(2023) 05 NCLT CK 0042

In the National Company Law Tribunal

Case No : C.P. (CAA)/16/MB/2023 IN C.A. (CAA)/158/MB/2022

Owens Corning Industries (India) Private Limited Vs

Date of Decision : 08-05-2023

Acts Referred:

Companies Act, 2013 — Section 90, 230, 230(1), 230(3), 230(5), 230(7), 232, 232(3)(1), 232(3)(i), 232(6)
Income Tax Act, 1961 — Section 2(1B)

Citation : (2023) 05 NCLT CK 0042

Hon'ble Judges : Kuldip Kumar Kareer, Member (J);Anuradha Sanjay Bhatia, Member (T)

Bench : Division Bench

Advocate : Harsh Ruparelia, Rupa Sutar

Final Decision : Disposed Of

Judgement

Kuldip Kumar Kareer, Member (Judicial)

1. This Bench convened through video conferencing.

2. Heard the Authorised Representative appearing for the Petitioner Companies. No objector has come before this Tribunal to oppose the Scheme nor has any party controverted any averments made in the Petition.

3. The sanction of this Tribunal is sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, to the Scheme of Merger by Absorption for the merger of Owens Corning Industries (India) Private Limited ("First Petitioner Company" or "First Transferor Company") and Owens Corning Enterprise (India) Private Limited ("Second Petitioner Company" or "Second Transferor Company") with InterWrap Corp Private Limited ("Third Petitioner Company" or "Transferee Company") and their respective shareholders ('Scheme').

4. The Authorised Representative for the Petitioner Companies submits that the First Petitioner Company was engaged in the business of manufacture and

trading of Composite Solution Business (CSB) and related products thereof. Presently, the First Petitioner Company is not engaged in any active business and the Second Petitioner Company was engaged in the business of selling of Fibre Glass Reinforcement Fabrics and was engaged in the business of shared services in the Finance & Accounting Function to various group companies. Presently, the Second Petitioner Company is not engaged in any active business and the Third Petitioner Company was engaged in the business of trading in packaging material, industrial fabrics, woven coated and printed fabrics and providing business auxiliary (back-office processing) services to its group companies. Presently, the Third Petitioner Company is not engaged in any active business.

5. The Authorised Representative for the Petitioner Companies submits that the rationale for the Scheme is as under:

• The Scheme will achieve rationalization of costs by simplification of management structure leading to better administration and cost savings;

• The Scheme will result in significant reduction in the multiplicity of legal and regulatory compliances required at present to be carried out by the Companies; and

• The Scheme will be beneficial, advantageous and not prejudicial to the interests of the shareholders, creditors and other stakeholders of the Transferor Companies and Transferee Company;

6. The Appointed Date means 1st April, 2022 or such other date as may be fixed or approved by the National Company Law Tribunal, Mumbai Bench.

7. The Authorised Representative for the Petitioner Companies submits that consideration of the Scheme is as follows:

For the equity shareholders of the First Petitioner Company / First Transferor Company

"1,472 Equity Shares having face value of INR 10/- each of Transferee Company to be issued to the shareholders of the First Transferor Company for every 100 Equity Share having face value INR 10/- each in the First Transferor Company".

For the equity shareholders of the Second Petitioner Company / Second Transferor Company

"33 Equity Shares having face value of INR 10/- each of Transferee Company to be issued to the shareholders of the Second Transferor Company for every 100 Equity Share having face value INR 10/-each in the Second Transferor Company".

8. The Authorised Representative for the Petitioner Companies states that the Board of Directors of the First Petitioner Company and the Second Petitioner Company in their respective meetings held on 16th May, 2022 and the Board of Directors of the Third Petitioner Company vide their meeting held on 31st May, 2022 have approved the Scheme by passing the Board Resolutions which are

annexed to the Company Scheme Petition.

9. The Hon’ble Tribunal in C.A.(C.A.A.)/158/MB/2022 vide its order dated 11th November, 2022 has directed the following with respect to meeting of equity shareholders, secured creditors and unsecured creditors of the Petitioner Companies:

Sr.

No.

Name of the Company

Meeting of Equity Shareholders

Meeting of the Secured Creditors

Meeting of the Unsecured Creditors

1

Owens Corning Industries (India) Private Limited / First Petitioner Company

Dispensed with in view of the consent affidavits of all the Equity Shareholders

No Secured Creditors as on 31st May, 2022.

Dispensed as there was no compromise or arrangement with the Unsecured Creditors. Further, directions were given to serve notices to all the Unsecured Creditors and procure Consent or No Dues Certificate. The First Petitioner Company has procured the No Dues Certificate

from all the Unsecured Creditors as on 31st May, 2022. Copies of the same are attached as Annexure G1 & G2 to the Company

Scheme Petition.

