(2023) 04 NCLT CK 0048

In the National Company Law Tribunal

Case No : C.P.(CAA) No. 196/MB/C-I/2022 Connected with C.A.(CAA) No. 50/MB/C-I/2022

Mars Hotels And Resorts Private Limited Vs

Date of Decision : 24-04-2023

Acts Referred:

Companies Act, 2013 — Section 230, 230(5), 232, 232(3)(i)
Income Tax Act, 1961 — Section 2(1B), 2(19AA)

Citation : (2023) 04 NCLT CK 0048

Hon'ble Judges : H. V. Subba Rao, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Ahmed M Chunawala

Final Decision : Disposed Of

Judgement

H. V. Subba Rao, Member (Judicial)

1. This Petition seeks sanction of the Tribunal under sections 230 to 232 and other applicable provisions of the Companies Act, 2013 (‘the Act’) to the Scheme of Amalgamation and Arrangement between Mars Hotels And Resorts Private Limited (‘First Petitioner Company’ or ‘Transferor Company 1’ or ‘MHRPL’), Vrihis Properties Private Limited (‘Second Petitioner Company’ or ‘Transferor Company 2’ or ‘VPPL’) and Kairos Property Managers Private Limited (‘Third Petitioner Company’ or ‘Transferee Company’ or ‘Demerged Company’ or ‘KPMPL’) and Striton Properties Private Limited (‘Fourth Petitioner Company’ or ‘Resulting Company 1’ or ‘SPPL’) and Aerobode One Private Limited (‘Fifth Petitioner Company’ or ‘Resulting Company 2’ or ‘AOPL’) and Parthos Properties Private Limited (‘Sixth Petitioner Company’ or ‘Resulting Company 3’ or ‘PPPL’) and their respective shareholders.

2. This Court was convened via video conferencing. Heard the Learned Counsel for the Petitioner Companies 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 averments made in the Petition.

3. It is submitted by the Learned Counsel for the Petitioner Companies that the First Petitioner Company is currently engaged in the business of acquiring, constructing, developing, managing, operating, leasing and letting out, of any property, serviced apartments, commercial spaces, hotels and any other property of any tenure and rendering other hospitality services. The Second Petitioner Company is currently engaged in the business of purchasing, acquiring, leasing and letting out, holding any property, lands, buildings and any other property of any tenure and also in the business of owning, constructing and developing, redeveloping, operating and managing commercial real estate, information technology parks and business centres. The Third Petitioner Company is currently engaged in the business of providing management related service including facilities management service and property management services. The Fourth Petitioner Company is authorised to undertake the business of acquiring, constructing, developing, managing, operating, leasing and letting out, of any property, serviced apartments, commercial spaces, hotels and any other property of any tenure and rendering other hospitality services. The Fifth Petitioner Company is authorised to undertake the business of purchase, acquire, leasing and letting out, holding any property, lands, buildings and any other property of any tenure and also in the business of owning, constructing and developing, redeveloping, operating and managing commercial real estate, information technology parks etc. The Sixth Petitioner Company is authorised to undertake the business of purchase, acquire, leasing and letting out, holding any property, lands, buildings and any other property of any tenure and also in the business of owning, constructing and developing, redeveloping, operating and managing commercial real estate, information technology parks, etc.

4. The Board of Directors of the Petitioner Companies approved the Scheme in their respective meetings held on 3rd December 2021. The Appointed Date for the purposes of merger and demerger in the Scheme is 1st October 2021.

5. Learned Counsel for the Petitioner Companies further submits that the rationale for the Scheme is as follows:

"KPMPL, MHRPL, VPPL, SPPL, AOPL and PPPL are companies held directly or indirectly by the same group. The management of the group has envisaged a re-organisation exercise to eliminate multiple entities, achieve operational efficiency and flexibility for independent growth and expansion of certain business undertakings without causing any changes to the shareholding structure.

Accordingly, the management of KPMPL believes that wholly owned subsidiaries can be consolidated and brought under a simplified holding structure via merger of the existing wholly owned subsidiaries viz. MHRPL and VPPL into KPMPL on an 'as is' basis to achieve elimination of multiple entities under the structure.

