(2023) 05 NCLT CK 0015

In the National Company Law Tribunal

Case No : C.P. (CAA)/ 5/ MB/ 2023 In C.A. (CAA) / 169 / MB / 2022

Rabbit Hole Entertainment Private Limited Vs

Date of Decision : 04-05-2023

Acts Referred:
Companies Act, 2013 — Section 230, 230(5), 232, 232(3)(i), 232(6)

Citation : (2023) 05 NCLT CK 0015

Hon'ble Judges : Kuldip Kumar Kareer, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Nitin Gutka, Rupa Sutar

Final Decision : Disposed Of

Judgement

Shyam Babu Gautam, member Technical

1. The Bench is convened by video conferencing.

2. We have heard the Representative for the Petitioner Companies and the Authorised Representative of the Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai ("Regional Director"). No objector has come before this Tribunal to oppose the Scheme and nor has any party controverted any averments made in the Petition to the Scheme.

3. The sanction of the Tribunal is sought under Sections 230-232 and other relevant provisions of the Companies Act, 2013 (the Act) and the Rules framed thereunder for the Scheme of Merger of Rabbit Hole Entertainment Private Limited ('First Transferor Company') and Foxymoron Digital Marketing Private Limited ('Second Transferor Company') with Zoo Media Private Limited ('Transferee Company') and their respective shareholders (hereinafter referred as to "Scheme").

4. The Representative for the Petitioner Companies submits that Board of Directors of the Petitioner Companies approved the Scheme in their respective Board Meetings held on 1st June, 2022. The Appointed Date fixed under the Scheme is 1st April, 2022.

5. The Petitioner Company 1 is engaged in the business of film production, animation, postproduction for digital and television commercials, including digital video commercials (DVCs), television video commercials (TVCs), vignettes, stories, long format content. The Petitioner Company 2 is engaged in the business of conceptualizing, designing and executing digital marketing solutions including online advertising, public relations, graphic design and print solutions, events and activation, creating information systems, websites and/or portals. The Petitioner Company 3 is currently engaged in the business of providing digital marketing solutions to various target groups including but not limited to industrial, commercial, banking, finance, etc. It also provides various consultancy services, advisory and counselling in the field of conceptualizing, designing and executing digital marketing solutions.

6. The rationale of the Scheme of Merger is summarised as follows:

a) Implementation of the Scheme shall result in consolidation of businesses, business resources and activities, integration of operations under a single unified entity, facilitating optimum utilization of assets and other resources for future growth, avoiding duplication of efforts and resources by economies of scale.

b) Consolidated entity to emerge stronger financially resulting in increased business and improved financial leverage.

c) All the companies have common shareholders with common management and control. The consolidation of the companies shall simplify the business structure by eliminating multiple entities and creating a single unified entity resulting in integration of operations and simplification of structure while all the shareholders / shareholding pattern pre and post the merger remains the same.

d) Combined entity would be able to optimize effectively the overall administrative and statutory compliances.

7. The Representative for the Petitioner Companies further submits that the Present Company Scheme Petitions is filed in consonance with Section 230-232 of the Companies Act, 2013 and in terms of order dated 18th November, 2022 passed in C.A. (CAA) / 169 / MB / 2022 by this Tribunal.

8. The Representative appearing on behalf of the Petitioner Companies submits that the Petitioner Companies have complied with all requirements as per directions of this Tribunal and they have made requisite filings to demonstrate compliance with this Tribunal. Moreover, the Petitioner Companies undertake to comply with all statutory / regulatory requirements, if and to extent applicable, as may be required under the Companies Act, 2013 and the Rules made thereunder to give effect to the Scheme.

9. The Authorised, Issued, Subscribed and paid-up Share Capital of the Petitioner Company 1 / First Transferor Company as on 31st March, 2022 is as under:

Particulars

Amount in Rs.

Authorised Share Capital

10,000 equity shares of Rs.10/- each

1,00,000

TOTAL

1,00,000

Issued, Subscribed and Paid–Up Share Capital:

10,000 equity shares of Rs. 10/- each fully paid up

1,00,000

TOTAL

1,00,000

10. The Authorised, Issued, Subscribed and paid-up Share Capital of the Petitioner Company 2 / Second Transferor Company as on 31st March, 2022 is as under:

Particulars

Amount in Rs.

Authorised Share Capital

10,000 equity shares of Rs.10/- each

1,00,000

TOTAL

1,00,000

Issued, Subscribed and Paid–Up Share Capital:

10,000 equity shares of Rs. 10/- each fully paid up

1,00,000

TOTAL

1,00,000

11. The Authorised, Issued, Subscribed and paid-up Share Capital of the Petitioner Company 3 / Transferee Company as on 31st March, 2022 is as under:

Particulars

Amt in Rs.

