

(2022) 05 NCLT CK 0034

In the National Company Law Tribunal

Case No : CP (CAA)/1042/2020/MB IN CA(CAA)/756/2020/MB

?Mukand Sumi Metal Processing Limited Vs

Date of Decision : 12-05-2022

Acts Referred:

Companies Act, 2013 — Section 52, 230, 230(1), 230(3), 230(5), 232, 232(6)
Income Tax Act, 1961 — Section 2(19AA)

Citation : (2022) 05 NCLT CK 0034

Hon'ble Judges : P.N. Deshmukh, Member (J); Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Gauraj Shah, Ajit Singh Tawar, Rupa Sutar

Final Decision : Disposed Of

Judgement

P.N. Deshmukh, Member Judicial

1. This bench is convened through video conference.
2. Heard the learned counsel for the Petitioner Companies. No objector has come before the Tribunal to oppose the Petition and nor any party has controverted any averments made in the Petition.
3. The sanction of this Tribunal is sought under Sections 230 to 232 of the Companies Act, 2013, to the Scheme of Arrangement amongst Mukand Sumi Metal Processing Limited, Petitioner No.1 and Mukand Sumi Special Steel Limited, Petitioner No.2 and their respective Shareholders and Creditors.
4. Petitioner No.1 is engaged in manufacturing, purchase, refinement, preparation, import, export, sale and generally to deal in iron & steel in all forms, and/or by-products thereof. It is engaged in the business of (i) special alloy steel cold finished bars and wires and (ii) stainless steel cold finished bars and wires. Petitioner No.2 is engaged in the rolling & finishing of Alloy Steel blooms/billets into bars & rods under an arrangement with Mukand Limited and marketing of alloy steel products. The equity shares of Petitioner No.1 are not listed on any stock exchanges in India. The equity and preference shares of Petitioner No.2 are not listed on any stock exchanges in India.

5. The Learned Counsel for the Petitioner Companies states that the Scheme of Arrangement is presented under Section 230 to 232 and other applicable provisions of the Companies Act, 2013 and the rules and regulations made thereunder, for the demerger of the alloy steel cold finished bars and wires business of Petitioner No. 1 into Petitioner No. 2.

6. The Learned Counsel for the Petitioner Companies further submits the Introduction and Rationale for the Scheme (demerger) is as follows:-

a. That the proposed Scheme is expected to enable better realisation of potential of the businesses, yield beneficial results and enhanced value creation for the Petitioner Companies, their respective shareholders, creditors, lenders, consumers and employees. The rationale for the Scheme is set out below:

b. The proposed Demerger will result in consolidation of Alloy Steel Business of Petitioner No.1 in a single entity, Petitioner No.2, resulting in alignment of interest of all shareholders, concentrated management focus, integration of business operations, greater financial strength and to maximise overall shareholders' value;

c. the Scheme will enable Petitioner No.1 to focus on and enhance its remaining business operations by streamlining its operations;

d. the Scheme will help in achieving and sustaining competitiveness and development of internal core competencies of the Petitioner Companies in the long term;

e. Synergies in operational processes arising from the proposed Demerger are expected to bring greater productivity & cost savings in marketing, selling and distribution expenses, resulting in benefit of economies of scale to Petitioner No.2.

7. The Counsel for the Petitioner Companies submits that the Board of Directors of both the Petitioner Companies in their respective meetings held on 13th February, 2020 have approved the Scheme of Arrangement with the Appointed Date as 1st April, 2020, the copies of the Board resolutions are annexed to the Company Scheme Petition.

8. The Learned Counsel for the Petitioner Companies submits that the Company Scheme Petition is filed in consonance with sections 230 to 232 of the Companies Act, 2013 along with the Order passed in the connected Company Scheme Application Nos. C.A.(C.A.A.)/1123/MB/2020 by this Tribunal.

9. By Order dated 26th April 2021 passed by the National Company Law Tribunal, Mumbai Bench in C.A.(CAA)/1123/MB/2020, the meetings of Equity Shareholders of the Petitioner Companies was dispensed with in view of the fact that, the respective Equity Shareholders of the Petitioner Companies had given their consent to the Scheme and for dispensing with the convening and holding of the meeting of the Shareholders by way of consent affidavits which were produced

before this Hon'ble Tribunal.

10. The Learned Counsel further states that pursuant to the directions contained in the said Order dated 26th April 2021, that the convening and holding of the meeting of the Preference shareholder of the Petitioner No. 2 was dispensed with in view of the fact that there is only one Preference Shareholder of the Petitioner Company No. 2 who had provided his consent to the Scheme by way of consent affidavit.