2

Owens Corning Enterprise (India) Private Limited / Second Petitioner

Company

Dispensed with in view of the consent affidavits of all the Equity Shareholders

No Secured Creditors as on 31st May, 2022.

No Unsecured Creditors as on 31st May, 2022.

3

Interwrap Corp Private Limited

/ Third

Petitioner Company

Dispensed with in view of the consent affidavits of all the Equity Shareholders

No Secured Creditors as on 31st May, 2022.

Dispensed as there was no compromise or arrangement with the Unsecured Creditors. Further, directions were given to serve notices to sole the Unsecured Creditor and procure Consent or No Dues Certificate. The Third Petitioner Company has procured the No Dues Certificate from sole Unsecured Creditor as on 31st May, 2022. Copy of the same is attached as Annexure H to the Company Scheme Petition.

10. The Authorised Representative for the Petitioner Companies states that the Company Scheme Petition has been filed in consonance with the order dated 11th November, 2022 passed by the National Company Law Tribunal, Mumbai Bench in the Company Scheme Application bearing C.A.(C.A.A.)/158/MB/2022.

11. The Authorised Representative for the Petitioner Companies states that the Petitioner Companies have complied with all requirements as per directions of this Hon'ble Tribunal and they have filed necessary affidavits of compliance with this Hon'ble Tribunal. Moreover, Petitioner Companies undertake to comply with all statutory requirements, if any, as required under the Companies Act, 2013 and the Rules & Regulations made there under. The said undertaking is accepted.

12. The Central Government through the Regional Director, Western Region, Mumbai has filed his Report dated 13th March 2023 with certain observations to the Scheme in paragraph 2 (a) to (g) therein. The observations made by the Central Government through the Regional Director, Western Region, Mumbai have been dealt with by the Petitioner Companies in their Affidavit in Reply dated 14th March 2023. The observations made by the RD and the response from the Petitioner Companies, are mentioned hereunder: -

Para

No. 2

Observations of the Regional

Director, Western Region

Response from the Petitioner

Companies

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.

As far as observation made in paragraph 2 (a) of the Report of Regional Director is concerned, the Transferee Company undertakes that in addition to compliance of AS-14, the

Transferee Company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such

as AS-5, etc.

b)

As per Definition of the Scheme,

“Appointed Date” means 1 April, 2022 or such other date as may be

fixed or approved by the National Company Law Tribunal, Mumbai Bench; And

“Effective Date” means the last of the

dates on which the certified copies of the orders sanctioning this Scheme, passed by the National Company Law Tribunal at Mumbai, are filed with the Registrar of Companies, Mumbai by the Transferor Companies and the Transferee Company. Any references in this Scheme to the date of “coming into effect of this Scheme” or “upon the Scheme becoming effective” shall mean the Effective Date.

In this regard, it is submitted that 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.

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.

As far as observation made in paragraph 2 (b) of the Report of Regional Director is concerned, the Petitioner Companies submits that as per Clause 1.3 of the Scheme, the Appointed Date means the 1st day of April, 2022 or such other date as may be fixed or approved by National Company Law Tribunal, Mumbai Bench.

Further, as per Clause 1.5 of the Scheme, the Effective Date means the last of the dates on which the certified copies of the orders sanctioning this

Scheme, passed by the National Company Law Tribunal at Mumbai, are filed with the Registrar of Companies, Mumbai by the Transferor Companies and the Transferee Company. Any references in this Scheme to the date of "coming into effect of this Scheme" or "upon the Scheme becoming effective" shall mean the Effective Date.

The same therefore, meets the requirements clarified vide circular no.

F. No. 7/12/2019/CL-I dated

21.08.2019 issued by the Ministry of Corporate Affairs.

c)

Petitioner Company have to undertake to comply with section 232(3)(i) of Companies Act, 2013, where the transferor company is dissolved, the fee and stamp duty paid by the transferor company on its authorised capital shall be set-off against fees and stamp duty payable by the transferee company on its authorised capital subsequent to the amalgamation and therefore, petitioners to undertake that the transferee company shall pay the difference of fees and stamp duty.

As far as the observation of the Regional Director, as stated in paragraph 2(c) is concerned, the Transferee Company, hereby submits that on Scheme of Amalgamation becoming Effective on the Effective date, where the Transferor Companies are dissolved, the ROC fees or stamp duty, if any, paid by the Transferor Companies on its authorised share capital shall be deemed to have been so paid by the Transferee Company on the combined authorised share capital, and the Transferee Company shall pay differential ROC fees/stamp duty for the increase of the authorised share capital, after setting-off fees and stamp duty already paid by the Transferor Companies. The aggregate authorised share capital of the Transferee Company shall automatically stand increased to that effect by simply filing the requisite forms with the relevant Registrar of Companies without any further act, instrument or deed on the part of Transferee Company. The Transferee Company undertakes to comply with the provisions of Section 232(3)(i) of the Companies Act, 2013 for payment of differential ROC fees and Stamp Duty, if any on the increased authorized share capital.

d)

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 7 subsection (3) to (5) of Section 230 of the Act and the Minutes thereof are duly placed before the Tribunal.