Pursuant to the aforesaid merger of wholly owned subsidiaries, KPMPL will house the businesses of MHRPL and VPPL. The shareholders of KPMPL further believe that the Demerger of Hotel and Development Business (as defined below), Redevelopment Business (as defined below) and Strata Floors Business (as defined below) into Resulting Company 1, Resulting Company 2 and Resulting Company 3 respectively, can help in unlocking maximum value for the shares held in KPMPL and ensure standalone focus on the Hotel and Development Business, Redevelopment Business and Strata Floors Business. This will also facilitate independent investment into the aforesaid specific business and lead to an independent growth and expansion of these businesses. Currently, the Resulting Companies and the Demerged Company are held by the same shareholder. Hence, the proposed Demerger will facilitate the said objective of segregation without changing the shareholding pattern and will maintain the desired shareholding pattern.

Hence based on the aforesaid commercial rationale, this Scheme provides for Merger of MHRPL and VPPL into KPMPL and thereafter Demerger of Hotel and Development Business, Redevelopment Business and Strata Floors Business into Resulting Company 1, Resulting Company 2 and Resulting Company 3, respectively and would inter alia have the following benefits:

(a) Elimination of multiple entities under the group which results in simplification of the group structure via Merger leading to savings of costs incurred in maintaining separate compliances etc and running of multiple entities;

(b) As regards subsequent Demerger of Hotel and Development Business, Redevelopment Business and Strata Floors Business, it shall enable focused management and leadership attention to each of the aforesaid business in the Resulting Companies;

(c) Confer shares in each business to the existing shareholder of KPMPL thereby giving them an opportunity to participate in Hotel and Development Business, Redevelopment Business and Strata Floors Business directly via separate entities;

(d) Enable each business to pursue growth opportunities and avail potential real estate investment opportunities in Mumbai region which meet the relevant business criteria for the respective Resulting Companies;

(e) Flexibility for each business to avail project specific investments in respective Resulting Companies with ease of entry and exit from such specific businesses housed separately in the respective Resulting Companies or enter into a joint venture in any of the respective businesses in the Resulting Companies;

(f) Ability for each business to attain fluid leverage terms in the respective Resulting Companies pertaining to assets that are transferred to the respective Resulting Companies pursuant to the Demerger;

(g) Beneficial to all stakeholders of the Scheme, leading to growth and value creation in the long run and maximizing the value and return to the shareholders, unlocking intrinsic value of the assets, achieving cost efficiencies and operational efficiencies;

(h) Result in economies in business operations, provide optimal utilization of resources and greater administrative efficiencies.

The intended Scheme is not prejudicial to the interest of the creditors or the employees of the Transferor Companies, Transferee Company / Demerged Company and Resulting Companies.

The Merger of the Transferor Companies into the Transferee Company and the Demerger of respective Demerged Undertakings into the respective Resulting Companies pursuant to and in accordance with this Scheme shall take place with effect from the Appointed Date and shall be in accordance with Section 2(1B) (with respect to the Merger) and Section 2(19AA) (with respect to the Demerger) of the Income-tax Act, 1961."

6. The Company Petition is filed in consonance with sections 230 to 232 of the Act along with the Order dated 12th September 2022 passed in C.A.(CAA) No. 50/MB/C-I/2022 of this Tribunal.

7. Learned Counsel appearing on behalf of the Petitioner Companies has stated that the Petitioner Companies have complied with all requirements as per directions of this Tribunal and they have filed necessary affidavits of compliance with the Tribunal. Moreover, the Petitioner Companies through their Learned Counsel undertake to comply with all statutory requirements, if any, as required under the Act and the Rules made thereunder. The undertaking given by the Petitioner Companies is accepted.

8. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, has filed a Report dated 5th December 2022, inter alia stating therein its observations on the Scheme as stated in paragraph 2 (a) to (k) of the said Report. In response to the observations made by the Regional Director, the Petitioner Companies have also given necessary clarifications and undertakings vide their rejoinder affidavit dated 09th January 2023. Further, the observations made by the Regional Director and the clarifications and undertakings given by the Petitioner Companies are summarized in the table below:

Sr. No. Para No.