11. The Learned Counsel further states that pursuant to the directions contained in the said Order dated 26th April 2021 the meeting of the Secured Creditors of the Petitioner Companies was dispensed with in view of the undertaking that the Petitioner Companies would serve individual notices on their Secured Creditors. The Petitioner Companies had on 10th June, 2021 and 18th June, 2021 respectively dispatched notices to all their Secured Creditors.

12. The Learned Counsel further states that pursuant to the directions contained in the said Order dated 26th April 2021 the meeting of the Unsecured Creditors of the Petitioner Companies was dispensed with in view of the undertaking that the Petitioner Companies would serve individual notices on their Unsecured Creditors. The Petitioner Companies had on 10th June, 2021 and 23rd June, 2021 dispatched notices to all their Unsecured Creditors as on 31st March, 2021.

13. The Counsel appearing on behalf of the Petitioner Companies further states that the Petitioner Companies have complied with all the requirements as per the directions of the Hon'ble Tribunal and they have filed necessary affidavits of compliance in the Hon'ble Tribunal. Moreover, the Petitioner Companies, through their Counsel, undertake to comply with all statutory requirements if any, as required under the Companies Act, 2013 and the Rules made there under whichever is applicable. The said undertakings given by the Petitioner Companies are accepted.

14. Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, has filed his report dated March 30, 2022 inter alia stating therein that save and except as stated in paragraph IV of the said report, it appears that the Scheme is not prejudicial to the interest of shareholders and public. In response to the observations made by the Regional Director, the Petitioner Companies have filed their combined affidavit dated 11th April, 2022. The observations of the Regional Director and the Petitioner Companies' response to the said observations are summarised below:

Sl.

No. (Col.1)

RD Observation via RD Report dated 30th March, 2022(Column 2)

Reply Via Consolidated RD Reply dated 11th April, 2022

(Column 3)

IV(a)

In compliance of AS-14 (IND AS-103), the

Petitioner Companies shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5(IND AS-

8) etc.

The Petitioner Companies undertake that in compliance with the said AS 14 (now IND- AS 103), accounting entries which are necessary in connection with the Scheme to comply with other Accounting Standards such as AS-5 (now IND AS-8) etc, if applicable, will be duly passed by them.

IV(b)

As per Definition of the

Scheme,

"Appointed Date" means 1st April, 2020 or such other date as the National Company Law Tribunal (defined hereinafter) may decide/ approve being the date with effect from which the Scheme shall become operative and / or be deemed to have become operative;

And

"Effective Date" means the last of the dates on which all the conditions and matters as referred to in Clause 22 of the Scheme occur or have been fulfilled, obtained or waived in accordance with this Scheme. References in this Scheme to date of 'upon this Scheme becoming effective' or 'upon this Scheme

coming into effect'

The Petitioner Companies submit that the

Appointed Date in present Scheme is in

compliance with the requirements of circular no. F. No. 7/12/2019/CI-1 dated 21.08.2019 issued by the Ministry of Corporate Affairs ("said Circular").

It is submitted that the Scheme was approved by the Board of Directors of the Petitioner Companies on 13th February, 2020 and the Company Application was presented on 20th October, 2020, which is less than a year prior to the "appointed date" under the Scheme, i.e. 1st April, 2020. Consequently, the present case is squarely covered by the said Circular.

means the Effective Date;

In this regard, it is submitted that Section

232 (6) of the Companies Act, 2013 states that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date. However, this aspect may be decided by the Hon'ble Tribunal taking into account its inherent powers. Appointed date is antedated for 2 years, therefore, the petitioner company may be directed to amend the

appointed date which

shall not be earlier than 1 year.

Further, the Petitioners may be asked to comply with the requirements as clarified vide circular no. F. No. 7 / 12 / 2019

/ CL-I dated 21.08.2019 issued by the Ministry of Corporate Affairs.

IV(c)

The Hon'ble Tribunal may kindly seek the undertaking that this Scheme is approved by the requisite majority of members and creditors as per Section 230(6) of the Act in meetings duly held in terms of Section 230(1) read with subsection (3) to

(5) of Section 230 of the Act and the Minutes thereof are duly placed before the Tribunal.

The Petitioner Companies submit that the Hon'ble Tribunal was pleased to dispense with the meetings of the shareholders and creditors of the respective Petitioner Companies as set out in the order dated 26th April 2021 passed in the captioned Company Scheme Application for the reasons set out therein. As such, there is no question of placing minutes of meetings of shareholders and creditors before this Hon'ble NCLT in this regard.

