(2021) 03 NCLT CK 0058

In the National Company Law Tribunal

Case No : Company Petition No. 4514/MB-I Of 2019

Lily Realty Private Limited Vs

Date of Decision : 10-03-2021

Acts Referred:

Companies Act, 2013 — Section 52, 66, 206
Companies Act, 1956 — Section 103(4)

Citation : (2021) 03 NCLT CK 0058

Hon'ble Judges : Janab Mohammed Ajmal, J;V. Nallasenapathy, Member (Technical)

Bench : Division Bench

Advocate : Hemant Sethi, Rupa Sutar

Final Decision : Allowed

Judgement

1. The Petitioner Company has filed this Petition dated 12th December 2019 under section 66 read with section 52 of the Companies Act, 2013 (the Act) for reduction of Share Capital.

2. We have heard the learned counsel for the Petitioner Company and the representative of the Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai. No objector has come before this Tribunal to oppose the Scheme and nor has any party controverted any averment made in the Petition.

3. It is submitted that Article 38 of the Articles of Association (AoA) of the Petitioner Company empowers the Company to reduce its share capital in any manner permitted by law by passing a Special Resolution.

4. That the Petitioner Company has passed a Special Resolution on 7th December 2019 whereby the shareholders have approved the reduction in the equity share capital by proportionately returning capital to the shareholders to the tune of an amount of INR 0.10/- (Indian Ten Paisa Only) per share aggregating to INR 3,20,00,000 (Indian Rupees Three Crores Twenty Lakhs Only). Further, the difference between the face value of the equity shares so cancelled and the amount to be paid to the shareholders, shall be first adjusted against the debit

balance of Profit and Loss Account and balance if any, shall be credited to the Capital Reserve in the books of the Petitioner Company and shall be deemed to form part of the reduction of capital.

5. The Regional Director has filed a Report dated 16th October 2020 stating therein, the following in para 7 and 9 of the said Report:

"7. ROC, Mumbai in the Report No. ROC/STA/255807/U/s. 66/1921 dated 31.08.2020 inter-alia mentioned at para No. 18 that there is no complaints received against the company/ Scheme of reduction. However, the status of the complaint verified from Portal of MCA website, it is observed that one SRN for complaint is pending but status of the same are not shown therein, hence the Petitioner Company may be directed to submit clarification about the pending complaints, by way of an Affidavit...."

"9.the observations of the Regional Director on the proposed scheme of the Reduction of share Capital are as under:

Applicant to submit an Affidavit to the effect that the interest of the creditors and all stakeholders and Government Revenue are protected as well as statutory dues are paid off.

The tax implication if any arising out of the proposal for reduction is subject to final decision of Income Tax Authorities. The approval of the Company Petition by this Hon'ble Court may not deter the Income Tax Authority to scrutinize the tax return filed by the Company after giving effect to the proposed reduction. The decision of the Income Tax Authority is binding on the petitioner Company.

As per the provision of Section 66 of the Companies Act, 2013, the Share Capital can be reduced, which is lost or unrepresented by the available assets and for paying of the paid up share capital, which is in excess of the wants of the Company. The provisions of Section 66 of the Companies Act, 2013 does not envisaged the payment of share capital to the Shareholders by way of reduction. The present scheme for payment to shareholders is in the guise of buy-back of shares and hence should not be allowed. Hence, the present scheme is not in the spirit of section 66 of the Companies Act, 2013 and hence liable for rejection. Further, the Company proposes to write off the very large losses for which ROC inquiry is in progress and that the company proposes to reduce such loss by borrowing the funds, as the company has Rs. 1.63 Crores only by way of cash.

In the present scheme the ROC has reported that the inquiry under section 206 of the Companies Act, 2013 is under way against the Company for booking of huge losses of Rs. 320 Crores (Rupees Three Hundred Twenty Crores) to the Shareholders and hence also the present scheme should not be allowed till the inquiry is completed by ROC."

