(2022) 09 NCLT CK 0050

In the National Company Law Tribunal

Case No : C.P. No. 137/ KB/ 2021

Kunal Foundation Private Limited Vs

Date of Decision : 12-09-2022

Acts Referred:
Companies Act, 2013 — Section 66, 66(1), 66(2), 133

Citation : (2022) 09 NCLT CK 0050

Hon'ble Judges : Rohit Kapoor, Member (J);Balraj Joshi, Member (T)

Bench : Division Bench

Advocate : Madhuri Pandey

Final Decision : Disposed Of

Judgement

Balraj Joshi, Member (Technical)

1. This is a Petition filed under section 66 of the Companies Act, 2013 ('the Act') read with the National Company Law Tribunal (Procedure for reduction of share capital of Company) Rules, 2016. The petitioner company, Kunal Foundation Private Limited ('the Company') seeks approval of this Tribunal qua Special Resolution passed at the Extraordinary General Meeting held on 26th May, 2021 for reduction of the issued, subscribed and paid-up equity shares capital of the company.

2. The Ld. Authorised Representative for the Petitioner Company submits that no objector has come before the Tribunal to oppose the Petition and nor has any party controverted any averments made in the Petition.

3. The Petitioner Company ('the Company') was incorporated on 17th August, 2009 under the provisions of the Companies Act, 1956 as a Company limited by shares. The registered office of the Company is situated at Kolkata in the State of West Bengal, which falls within the jurisdiction of this Bench.

4. The Ld. Authorised Representative for the submits that the reason for the reduction of share capital are as follows:

The present Issued, Subscribe and Paid-Up Share capital of the Company is

☐ 44,50,000 divided into 4,45,000 Equity shares of ☐ 10/- each. The company has issued certain equity shares in the preceding financial years. The Income tax Settlement Commission has held that the company through its directors has rendered services to earn incomein cash which has been routed to books of accounts as share capital by ways of accommodation entries to the tune of ☐ 1.85 Crores comprising of ☐ 1.35 Crores in FY 2011-12 and ☐ 50 lakh in FY 2013-14. The company has offered the amount as additional income before the Income Tax Settlement Commission and paid tax along with interest to the tune of 60% on the same.

Now since it has been held that such share capital is nothing but mere book entry to route the unaccounted money back to the books of the company as is bogus in nature, hence it is required to be written-off.

The proposed restructuring capital by reduction of capital under section 66 of the Companies Act, 2013 shall be reflected in the books of accounts of the company in the following manner as on effective date.

Sr.

No.

Particulars

As 31.03.2020

After

Reduction

1.

Authorised Share Capital

a) No. of shares

b) Amount

5,00,000

Equity Shares of ☐ 10/- each

5,00,000

Equity Shares of ☐ 10/- each

☐ 50,00,000/-

☐ 50,00,000/-

2.

Issued, Subscribed, Paid Up share capital

a) No. of shares

b) Amount

4,45,000

Equity Shares of ☐ 10/- each

☐ 44,50,000/-

2,10,000

Equity Shares of ☐ 10/-each

☐ 21,00,000/-

5. The Ld. Authorised Representative for the Petitioner Company submits that Article 37 of the Articles of Association of the Company authorizes the Company to reduce its capital in any manner permitted by law.

6. It is submitted by the Ld. Authorized Representative for the Petitioner that there is no pending inspection, inquiry or investigation against the Petitioner Company under the Companies Act, 2013. The Petitioner Company has been paying all its dues on time and has honoured its commitments and has not defaulted in any of its obligations.

7. Accordingly, the Board of Directors of the Company, at its meeting held on 25th April, 2021 subject to approval of the equity shareholders and subject to the approval of the National Company Law Tribunal, pursuant to section 66 of the Companies Act, 2013 and the National Company Law Tribunal (Procedure for reduction of share capital of Company) Rules, 2016 and other applicable provisions of theCompanies Act, 2013, approved the reduction of the issued, subscribedand paid-up equity shares capital of the company from ☐ 44,50,000/- (Rupees Forty-Four Lakh Fifty thousand only) divided into 4,45,000 Equity Shares of ☐ 10/- (Indian Rupees Ten only) each fully paid up to ☐ 21,00,000/- (Rupees Twenty-One Lakh only) divided into 2,10,000 Equity Shares of ☐ 10/- (Indian Rupees Ten only) each fully paid up. A certified copy of the resolution passed by the Board of Directors on 25th April, 2021 isannexed to the petition as Annexure "D".

8. By a Special Resolution of the Company, duly passed in accordance with section 66 of the Companies Act, 2013 and applicable rules at the Extra-Ordinary General Meeting of the Equity Shareholders, held after due notice to all its members conveying that an Extra-Ordinary General Meeting shall be held on 26th May, 2021, the shareholders had approved the resolutions for such reduction. A certified copy of the Special Resolution passed by the Equity Shareholders on 26th May, 2021 is annexed with the petition as Annexure "F".