RD Report/Observation Date of Report: 5th December, 2022

Response of Petitioner Companies

2(a)(2) & (3)

That on examination of the report of the Registrar of Companies, Mumbai dated 11.10.2022 for Petitioner Companies (Annexed as Annexure A-I) that the Petitioner Companies falls within the jurisdiction of ROC, Mumbai. It is submitted that no representation regarding the proposed scheme of Amalgamation has been received against the Petitioner Companies. Further, the Petitioner Companies (Transferor Companies 1 and 2, Transferee Company, Resulting Transferee No-2) has filed Financial Statements up to 31.03.2022 and Resulting

Transferee Companies 1 and 2 have been incorporated on 04/08/2021, thus only AOC 4 for Financial Years 2021-2022 have been filed.

The ROC has further submitted that in his report dated 11.10.2022 which are as under :-

1. That the ROC Mumbai in his report dated 11.10.2022 has stated that No Inquiry, Investigations, Inspections, Prosecutions, Technical Scrutiny are pending against the Petitioner Companies.

2. Interest of the Creditor and other stakeholders should be protected.

3. It is submitted that as per the pro/visions of Section 232(3)(i) of the Companies Act,2013, where the transferor company is dissolved, the fee, if any, paid by the transferor Company on its authorized capital shall be set off against any fees payable by the Transferee company on its authorized capital subsequent to the amalgamation. Therefore, remaining fee, if any after setting-off the fees already paid by the transferee company on the increased authorized capital subsequent to the amalgamation.

4. May be decided on its merits. Hence, the Petitioner Companies shall undertake to submit detail reply against observations mentioned above.

1. So far as the observation in paragraph 2(a)(2) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the interest of creditors and other stakeholders will be protected.

2. So far as the observation in paragraph 2(a)(3) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies undertakes that the setting off of fees paid by the Transferor Companies on its Authorized Share Capital shall be accordance with provisions of section 232(3)(i) of the Companies Act, 2013.

2(c)

Transferee company should undertake to comply with the provisions of section 232(3)(i) of the Companies Act, 2013 through appropriate affirmation in respect of fees payable by Transferee Company for increase of share capital on account of merger of transfer of companies.

So far as the observation in paragraph 2(c) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies undertakes that the setting off of fees paid by the Transferor Companies on its Authorized Share Capital shall be accordance with provisions of section 232(3)(i) of the Companies Act, 2013.

2(d)

In compliance of Accounting Standard14 or IND-AS 103, as may be applicable, the resultant company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting

Standards including AS-5 or IND AS-8 etc.

So far as the observation in paragraph 2(d) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the Transferee Company / Resulting Companies undertakes that in addition to compliance of Ind-AS 103 for accounting treatment, the Transferee Company and Resulting Companies shall pass such accounting entries as may be necessary in connection with the Scheme to comply with other applicable accounting standards such as Ind AS-8 as applicable.

2(e)

The Hon'ble Tribunal may kindly direct the Petitioner Companies to file an affidavit to the extent that the Scheme enclosed to the Company Application and Company Petition are one and same and there is no discrepancy, or no change is made.

So far as the observation in paragraph 2(e) of the Report of the Regional Director is concerned, the Petitioner Companies undertake that the Scheme enclosed to Company Application & Company Petition, are one and same and there is no discrepancy / any change / changes are made.

2(f)

The Petitioner Companies under provisions of section 230(5) of the Companies Act 2013 have to serve notices to concerned authorities which are likely to be affected by the Amalgamation or arrangement. Further, the approval of the scheme by the Hon'ble Tribunal may not deter such authorities to deal with any of the issues arising after giving effect to the scheme. The decision of such authorities shall be binding on the petitioner companies concerned.

So far as the observation in paragraph 2(f) of the Report of the Regional Director is concerned, the Petitioner Companies through their Counsel hereby confirm that notices have been served to the concerned authorities which are likely to be affected by the Amalgamation or Arrangement.

