(2023) 04 NCLT CK 0009

In the National Company Law Tribunal

Case No : CP(CAA)/185/MB-IV/2021 IN CA(CAA)/188/MB/2021

Raghuleela Estates Private Limited Vs

Date of Decision : 12-04-2023

Acts Referred:

Companies Act, 2013 — Section 230, 232
Income-tax Act, 1961 — Section 2(19AA), 47(vi), 49(1), 72A(5)

Citation : (2023) 04 NCLT CK 0009

Hon'ble Judges : Kishore Vemulapalli, Member (J);Prabhat Kumar, Member (T)

Bench : Division Bench

Advocate : Gaurav Joshi, Hemant Sethi, Tanaya Sethi, Rupa Sutar, Suresh Kumar Singh

Final Decision : Disposed Of

Judgement

Kishore Vemulapalli, Member (Judicial)

1. The Bench convened through video conferencing.

2. The Learned Counsel appearing on behalf of the Petitioner Companies submits that the Income-tax Department has filed a Company Application No. 628 of 2022 filing its objections / observations in the Scheme and the same have been addressed by the Petitioner Companies by way of an affidavit-in reply and was disposed of vide order dated January 23, 2023 as the Financial statements as required by the Income Tax Department are already available with it as part of Form 3CD under Income Tax Rules and it will have liberty to examine the benefits arising from the implementation of scheme, if approved, subsequent to its approval, if otherwise permissible under the Income Tax Law. Apart from an application filed by the Income-tax Department, no other objector has come before this Hon’ble National Company Law Tribunal, Mumbai Bench (‘Tribunal’) to oppose the Scheme and nor has any other party controverted any averments made in the Petition to the said Scheme.

3. The sanction from this Tribunal is sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 to the said Scheme of

Arrangement between Raghuleela Estates Private Limited ('Demerged Company' or 'Petitioner Company 1'), C59 Property Holdings Private Limited ('Resulting Company' or 'Petitioner Company 2') and their respective shareholders.

4. The Petitioner Companies in their respective board meetings held on June 29, 2021, have unanimously approved the said Scheme and the copies of the board resolutions are annexed to the Petition.

5. The Learned Counsel appearing on behalf of the Petitioner Companies state that the Petition has been filed in consonance with the order dated August 18, 2021 passed in C.A. (CAA) 188 / MB / 2021 by this Bench.

6. The Learned Counsel appearing on behalf of the Petitioner Companies further state that the Petitioner Companies have complied with all the directions in C.A. (CAA) 188 / MB / 2021 by this Bench and they have also filed necessary affidavits of compliance before this Tribunal.

7. The Learned Counsel for the Petitioner Companies further states that the Transferor Company is engaged, directly and indirectly, in the business of construction, development and operation of residential and commercial properties and the Transferee Company is a new company incorporated for the purpose of acquiring the Demerged Undertaking (as defined in the Scheme) by way of demerger.

8. The Learned Counsel for the Petitioner Companies submits that the rationale mentioned in the Scheme is as under:

i. Facilitate segregation of the Demerged Undertaking and thereby enhancing its potential for attracting strategic / financial investors having necessary ability, experience and interests in the business of the Demerged Undertaking;

ii. Assist in rationalizing the corporate structure; and

iii. Enable the Demerged Company and the Resulting Company to each have a focused strategy and specialization for sustained growth and profitability

9. The Regional Director has filed his Report dated 21st February, 2022 making certain observations and the Petitioner Company has undertaken/made following submission that ;-

a. Petitioner Companies will pass the necessary accounting entries in its books of account to give effect to the Scheme. The accounting entries will comply with the req65uirements of Accounting Standard 14 – Accounting for Amalgamation as well as other applicable Accounting Standards;

b. the Scheme enclosed in the company scheme application and the Scheme enclosed in the Company Scheme Petition are one and the same and there is no discrepancy or deviation;

c. The Petitioner Companies shall comply with the requirements clarified vide circular no. F. No.7/12/2019/CL-1 dated 21.08.2019 issued by the Ministry of Corporate Affairs which requires the Petitioner Companies to provide justification if Appointed Date is significantly ante-dated beyond a year from the date of filing and therefore should not be against public interest;

d. The Petitioner Companies shall comply with the accounting treatment presented in the Scheme and that surplus / deficit shall be adjusted to the Capital Reserve Account / Goodwill as the case may be, arising out of demerger. Further, above reserves shall not be available for distribution of dividend;

e. that the interest of the creditors is protected and clause 4.7 of the Proposed Scheme ensures protection of their interest;

f. The details of open charges for Secured Creditors are provided in the Affidavit and these Secured Creditors have also granted their 'No Objection Certificate' for the Scheme.