6. The Petitioner Company has filed an affidavit in Rejoinder with this Bench on 14th January 2021 in response to the report filed by the Regional Director. Copy of the Rejoinder is also served on the Regional Director, Western Region,

Mumbai. It is clarified as under:

A. Apropos observation made in para 7 of the Report of the Regional Director is concerned, there are no complaints received against the Petitioner Company/ scheme of reduction but there is one SRN reflected on the MCA portal in relation to some complaint for which the status is unknown. The complaint against the Petitioner Company relates to a matter unconnected with the reduction of capital.

B. Apropos observation made in para 9(a) of the Report of the Regional Director is concerned, the Petitioner Company states that the interest of the creditors, all stakeholders and Government Revenue will be protected and undertakes that statutory dues will be paid off in due course.

C. Apropos observation made in para 9(b) of the Report of the Regional Director is concerned, the Petitioner Company states that tax issues, if any, arising out of the proposed reduction of capital shall be subject to final decision of Income Tax Authorities. The approval of this petition by the Tribunal will not deter the Income Tax Authorities to scrutinize the tax return filed by the Petitioner Company after giving effect to the proposed reduction and the decision of the Income Tax Authority would be binding on the Petitioner Company.

D. Apropos observation made in para 9(c) of the Report of the Regional Director is concerned, the Petitioner Company states as under -

a. Relevant extract of reduction of Share Capital as set forth in Section 66 of the Act is as follows -

"(1) Subject to confirmation by the Tribunal on an application by the company, a company limited by shares or limited by guarantee and having a share capital may, by a special resolution, reduce the share capital in any manner and in, particular, may-

(a) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; or

(b) either with or without extinguishing or reducing liability on any of its shares,-

(i) cancel any paid-up share capital which is lost or is unrepresented by available assets; or

(ii) pay off any paid-up share capital which is in excess of the wants of the company,

alter its memorandum by reducing the amount of its share capital and of its shares accordingly:

Provided that no such reduction shall be made if the company is in arrears in the repayment of any deposits accepted by it, either before or after the commencement of this Act, or the interest payable thereon......."

b. The Petitioner Company is engaged in the business of real estate development. In the ordinary course of its business, the Petitioner Company raises debt from various financial institutions in order to purchase the development rights and upon subsequent sale of real estate inventory the debt is repaid by the Petitioner Company. For the year ended 31st March 2019, the Petitioner Company has borrowings aggregating to INR 513,40,68,328. In the course of development of real estate projects, the Petitioner Company incurs huge finance cost on such borrowings, as a result of which the Petitioner Company has incurred accumulated losses. Further, due to the market conditions, the Petitioner Company was not able to dispose-off the inventory. Also, to make good the loss and complete the project, the shareholders had infused substantial amount of funds. In view thereof, the Petitioner Company submits that the accumulated losses aggregating to INR 427,07,95,365 have been incurred in the ordinary course of its business.

c. The observation of the Regional Director that the payment of share capital to the shareholders by way of reduction of share capital is not envisaged by section 66 of the Act and that the same is in the guise of buy-back is contradictory to the judicial precedents available on the subject matter.

d. In this regard reliance is placed on the following rulings, wherein despite the company having accumulated losses, the Hon'ble Bombay High Court/ NCLT, Mumbai has allowed payout to shareholders pursuant to reduction of share capital, since the company demonstrated sufficient liquidity to discharge the consideration to be paid as a result of capital reduction.