Authorised Share Capital

10,000 equity shares of Rs.10/- each

1,00,000

TOTAL

1,00,000

Issued, Subscribed and Paid–Up Share Capital:

10,000 equity shares of Rs. 10/- each fully paid up

1,00,000

TOTAL

1,00,000

12. Consideration:-

a) The equity shareholders of the First Transferor Company, shall be issued and allotted 1 (One) equity share of Rs. 10/- (Ten) each, credited as fully paid up, of the Transferee Company for every 1 (one) equity shares of the face value Rs.10/- (Ten) each held by them in the First Transferor Company.

b) The equity shareholders of the Second Transferor Company, shall be issued and allotted 1 (One) equity share of Rs. 10/- (Ten) each, credited as fully paid up, of the Transferee Company for every 1 (one) equity shares of the face value Rs.10/- (Ten) each held by them in the Second Transferor Company.

13. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, has filed his Report dated 21st February, 2023. In paragraph 2(a) to (i) of the Report, the RD has made certain observations. In response to the observations made by the Regional Director, the Petitioner Companies have given necessary undertakings and clarification as per affidavit in rejoinder dated 6th March, 2023. The said observation of RD and response of the Petitioner Companies are summarised in the table below:

No. Para (2)

RD Report / Observations dated 21st February, 2023

Response of the Petitioner Companies in its Affidavit in Rejoinder dated 6th March,

2023

(a)

a) That on examination of the report of the Registrar of Companies, Mumbai dated 23.12.2022 for Petitioner Companies (Annexed as Annexure A-1) that the Petitioner Companies falls within the jurisdiction of

ROC, Mumbai. It is submitted that no representation regarding

the proposed scheme of Amalgamation has been received against the Petitioner Companies. Further, the Petitioner Companies has filed Financial Statements up to 31.03.2022.

The ROC has further submitted that in his report dated 23.12.2022 which are as under:-

1. That ROC Mumbai in his report dated 23.12.2022 has stated that No inspection, Inquiry, Investigations, Prosecutions, Technical Scrutiny, and Complaints are pending against the Petitioner Companies.

2. It is submitted that as per the provisions of Section 232(3)(i) of the Companies Act, 2013, where the Transferor Company is dissolved, thefee, 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 setting-off the fees already paid by the Transferee Company on the increased authorized capital subsequent to the

amalgamation.

3. Interest of the Creditors should be protected.

Hence, the Petitioner Companies shall

undertake to submit detail reply against

observations mentioned above.

I. As regards the observation made in paragraph 2 (a)(1) of the said Report, the Petitioner Companies submits that the contents thereof are correct and factual observations and thus, does not require any response.

. As regards the observation made in

paragraph 2 (a)(2) of the said Report, the Petitioner Companies submits that the Transferee Company undertakes to comply with the provisions set-out in Section 232(3)(i) of the Companies Act, 2013 and that the fee, if any, paid by the Transferor Companies on its authorized share capital shall be set-off against any fees payable by the Transferee Company on its authorized share capital subsequent to the Merger, if applicable.

III. As regards the observation made in paragraph 2 (a)(3) of the said Report, the Petitioner Companies submits that the present Scheme is an Arrangement between the Petitioner Companies and their respective shareholders and there is no Compromise and/or Arrangement with the creditors and no sacrifice is called for. Further, pursuant to the Scheme, all assets and liabilities of the Transferor Companies would be transferred to the Transferee Company. Also, the net worth of the Transferor Companies and Transferee Company are positive and

post-merger the assets of the Transferee Company are more than sufficient to discharge its liabilities of the Petitioner Companies. Accordingly, post-merger, the interest of the creditors is protected.

(d)

In compliance of Accounting Standard-14 IND AS-103, as may be applicable, the resultant company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards including AS- 5 or IND AS-8 etc.

V. As regards the observation made in paragraph 2(d) of the said Report, the Petitioner Companies undertake that the Petitioner Companies shall pass such accounting entries as may be necessary in connection with the Scheme of Merger to comply with accounting standards AS-14 (IND AS-103) and any other applicable accounting standards including AS-5

(IND AS-8) to the extent applicable.

(e)

The Hon'ble Tribunal may kindly direct the Petitioner Companies 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.

VI. As regards the observation made in paragraph 2(e) of the said Report, the Petitioner Companies submits that, the Scheme enclosed to the Company Scheme Application and Company Scheme Petition are one and same, and there is no discrepancy or deviation or changes. The Petitioner Companies state that a

statement to this effect has also been made in paragraph 38 of the Company Scheme Petition.

