(2022) 02 NCLT CK 0080

In the National Company Law Tribunal

Case No : R.U. Trading Private Limited And Ors.

R U Trading Private Limited Vs

Date of Decision : 23-02-2022

Acts Referred:

Companies Act, 2013 — Section 52, 133, 137(1), 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 230, 230(1), 230(5), 230(6), 232(3), 232(3)(i), 232(4), 441

Citation : (2022) 02 NCLT CK 0080

Hon'ble Judges : Rajasekhar V.K., Member J;Balraj Joshi, Member, T

Bench : Division Bench

Advocate : Mamta Binani, Madhuri Pandey, Sajay Sardar

Final Decision : Disposed Of

Judgement

Balraj Joshi, Member (Technical)

1. The instant petition has been filed under section 230(6) read with section 232(3) of the Companies Act, 2013 ('Act') for sanction of the Scheme of Amalgamation and Arrangement between R U Trading Private Limited ('Transferor Company No.1') and P A T Trading Private Limited ('Transferor Company No.2') and Om Saree House Private Limited ('Transferee Company') with Protea Fabric Private Limited ('Resulting Company'), whereby and where under from the the Appointed Date, viz 01 April, 2019 in the manner and on the terms and conditions stated in the said Scheme of Amalgamation ('Scheme').

2. The Petition has now come up for final hearing. Ld. Counsel for the Petitioners submits as follows:-

(a) The Scheme was approved unanimously by the respective Board of Directors of the Petitioner Companies at their meetings held on 02 December, 2019.

(b) The circumstances which justify Amalgamation and vesting of R U Trading Private Limited, P A T Trading Private Limited with Om Saree House Private Limited would, inter-alia, provide the following benefits:

i) Streamlining/ Simplification of the current organization structure.

ii) Greater financial strength and flexibility for the transferee entity, which would result in maximizing overall shareholder value, and improve the economic and competitive position of the combined entity.

iii) Enable better and efficient management, control and running of the businesses to attain operational efficiencies, cost competitiveness, create synergies and capitalize on the growth opportunities to the fullest extent.

iv) The amalgamation(s) will result in better financial, business and operational prospects including but not limited to, efficient management of costs, and improved administrative control, reduction in overheads and optimal utilization of resources.

v) Greater efficiency in working capital management of the amalgamated entity and pooling of cash flow generated by the combined business which can be deployed more efficiently to fund organic and inorganic growth opportunities to maximize shareholder value.

(c) The rationale behind the Demerger of Demerged Undertaking (as defined hereunder) of Amalgamated Om Saree House Private Limited and vesting of the same with and into Protea Fabric Private Limited, are as follows:

i) The demerger will enable Om Saree House Private Limited to focus and enhance its core Business operations by streamlining operations and cutting costs and it shall enable better and more efficient management, control and running of the Demerged Undertaking and the Core Business;

ii) Simplified group and business structure and consolidation of the investment activities undergone umbrella through which businesses can be carried on more economically, conveniently and advantageously and thus will have beneficial results for both the companies, their shareholders, stakeholders and all concerned.

iii) By demerger of the Demerged Undertaking, the financial resources will be conveniently merged and pooled with the resources of the Resulting Company, leading of utilization of resources towards expansion and growth of the business of the Resulting Company.

iv) The Scheme shall be in the beneficial interest of the Stakeholders of all the companies. The Scheme shall not be in any manner prejudicial to the interest of the concerned members, creditors, employees or others concerned with the companies.

(d) The Statutory Auditors of respective Petitioner Companies have by their certificates dated 06 November, 2019 confirmed that the accounting treatment in the Scheme is in conformity with the accounting standards prescribed under Section 133 of the Companies Act, 2013.

(e) No proceedings are pending under Sections 210 to 227 of the Companies Act, 2013 against the Petitioner(s).

(f) The exchange ratio of shares in consideration of the Amalgamation and Arrangement has been fixed on a fair and reasonable basis and on the basis of the Report thereon of Mr Pankaj Parakh, Registered Valuer.

(g) The shares of the all Petitioner Companies are not listed in any Stock exchange.

(h) By an order dated 20.01.2020 in CA (CAA) 29/KB/2020, this Tribunal made the following directions with regard to meeting(s) of shareholders and creditors under section 230(1) :-

Meeting(s) dispensed: Meeting(s) of the Equity Shareholders and creditors were dispensed in view of the receipt of the consent letters along with the affidavits for the approval of the scheme of arrangement or there being none which obviated the necessity of convening of the meeting.