9. It is stated that the Petitioner Company has Nil Creditors as on 15th June, 2021. An affidavit verifying the same is annexed as Annexure "H" along with a certificate from the Statutory Auditor of the Company which is annexed as Annexure "J".

10. It is further stated that the Petitioner Company is not in arrears in repayment of any deposits or interest thereon. A certificate from the statutory Auditor of the Company stating that the Company is not in arrears in repayment of any deposits or interest thereon is annexed to the petition as Annexure "I". Also, a certificate from the Statutory Auditor stating that the accounting treatment proposed by the Company for the reduction of share capital is in conformity with the accounting standards specified in section 133 or any other provisionsof the Act is annexed to the petition as Annexure "K".

11. It is also stated that even after the proposed reduction of the Petitioner in Company's Equity Share Capital, the Petitioner's Company financial position will be sound and, therefore, the interests of the creditor will not be adversely affected.

12. It is further stated that the proposed reduction will not cause anyprejudice to the creditors of the Company. The reduction of capital does not involve either diminution of any liability in respect of unpaid capital or the payment to any shareholder of any unpaid capital. Further, the proposed adjustment would not in any way adversely affect the ordinary operations of the Company or ability of the Company to honour its commitments or to pay its debts in the ordinary course of business.

13. It is also stated that no proceedings for winding up are initiated or are pending against the Company.

14. Vide order dated 7th September, 2021 the Petitioner was directed as per Rule 3 of the National Company Law Tribunal (Procedure for reduction of share capital of Company) Rules, 2016 to give notice in Form No. RSC-2 to the Central Government through the Regional Director, Eastern Region and the Registrar of Companies, West Bengal and also to the creditors of the Company in Form No. RSC-3 seeking their representations and objections, if any. The Petitioner was also directed to publish notice in newspapers once in "Business Standard" (English) in "Aajkal" (Bengali) as well as to upload the notice on the website of the Company seeking objections from the creditors and intimating about the date of hearing in Form No. RSC-4, within 7 days from the date of the order and file affidavit of compliance in Form No. RSC-5 confirming the dispatch and publication of notice. It was also directed that representation, if any, under section 66(2) of the Companies Act, 2013 may be filed within three months from the date of publication of notice. The matter was listed for hearing on 30th December, 2021.

15. In pursuance of the aforesaid order dated 7th September 2021 the petitioner has filed an affidavit in respect of compliance of the aforesaid order duly affirmed on 17th November, 2021.

16. The Central Government through the Regional Director, Eastern Region, Ministry of Corporate Affairs, Kolkata has made representation by an affidavit affirmed on 25th February, 2022 . The rejoinder has been filed on behalf of the

company wherein the representation has been made and rejoinder affirmed on 13.04.2022.

RD’s observation para 2(a)

That it is submitted that on examination of the records of the Petitioner/ Applicant Company, it appears that no complaint and/ or representation has been received against the proposed Reduction of Share Capital. However, since the Petitioner Company has filed Annual Return and Financial Statement for the year ended 31/03/2020, the Petitioner Company is required to file Financial Statement and Annual Return for the year ended 31/03/2021 before such reduction of share capital takes place to enable this Deponent to peruse the latest financial statement of the Company for ascertaining its state of affairs.

Reply in rejoinder by the petitioner

With regard to statements in Paragraph 2(a), we say that the Applicant Company has duly filed it’s Financial Statement and Annual Return Annual Return vide e-forms AOC-4 and MGT-7 for the Financial Year 2020-2021. The payment challan indicating the same are annexed as Annexure A.

RD’s observation para 2(b)

The Articles of Association of the Applicant Company does not have any specific clause/provision regarding reduction of Share Capital, although the Petitioner Company in a communication stated that in clause 6(a) of the Articles of Association has provision for reduction of share capital. In clause 6(a) of the Articles of Association of the Applicant company, it is stated that....." The Authorized Share Capital of the company shall be such amount and be divided into such shares as may from time to time be provided under Clause No. V of the Memorandum of Association of the Company". Therefore, the Petitioner Company is required to alter its Articles of Association to incorporate therein necessary provision regarding reduction of share capital.

Reply in rejoinder by the petitioner

With regard to statement made in paragraph 2(b), we say that the Articles of Association of the Company contains a clause regarding reduction to Capital under clause 37A. The copy of Articles of Association evidencing the same is being annexed as Annexure B.

RD’s observation para 2(c)

The Scheme basically provides for conversion of Capital into Reserves. No Reduction of Capital as enumerated in Clause (a) and (b) of Sub-section (1) of Section 66 of the Companies Act, 2013 is provided for in the Scheme. Moreover the Scheme provides for selective reduction of Share Capital, preserving the shares of certain shareholders, without mentioning reasons, for such specific selection. Therefore, the Scheme is not in Order.