It is further submitted that the loan from all the three Secured Creditors is adequately secured as there is no dilution in the security provided to the secured lenders who will continue having the same charge over the respective assets post sanction of the Scheme;

g. The Proposed Scheme is not an arrangement with the creditors and does not require any sacrifice from the Creditors, Secured or Unsecured. Thus, interests of the creditors are not prejudicially affected by the Scheme; and

h. the Petitioner Companies are not registered with the Maharashtra Real Estate Regulatory Authority, also Para 2 of the Circular No 24A of 2021 having file no MahaRERA/Secy/File No 27/144/2021 dated July 23, 2021 issued by Secretary of MahaRERA states that no approvals are required where 75% of the shareholders of the Demerged Company remain same in the Resulting Company as almost 100% of the Shareholders of Demerged Company will become the Shareholders of the Resulting Company, the Petitioner Companies would be exempted from the requirement of obtaining objection certificate from RERA.

10. The Regional Director appeared through its representative and submitted that their observations/ objections have been satisfactorily explained by the Petitioner Company and are acceptable to them. Hence, the Regional Director does not have any further objection to the proposed Scheme Company Petition. The Supplementary Report was filed on April 5, 2022 by the Regional Director stating that they are satisfied with the replies of the Petitioner Companies.

11. The Assistant Commissioner of Income Tax, Central Circle – 5(4), Mumbai, has filed its first Report dated August 29, 2022 inter-alia making certain observations in paragraph Nos. 2 and 3 and the Petitioner Company has undertaken/made following submission that :-

I. The Petitioner Companies mentioned in Clause 4.14 of the Scheme, this Demerger Scheme has been drawn up to comply with the conditions relating to 'demerger' as specified under Section 2(19AA) of the Income-tax Act, 1961 ('IT

Act') and the conditions stated in clauses (i) to (vi), being relevant sub-clauses, of Section 2(19AA) of the Income tax Act, 1961 have been complied with, however, the Tax Department shall be at full liberty to make the necessary enquiries in relation to the Demerger Scheme and the tax implications thereof during the course of any assessment proceedings, and nothing contained in the Demerger Scheme shall operate in a manner that curtails the rights of the Tax Department to scrutinize the returns filed by the Petitioner companies and does not prejudices the interest of the Tax Department, and the Tax Department shall be free to take any action as provided for under the law for assessment of tax and/ or recovery of any assessed tax and all issues arising out of IT Act will be met and answered in accordance with law.

II. In so far as the observations of the Tax Department in Sub-paragraph (vi) of paragraph 2 is concerned, the Learned Counsel for the Petitioner Companies submits that the earlier scheme of amalgamation between (a) Wadhwa and Associates Realtors Private Limited; and (b) Raghuleela Estate Private Limited ('Merger Scheme') was filed on June 30, 2020, almost two years ago, with an appointed date of October 1, 2019, which is almost 3 years back and the assets owned by Wadhwa and Associates Realtors Private Limited shall continue to remain, to the extent they have not already been liquidated or otherwise dealt with, with Raghuleela Estate Private Limited.

III. The present Demerger Scheme is being contemplated with the principal intention of segregating the businesses of Raghuleela Estate Private Limited, by carving out the Demerged Undertaking (as defined in the Scheme) into a new entity and the present Demerger Scheme will facilitate the segregation of the Platina building into a standalone entity, which would facilitate the entry of one or more foreign investors having experience and specialization in operation of commercial properties after it becoming an Investment Trust.

IV. that the pending assessment would be covered in Clause 7.1 of the Scheme, which provides that all legal proceedings of whatsoever nature pending as on the Effective Date, shall not abate or be discontinued or be in any way prejudicially affected by reason of the Demerger Scheme or by anything contained in this Demerger Scheme but shall be continued and enforced by or in the same manner and to the same extent as would or might have been in the absence of this Scheme, in accordance with applicable law.