(i) In compliance with the Order dated 20.01.2020, the Petitioner(s) have duly served such notices on the Regional Director, MCA, Registrar of Companies, Official Liquidator and Income Tax officer on 20.02.2020. The Petitioner(s) have also published such advertisements once each in the Financial Express and Aajkaal in their respective issues on 07.03.2020. An affidavit of compliance duly affirmed on 11.03.2020 in this regard has also been filed by them.

(j) The Petitioners presented the instant petition for sanction of the Scheme. By an order dated 18.02.2020 the instant petition was admitted by this Tribunal and fixed for hearing on 15.04.2020

(k) All statutory formalities requisite for obtaining the sanction of the Scheme have been duly complied with by the Petitioners. The Scheme has been made bona fide and is in the interest of all concerned.

3. Pursuant to the said advertisements and notices the Regional Director, Ministry of Corporate Affairs, Kolkata ("RD") & Official Liquidator, High Court, Calcutta have filed their representations before this Tribunal.

4. The Official Liquidator has filed his report dated 09.02.2021 and concluded as under:-

That the Official Liquidator on the basis of information submitted by the Petitioner Companies is of the view that the affairs of the aforesaid Transferor Companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to the public interest as per the provisions of the Companies Act, 1956/the Companies Act, 2013 whichever is applicable.

5. The Regional Director, Eastern Region, Ministry of Corporate Affairs, Kolkata vide his affidavit filed on 08.02.2021("RD affidavit") which has been dealt with by the Petitioners by rejoinder/undertaking dated 19.01.2022. The observations of

the RD and responses of the Petitioner(s) are summarized as under:-

Paragraph No. 2 (a) of RD affidavit-

It is submitted that on examination of the report of the Registrar of Companies, West Bengal, it appears that no complaint and/or representation regarding the proposed Scheme of Amalgamation. The petitioner companies are also up-dated in filing their statutory returns.

Paragraph No. 3(i) of the Rejoinder

With Regards to statements in Paragraph 2(a), we say that the statements contained therein, are affirmations and submissions by the respondent to this Tribunal and do not require any reply on the same.

Paragraph No. 2 (b) of RD affidavit-

Petitioner Company should undertake to comply with the provisions of Section 232(3)(i) of the Companies Act 2013 through appropriate affirmation.

Paragraph No. 3(ii) of the Rejoinder

With Regards to statements in Paragraph 2(b), We undertake that if required, The Transferee Company shall pay the requisite amount of fee with respect to increase in Authorized Capital of the Transferee Company subsequent to approval of scheme of Arrangement to comply with the provisions of Section 232(3)(i) of the Companies Act ,2013.

Paragraph No. 2 (c) of RD affidavit-

That the Transferee Company should be directed to pay applicable stamp duty on the transfer of the immovable properties from the Transferor Companies to it.

Paragraph No. 3(iii) of the Rejoinder

With Regards to statements in Paragraph 2(c), we undertake to pay the the immovable properties from applicable stamp duty on the transfer of Transferor Companies to it.

Paragraph No. 2 (d) of RD affidavit-

Tribunal may kindly direct the Petitioners to file an affidavit to the extent that the Scheme enclosed to the Company Application and Company Petition are one and same and there is no discrepancy or no change is made.

Paragraph No. 3(iv) of the Rejoinder

With Regards to statements in Paragraph 2(d), we affirm that the scheme enclosed to the Company Application and Company Petition are one and same and there is no change or discrepancy is made.

Paragraph No. 2 (e) of RD affidavit-

In compliance of Accounting Standard-14 or IND-AS 103, as may be applicable, 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 or IND AS-8 etc.

Paragraph No. 3(v) of the Rejoinder

With Regards to statements in Paragraph 2(e), we undertake that the Transferee Company shall pass such accounting entries which are necessary in connection with the scheme as per Accounting Standard-14 or IND-AS 103, whichever applicable, to comply with other applicable Accounting Standards such as AS-5 or IND AS-8.

Paragraph No. 2 (f) of RD affidavit-

The Petitioners under provisions of Section 230(5) of the Companies Act 2013 have to serve notices to the concerned authorities which are likely to be affected by the Amalgamation or arrangement. Further, the approval of the scheme by the Tribunal may not deter such authorities to deal with any of the issues arising after effect to the Scheme. The decision of such authorities shall be binding on the Petitioner Company(s) concerned.

