(2020) 06 NCLT CK 0032

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

Case No : Company Petition No. (CAA) 139/ND Of 2019

Orange Associates Private Limited And Ors — APPELLANT

Vs

Orange Education Private Limited — RESPONDENT

Date of Decision : 08-06-2020

Acts Referred:
Companies Act, 2013 — Section 133, 230, 231, 232, 232(3)(i), 233, 234

Citation : (2020) 06 NCLT CK 0032

Hon'ble Judges : P.S.N. Prasad, J;Dr. V.K. Subburaj, Member (Technical)

Bench : Division Bench

Advocate : Nonesh Kumar, Shlok Chandra, Chandratanay, Tania Sharma

Final Decision : Disposed Of

Judgement

P.S.N. Prasad, J

1. This Joint Application has been filed by the Petitioner Companies under Sections 230 to 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. The copy of the Scheme has been placed on record.

2. A perusal of the petition revels that initially the First Motion application seeking directions for convening/dispensing with the meetings of Shareholders and Creditors was filed before this bench and based on such joint application moved under Sections 230-232 of the Companies Act, 2013, this Tribunal vide its first motion order issued directions with respect to the same. On 01.11.2019 the Petitioners were directed to carry out publication in the newspapers English Daily 'Business Standard' (Delhi Edition) as well as in Hindi Daily 'Jansatta' (Delhi Edition). In addition thereto notices were directed to be served on the Regional Director (Northern Region), Registrar of Companies, NCT of Delhi and Haryana, Official Liquidator, the Income Tax Department and to the other relevant sectoral

regulators.

3. It is seen from the records that the Petitioners have filed an affidavit affirming compliance of the order passed by the Tribunal dated 01.11.2019. A perusal of the Affidavit discloses that the petitioners have effected the newspaper publication as directed in English Daily 'Business Standard' (Delhi Edition) on 18.11.2019 as well as in Hindi Daily 'Jansatta' on 19.11.2019 in relation to the date of hearing of the petition. Further, the affidavit also discloses that copies of petition were duly served on the Regional Director, Northern Region, Registrar of Companies, Delhi and Haryana, Official Liquidator and Income Tax Department in compliance of the order and in proof of the same acknowledgement by the respective offices have also been placed on record.

4. The Regional Director has filed its representation and has observed that compliance to sections 232(3)(i) of the Companies Act, 2013 be ensured by the Petitioner Companies. In response of the aforesaid observations of the Regional Director, the petitioner companies have undertaken to comply with sections 232 (3)(i) of the Companies Act, 2013.

5. The Official Liquidator has filed a report on 12.12.2019 wherein it has been stated that he has not received any compliant against the proposed Scheme from any person/party interested in the scheme in any manner and that the affairs of the Petitioner Companies do not appear to have been conducted in a manner prejudicial to the interest of its members, creditors or public interest.

6. The department of Income tax has filed its response dated 06.09. 2017. On perusal of the above representation of the Income tax as also stressed at the time of oral hearing by the representative of the Income tax, following observations come to the fore:

? Income Tax Department in Para 3 (i) to (iii) of his Report has pointed out that the Valuation report and the Share Exchange Ratio has been worked out by taking fair value of shares on the basis of Assets Approach as per the Audited Balance Sheet as at 31.03.2018. The learned Income Tax Department has further pointed out as per Para 1.1(b) of the Scheme of amalgamation, the appointed date has been fixed as 1st April, 2019.

7. The Income Tax Department in Para 3 of its Report to this Hon'ble Tribunal has also pointed out that the balance sheet for the financial year 31st March, 2019 is not audited.

8. Rejoinder Affidavit has been filed by the Petitioner companies on 04.02.2020 to meet the observations made in the report of Income Tax Department wherein they have undertaken:

a. That the aforesaid facts as pointed out by the Learned Income Tax Department has been duly disclosed in the Report on Valuation of Shares and Share Exchange Ration of Yashlok Dubey, Registered Valuer (IBBI Registration No. IBBI/RV/03/2019/11087), a copy of which was enclosed with the 1st motion application as Annexure: A-7 on page No. 638 to 664 Volume 4 of the Paper Book as filed in this Hon'ble Tribunal. The learned Income Tax Department has only mentioned the valuation methodologies as pointed out by Yashlok Dubey, Registered valuer. (IBBI Registration No. IBBI/RV/03/2019/11087) in their report.

Further they hove made following submissions:

b. The valuation of shares may be made on the basis of various methods as may be suitable for the given case. Even the future projected earnings may also be considered for valuation purposes. In the present case, NAV was calculated on the basis of Balance Sheet as at 31.03.2018 being the latest Audited Balance Sheet available at the time of such valuation.

c. The appointed date is merely a cut-off date fixed for the purpose of giving effect to the scheme of amalgamation in the Books of Accounts of the concerned companies.

d. There is no linkage or relevance between the date of share valuation and the appointed date.