IV(d)

Clause-16.2.4 of Accounting Treatment of the scheme; stated that the excess, if any, between the carrying value of assets and liabilities transferred to the Resulting Company and the consideration discharged by way of issuance of equity shares as per Clause

16.2.3. above, to the shareholders of the Demerged Company, upon Demerger of the Demerged Undertaking shall be credited to capital reserve account in the books of the Resulting Company.

In this regard it is submitted that as per Accounting Standard 14, such surplus / deficit if any arising out of the scheme should be

credited/debited to the

Capital Reserve / Goodwill arising out of demerger. Such Capital Reserve, arising out of the demerger shall not be considered as free reserve and not available for distribution of dividend.

The Scheme, inter alia, provides as follows:

"16.2 In the books of the Resulting Company:

16.2.4. The excess, if any, between the carrying value of assets and Liabilities transferred to the Resulting Company and the consideration discharged by way of issuance of equity shares as per Clause

16.2.3. above, to the shareholders of the Demerged Company, upon Demerger of the Demerged Undertaking shall be credited to capital reserve account in the books of the Resulting Company.

16.2.5. The deficit, if any, between the carrying value of assets and Liabilities transferred to the Resulting Company and the consideration discharged by way of issuance of equity shares as per Clause

16.2.3. above, to the shareholders of the Demerged Company, upon Demerger of the Demerged Undertaking shall be debited to securities premium account in the books of the Resulting Company in terms of Clause 19 of Part IV of the Scheme."

The Petitioner Companies submit that the Scheme duly provides that, the deficit/ surplus, if any, arising out of the Scheme, will be debited to securities premium account or credited to capital reserve of the Resulting Company, as the case may be.

The capital reserve, if any, created pursuant to the Scheme shall not be considered as free reserve and will not be available for distribution of dividend.

IV(e)

It is submitted that the petitioner Company has stated that the scheme is in compliance of Section 2(19AA), in this regard, petitioner company may be directed to place on record that as to how this scheme is in compliance of Section 2(19AA) of the Income Tax Act, 1961.

The Petitioner Companies submit that the Scheme is in compliance with Section 2(19AA) of the Income-tax Act, 1961, inter alia, since

(i) the properties and liabilities pertaining and/or relatable to the Demerged Undertaking, being transferred, becomes the properties and liabilities of the Resulting Company upon demerger;

(ii) consideration for the above transfer is discharged in the form of issue of equity shares by the Resulting Company on a proportionate basis to

shareholders of the Demerged Company, holding not less than three-fourths in value of the shares in the Demerged Company and such shareholders shall become shareholders of Resulting Company;

(iii) the property and the liabilities of the Demerged Undertaking being transferred by the Demerged Company are transferred at values appearing in its books of account immediately before the demerger; and

(iv) transfer of Demerged Undertaking is on- going concern basis.

IV(f)

The Petitioner Companies be directed to place on record of this Tribunal the list of assets to be demerged with complete details of its assets and valuation.

The Petitioner Companies submit the list of assets to be demerged with complete details of the assets and their value are annexed thereto and marked as Exhibit "A".

IV(g)

The Petitioner Company to place on record as to what is the business left in

demerged company after transfer of Demerged undertaking

Mukand Sumi Metal Processing Limited (Petitioner No. 1) is engaged in the business of (i) special alloy steel cold finished bars and wires ("Alloy Steel Business") and (ii) stainless steel cold finished bars and wires.

Pursuant to the Scheme being made effective, the Alloy Steel Business of Mukand Sumi Metal Processing Limited (Petitioner No. 1) will be demerged into Mukand Sumi Special Steel Limited (Petitioner No. 2).

As such, the Stainless Steel Business will be left in Mukand Sumi Metal Processing Limited (Petitioner No. 1).

IV(h)

As per Clause-19 of the Scheme, the petitioner company proposes for reduction of securities premium in resulting company. In this regard, the petitioner company may be directed to comply with the provisions of Section 52 and 66 of the

Companies Act, 2013.

The Petitioner Companies submit that as per the explanation to Section 230 of the Companies Act, 2013, the provisions of Section 66 of the Companies Act, 2013 shall not apply to the reduction of share capital effected pursuant to the order of the Tribunal under Sections 230-232. The relevant explanation is extracted hereinbelow for easy reference of

this Hon'ble Tribunal:

"For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section."