? Times Global Broadcasting Company Limited (Company Scheme Petition No. 445 of 2016) (@Page 2-4, Para 4 and 6 of the Judgement)

"4. The Counsel for the Petitioner Company states that the shareholders of the Petitioner Company have at its Extra Ordinary General Meeting held on 3rd June, 2016 consented for the reduction of the issued, subscribed and paid up share capital of the Petitioner Company from Rs. 2,85,00,00,000 (Rupees Two Hundred and Eighty Five Crores only) comprising of 8,57,89,606 (Eight Crores Fifty Seven Lakhs Eighty Nine Thousand Six Hundred and Six) Equity shares of Rs.10 (Rupees Ten) each fully paid up and 19,92,10,394 (Nineteen Crore Ninety Two Lakhs Ten Thousand Three Hundred and Ninety Four) 8.5% Non-Convertible Cumulative Redeemable Preference Shares of Rs.10 (Rupees Ten) each fully paid up shall be reduced to Rs. 41,83,39,250 (Rupees Forty-One Crore Eighty-Three Lakhs Thirty-Nine Thousand Two Hundred and Fifty only) comprising of 4,18,33,925 (Four Crores Eighteen Lakhs Thirty-Three Thousand Nine Hundred and Twenty- Five) Equity shares of Rs. 10 (Rupees Ten) each fully paid up, by cancelling 4,39,55,681 (Four Crore Thirty-Nine Lakhs Fifty-Five Thousand Six Hundred and Eighty-One) Equity shares of Rs.10/- each aggregating to Rs. 43,95,56,810/- (Rupees Forty-Three Crores Ninety-Five Lakhs Fifty-Six Thousand Eight Hundred and Ten Only) bearing distinctive numbers 4,18,33,926 to 8,57,89,606 and by cancelling the entire 19,92,10,394 (Nineteen Crore Ninety-Two Lakh Ten Thousand Three Hundred and Ninety-Four) 8.5% Non-Convertible cumulative redeemable preference shares of Rs. 10/- each aggregating to Rs. 199,21,03,940/- (Rupees One Hundred Ninety-Nine Crores Twenty One Lakhs Three thousand Nine Hundred and Forty Only) bearing distinctive number 1 to 19,92,10,394, by adjusting against the debit balance of Profit & Loss Account aggregating to Rs. 2,37,08,69,231.25 and by paying an aggregate cash consideration of Rs.6,07,91,518.75 to equity and preference shareholders and pursuant to extinguishing the paid up Equity and Preference Share Capital and payment of the cash consideration as aforementioned, the Securities Premium Account of the Petitioner Company shall stand reduced to the extent of debit balance remaining post the abovementioned reduction in Preference and Equity Share Capital in the Profit & Loss Account as on the date of obtaining the certificate from Registrar of Companies for the Proposed Reduction pursuant to section 103(4) of the Companies Act, 1956. Copy of the Special Resolution is annexed at Exhibit- E to the Petition.

6. No objector has come forward to oppose the proposed reduction. Since the requisite statutory procedure has been fulfilled, the Company Scheme Petition is made absolute in terms of prayer clauses (a) and (b)."

? Atlas Copco (India) Limited (CP No. 4475 of 2018) (@Page 3 Para 3 and 4 and Page 14 Para 20)

"3. ...The Learned Senior Counsel for the Petitioner Company further submits that the Company Petition was filed for providing the non-promoter public shareholders an opportunity to liquidate their shareholding at a fair and equitable price.

4. ...The Learned Senior Counsel for the Petitioner Company further submits that the Petitioner Company have passed a special resolution on 25th October 2018 whereby the shareholders had approved the reduction in the issued, subscribed and paid-up equity Share Capital of the Petitioner Company by cancelling and extinguishing the equity shares held by the non-promoter in the Company. Consequent to the reduction, the issued , subscribed and paid-up equity share capital of the Petitioner Company would get reduced from INR 22,56,15,640 (Indian Rupees Twenty Two Crores Fifty Six Lakhs Fifteen Thousand Six Hundred and Forty Only) comprising 22,561,564 fully paid up equity shares of INR 10 (Indian Rupees Ten Only) each to INR 21,73,19,510 (Indian Rupees Twenty One Crores Seventy Three Lakhs Nineteen Thousand Five Hundred and Ten Only), comprising of 2,17,31,951 fully paid up equity shares of INR 10 (Indian Rupees Ten Only) each...