2(g)

As per Definition of the Scheme, "Appointed Date" means October 1, 2021 for the purposes of Merger of Transferor Companies with Transferee Company and Demerger of the Demerged Undertakings into the respective Resulting Companies under the scheme. "Effective Date" means:

I.In relation to the merger, the date or last of the dated on which the certified copy of the order of the NCLT sanctioning this Scheme is filed with Registrar of Companies, Mumbai by the Transferor Companies and Transferee Company and thereafter

II. In relation to the Demerger, the date or last of the dates on which the certified copy of the order of NCLT sanctioning this scheme is filed with the

Registrar of Companies, Mumbai by the demerged Company and the Resulting Companies. It is clarified that upon filing of the order as aforesaid the Demerger will be deemed to have been effective immediately after the Merger that is mentioned under clause 1.3.15(i) on the Effective date.

It is submitted that the Petitioners may be asked to comply with the requirements as clarified vide circular no. F. No. 7/12/2019/CL-1 dated 21.08.2019 issued by the Ministry of Corporate Affairs

In so far as observations made in paragraph 2(g) of the Report of the Regional Director is concerned, the Petitioner Companies clarify that scheme shall be effective from the Appointed Date which is a specific calendar date i.e. 1st Day of October, 2021. Pursuant to circular no. F. No. 7/12/2019/CL-1 dated 21.08.2019 issued by the Ministry of Corporate Affairs, the appointed date shall not be ante-dated beyond a year from the date of filing of application for the scheme with NCLT. After the approval of the scheme by the Board of Directors of the Petitioner Companies on 3rd December 2021, the Petitioner Companies filed joint application with Hon'ble NCLT on 22nd December 2021 i.e within a period of one year from the Appointed Date. Further, the Appointed Date is not based on the occurrence of a trigger event which is key to the proposed scheme. Hence, the appointed date of 1st October, 2021 is not required to be amended.

2(h)

Petitioner Companies shall undertake to comply with the directions of the concerned sectoral Regulatory, if so required.

So far as the observation in paragraph 2(h) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies undertakes to comply with the directions of the concerned sectoral Regulatory, if any.

2(i)

Petitioner Companies shall undertake to comply with the directions of Income tax department, if any.

So far as the observation in paragraph 2(i) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies undertakes to comply with the directions of the Income tax department, if any as per the provisions of the Income-tax Act 1961.

2(j)

Petitioner Companies shall undertake to comply with the directions of RERA.

So far as the observation in paragraph 2 (j) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies undertakes to comply with the directions of the RERA, if any.

2(k)

It is observed from MCA21 record that Transferor Company-1 in financial statements as on 31.03.2021 has issued shares at Security Premium and collected total premium amounting to Rs 78,44,00,000/- as the following particulars: -

Date of Allotm ent

Name of Allottees

No. of Shar es

Issue Price of Share including Premium

Secu rity Prem ium Per Shar e

Total Share Premiu m collected (Rs.)

Remarks

10.02.

2020

Mars Hotels and Resorts Private Limited

7310

4

1728

1718

12,55,92

,672

Share have been issued in Year 2020 at Face Value of Rs. 10

01.08.

2019

Mars Hotels and Resorts Private Limited

388,

235

1700

1690

65,61,17

,150

Share have been issued in Year 2029 at Face Value of Rs. 10

No information available on MCA21 back-office portal

26,90,17

8

Total

73,1

04

78,44,00

,000

(ii) It is observed from MCA21 record that Transferor Company-2 in financial statements as on 31.03.2021 has issued shares at Security Premium and collected total premium amounting to Rs. 24,59,19,224/- as the following particulars: -

Date of Allotm ent

Name of Allottees

No. of Shares

Issue Price of Share includ ing Premi

um

Securitie s Premiu

m Per Share

Total Share Premium Collected (Rs.)

Rem arks

23.06.

2020

Vrihis Properties Private Limited

2500

10000

0

2500

62,50,000

Shar e have been issue d in Year 2020

.

06.03.

2020

Vrihis Properties Private Limited

10,33,0

57

242

232

23,96,69,

224

Shar e have been issue d   in Year 2020

.

Total

50,00,

000

24,59,19,

224

However, the share price of Rs. 24,59,19,224/- is reduced to Rs. 239.6 million. The Petitioner company i.e. Transferor Company No. 2 shall satisfy as to how share premium is utilized as per section 52 r/w. 66 of CA, 2013.

