(2023) 05 NCLT CK 0019

In the National Company Law Tribunal

Case No : CP (CAA) 78 Of 2021 Connected With CA NO 174 Of 2022

Toccata Realtors Private Limited Vs

Date of Decision : 04-05-2023

Acts Referred:
Companies Act, 2013 — Section 133, 230, 230(3), 230(5), 230(6), 232, 232(6)
Income Tax Act, 1961 — Section 2(1B), 47

Citation : (2023) 05 NCLT CK 0019

Hon'ble Judges : H. V. Subba Rao, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Hemant Sethi, Vidisha Poonja, Rupa Sutar, M. S. Bharadwaj

Final Decision : Disposed Of

Judgement

H.V. Subba Rao, Member (Judicial)

1. The Court is convened by videoconference today.

2. Heard Learned Counsel for the Petitioner Companies.

3. The Learned Counsel for the Petitioner Companies submits that the Second Petitioner Company has been converted from Private Limited Company to Public Limited Company with effect from April 28, 2022 and accordingly the name of the Second Petitioner Company has been changed from 'Keystone Realtors Private Limited' to 'Keystone Realtors Limited'.

4. The Learned Counsel for the Petitioner Companies submits that the Second Petitioner Company has allotted 34,95,542 (Thirty Four Lacs Ninety Five Thousand Five Hundred and Forty Two) equity shares by way of conversion of its convertible instruments into equity shares and further issuance of equity shares during financial year 2022-23. On account of this change in capital structure, the authorized share capital of the Second Petitioner Company has also undergone a change and consequentially Clause 11 of the Scheme relating to the combined authorized share capital of the Second Petitioner Company has also undergone a change which shall be read as under:

"The Authorized Share Capital of the Company is Rs. 428,42,00,000/-(Rupees Four Hundred and Twenty Eight Crores Forty Two Lacs only) divided into 42,80,00,000 (Forty Two Crores Eighty Lacs) Equity Shares of Rs. 10/-each and 4,20,000 (Four Lacs and Twenty Thousand) 0% Redeemable Preference Shares of Rs. 10/- each with power to increase or reduce the capital of the Company and to divide the shares in the Capital for the time being, into several classes and to attach thereto respectively, such preferential, deferred, qualified or special rights, privileges or conditions as may be determined by or in accordance with the Articles of Association of the Company and to vary, modify or abrogate any such rights, privileges or conditions in such manner as may be for the time being he provided by the Articles of Association of the Company."

5. The Learned Counsel for the Petitioner Companies submits that the Board of Directors of the Petitioner Companies in exercise of powers conferred by Clause 16 of the Scheme vide resolution dated June 3, 2022 consented to modify the Clause 1.6 and any other clause appears in the Scheme with the old name of the Second Petitioner Company, Clause 3.2 of the Scheme relating to share capital of the Second Petitioner Company and Clause 11 of the Scheme relating to combination and increase of authorized share capital of the Second Petitioner Company. The same has been submitted by the Petitioner Companies by way of an additional affidavit dated June 6, 2022.

6. The Learned Counsel for the Petitioner Companies submits that the Petitioner Companies have filed a Company Application no. 174 of 2022 for shifting the appointed date from October 16, 2020 to close of business hours on March 31, 2022. Further, the Learned Counsel for the Petitioner Companies submits that the Board of Directors of the Petitioner Companies in exercise of powers conferred by clause 16 of the Scheme vide resolution dated February 14, 2022 modified the Appointed Date of the Scheme from October 16, 2020 to the close of business hours on March 31, 2022. Accordingly, the Tribunal, vide order dated May 5, 2022 allowed the Company Application no. 174 of 2022.

