(2021) 04 NCLT CK 0022

In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi

Case No : Company Application (CAA) No. 46, 66/(ND) Of 2020

M/S Fibcom India Limited — APPELLANT

Vs

M/S Prime Telecom Limited — RESPONDENT

Date of Decision : 27-04-2021

Acts Referred:

Companies (Compromises, Arrangements And Amalgamations) Rules, 2016 — Rule 8
Companies (Registration Office And Fees) Rules, 2014 — Rule 7
Companies Act, 2013 — Section 117(1), 133, 179(3), 230, 231, 232, 232(i), 232(3)(i)

Citation : (2021) 04 NCLT CK 0022

Hon'ble Judges : Dr. Deepti Mukesh, J;Sumita Purkayastha, Member (Technical)

Bench : Division Bench

Advocate : Deepak Diwan, Apoorva Chowdhury, Deepak Anand, Vipul Agrawal

Final Decision : Allowed/Disposed Of

Judgement

1. This petition has been filed by the Petitioner Companies under Sections 230 and 232 of the Companies Act, 2013 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and the National Company Law Tribunal Rules, 2016, for the purpose of the approval of the Scheme of Amalgamation of Transferor Company into Transferee Company.

2. From the records, it is seen that the First Motion application was filed before this Tribunal vide CA (CAA) 46 (ND) 2020 under Sections 230- 232 of the Companies Act, 2013 and vide order dated 01.07.2020 of this Tribunal, the meeting of the Equity Shareholders, Preference shareholders and Secured Creditors ofthe Transferor/Applicant Company No.1 was directed to be convened on 08.08.2020 at ML 13 Forest Lane, Sainik Farm, New Delhi 110068 or online subject to the notice of the meeting being issued. Since the Unsecured Creditors of Transferor/Applicant Company No.1, holding 92% in value of the Unsecured debt in the Company had given their consents, therefore the meetings were dispensed with. The meeting of the Equity Shareholders, Unsecured Creditors

and Secured Creditors of the Transferee/Applicant Company No.2 was directed to be convened on 08.08.2020 at ML 13 Forest Lane, Sainik Farm, New Delhi 110068 or online subject to the notice of the meeting being issued. Since there are no Preference shareholders of Transferee/Applicant Company No.2, therefore the meetings were dispensed with.

3. The Report dated 10.08.2020 of the Chairperson with respect to the meetings convened, is filed.

4. Thereafter 2nd motion petition was filed vide CAA -66 (ND)/2020 and vide order dated 13.10.2020 the Petitioners were directed to carry out publication in the newspaper 'Business standard' (English, Delhi Edition) and ''Business standard'' (Hindi, Delhi Edition) and in addition, notices were directed to be served on to the Regional Director (Northern Region), Ministry of Corporate Affairs, Registrar of Companies, NCT of Delhi and Haryana, the Income Tax Department, Official Liquidator and to the other relevant sectoral regulators.

5. It is seen from the records that the Petitioners have filed an affidavit on 23.11.2020 affirming compliance of the order passed by the tribunal dated 13.10.2020. A perusal of the affidavit disclose that the Petitioners have affected the newspaper publication as directed in one issue of the 'Business Standard' (English Edition) and (HindiEdition) both on 13.11.2020 in relation to the date of hearing of the petition. Further, the Petitioners have also affirmed that the copy of petition have been duly served upon the Registrar of Companies, Regional Director, Northern Region and Income Tax Department, Official Liquidator, in compliance of the order and in proof of the same acknowledgment from the respective offices have also been placed on record.

6. The Regional Director filed its representation on21.01.2021 and submitted that as per the report of the Registrar of Companies the filling position of all the petitioner companies areupto date and no prosecution has been filed against the petitioner companies and no investigation is pending. The Regional Directorstates that as per Clause 32 of the report of the ROC, the following observation are made:

i. There is no employee clause in the Scheme, hence petitioner companies may kindly be directed to clarify and amend the scheme accordingly.

ii. Refer to clause 3.19 of the scheme, The Transferee Company shall comply with section 232(3)(i) of the Companies Act, 2013 and pay the difference fee on consolidated authorized share capital of Transferee Company, after setting off the fee already paid by the Transferor Companies on their respective capital. The Transferee Company may kindly be directed to include the said clause in the scheme.

iii. Refer to clause 4.1 & 4.2 of the scheme regarding change of name and object of the Transferee Company, in this regard it is stated that any change in name and object shall not be automatic. The Company has to make compliance of relevant sections and rules made thereunder to change the name and object of the Company.

iv. Notice of Scheme of amalgamation/merger to the Registrar of Companies has not been served in Form No. CAA-3 in accordance with Rule 8 of the Companies (Compromises, Arrangements, and Amalgamation) Rules, 2016 read with Rule 7 of Chapter 24 of the Companies (Registration Office & Fees) Rules, 2014. The petitioner companies may be directed to file e- form GNL-1 in this regard.

v. It has been observed from the petition that the Board of Directors of the Transferor Company and Transferee Company have approved the proposed Scheme of Amalgamation in their Board Meetings. Accordingly, in terms of the provisions of section 117(1) r/w 179(3) of the Companies Act, 2013, the company is required to file such resolution (e-form MGT-14) with this office within thirty days of passing the resolution whereas none of the above company has filed such resolution so far thereby prima facie violated the provisions of section 117(1) of the Companies Act, 2013.