(f)

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

VII. As regards the observation made in paragraph 2(f) of the said Report, the Petitioner Companies submits that, the Petitioner Companies have submitted the notices under section 230(5) of the Companies Act, 2013 to (i) the Central Government through the office of Regional Director, Western Region, Mumbai on 1st December, 2022 (ii) Registrar of Companies, Mumbai on 1st December, 2022 (iii) Official Liquidator, High Court, Bombay on 1st December, 2022 (for Petitioner Company 1 and Petitioner Company 2) and (iv) Concerned Income Tax authority on 1st December, 2022. The Petitioner Companies through their Representative submits that no representations or objections have been received from any of the Regulatory Authorities. Further, the approval of the Scheme by this Tribunal may not deter

any such authorities to deal with any of the issues arising after giving effect to the scheme and the Petitioner Companies submit that any issues arising out of the Scheme will be met and answered in

accordance with the law.

(g)

As per Definition of the Scheme, "Appointed Date" means April 1, 2022. "Operative Date" means the date on which certified copies of the NCLT's order sanctioning this Scheme are filed by the companies with the Registrar of Companies, Mumbai. Any references in this Scheme to "upon this Scheme becoming effective" or "upon coming into effect of this Scheme" or "upon the Scheme coming into effect" or "upon this Scheme becoming operative" or "upon coming into operation of this Scheme" shall be construed to be a reference to the Operative Date.

Petitioner Companies shall undertake to define effective date.

It is submitted that 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.

VIII. As regards the observation made in paragraph 2(g) of the said Report, the Petitioner Companies submits that, the Appointed Date i.e. 1st April, 2022 has been clearly indicated in the Scheme in accordance with provision of Section 232(6) of the Companies Act, 2013 and the scheme shall become operative from the appointed date. The Effective date is operative date and defined in clause 2.5 of the Scheme of Merger. Further, the Petitioner Companies have complied with the requirements and clarification of circular no. F. No. 7/12/2019/CL-I dated 21.08.2019 issued by the Ministry of Corporate Affairs ("Circular") and the Appointed Date is in accorandance with the provisons thereof. The Circular clarifies that a company may choose the appointed date to be a specific calender date and the Petitoner Companies have accordingly complied with the requirements of the Circular.

(h)

tioner Companies shall undertake to ply with the directions of the concerned orial Regulatory, if so required.

IX.As regards the observation made in paragraph 2(h) of the said Report, the Petitioner Companies submits that, the Petitioner Companies does not carry on business which required approval of sectoral regulators. Further, the approval of the Scheme by this Tribunal may not deter the sectoral regulators to deal with any issues arising after giving effect to the

Scheme.

(i)

tioner Companies shall undertake to ply with the directions of Income tax artment, if any

X. As regards the observation made in paragraph 2(i) of the said Report, the Petitioner Companies submits that, the Petitioner Companies hereby undertakes to ensure compliance of all the provisions of the Income tax Act, 1961 and the Rules made thereunder, pursuant to the Scheme. Further, the approval of the Scheme by this Tribunal may not deter the Income-

tax authorities to deal with Income-tax related issues arising, after giving effect to the Scheme and the Petitioner Companies submit that any Income-tax related issues arising out of the Scheme will be met and answered during the course of regular Income-tax assessment, in accordance with the provisions of the Income-tax Act,

1961.

14. The observations made by the Regional Director have been explained by the Petitioner Companies in paragraph 13 above. The Affidavit dated 6th March, 2023 filed by the Petitioner Companies, the clarifications and undertakings given by the Petitioner Companies are accepted by this Tribunal, and the Petitioner Companies are directed to comply with the same. Moreover, the Petitioner Companies undertake to comply with all the statutory requirements, if any, as may be required under the Companies Act, 2013 and the Rules made thereunder. The Authorised Representative of the Regional Director, MCA (WR), Mumbai Ms. Rupa Sutar who is present at the time of the hearing has submitted that the explanation and clarifications given by the Petitioner Companies are found

satisfactory she stated that they have no serious objections for approving the scheme by the Tribunal.

15. The Official Liquidator, Mumbai, has filed its report dated 6th April, 2023 setting out his observations on the Scheme as stated in Paragraph 7 & 8 of the Report. In response to the observations made by the Official Liquidator, the Petitioner Companies have given necessary clarifications by way of an Affidavit dated 11th April, 2023. In the said Report it is, inter alia, mentioned that:

Sr. No. Para

Official Liquidator Report / Observations

dated 6th April, 2023

Response of the Petitioner Companies in its Affidavit in

Rejoinder dated 11th April, 2023

7.

The Official Liquidator

submits that, with reference to

clause No. 17.1 of the scheme

it is stated that such clause

overrides the provision of

Companies Act, 2013 namely

section 232(3)(i) which inter-

alia provides that, if a

company is dissolved the fee paid by such company on its Authorised Capital shall be set off against any fees payable by the transferee company on its Authorised Capital. Accordingly, clause 17.1 may be modified.