Reply in rejoinder by the petitioner

With regard to the statements in Paragraph 2(c), we say that the Applicant Company has filed this Reduction of Capital as enumerated in Clause (a) and (b) of Sub-section (1) of Section 66 of the Companies Act, 2013, pursuant to an order passed by Income Tax Settlement Commission vide order dated on 11th November, 2020 as directed in the said order and hence this is not a selective capital reduction. This application has been filed to cancel the bogus share capital of the Company. The copy of the said order is being annexed as Annexure C.

RD's observation para 2(d)

In terms of the Order dated 11/11/2020 read with order dated 05/11/2020 of the Income Tax Settlement Commission, the Petitioner Company was required to pay Total Tax and interest Rs. 1,22,66,556/-. The Applicant Company should be put to strict proof whether they have deposited the Income Tax liabilities pursuant to the said order of the Income tax Settlement Commission within due date.

Reply in rejoinder by the petitioner

With regard to the statements in Paragraph 2(d), we affirm that the applicant company has made the payment of Rs. 1,22,66,556/- pursuant to the order of the Income Tax Settlement Commission within the due date. The proof of payments is attached as Annexure

17. We have heard the Ld. Authorised Representative appearing on behalf of the Petitioner Company and perused the affidavit of the Central Government filed through the Regional Director (Eastern Region), Ministry of Corporate Affairs, Kolkata. It appears from the materials on record that the instant Petition has been accompanied with all the documents as required under Rule 2 of the NCLT (Procedure for reduction of share capital of Company) Rules, 2016.

18. Having regard to the facts and circumstances of the above case and since all the requisite statutory compliance having been fulfilled and that the proposed reduction of Share Capital shall not cause any prejudice either to the members or the Creditor of the Petitioner Company and the points raised by the Regional Director, Eastern Region, representing the Central Government has been suitably dealt with in the foregoing paragraphs.

19.We hereby grant approval for the reduction of share capital of the Petitioner Company as resolved on and effected by Special Resolution passed at Extra-Ordinary General Meeting of the Petitioner Company on 26th May, 2021, the extract is reproduced hereunder:

"RESOLVED THAT pursuant to the provisions of Section 66 and other applicable provisions, if any, of the Companies Act, 2013, read with National Company Law Tribunal (Procedure of Reduction of Capital of Company) including any statutory modifications, amendments, re-enactments thereof for the time being in force, the provisions of the Memorandum and Articles of Association of the Company and subject to the requisite approvals, sanctions, consents, observations, no objections, confirmations, permissions from the Regional Director, Eastern Region or such other competent authority as may be applicable, and the confirmation, permission, sanction and approval of the other statutory/regulatory authorities, if any, in this regard and subject to such other conditions or guidelines, if any, as may be prescribed or stipulated by any such authorities, from time to time, while granting such approvals, sanctions, consents, observations, no objections, confirmations, permissions and which may be agreed by the Board of Directors of the Company, the Scheme of Reduction of Capital between Kunal Foundation Private Limited and their respective Shareholders and Creditors ("Scheme").

"RESOLVED FURTHER THAT the Board be and is hereby authorized, empowered and directed to do all such acts, deeds, matters and things, as may be considered requisite, desirable, appropriate or necessary to give effect to aforesaid resolution and to effectively implement the arrangements embodied in the Scheme and to accept such modifications, amendments, limitations and/or conditions, if any, which may be required and/or imposed, while sanctioning the Reduction of Capital embodied in the Scheme or by any authorities under law, or as may be required for the purpose of resolving any doubts or difficulties that may arise in giving effect to the Scheme, as may be deemed fit and proper".

1. The Minute appended to the Petition and set forth in the Schedule hereto, is hereby approved.

2. This sanction will also not affect any action pending or contemplated by any Government authority or regulatory or statutory authorities for violation of any provision of the law for the time being in force.

3. A certified copy of this order including the Minute as approved be delivered to the Registrar of Companies within thirty days of receipt of the order as per provisions of sub-section (5) of section 66 of the Companies Act, 2013, who shall register the same and issue a certificate to that effect in Form No. RSC-7 [Rule 6(3)].

4. The Petitioner shall, after receiving such certificate, to publish Notice of Registration of Order and Minute once in leading English Newspaper and once in Bengali Newspaper having wide circulation in the State of West Bengal within two weeks thereafter.

5. The Petitioner Company shall comply with the statutory filing requirements, if any, required under the Companies Act, 2013 and the Rules notified thereunder as may be applicable.

6. All concerned regulatory authorities to act on the certified copy of the Order including the Minute forming part of the petition.

7. C.P. No. 137/ KB/ 2021 is hereby disposed of on the above terms.

The Minute referred to above

“The paid –up equity share capital of Kunal Foundation Private Limited is henceforth Rs. 21,00,000(Twenty One Lakh) divided into 2,10,000 (Two Lakh Ten thousand) Equity shares of Rs. 10 each”.