7. The Regional director observed that, with regard to points (i) above, the petitioner has stated in the rationale of the Scheme about the continuity of employment of the employees of the transferor company. With reference to point (iv) and (v) above, the petitioner companies has filed e-form GNL-1 on 02.11.2020 and MGT-14 on 14.10.2020.

8. The Petitioners have filed an affidavit dated 07.01.2020 undertaking that the Transferee Company shall comply with the provision of Section 232(i) of the Companies Act, 2013 in regards to the additional fee payable on its revised consolidated Authorized Share Capital after setting off the fee already paid by the Transferee Company.

9. The Income Tax Department has filed its report dated 07.01.2021 with respect to Fibcom India Limited (Transferor Company) wherein no specific objections have been raised against the approval of the scheme however,Income Tax Department has filed another report dated 12.01.2021 with respect to Prima Telecom Ltd(Transferee Company), whereinit is stated that on verification of the case records from ITBA system, there is an outstanding demand of Rs. 16,836/-. The Petitioners have filed an undertaking vide an affidavit dated 13.01.20121, stating that the Transferee Company has paid the outstanding demand and the copy of the challan has been placed on record.

10. The Official Liquidator has filed its report on 27.11.2020 wherein no specific objections have been raised against the approval of the scheme. The report states that the Official Liquidator has not received any complaint against the proposed scheme and the affairs of the Petitioner Companies do not appear to have been conducted in manner prejudicial to the interest of its members or to public interest as per the provisions of the Companies Act, 1956/ Companies Act, 2013.

11. In the petition it has been affirmed that no proceedings for inspection, inquiry or investigation under the provisions of the Companies Act, 2013 or under the provisions of the Companies Act, 1956 are pending against the Petitioner Companies.

12. Certificates of respective statutory auditors of all the petitioner companies have been placed on record to the effect that accounting treatment proposed in the Scheme of Amalgamation is in conformity with the accounting standard notified by the Central Government as specified under the provisions of Section 133 of the Companies Act, 2013.

13. In view of the foregoing, upon considering the approval accorded by the members and creditors of the petitioner companies to the proposed scheme, as well as the no objections filed by the regional director, northern region, the official liquidator, and the income tax department and if any, have been satisfied vide an undertaking filed by the Petitioner Companies, there appears to be no impediment in sanctioning the present scheme. Consequently, sanction is hereby granted to the scheme under section 230 & 232 of the companies act, 2013. The petitioners however remain bound to comply with the statutory requirements in accordance with law.

14. Notwithstanding the above, if there is any deficiency found or, violation committed qua any enactment, statutory rule or regulation, the sanction granted by this court to the scheme, will not come in the way of action being taken, albeit, in accordance with law, against any of the concerned person, director and officials of the petitioners.

15. While approving the scheme as above, we further clarify that this order should not be construed as an order in any way granting exemption from payment of stamp duty, taxes, GST, or any other charges, if any, and payment in accordance with law or in respect to any permission/ compliance with any other requirement which may be specifically required under any law.

16. THIS TRIBUNAL ORDERS AS UNDER:

a) That the transferor company shall stand dissolved without following the process of winding up; and

b) That all the properties, rights and powers of all the transferor company, be transferred without further act or deed, to the transferee company and accordingly the same shall pursuant to Section 232 of the Companies Act, 2013, be transferred to and vest in the transferee company.

c) That Transferee Company shall issue and allot 1 equity share of Rs. 100/- each fully paid up for every 45 equity shares of Transferor Company of Rs. 10/- each fully paid up. Further swap/exchange ratio of 22,26,128 preference shares of the Transferee Company of Rs. 10/- each fully paid up for 38,00,000 preference shares of Transferor Company of Rs. 10/- each.

d) That all the liabilities and duties of the transferor company, be transferred without further act or deed, to the transferee company and accordingly the same shall, pursuant to Section 232 of the Act, be transferred to and become the liabilities and duties of the transferee company; and

e) That all proceeding now pending by or against the transferor company, be continued by or against the transferee company; and

f) That all the employees of all the transferor company in service, on the date immediately preceding the date on which the scheme takes effect, i.e., the effective date shall become the employees of the transferee company on such date without any break or interruption in services and upon terms and conditions not less favorable than those subsisting in the respective transferor companies on the said date.

g) That petitioner companies shall within thirty days of the date of the receipt of this order cause a certified copy of this order to be delivered to the Registrar of Company for registration and on such certified copy being so delivered the transferor companies shall stand dissolved and the Registrar of Company shall place all documents relating to all the transferor company registered with him on the file kept by him in relation to the transferee company and the files relating to all the petitioner companies shall be consolidated accordingly; and

h) That any person interested shall be at liberty to apply to the tribunal in the above matter for any directions that may be necessary.

The petition stands allowed and disposed of in the above terms.