Further, the Petitioner Companies submit that the Hon'ble National Company Law Appellate Tribunal (NCLAT) in R. Systems International Limited 2018 SCC Online NCLAT 321, had an occasion to deal with the aforesaid issue. It is relevant to note that the Hon'ble NCLAT had held as follows:

"7. From the explanation below Section 230, it will be evident that for passing an order under Section 230 to compromise or make arrangements with the creditors and the members, the provision of Section 66 shall not apply for reduction of share capital. Such order can be passed by the Tribunal under Section 230 of the Act.

8. In view of the aforesaid provisions, we hold that the Tribunal failed to notice the

'Explanation' below Section 230, which makes it clear that even for reduction of share capital effected in pursuance of the order of the Tribunal under Section 230, the provision of Section 66 shall not apply.

9. As noticed above, earlier the Hon'ble High Courts used to entertain application(s) under Section 391 for reduction of share capital. This will be evident from the decision of the Hon'ble Bombay High Court

in "Investment Corporation of India Ltd."

(1987) 61 Com Cases 92 Bom"; Hon'ble

High Court of Gujrat in "Gujarat Ambuja

Exports Ltd." 2003-(CC1)-GJX-0113-

GUJ"; Hon'ble High Court of Madras in

"Panasonic Appliances India Co. Limited"

in Company Petition No. 331 of 2013 and the Hon'ble High Court of Andhra Pradesh

decision in "Jyoti Inraventures Limited"

Company Petition No. 263 of 2013" decided on 21st April, 2014.

Now it is not necessary to refer the earlier decisions in view of the 'explanation' below Section 230. Having held that the Tribunal failed to notice the aforesaid observations, we have no other option but to set aside the order dated 8th December, 2017 passed in CA (CAA)-105(ND)/2017 which is accordingly set aside." Emphasis Supplied

Therefore, the Petitioner Companies submit that, since in the captioned matter, the Scheme of Arrangement involves inter-alia capital reduction of the share capital of Resulting Company, proposed to be undertaken/ implemented by way of sanction obtained through an order from this Hon'ble Tribunal under Sections 230 to 232 of the Companies Act, 2013, on the application of the explanation provided under Section 230 of the Companies Act, 2013, and also the ratio laid down by the

Hon'ble NCLAT, the provisions of Section

66 of the Companies Act, 2013 shall not apply to the present case.

IV(i)

It is observed that the Petitioner Companies are having non-residential Shareholders/ foreign shareholders, therefore, petitioner company may be directed to comply with the provisions of FEMA and RBI guidelines.

The Petitioner Companies undertake to comply with the applicable provisions of FEMA and RBI guidelines.

IV(j)

The Hon'ble Tribunal may hereby kindly consider the report of ROC as narrated in Para III(14) above and pass appropriate order.

The Petitioner Companies undertake to comply with the observations made by ROC Mumbai in its report in accordance with the applicable provisions of law as follows:

(i) It is submitted that the observation made by ROC w.r.t. disagreement between the Scheme and MCA Mater data on the amount of paid up Share Capital appears to be incorrect since as per the MCA Master data the paid up Share Capital is reflected as INR 41,58,58,430 which agrees with the Scheme.

It appears that the ROC has wrongly considered the paid up Share Capital as INR 41,58,57,000.

(ii) Charges of the Demerged Company forming part of the Demerged Undertaking shall stand transferred to the Resulting Company.

(iii) Charges of the Resulting Company shall remain unaffected pursuant to the effectiveness of the Scheme.

(iv) ROC has given the observation that the Petitioner Companies had not filed e- form MGT-14 with ROC office intimating the Board approval for the Scheme (Sec 179(3)(i) read with Sec 117(3)(g) of Companies Act, 2013). However, the said observation appears to be incorrect since the Petitioner Companies had already filed e- form MGT-14 intimating the Board approval for the Scheme.

Copy of the e-form MGT-14 as filed by the Petitioner Companies is attached herewith

and marked as Exhibit "B" Colly for this Hon'ble Tribunal's reference.

(v) The Petitioner Companies undertake

to deal with the creditors in the ordinary course of business, as per law.

IV(k)

The Income Tax Department has submitted their letter dated 02.09.2021 and

06.09.2021, which are enclosed herewith, therefore, the Hon'ble tribunal may hear to the Income Tax

Department before consideration of the Scheme. Copy of the letters are enclosed as Exhibit-'E' colly.

The Petitioner Companies submit that the Income Tax Department vide letter dated 2nd September, 2021 addressed to the Regional Director, Western Region, requested Regional Director to direct the Petitioner Companies to submit details asked by the Income Tax Department vide their letters dated 20th August, 2021 served separately on each of the Petitioner Companies.

