

(2014) 09 DEL CK 0294
In the Delhi High Court
Case No : Co. Pet. 365/2014

In Re: Usha Breco Reality Limited

Date of Decision : 12-09-2014

Acts Referred:

Companies Act, 1956 — Section 235, 236, 237, 238, 239

Citation : (2015) 2 AD 321 : (2015) 215 DLT 486

Hon'ble Judges : Sanjeev Sachdeva, J

Bench : Single Bench

Advocate : Amit Goel, Advocate, P.K. Mallik and S.B. Gautam, Official Liquidator, Advocate for the Appellant

Final Decision : Allowed

Judgement

Sanjeev Sachdeva, J.

Co. Appl. 2025/2014 (on behalf of the Regional Director for condonation of delay)

This is an application filed by the Regional Director seeking condonation of delay in filing the reply.

Learned counsel for the petitioner submits that Petitioner has no objection to the delay being condoned in filing the reply.

In view of the above, the delay is condoned and the reply is taken on record.

The application is allowed.

Co. Appl. 2010/2014 (on behalf of the Official Liquidator for condonation of delay)

This is an application filed by the Official Liquidator seeking condonation of delay in filing the report.

Learned counsel for the petitioner submits that petitioner has no objection to the delay being condoned in filing the report.

In view of the above, the delay is condoned and the report is taken on record.

The application is allowed.

1. This second motion joint petition has been filed under sections 391 to 394 of the Companies Act, 1956 ("Act ") seeking sanction of the Scheme of Amalgamation ("Scheme ") of Usha Breco Realty Limited (hereinafter referred to as Transferor Company) with Usha Breco Limited (hereinafter referred to as Transferee Company) (hereafter collectively referred to as Petitioner Companies). A copy of the Scheme has been enclosed with the Petition.
2. The registered offices of the Petitioner Companies are situated at New Delhi, within the jurisdiction of this Court.
3. The details of the respective dates of incorporation of the Petitioner Companies, their authorized, issued, subscribed and paid-up capital have been given in the Petition.
4. The copies of the Memorandum and Articles of Association as well as Annual Accounts along with the audited Balance Sheets for the year ended 31st March 2013 have also been enclosed with the Petition.
5. The copies of Resolutions passed by the Board of Director of the Petitioner Companies approving the Scheme of Amalgamation have also been filed along with the Petition.
6. Learned counsel for the Petitioner Companies submitted that no proceedings under sections 235 to 251 of the Act are pending against the Petitioner Companies.
7. The Petitioner Companies had earlier filed C.A. (M) No. 59 of 2014 seeking directions of this Court for dispensation/convening of meetings. Vide order dated 3rd April 2014, this Court allowed the application and dispensed with the requirement of convening meeting of shareholders of Transferor Company and directions were given for convening of meeting of Unsecured Creditors of the Transferor Company and the Shareholders, Secured Creditors and Unsecured Creditors of the Transferee Company. The Transferor Company had no Secured Creditors. From the report of the Chairperson at the above said meetings it is apparent that the Scheme was approved unanimously by the Unsecured Creditors of the Transferor Company, Shareholders and Unsecured Creditors of Transferee Company. The Chairperson of the meeting of the Secured Creditors of Transferee Company has reported that all the secured creditors of the Transferee Company had been paid off by the Transferee Company before the date of the meeting and therefore as on the date of meeting, the Transferee Company had no secured creditors.
8. The Petitioner Companies had thereafter filed the present Petition seeking sanction to the Scheme of Amalgamation. By Order dated 29th May 2014, notice of the Petition was directed to be issued to the Regional Director, Northern Region, Ministry of Corporate Affairs and the Official Liquidator attached with this Court. Citations were also directed to be published in "Business Standard

" (English, Delhi Edition) and "Jansatta " (Hindi, Delhi Edition). An Affidavit of Publication has been filed by the Transferee Company showing compliance regarding publication of Citations in the aforesaid newspapers. Copies of the newspaper cuttings, in original, containing the publications have also been filed along with the affidavit of publication.

9. In response to the notice issued, the Official Liquidator sought information from the Petitioner Companies. Based on the information received, learned Official Liquidator has filed his report dated 5th September 2014, wherein he has stated that he has not received any complaint against the proposed Scheme from any person/ party interested in the Scheme in any manner and that the affairs of the Transferor Company do not appear to have been conducted in a manner prejudicial to the interest of its members, creditors or to public interest as per the 2nd proviso of Section 394(1) of the Act.

10. In response to the notice issued in the Petition, the Regional Director, Northern Region, Ministry of Corporate Affairs has filed his Affidavit dated 5th September 2014. Relying on 7.1 of Part-B of the Scheme of Amalgamation, he has stated that all the employees of the Transferor Company shall become the employees of the Transferee Company without any break or interruption in their services upon sanctioning of the Scheme of Amalgamation by the Court.

