
(2024) 04 NCLT CK 0054

In the National Company Law Appellate Tribunal

Case No : Company Petition No. 66/66/ND/2022

M/s Under Armour India Trading Private Limited Vs

Date of Decision : 15-04-2024

Acts Referred:

Companies Act, 2013 — Section 66, 66(1), 66(1)(b), 66(5), 133, 455

Citation : (2024) 04 NCLT CK 0054

Hon'ble Judges : Manni Sankariah Shanmuga Sundaram, Member (J); Dr. Sanjeev Ranjan, Member (T)

Bench : Division Bench

Advocate : Tine Abraham, Shivani Rawat, Shaurya, Himanshu Singhal

Final Decision : Disposed Of

Judgement

Manni Sankariah Shanmuga Sundaram, Member (Judicial)

1. The instant Company Petition is filed by the Petitioner Company i.e., M/s. Under Armour India Trading Private Limited bearing CIN: U51909DL2018FTC340615 seeking inter-alia following prayer(s) before this Tribunal: -

a. That the reduction of capital resolved by the shareholders of the Company in terms of the special resolution passed on 12th April 2022 and as set out in paragraph 18 above be confirmed.

b. That all directions necessary and proper be made and given.

c. That the proposed minute to be registered under Section 66(5) of the Act as set out in paragraph 44 be approved; and

d. That such further or other orders be made as the NCLT shall deem fit.

2. It is submitted that Petitioner Company was incorporated on 16.10.2018 under the provisions of the Companies Act, 2013 having its registered office at Level 3 Vasant Square Mall, Pocket V, Sector B, Vasant Kunj, New Delhi-110070 and the corporate office at We Work, Forum, DLF Cyber City, Phase-III, Sector 24 Gurugram-122002.

3. The main objects of the petitioner company are briefly stated as under:

i. To engage in and carry on the business of trading, importing, manufacturing, exporting, re-export of imported products, e-commerce, labelling, selling, marketing, distribution, wholesaling and warehousing of all kind of apparel and general outfitters, shoes and other goods including all forms of sportswear, casual wear, accessories, equipment such as sports equipment, phone cases, headphones and customized options for the aforementioned products.

ii. With respect to the object at paragraph (i) above, to acquire, own, lease hire, rent, build, develop, construct, operate, dispose and/or manage warehouses, godowns, infrastructure, workshops, machines, tools and resources and hire, engage, deploy or otherwise arrange, manpower, technicians, agencies with respect to the products dealt with by the Company.

4. That the Petitioner Company vide Articles 4.10 of Articles of Association ('AOA') is permitted to alter its share capital in any manner permitted by law.

5. The Authorized Share Capital of the Petitioner Company is Rs. 71,81,62,500/- divided into 7,18,16,250 equity shares of Rs. 10/- each. The issued, subscribed and paid-up capital of the petitioner company is Rs. 61,81,62,500/- divided into 6,18,16,250 equity shares of Rs. 10/-each. All of the issued equity shares are fully paid up. The Company does not have any other class of equity shares or preference shares.

6. The Board of Directors of the Petitioner Company at their meeting held on 12.04.2022 approved the proposed reduction of the Company's equity share capital.

7. The Petitioner Company has 8 unsecured creditors having an outstanding balance of INR 56,54,410 as on 31.03.2022 and nil secured creditors. List of Creditors of the Petitioner Company, duly certified by a director along with a certificate by the Statutory Auditor, are attached as Annexure G (Part A). Additionally, NOC has been obtained from Under Armour Europe BV for the outstanding amount of INR 42,91,176. Further, the Company has paid the outstanding dues to Central Board of Direct Taxes towards TDS amounting to INR 8,13,154 and the documents evidencing payment of these dues are annexed to this application as Annexure G (Part C). The Petitioner Company has informed all creditors of the proposed capital reduction. The Company has sufficient financial resources as represented by its cash and cash equivalents as on 31.03.2022 to discharge the debt owed to the outstanding creditors in the ordinary course of business.