7. The Learned Counsel for the Second Petitioner Company submits that the Goods and Services Tax department has served a notice dated September 14, 2021 which provides for a demand of INR 44,82,794 (including interest and penalty of INR 4,48,279) pertaining to disallowance of transitional credit availed on work-in-progress for the period July 1, 2017 to March 31, 2018. The same has been submitted by the Second Petitioner Company by way of an additional affidavit dated September 15, 2021. Further, the Second Petitioner Company has filed an appeal before the Appellate Authority on October 22, 2021 against the said demand. The outcome of the said appeal is pending as on date of this order. The Counsel for the Second Petitioner Company further submits that the purported demand is in respect to the Transferee Company which shall continue to be in existence. Further, the rights of the Goods and Services Tax department are not affected as no sacrifice is called for.

8. The sanction of this Tribunal is sought under Sections 230 to 232 and other

applicable provisions of the Companies Act, 2013 ('Act') and in the matter of Scheme of Amalgamation between Toccata Realtors Private Limited ('TRPL' or 'the Transferor Company') and Keystone Realtors Limited ('KRL' or 'the Transferee Company') and their respective shareholders ('Scheme').

9. The Learned Counsel for the Petitioner Companies submits that the Petitioner Companies are engaged in the business of real estate constructions, development, and other related activities in India.

10. The Counsel for the Petitioner Companies further submits that the rationale for the Scheme is as under:

TRPL and KRL are part of the Rustomjee Group ('the Group'). KRL is the flagship company of the Group and one of its subsidiary viz. Kapstone Constructions Private Limited holds the entire equity share capital of TRPL. Both TRPL and KRL are engaged in the business of real estate constructions, development and other related activities in India. The management of TRPL and KRL believe that amalgamation of TRPL with KRL, inter alia, would have the following benefits for the Group:

• Consolidation of companies within the Group;

• Reduction of intra-group transactions and compliance requirements under various laws;

• Reduction of operating and compliance costs; and

• Achieve administrative, operational and management efficiencies.

11. The Petitioner Companies have approved the Scheme by passing their respective Board Resolutions dated October 20, 2020 and have approached the Tribunal for sanction of the Scheme.

12. The Regional Director has filed his report dated September 6, 2021 ('Report') praying that this Tribunal may pass such orders as it thinks fit, save and except as stated in paragraphs IV (a) to (h). In response to the observations made by the Regional Director, the Second Petitioner Company has given necessary undertakings and clarification vide rejoinder affidavit dated September 9, 2021. In response to the rejoinder affidavit, the Regional Director has filed his Supplementary Report dated September 14, 2021. The observations made by the Regional Director and the clarifications given by the Petitioner Companies and the observations of the Regional Director in the Supplementary Report are summarized in the table below:

Sr.

No. Para (IV)

RD Report/ Observation September 6, 2021

Response of the Petitioner Company

Observation of Regional director in Supplementary Report dated September 14, 2021.

(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.;

In so far as the observation made in paragraph IV(a) of the Report of the Regional Director is concerned, the Petitioner Companies undertake that in addition to compliance of AS-14 (IND AS-103), to the extent applicable, 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.

(b)

As per Definition of the

Scheme,

'Appointed Date' means 16 October 2020, or such other date as may be fixed or approved by the National Company Law Tribunal, or any competent authority may otherwise direct; 'Effective Date' means the last of the date on which certified copies of the orders sanctioning the Scheme, passed by the National Company Law Tribunal, Mumbai Bench are filed with the Registrar of Companies, Mumbai, by the Transferor Company and

the Transferee Company respectively.

In this regard, 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.

Further, the Petitioners may be asked to comply with the requirements as clarified vide circular no. F. No. 7/12/2019/CL-1

dated 21.08.2019 issued by the Ministry of Corporate Affairs.

In so far as the observation made in paragraph IV(b) of the Report of the Regional Director is concerned, the Petitioner Companies confirm that the Scheme shall be effective from the Appointed Date and shall be operative from the Effective Date. In this regard, it is submitted that in terms of section 230(6) of the Companies Act, 2013, the Scheme shall be deemed to be effective from the 16th day of October, 2020, i.e., the Appointed Date. Thus, the Petitioner Companies will be complying with the requirements as clarified vide

circular no.