11. Further, the learned Regional Director in Para 4 of his Affidavit submits that the Income Tax Officer (Hq.), CIT-VI, New Delhi vide its Letter dated 12.08.2014 has forwarded the comments of Deputy Commissioner of Income Tax, Circle 18(1), New Delhi. They have stated that the consideration of Amalgamation is prima facie not reasonable as the Transferor Company is continuously in losses for a period of continuous 7 financial years. The purpose of Amalgamation seems to be set off losses of the Transferor Company with the profit of Transferee Company. Further, it has been stated in para 3 of the letter that on behalf of the Income Tax Department that approval of Amalgamation must be subject to the following:

"(i) The Income Tax Department must be permitted to retain its recourse for recovery of any existing or future tax liabilities of the Transferor Company or the Transferee Company, in respect of the assets sought to be transferred under the proposed Scheme, and this protection must be made explicit by this court in its final order and has to bind all the parties to the Scheme, particularly the Transferor and Transferee Companies. There should be no limitation on the powers of the Income Tax Department for recovery, including imposition of penalties, etc.

(ii) That without prejudice to the above the approval of the Scheme, should in no manner affect the tax treatments of the transactions under the Income Tax Act, 1961 or any other applicable taxing statute, nor would sanction of the Scheme or the effect thereof serve as a defence for the Companies concerned against tax treatment under the abovementioned statutes."

12. Learned Counsel for the Petitioners submits that the Petitioner Companies do not have any objection if the Scheme is approved subject to the conditions mentioned by the Regional Director in its Affidavit. Mr. Rakesh Sharma, Director of Transferor as well as Transferee Company has filed separate undertakings dated 10th September 2014 both on behalf Transferor and Transferee Company to the effect that they do not have any objection if the Scheme of Amalgamation of the Petitioner No. 1 with Petitioner No. 2 is approved subject to the conditions mentioned in para 4 of the Affidavit filed by the Regional Director, Northern Region, Ministry of Corporate Affairs.

13. It is thus directed that the Income Tax Department is permitted to retain its recourse for recovery of any existing or future tax liabilities of the Transferor Company or the Transferee Company, in respect of the assets sought to be transferred under the proposed Scheme irrespective of the sanction of the scheme. The sanction of the scheme would not affect the powers of the Income Tax Department for recovery, including imposition of penalties, etc. as permissible under law.

14. It is clarified that the approval of the Scheme, would in no manner affect the tax treatments of the transactions under the Income Tax Act, 1961 or any other applicable taxing statute, nor would the sanction of the Scheme serve as a defence for the petitioners against tax treatment under the abovementioned statutes.

15. In view of the aforesaid undertaking given by the Petitioners, the concern of the Regional Director has been duly addressed.

16. No objection has been received to the Scheme from any other party. Mr. Rakesh Sharma, Director of Transferee Company has filed an affidavit dated 3rd September 2014 confirming that neither the Petitioner Companies nor their Counsel have received any objection pursuant to the citations published in the newspapers.

17. In view of the approval accorded by the Shareholders and Creditors of the Petitioner Companies; representations/reports filed by the Regional Director, Northern Region and the Official Liquidator, attached with this Court to the proposed Scheme of Amalgamation, there appears to be no impediment to the grant of sanction to the Scheme of Amalgamation. Consequently sanction is hereby granted to the Scheme of Amalgamation u/s 391 and 394 of the Companies Act, 1956. The Petitioner Companies will comply with the statutory requirements in accordance with law.

18. Certified copy of the order will be filed with the Registrar of Companies within 30 days from the date of receipt of the same. In terms of the provisions of Sections 391 and 394 of the Act, and in terms of the Scheme the whole of the undertaking, the properties, rights and powers of the Transferor Companies be transferred to and vest in the Transferee Company without any further act or deed. Similarly, in terms of the Scheme, all the liabilities and duties of the

Transferor Companies be transferred to the Transferee Company without any further act or deed. Upon the Scheme coming into effect, the Transferor Companies shall stand dissolved without following the process of winding up.

19. It is, however, clarified that this order will not be construed as an order granting exemption from payment of stamp duty or taxes or any other charges, if payable in accordance with any law; or permission/ compliance with any other department which may be specifically required under any law.

20. Learned counsel for the Petitioner Companies states that the Petitioner Companies (Collectively) would voluntarily deposit a sum of Rs. 50,000/- with the Common Pool Fund of the Official Liquidator within three weeks from today. The said statement is accepted.

21. The Petition is allowed in the above terms.