The Petitioner Companies submit that the requisite information was submitted by each of them vide letters dated 3rd September, 2021, copies of the letters dated 3rd September 2021 are attached herewith and marked as Exhibit "C" Colly.

The Petitioner Companies further submit that the Income Tax Department submitted observations on the Scheme before Hon'ble Tribunal vide its letter dated 6th September,

2021 against which the following clarification is being made:

(i) As far as the observation of the Income Tax Department as stated in paragraph 4 of the said letter is concerned, the Petitioner Companies submit that as per Clause 9 of the Scheme, all Legal

Proceedings of whatsoever nature, by or against, pertaining to the Demerged Undertaking shall not abate or be discontinued or in any way be prejudicially affected by reason of the transfer and vesting of the Demerged Undertaking or anything contained in this scheme, the said Legal Proceedings, whether pending and/ or arising on or before the Appointed Date, or which may be instituted any time thereafter, shall be continued and/ or enforced by or against the Resulting Company after the Effective Date, to the extent legally permissible, in the same manner and to the same extent as if the same had been instituted and/ or pending and/ or arising by or against Resulting Company. The Petitioner Companies confirm that the scheme shall be without prejudice to the

rights of the Income Tax Department and the

Income-tax Department may proceed against the Resulting Company, w.r.t. litigation pertaining to Demerged Undertaking transferred to Resulting Company pursuant to Demerger, in terms of applicable laws.

(ii) As far as observation of the Income Tax Department as stated in paragraph 5 of the said letter is concerned, the Petitioner Companies submit that sanction of the Scheme would not adversely impact the rights of the Income Tax Department for any present or future proceedings.

15. The observations made by the Regional Director have been explained in Column 2 of table provided in Para 14 above. The clarifications and undertakings given by the Petitioner Companies have been explained in Column 3 of the table provided in Para 14 above. Further, with respect to the response of the Petitioner Companies to the observation made by Regional Director in para IV (a) to (k) in its Report, the Regional Director vide his supplementary report dated 13th April 2022 in paras 3 and 4 has stated that as in respect of reply of the Petitioner company of observation IV(b) of the Report, the Petitioner Company may kindly be directed to amend its Appointed date from 1.04.2020 to 01.04.2021 or thereafter and as regard to reply of observation IV(k) of the report, the Hon'ble NCLT may kindly hear to Income Tax authority before considering the present Scheme.

16. With regard to the observations made by the Regional Director in para 3 and 4 of his Supplementary Report dated 13.04.2022, the Petitioner Companies state that the Company Scheme Application was filed on 10th October 2020 and the Appointed Date is 1st April 2020 which is within one year from the date of filing of the Company Scheme Application and therefore the Provisions of Circular No. F. No. 7/12/2019/CL-1 dated 21st August 2019 issued by the Ministry of Corporate Affairs, Government of India do not apply. The Petitioner Companies further stated that with regards the observations made in para 4 the Petitioner Companies have confirmed that the scheme shall be without prejudice to the

rights of the Income Tax Department and the Income-tax Department may proceed against the Resulting Company, with regard to litigation pertaining to Demerged Undertaking transferred to Resulting Company pursuant to Demerger, in terms of applicable laws. The said undertakings and confirmations are accepted.

17. From the material on record, the Scheme appears to be fair and reasonable and does not violate any provisions of law and is not contrary to public policy or public interest.

18. Since all the requisite statutory compliances have been fulfilled, C.P. (CAA)/1123 of 2020 have been made absolute in terms of the prayers of the Petition mentioned therein.

19. The Petitioner Companies are directed to file a copy of this order along with a copy of the Scheme with the concerned Registrar of Companies, electronically, along with E-Form INC-28, in addition to the physical copy, within 30 days from the date of receipt of order duly certified by the Deputy/Assistant Registrar, of the National Company Law Tribunal, Mumbai Bench.

20. The Petitioner Companies to lodge a copy of this order duly certified by the Deputy/Assistant Registrar of the National Company Law Tribunal, Mumbai Bench, along with a copy of the Scheme of Arrangement 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 receipt of the certified true copy of the order.

21. All concerned Regulatory authorities to act on a copy of this order duly certified by the Deputy/Assistant Registrar, National Company Law Tribunal, Mumbai Bench along with Scheme.

22. The Scheme of Arrangement is sanctioned hereby, and the appointed date of the Scheme of Merger by Absorption is 1st day of April, 2020 as defined the Scheme.

Ordered accordingly. Pronounced in open court today.