8. The Petitioner Company submits that in terms of the provisions of Section 66 of the Companies Act, 2013, and other applicable provisions, if any, the Shareholders of the Company in the Extra Ordinary General Meeting held on 12.04.2022. At the Extra Ordinary General Meeting of the Petitioner Company, the Equity shareholders of the Petitioner Company have unanimously approved

the proposed reduction of capital by passing special resolutions. The special resolution passed by the Equity Shareholders in the Extra Ordinary General Meeting is reproduced below:-

"RESOLVED THAT pursuant to section 66 of the Companies Act, 2013, read with the National Company Law Tribunal (Procedure for reduction of share capital) Rules, 2016 (including any statutory modification, amendment or re-enactment thereof for the time being in force) and subject to the confirmation of the National Company Law Tribunal (NCLT), the consent of the shareholders of the Company be and is hereby accorded to the proposed reduction of the paid-up share capital of the Company from INR 61,81,62,500/- divided into 6,18,16,250 equity shares of INR 10 each to INR 9,50,00,000 divided into 95,00,000 equity shares of INR 10 each by cancelling and extinguishing paid up equity share capital of INR 52,31,62,500 divided into 5,23,16,250 equity shares of INR 10 each fully paid up, being in excess of wants/requirements of the company. The amount proposed to be reduced under the scheme would be utilized in the following manner:

- (i) Returning to Under Armour Europe BV, a shareholder of the Company, an aggregate amount of INR 20,00,00,000 at an approximate rate of INR 3.82 per equity share; and
- (ii) Writing off accumulated losses of INR 32,31,62,500 which is not represented by available assets of the Company out of the total accumulated losses amounting to INR 35,92,78,650 in their profit and loss account.

RESOLVED FURTHER THAT subject to requisite approvals of the shareholders of the Company for the proposal reduction of the share capital of the Company and subject to the confirmation of the NCLT, the existing share certificate held by Under Armour Europe BV in relation to the existing equity shares of the face value of INR 10 each held in physical form shall be deemed to have been automatically surrendered and thereafter cancelled by the Company.

RESOLVED FURTHER THAT subject to requisite approvals of the shareholders of the Company and subject to the confirmation of the NCLT, the paid-up share capital of the Company, shall stand reduced to the extent of the face value of the shares so extinguished and cancelled (as set out above).

RESOLVED FURTHER THAT the Company shall debit the equity share capital account to the extent of the face value of the shares cancelled under the capital reduction application and the difference between the face value per share and the amount of consideration per share shall be credited to the 'Retained Earnings' under the head 'Reserves and Surplus' and that this accounting treatment is in conformity with the Accounting Standards applicable to the Company.

RESOLVED FURTHER THAT any Director of the Company, be and is hereby authorized severally to do all such acts, matters, deeds and things as may be

necessary or desirable including any directions for settling any question or doubt or difficulty whatsoever that may arise, for the purpose of giving effect to the proposed reduction of the share capital of the Company as placed before the Board or to any modification thereof, in particular:

- i. File application with the NCLT for directions and confirmation of the proposed reduction of equity share capital, signing, affirming and verifying affidavit, applications, petition, vakalatnama etc., before the NCLT;
- ii. To appoint or engage any counsel, advocate, legal advisors, attorney, representative and any other persons in connection with the proposed reduction of equity share capital;
- iii. Make representation on their own or through legal counsels before NCLT or other authorities for confirmation of the proposed reduction of equity share capital; and
- iv. Do all such acts and things necessary and convenient in relation thereto and to give effect to this resolution as the Board of Directors in their absolute discretion consider necessary, expedient and proper.

RESOLVED FURTHER THAT, consequent amendments be made in the capital clause of memorandum of association and articles of association (if any) of the Company after the said reduction becomes operative and effective and necessary forms, documents and information be filed with the Registrar of Companies in accordance with the Companies Act, 2013.

RESOLVED FURTHER THAT the Board be and is hereby authorized in their absolute discretion, to make the reduction and cancellation of the share capital (as set out above) on such other terms and conditions as they may consider appropriate and to accept such other conditions and modifications as may be prescribed by the NCLT, and other appropriate bodies/authorities while according their confirmation to the proposed reduction and cancellation of share capital.

AND RESOLVED THAT a certified true copy of the aforesaid resolution be issued as and when necessary, under the signature of any of the Directors of the Company.”