No.7/12/2019/CL-1 dated 21.08.2019 issued by the Ministry of Corporate Affairs to the extent applicable.

(c)

ROC, Mumbai Report dated 26.04.2021 has made following observations:

1. As per MCA portal enforcement there is one complaint against the transferee company filed by Shri M. Mas and Shah on 25.07.2016 regarding discrepancy in the flat offered to daughter of the complainant by the

company against the flat booked by her. The said complaint is closes as on date.

2. The transferee company has number of open charges.

3. Interest of the Creditors

should be protected.

In this regard, petitioner company is directed to submit full facts and figures.

In so far as the observation made in paragraph IV(c) of the Report of the Regional Director is concerned, the Petitioner Companies hereby state that pursuant to the merger of the First Petitioner Company with the Second Petitioner Company, the net worth of the Second Petitioner Company shall increase since there are no

liabilities in the First Petitioner Company. Further, there is no compromise and/or arrangements with the creditors of the Petitioner Companies in the present Scheme of Amalgamation as no sacrifice is called for and the interest of the creditors of Petitioner Companies shall be protected and appropriately safeguarded and discharged in due course of time.

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

In so far as observation made in clause (d) of Sr. No. IV of the Regional Director Report is concerned, the Petitioner Companies state that pursuant to the Order dated 16th February 2021 passed by this Tribunal, the requirement to convene meeting of the Shareholders of the Petitioner Companies was dispensed with in view of consent affidavits provided by all the Shareholders of the Petitioner Companies.

Further, there are no Secured or Unsecured Creditors in the First Petitioner Company and therefore the question of convening meeting of Secured or Unsecured Creditors of the First Petitioner Company does not arise.

Further, there are no Secured or Unsecured Creditors in the First Petitioner Company and therefore the question of convening meeting of Secured or Unsecured Creditors of the First Petitioner Company does not arise. Further, the meeting of the Secured Creditors of the Second Petitioner Company was convened on Friday, 9th April 2021 at 11:30 am and the Scheme was passed with approval of requisite majority. In so far as the Unsecured Creditors are concerned, notices have been served to all the Unsecured Creditors of the Second Petitioner Company.

(e)

Clause-10 of Accounting Treatment of the scheme; stated that Notwithstanding anything contained in any other clauses of this Scheme, the accounting treatment for the purpose of this Scheme, in the financial statements of the Transferee Company, shall be in accordance with the applicable accounting principles as prescribed under the Companies (Indian Accounting Standards) Rules, 2015 ('Ind-AS') as notified under Section 133 of the

Companies Act, 2013 and on the date determined in accordance with Ind-AS.

In this regard it is submitted that as per Accounting Standard 14, such surplus if any arising out of the scheme should be credited to the Capital Reserve arising out of amalgamation and deficit if any arising out of the same shall be debited to Goodwill Account of the Transferee Company. Such Capital Reserve, arising out of the amalgamation shall not be considered as free reserves and not available for distribution of dividend.

In so far as the observation made in paragraph IV(e) of the Report of the Regional Director is concerned, the Petitioner Companies hereby submit that accounting principles as prescribed under the Companies (Indian Accounting Standards) Rules, 2015 as notified under Section 133 of the Companies Act, 2013 are applicable to the Petitioner Companies. Further, in case capital reserve arises pursuant to accounting treatment as per Ind-AS, the Petitioner

Companies hereby undertake that the same shall not be considered as a free reserve and shall not be available for distribution of dividend.

(f)

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;

In so far as observation made in clause (f) of Sr. No. IV of the Regional Director Report is concerned, the Petitioner Companies hereby undertake to comply with the provisions of Income Tax Act, 1961 and Rules thereunder.

(g)

It is observed that that the petitioner companies are working in real estate business, therefore, petitioner companies may be directed to submit approval of RERA.