20. Application for the reduction of share capital allowed subject to the directions given herein above. All concerned regulatory authorities to act on production of certified copy of this order to be issued by the Assistant Registrar, National Company Law Tribunal, Mumbai Bench."

? Raymond UCO Denim Private Limited (CP No. 4645 of 2018) (@Page 2-3 and 5, Para 4 and 9 of the Judgement)

"4. The Counsel for the Petitioner Company further submits that the Petitioner having passed a special resolution on 20th November 2018, whereby the shareholders had approved the reduction in the amount of Preference share capital of Rs. 20,00,00,000/- (Rupees Twenty Crores Only) consisting of 2,00,00,000 (Two Crores) Preference shares of Rs.10 (Rupees Ten) each fully paid up, at its present value as on 31st October, 2018 amounting to Rs.160,63,56,000/- (Indian Rupees One Hundred and Sixty Crores Sixty Three Lakhs Fifty Six Thousand Only), discharged for an aggregate consideration of Rs. 20,00,000/- (Indian Rupees Twenty Lakhs only). Further, there will be set off of a debit balance of Profit and Loss Account as on 31st March 2018 of Rs.466,51,60,000/- (Indian Rupees Four Hundred and Sixty-Six Crores Fifty-One Lakhs Sixty Thousand Only) against the following:

i. Capital Reserves of Rs. 160,43,56,000/- (Indian Rupees One Hundred and Sixty Crores Forty-Three Lakhs Fifty-Six Thousand Only) generated on account of reduction of preference capital;"

"9. Since the requisite statutory procedure has been fulfilled, the Company Petition is made absolute in terms of the prayer clauses of the Petition and the minute appended to the Petition is set forth in this order be and is hereby approved."

? KSH Infra Private Limited (CP No. 1343 of 2019) (@Page 1-2 and 4, Para 3 and 7 of the Judgement)

"3. The Counsel for the Petitioner Company submits that the Petition was filed for rationalisation of the capital structure by reducing its outstanding equity shares by way of capital reduction for a cash consideration thereby maximising overall shareholder value by returning the excess capital to the shareholders on a proportionate basis and proper utilisation of resources. The Board of Directors of the Petitioner Company at their meeting held on 14th March, 2019 have deemed it appropriate to reduce its equity share capital. The Counsel for the Petitioner Company further submits that the Petitioner Company having passed a special resolution on 18th March, 2019 whereby the shareholders had approved the reduction in the equity share capital on a proportionate basis from the shareholders from INR 49,85,720/- (Indian Rupees Forty Nine Lakhs Eighty Five Thousand Seven Hundred and Twenty only) divided into 4,98,572 (Four Lakhs Ninety Eight Thousand Five Hundred and Seventy Two only) equity shares of INR 10/- (Indian Rupees Ten only) each to INR 29,95,720/- (Indian Rupees Twenty Nine Lakhs Ninety Five Thousand Seven Hundred and Twenty only) divided into 2,99,572 (Two Lakhs Ninety Nine Thousand Five Hundred and Seventy Two only) equity shares of INR 10/- (Indian Rupees Ten only) each, and that such reduction is effected by returning capital to the shareholders on a proportionate basis of an aggregate amount of INR 77,11,34,950/- (Indian Rupees Seventy Seven Crores Eleven Lakhs Thirty Four Thousand Nine Hundred and Fifty only). Further, the difference between the face value of the equity shares so cancelled and the amount to be paid to the shareholders, shall be adjusted in the Capital Reserves of the Petitioner Company and such shall be deemed to form part of the reduction of capital in the manner proposed above."

7. Since the requisite statutory procedure has been fulfilled, the Company Petition is made absolute in terms of the prayer clauses of the Petition."