9. As per the Certificate issued by the Statutory Auditors of the Petitioner Company, the accounting treatment proposed by the Petitioner Company for the Reduction of Share Capital is in conformity with the Accounting Standards specified in Section 133 or any other applicable provisions of the Companies Act, 2013 and is annexed with the main petition and marked as Annexure-I1

10. The Certificate from the statutory auditor dated 14.04.2022 stating and confirming that the Company has not accepted any deposits, and accordingly, there are no arrears in repayment of the deposits or the interest thereon. The same is placed on record before us under page no. 117-119.

11. The Petitioner Company submits that the equity shareholder of the Company,

Under Armour Europe BV made foreign direct investment in the Company on repatriable basis and prior to making the due payments, the Company is required to undertake a fair market valuation of the equity shares under Foreign Exchange Management Act, 1999 (FEMA). A copy of the Valuation report is annexed as Annexure-J. Further, the Petitioner Company submits that the Company shall comply with all applicable regulations, if any, under FEMA in respect of capital reduction of non-resident shareholders.

12. The Petitioner Company net worth as on 31.03.2022 before and after giving effect to the proposed reduction of share capital are INR 25,88,82,850/- and approximately INR 5,88,82,850/- respectively. It is further submitted that the capital reduction shall not adversely affect the Company's ability to honor its commitments or meet its liabilities or settle the dues of all the creditors in the ordinary course of business and the Company would continue to have a positive net worth of INR 5,88,82,850/- after giving effect to the capital reduction. Therefore, the present reduction of the share capital shall not prejudice any creditors of the Company.

13. This Tribunal vide its order dated 07.06.2022 had directed the Petitioner Company to issue notice. In compliance of order dated 07.06.2022, an affidavit of service dated 13.07.2022 has been filed by the Petitioner Company.

14. Pursuant to the notice dated 07.06.2022, the RD its report vide letter dated 01.03.2023, had raised certain observations with regard to the proposed scheme of Capital Reduction of the Petitioner Company and in response to the same, the Petitioner Company had filed reply dated 31.03.2023 wherein the Petitioner Company gave clarification and undertaking to address the observations made by the RD. The details of the same are summarized below:

S. No.

Observations in the RD's report affidavit dated 01.03.2023

Response of the petitioner company vide letter dated 31.03.2023

1.

In the financial statements for year ended 31.03.2021 the Auditor has made emphasis of matter as under:

i. Note 33 to the financial statements, which describes the

management's assessment of the impact of the

outbreak of COVID-19 on the business operations of the company. The management believes that no adjustments are required in the financial statements as it does not impact the current financial year, however, in view of the various preventive measures taken (such as lock-down restrictions by the government of

India, travel restrictions etc.) and highly uncertain economic environment, a definitive assessment of the impact on the subsequent periods is highly dependent upon circumstances as they evolve. Our opinion is not modified in respect of this matter.

ii. Note 31 to the financial statements regarding overdue payables in foreign currency aggregating to Rs. 1397622 (31 March 2020:

Rs. Nil) disclosed under Trade Payables, which are outstanding beyond the stipulated time period of twelve months from the date of shipment prescribed in the RBI Master Direction No. 17/2016-17 dated January 1, 2016 (time period has been extended from six months to twelve months via RBI/2019-20/242 A.P.

(DIR Series) Circular no. 33

dated May 22, 2020), for which the company has made an application seeking permission from AD Banker for writing back the said amounts. Our opinion is not modified in respect of this matter.

We understand the observations made in the Letter are based on a review

of the audited financial statements for the year ended 31 March 2021 (Audited Financials 2021), which were the latest audited financial statements available at the time of submitting the Application to the NCLT. Please note that, the financial position of the company has undergone a significant change since then as recorded in the latest available audited financial statements for the year ended 31 March 2022 (Audited Financials 2022), which were shared by the Company with your office along with our Response to Previous Letter.

Accordingly, we wish to draw your attention to following facts and figures from the Audited Financials 2022:

a) Over dues

As per the Audited Financials 2022, the over-due payables in foreign currency aggregates to Rs. 18,27,930 (including the amounts for 31 March 2021 i.e., Rs. 13,97,620) disclosed under heading Trade Payables.

b) Inventories and Trade Receivables

The Company had disclosed 'Inventories' amounting to Rs. 16,75,11,060 and 'Trade Receivables' amounting to Rs.21,33,49,230 in the Audited Financials 2021. Please note that in the Audited Financials 2022, both the 'Inventories' and 'Trade Receivables' of the Company have been reduced to 'zero'.

c. Cash and bank balances

As per the Audited Financial 2021, the 'Cash and bank balance' of the Company amounts to Rs. 38,85,07,020. Please note that as per Audited Financials 2022, the 'Cash and bank balances' of the Company is Rs. 26,99,33,770.

d. Current Liabilities

The 'Current Liabilities' under the Audited Financials 2021 amounts to Rs. 50,60,61,220. Please note that as per audited financials 2022, the current liabilities have reduced to Rs. 1,32,73,460/-.