As regards the observation made in

paragraph 7 of the said Report, the

Petitioner Company 3 undertakes

to comply with the provisions set-

out in Section 232(3)(i) of the

Companies Act, 2013 and that the

fee, if any, paid by the Transferor

Companies on its authorized share

capital shall be set-off against any fees payable by the Transferee Company on its authorized share capital subsequent to the Merger, if applicable and also undertakes to pay the difference in fees, if any. Hence, it doesn't require any

modification to the Scheme.

It has been noticed from the Note No. 5 (b) of Balance Sheet as at 31.03.2022 of Rabbit Hole Entertainment Private Limited that the company owes the Rs. 12,79,320/- on 31.03.2022

and Rs.11,39,480/- on 31.03.2021 to MSME.

Further, the company has declared through Note on MSEME Payments that 'There is, no interest due or outstanding on dues to Micro, Small and Medium Enterprises. 'In this respect it

is stated that under MSMED Act, 2006 the buyer is to make payment within 45 days of it becoming due. In case of failure to pay to the MSME supplier, the company is liable to pay compound interest rate. Hon'ble Tribunal may require the company to clarify whether any reference has been made to the MSME Facilitation Council constituted by the respective Government or not. The company may also be require to produce form MSME-1 filed with the ROC for the above said dues.

As regards the observation made in paragraph 8 of the said Report, the Petitioner Company 1 submits the amount for both the financial year is due from Bombay Film Company a service provider for the shooting of advertisement and supply of equipment. The above party has informed us about status of being registered as MSME vide its letter dated 15th December, 2021.Hence in the audited accounts of financial year 2020-21 the said creditors was not classified as MSME Creditors. However, it was classified as

MSME Creditors in the financial

year 2021-22 and shown in the previous year's figure for requirements to give comparative figures a certificate of statutory auditor is annexed to the reply affidavit. The Petitioner Company 1 has cleared due of the creditors and they are not outstanding as on date. The delay in the financial years was due to incomplete services which was later on completed and their outstanding was cleared. The Petitioner Company 1 has obtained clarification letter from the creditors confirming the delay in completion of services and there being no outstanding as on date annexed to the reply affidavit. The Petitioner Company 1 confirms that no reference has been made of MSME facilitation council by the creditors and the Petitioner Company 1 has filed Form MSME -1 annexed to the reply affidavit.

16. The observations made by the Official Liquidator, High Court, Bombay have been explained by the Petitioner Companies in paragraph 15 above. The Representative for the Petitioner Companies submits that the they have filed an Affidavit-in-Rejoinder dated 11th April, 2033 to the Report of Official Liquidator and has served the copy of the same upon the Official Liquidator, Bombay High Court and have dealt about the same in details which are self-explanatory. The Petitioner Company 3 undertakes that in case any other action under Companies Act, 2013 or any other law is made out against the Petitioner Company 1 and Petitioner Company 2, the same shall be enforced against the Petitioner Company 3. In view of the above, the objection of the Official Liquidator no longer sustains.

17. The Income Tax Department will be at liberty to examine the aspect of any tax payable as a result of this scheme and in case it is found that the scheme ultimately results in tax avoidance under the provisions of Income Tax Act, it shall be open to the income tax authorities to take necessary action as possible under the Income Tax Law.

18. From the material on record, the Scheme appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy considering that no objection has so far been received from any authority or creditors or members or any other stakeholders.

19. Since all the requisite statutory compliances have been fulfilled, consolidated Company Scheme Petition in C.P. (CAA) 5 / MB / 2023 filed by Petitioner Companies are made absolute in terms of clause (a) to (c) of the said Company Scheme Petition.

20. The Scheme is hereby sanctioned and the Appointed Date of the Scheme is fixed as 1st April, 2022.

21. The Petitioner Companies are directed to lodge a certified copy of this Order along with a copy of the Scheme with the concerned Registrar of Companies, electronically in E-Form INC-28 within 30 days from the date of receipt of the Order from the Registry.

22. The Petitioner Companies are directed to lodge a certified copy of this order and the Scheme duly authenticated by the Deputy / Assistant Registrar of this Tribunal, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty, payable, if any, within 60 clear working days from the date of receipt of certified copy of the Order from the Registry of this Tribunal.

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

24. Any person or any Authority, whose interest is adversely affected, shall be at

liberty to approach appropriate Forum or to take appropriate action as permissible under law.

25. Further heard, Ms. Rupa Sutar, Authorised Representative of Regional Director, MCA (WR), Mumbai, is present and reported no objections for allowing the above Company Scheme Petition.

26. Ordered Accordingly. C.P. (CAA)/5/MB/2023 is allowed and disposed of.