As far as observation made in paragraph 2 (d) of the Report of Regional Director is concerned, the Petitioner Companies submits that as per the directions contained in the Order dated 11th November, 2022 passed by the Tribunal in C.A. (CAA) 158/MB/2022, dispensation was granted from convening the meeting of Equity Shareholders and Creditors of the Petitioner Companies. Hence, no statement under Section 230(3) of the Companies Act, 2013 has been sent to Equity Shareholders and Creditors. There were no Secured Creditors in the Petitioner Company. Further there were no Unsecured Creditors in the Second Petitioner Company. NCLT, had directed the First Petitioner Company and the Third Petitioner Company to send notices to all its Unsecured Creditors and procure consent letters or no dues certificate from all their Unsecured Creditors as on 31st May, 2022. The First Petitioner Company and the Third Petitioner Company have procured no dues certificates from all their Unsecured Creditors which is annexed to the Petition as Annexure G1 & G2 and Annexure H, respectively.

e)

The Petitioner Company states that the Transferee Company shall be in compliance with provisions of Section 2(1B) of the. Income Tax Act, 1961. In this regards, the petitioner company shall ensure compliance of all the provisions of Income Tax Act and Rules

thereunder.

As far as the observation of the Regional Director, as stated in paragraph 2(e) of the Report is concerned, the Petitioner Companies, undertake to comply with the provisions of the Income Tax Act and rules & regulations framed

thereunder.

f)

It is observed from latest MGT-7 for the year ending 31.03.2022 filed by the petitioner companies that petitioner companies have following corporate body shareholders having more than 10% shareholding, but form Ben-2 has not been filed:

Name of the Company

Name of the Shareholder

Percent age of Shareholding

Status of Ben2

OWENS CORNING INDUSTRI ES (INDIA) PRIVATE LIMITED (Transferor Company No.1)

OCV Chambers/ International

100%

Not filed

OWENS CORNING ENTERPRI SE (INDIA) PRIVATE LIMITED (Transferor Company No.2)

OC NL Invest Cooperat ief U.A.

100%

Not filed

INTERWR AP CORP PRIVATE LIMITED (Transferee Company)

Owens Corning Canada Holdings ULC (formerly known as Interwra p Inc.)

100%

Not filed

Therefore, petitioner company may be directed to clarify and comply with the same as required u/s. 90 of the Companies Act, 2013 r.us. companies (Significant Beneficial Owners) Rules, 2018

As far as the observation of the Regional Director, as stated in paragraph 2(f) of the Report is concerned with respect to non-filing of Form No. BEN-2 with ROC, the Petitioner Companies hereby submit that, none of the individual shareholders of the holding companies of petitioner companies are holding majority stake (i.e. more than 50%) in holding companies. Hence filing of Form No. BEN-2 is not applicable in case of the Petitioner Companies. To the best of the knowledge and belief, the requirement of filing eForm BEN-2 is not applicable to the corporate shareholders, as stated hereinabove. Without prejudice to the above, the Petitioner Companies hereby undertake to comply with provisions of Section 90 of the Companies Act, 2013 read with the Companies (Significant Beneficial Owners) Rules, 2018, amended from time to time and make

necessary filings with Registrar of Companies, if applicable, or comply with directions, if any issued by the concerned Registrar of Companies in this regard.

g)

That on examination of the report of the Registrar of Companies, Mumbai dated 12.01.2023 (Annexed as Annexure A-1)) that all the Petitioner Companies fall within the jurisdiction of ROC, Mumbai. It is submitted that no complaint and /or representation regarding the proposed scheme of Amalgamation has been received against the Petitioner Companies. Further, the petitioner companies have filed Financial Statements up to 31.03.2022 further observations in ROC report are as under:-

i. That the ROC Mumbai in his report dated 07.12.2022 has stated that no Inquiry, inspection, investigation & prosecution is pending against the subject applicant companies.

ii. It is submitted that as per the

provisions of Section 232(3)(1) 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 settingoff the fees already paid by the transferee company on the increased authorized capital subsequent to the amalgamation. iii. Interest of the Creditor should be protected. iv. May be decided on its merit.