12. That the Income Tax Department has filed a fresh Company Application No. 628 of 2022 and raised fresh objections/ observations paragraph 3.1 to 3.3 in response to the affidavit-in-rejoinder filed by the Petitioner Companies dated October 3, 2022. The Petitioner Company has undertaken/made following submission that ;-

I. The Tax Department has not brought out anywhere in its submissions as to why or how or on what basis it appears that the provisions of Section 2(19AA) of the Income Tax Act, 1961 ('IT Act') are not being complied under the Scheme, however, the proposed scheme clearly states that if any terms or provisions of the Scheme are found or interpreted to be inconsistent with the provisions of the said Section at a later date including resulting from an amendment of law or for any other reason whatsoever, the provisions of the said Section shall prevail and the Scheme shall stand modified to the extent determined necessary to comply with Section 2(19AA) of the Income-tax Act, 1961. Such modification will however, not affect the other parts of the Scheme;

II. the Income Tax Department will have adequate opportunity to examine the applicability and compliance of the Scheme in accordance with the provisions of Section 2(19AA) of the IT Act at the time of scrutiny assessment for the assessment year in which the Scheme comes into effect and that such objections/ observations are not germane to the approval of the Scheme itself.

III. No diversion of funds out of proceeds of secured loan from Housing Development Finance Corporation Limited ('HDFC Bank') has been made by extending the loan of Rs 444 crores given to Wadhwa Construction and Infrastructure Private Limited as such loan is also interest bearing and in accordance with the terms of sanction;

IV. the loan has been taken and utilized even prior to the filing of the Scheme itself;

V. the Income Tax Department is at complete liberty to scrutinize the details of the Scheme during the course of assessment proceedings, and the sanction of the Scheme need not be held up for this reason;

VI. the Demerged Company will have adequate resources to meet its obligations and liabilities post sanction of the Scheme as well;

VII. the determination of the creditworthiness of the Demerged Company and Resulting Company pursuant to the Scheme is the prerogative of the secured and unsecured creditors and the shareholders of the Petitioner Companies, and not the Income Tax Department;

VIII. the Petitioner Company 1 has obtained a certificate confirming that Wadhwagroup Holdings Private Limited has no objection to the sanction of the Scheme since its interest are adequately protected;

IX. the Resulting Company will continue to survive even post approval of the Scheme and their records and books of accounts will be available for examination by the ITD or by any other authorities;

X. the Central Government has not notified any conditions under Sub-section (5) of Section 72A of the IT Act till date and therefore such sub-clause (vii) of section 2(19AA) of the IT Act is not germane to the Scheme;

XI. In so far as the liability for tax of Rs 12.14 cr is concerned, it is submitted that the treatment of taxes have been covered under Clause 8 of the Scheme;

XII. The Petitioner Company 1 has not taken any advantage through the previous merger to enhance the loan-taking ability. The additional loan has been granted against security of existing assets and have been granted by reputed banks and financial institutions, which have adequate checks in place to determine the borrower's ability to borrow and repay any loans made; accordingly, this fact is irrelevant from the ITD's perspective;

XIII. in terms of Sub-Section 1 of Section 49 read with Clause (vi) of Section 47 of the IT Act, the cost of acquisition for income- tax purposes remains restricted to Rs 3,84,74,36,004 and this cost of acquisition does not change by virtue of the Scheme or the merger which was undertaken prior to the Scheme;

XIV. the commercial wisdom of the shareholders cannot be examined by the Income Tax Department to question a business rationale;

XV. None of the submissions made by the ITD indicate their belief that the Scheme is intended to defraud them and it cannot be said that the group should always have known that Platina building should be segregated for being transferred into a REIT and the proposed scheme is contemplated after having examined the working of REIT over period of time since its introduction;

XVI. The issue in the assessment proceedings is fairly simple – whether interest is allowable or not – this can, should and must be dealt with in assessment proceedings only;

XVII. The sanction of the Scheme need not be upheld merely because of an apprehension of the ITD that the Scheme is not in compliance with section 2(19AA) of the IT Act;

XVIII. the Petitioner Companies will provide all requisite information and explanation to the ITD during the course of pending assessment proceedings of the Petitioner Companies as may be called for. It is further clarified that tax implications, if any arising out of the Scheme is subject to the final decision of the Income Tax Department and the findings of the said authority is binding on the Petitioner Companies subject to right of appeal as may be available to the Petitioner Companies.

13. In support of the contention of the Income-tax Department, the Learned Counsel has relied on the various decisions which supports its scheme on facts and averments contained in the proposed scheme.