Paragraph No. 3(vi) of the Rejoinder

With regard to the statements in Paragraph 2(f), we say that the statements contained therein, are affirmations and submissions by the respondent to this Tribunal and do not require any reply on the same. However, we undertake that we have already served notices under section 230(5) to the concerned authorities who are likely to be affected by the proposed arrangement. Copy of the intimation filed is enclosed and marked as "Annexure A".

Paragraph No. 2 (g) of RD affidavit-

In the scheme it is not stated with clarity that exactly which undertaking shall remain back with the demerged company. This is a material information in respect of the scheme which information is not made available by the petitioner. The petitioner should undertake that no asset, right, property and liability or obligation etc. which are transferred to the demerged company from the transferor companies under the scheme should be transferred to the resultant company through the demerger.

Paragraph No. 3(vii) of the Rejoinder

With regard to the statements in Paragraph 2(g), we say that Clause 4.15 of the scheme clearly mentions that the "Remaining Undertaking" shall include all the undertakings, business activities and operations of the Demerged Company other than the "Demerged Undertaking" which has been mentioned in clause 4.10 of the scheme. The definition of Demerged Undertaking has been described exhaustively. Further, we undertake that no asset, right, property and liability or obligation, etc. would be transferred to the demerged company from the transferor companies under the scheme shall be transferred to the Resultant Company through the demerger.

Paragraph No. 2 (h) of RD affidavit-

The applicant companies should undertake that no assets and liabilities transferred to the Transferee Company under the Scheme shall be demerged to the resulting company as it would mean Passover of the assets and liabilities from the Transferor companies to the resulting company through the media of the transferee company.

Paragraph No. 3(viii) of the Rejoinder

With regard to the statements in Paragraph 2(h), we undertake that no assets and liabilities transferred to the Transferee Company under the Scheme shall be demerged to the resulting company

Paragraph No. 2 (i) of RD affidavit-

The scheme envisages demerger of the non-strategic investments of the demerged company, Om Saree House Private Limited into the resultant company, Protea Fabric Private Limited. But no list of the non- strategic investments is provided in the Scheme, as it appears. The specific criteria to demarcate the investments held by the demerged Company, into strategic investments or investments related to its core business and the non-strategic investments or investments related to its core business are also not mentioned in the scheme. As a result the scheme is cryptic, lacking clarity.

Paragraph No. 3(ix) of the Rejoinder

With regard to the statements in Paragraph 2(i), we say that a list mentioning the strategic investments or investments related to its core business and the non-strategic investment or investments not related to its core business held by the demerged company has been annexed and marked as “Annexure B” for better clarity.

Paragraph No. 2 (j) of RD affidavit-

In clause 31.2 of the Scheme it is stated that the excess of the book value of the assets of the demerged undertaking transferred under this scheme and the investment in share capital of the resulting company as reduced under clause 30.6 over the aggregate of book value of the liabilities of the demerged undertaking transferred under this scheme, if any, shall be adjusted against the securities premium account balance and general reserve and balance in profit and loss account of the demerged company/transferee company. The scheme aims to reduce the share premium account through the mechanism laid down in the scheme contrary to the provisions of section 52 of the Companies Act 2013.

Paragraph No. 3(x) of the Rejoinder

With regard to the statements in Paragraph 2(j), we say that the excess of the book value of the assets of the demerged undertaking and the investment in share capital of the resulting company as reduced under clause 30.6 over the aggregate of book value of the liabilities of the demerged undertaking transferred under this scheme shall be adjusted in the following order:

General Reserve and Balance, if any, shall be then surplus in the statement of Profit & Loss Account or the treatment will be given as per the law in force as on the effective date of the scheme.

Paragraph No. 2 (k) of RD affidavit-

In the balance as at 31.03.2020 and 31.03.2019 the Transferor Company, R U Trading Private Limited, has shown that it holds 10,000 nos. shares of Adhyayan Suppliers Private Limited. But in the Annual Return as at

31.03.2019 of Adhyayan Suppliers Private Limited it is shown that R U Trading Private Limited holds 2,000 nos. shares of the company. This major difference is not clarified in the scheme.

Paragraph No. 2 (l) of RD affidavit-

In the balance sheet as at 31.03.2020 the Transferor Company, R U Trading Private Limited, has shown under the heading "Other Advances" under "Long Term Loans and Advances" doubtful advances (described as "Others") of Rs. 78,65,055/-. As on 31.03.2019, no such advance was shown. No provision is shown made against the doubtful advances, which is of considerable sum comprising about 56% of the total assets of the Company. Therefore, the balance sheet of the company refrains from giving true and fair view of its state of affairs and hence the operation of the scheme is impacted by such balance sheet.