e. Every scheme of the amalgamation, if approved by the Hon 'ble Tribunal, becomes effective only when the copy of Tribunal order is filed with the concerned Registrar of Companies. However, a cut-off date/appointed date is fixed to give effect to the scheme of amalgamation in the Books of Accounts of the Transferor and the Transferee Companies. The relevance of the Appointed date is limited to giving effect to the scheme of amalgamation in the books of accounts of the Transferor and the Transferee companies. Appointed date has no relevance for the valuation exercise which is essentially done on the date of negotiation or as per the mutual agreement. That since the Transferor Company No. 2,3 and 4 are wholly owned subsidiary of the Transferee Company, No. shares will be issued Pursuant to the Scheme of Amalgamation.

f. That in Transferor Companies No. 1 & 5 all the shares held by the Directors, their Relatives and the Transferee Company itself held some of the Shares of the Transferor Company No. 1. There is no public interest is effected to the Scheme of Amalgamation.

g. With reference to the submission made by the Income Tax Department 3 9iv) of Income Tax Report that for the assessment year 2017-18 there is outstanding demand in Transferor Company No. 1 of Rs. 18,89,096/- and there is a outstanding demand of Rs. 1,72,74,352/- for the Assessment Year 2016-17 respectively. That we wish to submit that the Transferor Company No. 1 has deposited Rs. 3,78,000/- out of Rs. 18,89,096/-for remaining amount Transferor Company No. 1 has already filed an appeal before the Hon'ble CIT (A) against the alleged disallowances made on 8th January, 2020. A copy of letter is enclosed herewith and marked as Annexure 3 and the Assessment Year 2016-17 the transferor company already received an Assessment order dated 22.08.2017 for the Income Tax Department. A Copy of the Assessment order dated

22.08.2017 is enclosed herewith and marked as Annexure 4 for perusal of this Hon'ble Tribunal.

h. That all the Transferor Companies are to be amalgamated with the Transferee Company. We, further say that pursuant to the Scheme all the assets along with the liabilities including all the debts, liabilities, duties and obligations incurred by the Transferor Companies will be transferred to the Transferor Companies. Further, any legal proceedings and order enforceable by or against the Transferor Companies pending as on the effective date, shall abate or be discontinued or any way prejudicially affected by reason of the transfer of the undertaking of the Transferor Companies or of anything contained in this Scheme but the proceedings may be continued, prosecuted and enforced by or against the Transferee Company in the same manner and to the same extent as it would or might have been continued, prosecuted and enforced by or against the Transferor Companies as the same is already in Para 4 of the Scheme.

i. They have also placed reliance upon the Hon'ble High Court of Delhi judgement of HPL Socomec Pvt. Ltd. (2008) and Indian Express Multimedia ltd. (2007) I which the Court has held a similar view and rejected the objection of Central Government in this regard.

9. In view of the aforementioned clarification filed by the petitioners it is seen that the observations made by the income tax department are adequately addressed.

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

11. Certificates of respective Statutory auditors of allthe 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.

12. The shareholders of the applicant companies are the best Judges of their interest, fully conversant with market trends, and therefore, their decision should not be interfered with by Tribunal for the reason that it is not a part of judicial function to examine entrepreneurial activities and their commercial decisions. It is well settled that the Tribunal evaluating the Scheme of which sanction is sought under Section 230-232 of the Companies Act of 2013 will not ordinarily interfere with the corporate decisions of companies approved by shareholders and creditors.

13. In the case of Hindustan Lever Employees Union V. Hindustan Lever Limited (1995) 5 SCC 491 the three judges Bench of Hon'ble Supreme Court held that:

'A company court does not exercise appellate jurisdiction over a scheme and its jurisdiction is limited to ascertaining fairness, justness and reasonableness of the Scheme and to ensure that neither any law has been violated or public interest compromised in the process.'

14. Rightto apply for the sanction of the Scheme has been statutorily provided under Section 230-234 of the Companies Act, 2013 and therefore, it is open to the applicant companies to avail the benefits extended by statutory provisions and the Rules.

15. It has also been affirmed in the petition that the Scheme is in the interest of all the transferor companies and the transferee company including their shareholders, creditors, employees and all concerned.

16. In view of the foregoing, upon considering the approval accorded by the members and creditors of the Petitioner companies to the proposed Scheme, and the affidavits filed by the Regional Director, Northern Region, Ministry of Corporate Affairs and the report of official liquidator, there appears to be no impediment in sanctioning the present Scheme.

17. Consequently, sanction is hereby granted to the Scheme under Section 230 to 232 of the Companies Act, 2013.

18. The Petitioners shall however remain bound to comply with the statutory requirements in accordance with law.

19. 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 the concerned persons, directors and officials of the petitioners.

20. 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 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.

21. THIS TRIBUNAL DO FURTHER ORDER

1. That all the Transferor Companies shall stand dissolved without following the process of winding-up; and

2. That all the property, rights and powers of all the Transferor Companies, 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.

3. That all the liabilities and duties of the all Transferor Companies, 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

4. That all proceedings now pending by or against all the Transferor Companies, be continued by or against the transferee company; and

5. That all the employees of all the Transferor Companies 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 service and upon terms and condition not less favorable than those subsisting in the concerned Transferor Companies on the said date.

6. 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 Companies for registration and on such certified copy being so delivered the all the Transferor Companies shall be dissolved and the Registrar of Companies shall place all documents relating to all the Transferor Companies 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

7. 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 disposed of in the above terms. Let copy of the order be served to the parties.