2.

The company has stated in its petition that after reduction of share capital the company intends to seek dormant status u/s 455, however, on perusal of financial statements of company for year ended 31.03.2021, it is seen that it has sizable amount of inventory of approximate Rs. 16.75 crore, it has trade receivables worth Rs. 21.33 crores in such scenario, it may not be apt for the company to obtain dormancy.

Further, as stated in our application at paragraph 4, the Board of Directors of the Company in their meeting dated 12 April 2022 considered the capital requirements, and other business factors and acknowledged that since the Company has not been actively undertaking any business operations pursuant to the transfer of its assets and employees with effect from 1 September 2021, the current paid up share capital of the Company is in excess of its current and expected future requirements. Therefore, the Company plans to seek 'dormancy status' in the future after completion of the capital reduction subject to the Company meeting the eligibility and other conditions of section 455 of the Companies Act 2013.

3.

As per the cash flow statement of company the cash and cash equivalents at end of year are Rs. 38.85 crores, but company has current liability of Rs. 50.61 crores. Therefore, the interest of the creditors is required to be protected.

Separately, please note the 'Cash and bank balances' of the Company (Rs. 26,99,33,770) are considerably higher in comparison to the 'Current Liabilities' (Rs. 1,32,73,460) as recorded in the Audited Financials 2022. As stated in our application at paragraph 9, the proposed capital reduction shall not adversely affect the Company's ability to honor its commitments to meet its liabilities or settle the dues of all the creditors in the ordinary course of business as the Company will continue to have a positive net worth after giving effect to the capital reduction. Therefore, the present reduction of the share capital shall not prejudice any creditors of the company. For ease of reference, we are attaching the audited financial statements as of

31 March 2022 again for your reference herewith as Annexure A'.

4.

Since the entire outflow on account of capital reduction would be in favour of Under Armour Europe BV, a foreign company, therefore compliance of FEMA may be ensured.

We note your observation in respect of paragraph 4 and in this regard, we will ensure the compliance under the foreign exchange laws of India for any outflow or outward remittance of funds from the Company to its non-resident shareholders after the Application receives approval from the NCLT. That reduction of capital shall be affected by returning to Under Armour Europe BV, a shareholder of the Company, an aggregate amount of Rs. 20 Crore @ Rs. 3.82 per share and by writing off accumulated losses of Rs. 35,92,79,650 as on 31.03.2022. In the same balance sheet outstanding dues to the creditors other than micro enterprises and small enterprises are indicated to be Rs. 56,54,410 while current liabilities are Rs. 65,10,830 (copy of the balance sheet as on 31.03.2022 before and after reduction of capital stated is attached). Thus, this Tribunal be satisfied about the scheme of reduction in Capital as entries outflow on account of reduction in capital would be in favour of a foreign Company thus same be subject to FEMA compliant too. Further, Hon'ble Tribunal may pass any other order as deem fit & proper.

15. The RD stated in his report affidavit dated 13.04.2023, as under:

That reduction of capital shall be affected by returning to Under Armour Europe BV, a shareholder of the Company, an aggregate amount of Rs. 20 Crore @ Rs. 3.82 per share and by writing off accumulated losses of Rs. 35,92,79,650 as on 31.03.2022. In the same balance sheet outstanding dues to the creditors other than micro enterprises and small enterprises are indicated to be Rs. 56,54,410 while current liabilities are Rs. 65,10,830 (copy of the balance sheet as on 31.03.2022 before and after reduction of capital stated is attached). Thus, this Tribunal be satisfied about the scheme of reduction in Capital as entries outflow on account of reduction in capital would be in favour of a foreign Company thus same be subject to FEMA compliant too. Further, Hon'ble Tribunal may pass any other order as deem fit & proper.