Paragraph No. 3(xi) of the Rejoinder

With regard to statements in Paragraph 2 (k) and 2(l), we say that the statement contained therein, are affirmations and the Transferor Company No.1 has filed the financial statements for the financial year ended 31.03.2019 and 31.03.2020 vide e-forms AOC 4 bearing SRN: R13762794 dated 18.12.2019 and SRN: 87921961 dated 23.01.2021 within the time limit specified in Section 137(1) of the Companies Act, 2013, however, in the Balance sheet drawn for the said financial years, it has been inadvertently shown that the Company holds 10,000 number of shares of Adhyayan Suppliers Private Limited whereas the fact is that the Company holds 2000 number of shares of Adhyayan Suppliers Private Limited as at 31.03.2019 and 31.03.2020. With regard to the statements in Paragraph 2(l), we say that the amount i.e., 78,65,055 shown as Doubtful Advances by the company i.e., R U Trading Private Limited in its financial statement for the year ended 31.03.2020 inadvertently shown under the heading other advances. The said amount is actually the advances made by the company in the said financial year.

Therefore, the Transferor Company 1 has already filed an application before the

Central Government (power delegated to Regional Director), Regional Director, Eastern Region, for seeking Compounding for rectification of defects made in the financial statements related to the financial year 2018-2019 and 2019-2020 under section 441 of the Companies Act, 2013 and the same has been annexed and marked as “Annexure C”.

Paragraph No. 2 (m) of RD affidavit-

In the balance as at 31.03.2020 and 31.03.2019 the Transferor Company, PAT Trading Private Limited, has shown that it holds 8,500 nos. shares of Adhyayan Suppliers Private Limited. But in the Annual Return as at 31.03.2019 of Adhyayan Suppliers Private Limited it is shown that PAT Trading Private Limited holds 1,700 nos. shares of the company. This major difference is not clarified in the scheme.

Paragraph No. 2 (n) of RD affidavit-

In the balance sheet as at 31.03.2020 the Transferor Company, PAT Trading Private Limited, has shown under the heading “Short Term Loans and Advances” Doubtful Advances (described as “Others”) of Rs. 67,92,932/-. No provision is shown made against the doubtful advances, which is of considerable sum comprising about 53% of the total assets of the Company. Therefore, the balance sheet of the company refrains from giving true and fair view of its state of affairs and hence the operation of the scheme is impacted by such balance sheet.

Paragraph No. 3(xii) of the Rejoinder

With regard to statements in Paragraph 2 (m) and 2(n), we say that the statement contained therein, are affirmations and the Transferor Company No.2 has filed the financial statements for the financial year ended 31.03.2019 and 31.03.2020 vide e-forms AOC 4 bearing SRN: R13764816 dated 18th November, 2019 and SRN: R97891410 dated 11th February, 2021 within the time limit specified in Section 137(1) of the Companies Act, 2013, however, in the Balance sheet drawn for the said financial years, it has been inadvertently shown that the Company holds that as per the Balance sheet as at 31.03.2020 and 31.03.2019, the Transferor Company, P A T Trading Private Limited, holds 8500 nos. shares of Adhyayan Suppliers Private Limited, but in the annual Return as at 31.03.2019 of Adhyayan Suppliers Private Limited, it is shown that R U Trading Private Limited holds 1700 nos. shares of the company. With regard to the statements in Paragraph 2(n), we say that the amount i.e., 67,92,932 shown as Doubtful Advances by the company i.e., P A T Trading Private Limited in its financial statement for the year ended 31.03.2020 is inadvertently shown under the head short term loans and advances. The said amount is actually the advances made by the company in the said financial year. Therefore, the application is being made before the Central Government (power delegated to Regional Director), Regional Director, Eastern Region, for seeking Compounding for rectification of defects made in the financial statements related to the financial year 2018-2019 and 2019-2020 under section 441 of the Companies Act, 2013 and the same has been annexed and marked as “Annexure D” for your reference.

Paragraph No. 2 (o) of RD affidavit-

It is submitted that as per instructions of the Ministry of Corporate Affairs, new Delhi, a copy of the scheme was forwarded to the Income Tax Department on 20/02/2020 with a request to forward their comments/observations/objections, if any. However, the same is till awaited.