As far as observation made in paragraph 2 (g) of the Report of Regional Director is concerned, the Petitioner Companies, hereby submit the following:

i. As far as the observation of the Regional Director, as stated in paragraph 2(g)(i) of the Report is concerned, the contents thereof are correct factual observations and thus, does not require any response.

ii. As far as the observation of the Regional Director, as stated in paragraph 2(g)(ii) is concerned, the Transferee Company, hereby submits that on Scheme of Amalgamation becoming Effective on the Effective date, where the Transferor Companies are dissolved, the ROC fees or stamp duty, if any, paid by the Transferor Companies on its authorised share capital shall be deemed to have been so paid by the Transferee Company on the

combined authorised share capital, and the Transferee Company shall pay differential

ROC fees/stamp duty for the increase of the authorised share capital, after setting-off fees and stamp duty already paid by the

Transferor Companies. The aggregate authorised share capital of the Transferee

Company shall automatically stand increased to that effect by simply filing the requisite forms with the relevant Registrar of Companies without any further act, instrument or deed on the part of Transferee Company. The Transferee Company undertakes to comply with the provisions of

Section 232(3)(i) of the Companies Act, 2013 for payment of differential ROC fees

and Stamp Duty, if any on the increased authorised share capital.

iii.As far as the observation of the Regional Director, as stated in paragraph 2(g)(iii) is concerned, the Transferee Company, hereby undertakes to protect the Interest of the Creditors, if any.

iv. As far as the observation of the Regional Director, as stated in paragraph 2(g)(iv) is concerned, the Hon'ble Tribunal can decide

the Scheme on its merits.

13. The observations made by the Regional Director, Western Region are enlisted herein in Para 12 above along with response of the Petitioner Companies on the observation of the Regional Director, Western Region. The clarifications and undertakings given by the Petitioner Companies in Para 12 above are accepted by this Tribunal.

14. Ms. Rupa Sutar, Authorised representative of the Regional Director, MCA (WR), Mumbai, who was present at the time of Final hearing has submitted that the clarifications, submissions and undertakings given by the Petitioner Companies are hereby accepted and that they have no objection for approving the scheme by the Tribunal.

15. The Official Liquidator, High Court, Bombay has filed its report dated 28th March 2023, inter alia, stating therein that the affairs of the First Petitioner Company and the Second Petitioner Company have been conducted in proper manner.

16. From the material on record, the Scheme appears to be fair, reasonable and is not in violation of any provisions of law nor is contrary to public interest. None of the stakeholders concerned have come forward to oppose the Scheme. With effect from Appointed Date, all the assets and properties of the Transferor Companies, of whatsoever nature and wheresoever situated, shall, under the provisions of Sections 230 to 232 and all other applicable provisions, if any, of the Companies Act, 2013 without any further act or deed, be and stand transferred to and vested in the Transferee Company or be deemed to be transferred to and vested in the Transferee Company as a going concern so as to become the assets and properties of the Transferee Company.

17. Further, with effect from the Appointed Date, all the liabilities of the Transferor Companies, including all secured and unsecured debts, sundry creditors, liabilities (including contingent liabilities), duties and obligations and undertakings related to the Transferor Companies shall, pursuant to the sanction of this Scheme by the Tribunal under and in accordance with the provisions of Sections 230 to 232 and other applicable provisions, if any, of the Companies Act, 2013 without any further act, instrument, deed, matter or thing, be transferred to and vested in or be deemed to have been transferred to and vested in the Transferee Company, along with any charge, encumbrance, lien or security thereon, and the same shall be assumed by the Transferee Company in accordance with the Scheme.

18. Since all the requisite statutory compliances have been fulfilled, C.P. (CAA)/16/MB/2023 is made absolute in terms of the prayer clauses of the

Company Scheme Petition.

19. The First Petitioner Company and the Second Petitioner Company are ordered to be dissolved without winding up.

20. The Scheme annexed to the Company Scheme Petition No. C.P.(CAA)/16/MB/2023 is hereby sanctioned. It shall be binding on the Petitioner Companies involved in the Scheme and all concerned including their respective shareholders, employees and/or any other stakeholders concerned.

21. The Petitioner Companies is directed to lodge a certified copy of this order along with a copy of the Scheme with the concerned Registrar of Companies, Mumbai electronically in e-form INC-28 within 30 days or an extended timeline with payment of additional fees, as may be applicable from the date of receipt of order duly certified by the Designated Registrar of this Tribunal.

22. The Petitioner Companies shall lodge a copy of this order duly certified by the Deputy Registrar or Assistant Registrar of this Tribunal along with Scheme, with the concerned Superintendent of Stamps for the purpose of adjudication of stamp duty payable, if any, within a period of 60 working days from the date of the receipt of the certified copy of the order from the Registry of this Tribunal.

23. All the concerned regulatory authorities to act on a copy of this order along with the sanctioned Scheme, duly certified by Deputy/Assistant Registrar of this Tribunal.

24. Any concerned Authorities are at liberty to approach this Tribunal for any further clarification as may be necessary.

25. Ordered accordingly. Thus, the Company Scheme Petition with C.P. (CAA)/16/MB/2023 in C.A.(CAA)/158/MB/2022 shall stand to be disposed of.