Hence, the Petitioner Companies have issued shares at premium and collected huge amount of securities premium and it is submitted that Petitioner shall satisfy the Hon'ble Bench about fairness/ genuineness of issue of share capital by bring the fact about date of issue of shares, names of original allottee, price at which share originally allotted, assessment of share capital u/s 68 of the Income Tax Act, 1961 and date & price at which shares were transferred from original allottees to present shareholder, if any.

So far as the observation in paragraph 2(k) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies at the outset submits that the Regional Director in paragraph 2(k)(ii) with respect to Transferor Company 2 has mentioned the Transferor Company 2 has allotted 2,500 shares on 23.06.2020 at an issue price of Rs. 1,00,000 per share and security premium of Rs. 2,500 per share. Further, the report states that Transferor Company 2 has collected total share premium of Rs. 62,50,000 on such issuance. The Learned Counsel for the Petitioner Companies clarifies that the said allotment on 23.06.2020 is relating to issuance of Nonconvertible

Debentures (‘NCDs’). 2,500 NCDs of face value of Rs 1,00,000 were issued at an issue price of Rs. 1,00,000. Accordingly, no securities premium was collected on such issue of NCDs. Form PAS 3 filed with the Registrar of Companies evidencing the allotment of NCDs is attached herewith as Annexure 1. In view of the aforesaid, it is submitted that such issuance of NCDs should not be considered for calculation of total securities premium

9. The Observations made by the Regional Director and the clarifications and undertakings given by the Petitioner Companies have been explained in Para 8 above. The Undertakings filed by the Petitioner Companies in response to the said report are accepted by this Tribunal.

10. The Official Liquidator has filed his report 14th October 2022 inter alia, stating therein that the affairs of the Transferor Companies have been conducted in a proper manner.

11. From the material on record, the Scheme appears to be fair and reasonable and so far not in violation of any provisions of law, nor contrary to public interest.

12. Since all the requisite statutory compliances have been fulfilled, the C.P. (CAA) No. 196/MB.I./2022 is made absolute in terms of prayer made in the Petition. Hence ordered.

Order

The Petition be and the same is allowed subject to the following:

i. The Scheme, with the Appointed Date for merger and demerger fixed as 1st October 2021 placed at page nos. 577 to 696 (Annexure I) of the C.P.(CAA) No. 196/MB.I./2022 connected with C.A.(CAA) No. 50/MB/C-I/2022 is hereby sanctioned. It shall be binding on the Petitioner Companies involved in the Scheme and all concerned including their respective shareholders, secured creditors, unsecured creditors / trade creditors and employees.

ii. The First Petitioner Company and Second Petitioner Company be dissolved without being wound up.

iii. The Registrar of this Tribunal shall issue the certified copy of this Order along with the Scheme forthwith.

iv. The Petitioner Companies are directed to file a certified copy of this Order along with a copy of the Scheme with the concerned Registrar of Companies, electronically in E-form INC-28 within 30 days from the date of receipt of the Order duly certified by the Deputy /Assistant Registrar of this Tribunal.

v. The Petitioner Companies to lodge a copy of this Order duly certified by the Deputy /Assistant Registrar of this Tribunal, along with a copy of the Scheme with the concerned Superintendent of Stamps for the purpose of adjudication of stamp duty payable, if any, on the same, within 60 days from the date of the receipt of the Order duly certified by the Deputy /Assistant Registrar of this

Tribunal.

vi. The Petitioner Companies shall comply with all the undertakings given by it.

vii. All concerned authorities to act on a copy of this Order duly authenticated by the Deputy /Assistant Registrar of this Tribunal along with the Scheme.

viii. The Petitioner Companies are directed to issue newspaper publications with respect to approval of the Scheme, in the same newspapers in which previous publications were issued.

ix. The Petitioner Companies shall take all consequential and statutory steps required under the provisions of the Act in pursuance of the Scheme.

x. Any person interested in the above matter shall be at liberty to apply to the Tribunal for any directions that may be necessary.