A. Thomas Cook Insurance Services (India) Limited (Bombay High Court)– CSP 100 / 2015 with Company Summons for Direction No 892 of 2014, order passed on July 2, 2015;

B. Kishore Vadilal Private Limited (Gujarat High Court) –Company Petition No. 142 of 2012 in Company Application No. 175 of 2012 with Company Petition No. 143 of 2012 in Company Application No. 176 of 2012 and Company Petition No. 144 of 2012 in Company Application No. 177 of 2012, order passed on

October 30, 2012;

C. Vodafone Essar Infrastructure Limited (Delhi High Court)– Company Petition 334 / 2009, order passed on March 29, 2011 holding that “62. Simply because the tax payable under the business structure adopted by the assessee, which he is otherwise entitled to adopt in law, is reduced, does not, in my view, ipso facto, make such adoption illegal or impermissible on the ground that it is opposed to the public interest”;

D. A.W. Figgis & Co. Pvt. Ltd vs Queens Park Property Co. Pvt. Ltd. – Company Petition No. 215 of 1978 connected with Company Application No. 73 of 1978, decided on July 31, 1978 The High Court made following observations;

E. Metrochem Industries Limited (Gujarat High Court) – O.J. Appeal No. 27 of 2012 in Misc. Civil Application No 59 of 2011 in Company Petition No. 177 of 2010 with Civil Application No 80 of 2012;

F. AVM Capital Services (P.) Ltd (Bombay High Court) – CSP 670 to 675 of 2011 connected with Company Summons for Direction No 598 to 603 of 2011, order passed on July 2, 2015;

G. Goman Agro-Farms (P.) Ltd. (Andhra Pradesh High Court) – Company Petition no. 179 to 193 of 2015, order passed on September 29, 2015;

H. Ad2Pro Global Creative Solutions Private Limited vs Registrar of Companies, Official Liquidator, Income Tax Department - PCIT, Designated Nodal Officer, ITD (for Karnataka State) and Regional Director (NCLAT) – Company Appeal (AT) no. 98 of 2019, order passed on September 25, 2019 wherein it was held that “Once a scheme has been sanctioned by a Tribunal in accordance with law, as admittedly in the instant case it is and the same goes unassailed, nothing precludes the Tax Authorities from recovering its legitimate and recoverable outstanding tax dues from the Transferor or the Transferee Company, as provided in the scheme”;

I. Carin India Limited (‘Transferor Company’) and Vedanta Limited (‘Transferee Company’) (NCLT Mumbai) – CSP no. 765 of 2016 connected with Company Summons with Direction No 1 of 2016, order passed on March 23, 2017;

J. Vodafone Essar Gujarat Limited – SLP (C) no 29819 / 2012, order passed on April 15, 2015 (SC) The Supreme Court of India held that:

"… We only state that the Income tax Department is entitled to take out appropriate proceedings for recovery of any tax statutorily due from the transferor of transferee company or any other person who is liable for payment of such tax due.”;

K. Panasonic India Private Limited - CP (CAA) no 8 / CHD / HRY / 2021 (2nd motion), order passed on May 19, 2022 (NCLT Mumbai);

L. Ludhiana Holdings Ltd - CP no 25 of 2014 and 166 of 2013, order passed on

March 28, 2014 (High Court of Punjab and Haryana);

M. Ring Plus Aqua Limited – CSP 105 and 106 / 2014 in Company Summons for Direction No 858 and 859 of 2013 (High Court of Bombay);

N. Nirmay Properties (P.) Ltd. – Company Petition Nos. 181 and 186 of 2008 in Company Application Nos. 343 and 348 of 2008, order passed on April 27, 2009 (Gujarat High Court).

14. It is hereby clarified that all the tax implication (if any) arising out of the Scheme is subject to final decision of Income Tax authority and shall not deter the Income Tax authority to examine the returns filed by the Petitioner Company independently and the finding of the said authority is binding on the Transferee Company subject to right of Appeal as may be available to the Petitioner Companies.

15. 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.

16. Since all the requisite statutory compliances have been fulfilled, CP(CAA)/185/MB/2021 connected with CA(CAA)/188/MB/2021 is made absolute in terms of prayer in the Petition mentioned therein.

17. The Petitioner Companies are directed to lodge a certified copy of this Order and the along with a copy of the Scheme with the concerned Registrar of Companies, electronically along with e-Form INC-28, in addition to a physical copy within 30 days from the date of receipt of the Order from the Registry duly certified by the Designated Registrar of this Tribunal.

18. The Petitioner Companies shall lodge a certified copy of this Order along and the Scheme duly certified by the Designated Registrar of this Tribunal, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, within 60 working days from the date of receipt of certified copy of the certified Order.

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

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

21. Ordered Accordingly. Pronounced in open court today.