In so far as observation made in clause (g) of Sr. No. IV of the Regional Director Report is concerned, pursuant to the Orders dated 16th February 2021 in CA(CAA) No.1175/MB/2020 and 18th August, 2021 in CA(CAA) No.78/MB/2021

passed by this Tribunal, the Second Petitioner Company has served notices to the Maharashtra Real Estate Regulatory Authority. The First Petitioner Company is not registered with the Maharashtra Real Estate Regulatory Authority and the question of serving notices does not arise.

Further, the Petitioner Companies state that approval of the Maharashtra Real Estate Regulatory Authority shall not be required in reference to circular 24/2019 dated 04th June 2019 issued by the Maharashtra Real Estate Regulatory Authority stating the following, "if the amalgamation or merger or demerger of the companies, which is not regarded as transfer under section 47 of the Income Tax Act, 1961 or where 75% of the shareholders remain same in the resultant company, the same shall not require the aforesaid approvals of the Allottee(s) under section 15 of the Act.".

(h)

It is observed that the Transferor Company is a Wholly owned Subsidiary of the Step Down Subsidiary of Transferee Company viz. Kapstone Constructions Private Limited being a legal entity the Kapstone Constructions Private Limited may also be heard in the matter.

In so far as observation made in clause (h) of Sr. No. IV of the Regional Director Report is concerned, the Petitioner Companies hereby confirm that the First Petitioner Company is the wholly owned subsidiary of the step- down subsidiary of the Second Petitioner Company, viz. Kapstone Constructions Private Limited.

Accordingly, on the basis of observations made by the Regional Director and reply submitted by the petitioner Company thereon, Hon’ble Tribunal may decide the matter on it’s merit.

13. The Official Liquidator, High Court, Bombay, has filed his report dated August 11, 2021, inter alia, stating therein that the affairs of the Transferor Company have been conducted in a proper manner and the representation of the Official Liquidator may be taken on record by the Tribunal.

14. 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. All the assets and properties of the Transferor Company, of whatsoever nature and wheresoever situated, shall, under the provisions of Sections 230 to 232 and all other applicable provisions, if any, of the Act, 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. Further, upon the coming into effect of this Scheme and with effect from the Appointed Date, all liabilities of the Transferor Company, including all secured and unsecured debts (whether in Indian rupees or foreign currency), sundry creditors, liabilities (including contingent liabilities), duties and obligations and undertakings related to the Transferor Company 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 Act, 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.

15. The Counsel for the Petitioner Companies further submits that the entire issued, subscribed and paid up share capital of the Transferor Company is held directly or indirectly by the Transferee Company and/or its subsidiary. Thus, no consideration shall be payable by the Transferee Company upon the amalgamation of the Transferor Company with the Transferee Company pursuant to clause 9 of the Scheme.

16. Since all the requisite statutory compliances have been fulfilled, CP (CAA) 78 of 2021 is made absolute in terms of the prayer clauses of the said Company Scheme Petition.

17. The Scheme is hereby sanctioned with the Appointed Date being close of business hours on March 31, 2022.

18. The Petitioner Companies are directed to file a copy of this Order along with a copy of the Scheme with the concerned Registrar of Companies, electronically along with e-form INC28 within 30 days from the date of receipt of the certified copy of Order by the Petitioner Companies. The Scheme will become effective on filing of the copy of this order with the concerned Registrar of Companies.

19. The Petitioner Companies to lodge a copy of this Order along with the Scheme duly authenticated/ certified by the Deputy Director or the Assistant Registrar, National Company Law Tribunal, Mumbai Bench, with the concerned Superintendent of Stamps for the purpose of adjudication of stamp duty payable, if any, within 60 days from the date of receipt of the certified Order from the Registry of this Tribunal.

20. All concerned regulatory authorities to act on a copy of this Order along with Scheme duly certified by the Deputy Director or the Assistant Registrar, National Company Law Tribunal, Mumbai Bench.

21. Any person interested is at liberty to apply to this Tribunal in the above matters for any directions that may be necessary.

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

23. Ordered accordingly.