Paragraph No. 3(xiii) of the Rejoinder

With regards to the statements in Paragraph 2(o), we say that the statements contained therein, are affirmations and submissions by the respondent to this Tribunal and do not require any reply on the same.

6. Heard the submissions made by the Ld Counsel appearing for the Petitioners, it is ordered that in case of any default including any Provisions of Income Tax Act in this respect of the Transferor Companies the Income Tax department , the ROC, West Bengal and all other Statutory Department shall be at liberty to initiate appropriate proceedings against the Transferee Company, which after the sanction of the scheme by this Tribunal is in any case responsible for the liabilities/non-compliance of the Transferor Companies also.

7. Further, heard submissions made by the Ld Counsel appearing for the Petitioner, Mr. Sajay Sardar, Dy. Director for and on behalf of RD, who appeared and were heard. Upon perusing the records and documents in the instant proceedings and considering the submissions, we allow the petition and make the following orders: -

a) The Scheme of Arrangement and Amalgamation mentioned in paragraph 1 of the petition, being Annexure “A” hereto, be and is hereby sanctioned by this Tribunal to be binding with effect from 01 April, 2019 (“Appointed Date”) on Transferor Companies, Demerged Company, Resulting Company and Transferee Company, their respective shareholders and creditors and all concerned;

b) That the Transferor Companies with all their respective assets, properties, rights, powers, titles, and interest thereof be respectively transferred to and vested without any further act or deed in the Transferee Company and accordingly, the same shall pursuant to Section 232(4) of the Companies Act, 2013 be Transferred to and vested in the Transferee company for all the estates and interests of the said Transferor Companies therein but subject nevertheless to all charges, now affecting the same;

c) All the debts, properties, rights, permission, license, titles and interest of Demerged Undertaking of Demerged Company respectively to be transferred to and vested in Resulting Company without further act or deed, the same shall pursuant to Section 232(4) of the Companies Act, 2013 but subject nevertheless to all charges, now affecting the same;

d) That all the liabilities and duties of the Transferor Companies respectively be transferred without any further act or deed to the Transferee Company and accordingly, the same shall pursuant to Section 232(4) of the Companies Act, 2013 be transferred to and become the liabilities and duties of the Transferee Company.

e) That all the liabilities and duties of Demerged Undertaking of the Demerged Company be transferred without any further act or deed to the Resulting Company respectively and the same shall pursuant to Section 232(4) of the Companies Act, 2013 be transferred to and become the liabilities and duties of the Resulting Company.

f) That all proceedings and/or suits and/or appeals now pending by or against the Transferor Companies and Demerged Undertaking of Demerged Company shall be continued by or against the Transferee Company and Resulting Company as applicable, respectively.

g) Leave is granted to the Petitioners to file the Schedule of Assets of the Transferor Companies in the form as prescribed in the Schedule to Form No.CAA-7 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 within four weeks from the date of receiving a copy of this order;

h) The employees of the Transferor Companies and Demerged Undertaking of Demerged Company shall be engaged by the Transferee Company and Resulting Company, as provided in the Scheme;

i) All proceedings and/or suits and/or appeals now pending by or against the Transferor Companies and Demerged Undertaking of Demerged Company be continued by or against the Transferee Company and Resulting Company, as provided in the Scheme;

j) The Transferee Company and Resulting Company do without further application issue and allot to the shareholders of the Transferor Companies and Demerged Company , the shares in the Transferee Company and Resulting Company to which they are entitled in terms of the Scheme;

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

l) The Transferor Companies, Demerged Company, Resulting Company and the Transferee Company shall each within thirty days of the date of the receipt of this order, cause a certified copy thereof to be delivered to the Registrar of Companies for registration and on such certified copies being so delivered, the Transferor Companies, namely, R U Trading Private Limited and P A T Trading Private Limited shall be dissolved without winding up with effect from the date or last of the dates of filing of the certified copies of the order (known as Effective Date) and the Registrar of Companies shall place all documents relating to the Transferor Companies and registered with him on the file kept by him in relation to the Transferee Company and the files relating to the said companies shall be consolidated accordingly.

8. The Petitioners shall supply legible print out of the scheme and schedule of assets in acceptable form to the registry and the registry will append such printout, upon verification to the certified copy of the order.

9. Company Petition (CAA) No. 500/KB/2020 connected with Company Application (CAA) 29/KB/2019 is disposed accordingly.

10. Urgent certified copy of this order, if applied or, be supplied to the parties, subject to compliance with all requisite formalities.