? GMR Highways Limited (CP No. 4137 of 2019) (@Page 2-3, 5 and 7, Para 5, 6, 10 and 18 of the Judgement)

"5. The Counsel for the Petitioner Company submits that the Board of Directors of the Petitioner Company, at their meeting held on October 26th, 2019 have deemed it appropriate, subject to approval of the shareholders to reduce the paid-up equity share capital of the Petitioner Company from Rs. 20,52,92,97,490 divided into 2,05,29,29,749 fully paid up equity shares of Rs.10 each to Rs.7,75,44,05,100 divided into 77,54,40,510 fully paid up equity shares of Rs.10 each and that such reduction be affected by cancelling and extinguishing 62.23% of the total issued, subscribed and paid up equity shares capital of the Company."

"6. The Counsel for the Petitioner Company further submits that the Board of Directors of the Petitioner Company, at their meeting held on October 26th, 2019 have resolved that the upon capital reduction being confirmed by the Hon'ble Tribunal and the registration of order and minute of reduction of share capital by the Registrar of the Companies, the Company shall pay to the shareholders of the Company as on the record date, whose shares have been reduced, a sum of 0.10 Paisa per equity share, as consideration of capital reduction. The Counsel for the Petitioner submits that payment of Rs.12,77,48,923.90 will be paid to the shareholders from internal accruals."

"10. Our attention is drawn to rationale for capital reduction provided in paragraph 10 of the Petition, wherein it has been stated as under:

The Company has accumulated losses of INR 12,77,48,92,399/- as per audited financial statements dated March 31, 2019 which has substantially wiped off the value represented by the share capital of the Company...."

"18. Since the requisite statutory procedure has been fulfilled, the Company Petition is made absolute in terms of the prayer clause of the Petition."

e. In the past, Courts have unanimously taken a view that 'Reduction of Capital' is a 'Domestic Affair' of a particular Company, in which, ordinarily, a Tribunal will not interfere because of the reason that it is a 'majority decision' which prevails. One of the oldest judgements on the subject is the judgement of the House of Lords of England in the case of British and American Trustee and Finance Corporate v. Couper, (1894) AC 399. In this case, the Court held that the prescribed majority of the shareholders of a company is entitled to decide whether there should be a reduction of capital, and if so, in what manner and to what extent it should be carried into effect. The Court observed that:

"..It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected. Nor is there any limitation of the power of the Court to confirm the reduction..."

"I do not see any danger in conclusion that the Court has power to confirm such a scheme as that now in question, or any reason to doubt that this was the intention of the Legislature. The interest of the creditors are not involved, and I think it was the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision whether there should be reduction of capital, and if so, how it should be carried into effect...."

"...If the parties to the transaction come to the conclusion that the bargain is a fair one, why should the Court say that there is a preference on the one side or on the other. If there is nothing unfair or inequitable in the transaction, I can-not see that there is any objection to allowing a company limited by shares to extinguish some of its shares without dealing in the same manner with all other shares of the same class. There may be no real inequality in the treatment of a class of shareholders although they are not all paid in the same coin or in coin of the same denomination..."

f. Further, the Madras High Court in Re. Panruti Industrial Company (Private) Ltd., AIR 1960 Mad. 537, held that "...the question of reduction of capital has been treated as a matter of domestic concern, one for the decision of the majority of the shareholders of the company".

g. The principles distilled from the aforesaid precedents were summarized in the case of Reckitt Benckiser (India) Ltd. (CP 206 of 2004) (Delhi High Court) that have further been upheld by several courts:

"(i) The question of reduction of share capital is treated as matter of domestic concern, i.e. it is the decision of the majority which prevails.