16. The Petitioner have placed on record an affidavit dated 12.12.2023 in which certain documents were submitted to the RD on 28.11.2023 which are as under: -

a. Statutory Auditor's certificate of Applicant Company's net worth as of 31.03.2023.

b. Statutory Auditor's certificate on Applicant Company's cash flow and statement of cash flow as extracted from applicant company's financial statements for the financial year 2022-23.

c. Statutory Auditor's Certificate on Applicant Company's list of secured and unsecured creditors as of 31st March, 2023.

d. Statutory Auditor's Certificate on Applicant Company's Statement of Cash and Bank Balance as of 31st March, 2023.

17. The Petitioner filed an affidavit dated 07.02.2024 stating that which is extracted hereunder: -

18. In 'Reckitt Benckiser (India) Ltd. (Supra), the Hon'ble Delhi High Court has upheld the view that "the question of reduction of Share Capital will be treated as a matter of domestic concern i.e., it is the decision of the majority which prevails.

19. The Hon'ble NCLAT in case of M/s. Precious Energy Services Limited [Company Appeal (AT) No. 17 of 2021; judgement dated 28.07.2022], while approving the reduction of share capital observed as follows: -

7. The Madras High Court in 'Re. Panruti Industrial Company (Private) Ltd.', AIR 1960 Mad. 537, held as follows:

"...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."

.....

8. The principles distilled from the aforesaid precedents were summarized in 'Reckitt Benckiser (India) Ltd. (CP 206 of 2004) (Delhi High Court)' that has 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...."

11. It is seen from the record that the Reduction of the Share Capital was approved by the Shareholders of the Appellant Company unanimously by way of a Special Resolution with the objective of reducing the overall weighted average cost of Capital and improving the earnings per share. In 'Reckitt Benckiser (India) Ltd. (Supra), the Hon'ble Delhi High Court has upheld the view that "the question of reduction of Share Capital will be treated as a matter of domestic concern i.e., it is the decision of the majority which prevails. If majority by Special Reduction decides to reduce the Share Capital of the Company, which also has the right to decide as to how this reduction should be carried into effect...".

In the instant case, admittedly, the reduction of this Share Capital was approved unanimously by the Shareholders by way of a Special Resolution.

.....

14. It is seen from the record that the Company has complied with all the statutory requirements as per the directions of the Tribunal and has also filed necessary Affidavits to that effect. It is also pertinent to mention that none of the Creditors objected to the reduction of the Capital. Section 66(1)(b) of the Act enables a Company to reduce its Share Capital in any manner provided it is approved by the majority of Shareholders through a Special Resolution Relevant extracts of Section 66(1) is reproduced hereunder for ready reference: "66(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 Company Appeal (AT) No. 17 of 2021 memorandum by reducing the amount of its share capital and of its shares accordingly;" It is observed that section 66(1) permits the Company to reduce its share capital "in any manner".

20. From the records placed before this Tribunal and the submissions of the Learned Counsel of the Petitioner Company, it seems that the Petitioner Company has complied with statutory requirements as per the directions of the Tribunal and have filed the necessary affidavits.

21. Since, the shareholders are being paid at much higher amount than their original capital contribution, relevant provisions of the Income Tax Act, 1961, regarding payment of withholding taxes are to be complied with by the petitioner company, before making the payment to the shareholders.

22. This Tribunal approves the amended form of minutes to be registered under Section 66(5) of the Companies Act, 2013 subject to the compliance of the observations above. Any other compliances which are to be made under various provisions of the Companies Act, FEMA and other laws, if any, have to be taken care of by the petitioners and ensure compliance thereof.

23. Ordered accordingly.

Files be consigned to the records.

FORM OF MINUTES

" The paid up share capital of M/s Under Armour India Trading Private Limited, is henceforth INR 9,50,00,000 (Indian Rupees Nine Crore Fifty Lakh) divided into 95,00,000 (ninety five lakh) equity shares of INR 10 (Indian Rupees Ten) each fully paid-up, as reduced from INR 61,81,62,500 (Indian Rupees Sixty One Crore

Eighty One Lakh Sixty Two Thousand Five Hundred) divided into 6,18,16,250 (Six Crore Eighteen Lakh Sixteen Thousand Two Hundred Fifty) equity shares of INR 10 (Indian Rupees Ten) each fully paid up.”