(ii) If majority by special reduction decides to reduce share capital of the Company, it has also the right to decide as to how this reduction should be carried into effect...."

h. In a recent order of the Hon'ble NCLAT in the matter of Economy Hotels India Services Private Limited vs. Registrar of Companies it was observed that,

"Be it noted, that 'Reduction of Capital' is a 'Domestic Affair' of a particular Company in which, ordinarily, a Tribunal will not interfere because of the reason that it is a 'majority decision' which prevails..."

i. In the matter of IL&FS Engineering and Construction Company Limited v. Wardha Power Company Limited, the Andhra Pradesh High Court while allowing a Scheme of Reduction involving adjustment of accumulated losses against the balance of securities premium account held that (@Para 22 of the Judgement)

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"... The Section provides that share capital can be reduced "in any way". Those words are extremely wide and general. There are then given three particular instances of ways, but they are expressly given without prejudice to the generality of the foregoing "in any way" (Re. Ratters Group Plc). The Statute has not prescribed the manner in which the reduction is to be carried out nor has it prohibited any method effecting the object..."

j. In view of the above, the Petitioner Company respectfully submits that Section 66 of the Act allows the company to pay-off the share capital to the shareholders pursuant to reduction of share capital and thus, it would be inappropriate to re-characterize the same as buy-back.

E. Apropos observation made in para 9(d) of the Report of the Regional Director is concerned, the Petitioner Company states that the inquiry under section 206 of the Act is an ongoing proceeding and that the application for reduction of share capital under section 66 of the Act does not come in way of the inquiry. Since both are independent matters, the scheme should be allowed irrespective of the pendency of inquiry.

7. It is further submitted that one of the creditors namely, Shapoorji Pallonji (Complainant) has raised a claim against the Petitioner Company for which it has not filed any affidavit and it is the subject matter of a pending arbitration in Bangalore. Further, the capital reduction does not envisage any compromise or arrangement with the creditors of the Petitioner Company and hence, the interest of the creditors would not be adversely affected pursuant to reduction of equity share capital of the Petitioner Company. That the Petitioner Company shall continue to remain in existence post sanctioning of the capital reduction and the complainant shall continue to have his rights of redressal and claims, if any, against the Petitioner Company in the appropriate forum.

8. In response to the Affidavit in Rejoinder filed by the Petitioner Company, the Regional Director, Western Region, Mumbai has filed supplementary Report on 21st January 2021 with this Bench stating that the reply filed by the Petitioner Company has been is satisfactory.

9. The learned Counsel appearing for the Petitioner Company further submitted that the Company has complied with all statutory requirements as per the directions of the Tribunal vide its order dated 22.01.2020 and has filed necessary affidavits to that effect with the Tribunal. Moreover, the Company also undertakes to comply with statutory requirements, if any, under the Act and the Rules made thereunder, as would be applicable. The undertaking given by the Petitioner Company is accepted.

10. Since the requisite statutory procedure has been fulfilled, the Company Petition is made absolute in terms of prayer made in the Petition. Hence ordered.

ORDER

The Petition for reduction of share capital is allowed subject to the following:

i. The Special Resolution as approved by the shareholders in their Extra Ordinary General Meeting held on 7th December 2019 be and is hereby confirmed.

ii. The minutes set forth hereto be and is hereby approved.

iii. All regulatory authorities concerned to act on a certified copy of this order duly certified by the Registrar of this Tribunal. The Petitioner Company is directed to file the same with the Registrar of Companies, concerned within 30 days from the date of the receipt of the order.

iv. The Petitioner Company to publish notices about registration of order and minutes of reduction by the concerned Registrar of Companies, in the same newspapers (i.e. Business Standard and Navshakti) in which previous publications were issued, having circulation in the state of Maharashtra, within 30 days of registration.

FORM OF MINUTES

"The Issued, Subscribed & Paid-up Equity Share Capital of Lily Realty Private Limited, the Petitioner Company is henceforth INR 1,00,000 (Indian Rupees One Lakh Only) divided into 10,000 (Ten Thousand) equity shares of INR 10/- (Indian Rupees Ten Only) each, fully paid up, reduced from INR 320,01,00,000 (Indian Rupees Three Twenty Crores One Lakh Only) divided into 32,00,10,000 (Thirty Two Crores Ten Thousand) equity Shares of INR 10/- (Indian Rupees Ten Only) each, fully paid up."

