(2023) 05 NCLT CK 0026

In the National Company Law Tribunal

Case No : C.P.(CAA)/07/MB-V/2023 Connected with C.A.(CAA)/176/MB-V/2022

Windmere Hospitality (India) Private Limited Vs

Date of Decision : 08-05-2023

Acts Referred:
Companies Act, 2013 — Section 230, 230(1), 230(3), 230(5), 230(6), 232, 232(3)(i)

Citation : (2023) 05 NCLT CK 0026

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

Bench : Division Bench

Advocate : Ahmed M Chunawala, Rajesh Shah

Final Decision : Disposed Of

Judgement

Kuldip Kumar Kareer, Member (Judicial)

1. Heard the Learned Counsel for the Petitioner Companies. No objector has come before this Tribunal to oppose the Scheme and nor has any party controverted any averments made in the Petitions to the said Scheme.

2. The sanction of the Tribunal is sought under Sections 230 to 232 of the Companies Act, 2013 and other relevant provisions of the Companies Act, 2013 and the rules framed there under for the Scheme of Amalgamation of WINDMERE HOSPITALITY (INDIA) PRIVATE LIMITED, the Transferor Company with SARAYU INVESTMENTS PRIVATE LIMITED, the Transferee Company.

3. The Petitioner Companies have approved the said Scheme of Amalgamation by passing the Board Resolutions dated 31st January, 2022 which are annexed to the respective Company Scheme Petitions.

4. The Learned Advocate appearing on behalf of the Petitioners states that the Petitions have been filed in consonance with the Order passed

in the Company Scheme Application No. 176 of 2022 of the Hon’ble Tribunal.

5. The Learned Advocate appearing on behalf of the Petitioners further states that the Petitioner Companies have complied with all requirements as per

directions of the National Company Law Tribunal, Mumbai Bench and they have filed necessary affidavits of compliance in the National Company Law Tribunal, Mumbai Bench.

6. The Learned Counsel for the Petitioner Companies states that the Petitioner Company No. 1 is presently carrying on business of Establishing, Maintaining and Conducting Hotels, Restaurants, Permit rooms and Holiday Resort, Recreation Complex and other facilities such as Health Clubs, Swimming Pool, Boutiques, Shopping Arcades and that the Petitioner Company No. 2 is presently carrying on the business of Invest in and deal with and acquire and hold shares, stocks debentures, debentures-stock, bonds, notes, obligations and securities issued or guaranteed by any company or body corporate and debentures, debentures-stocks, and securities issued or guaranteed by any state. or Central Govt. Public body or authority, Municipal local.

7. The rationale for the Scheme of Amalgamation of the Petitioner Companies is in the interest of the stakeholders of these companies and shall result in the following benefits:

The transferor company, due to the slack in the industry, is not carrying on any business operations presently. The management of the Transferor Company also decided not to carry on any future business. Presently, there is no revenue stream in transferor Company to sustain the company's basic operations and running cost including compliance costs. This has resulted in the unproductive cost of administration of managing the company and compliances cost. Hence the Transferor Company decided to merge its business operations into the Transferee Company through following merger process as prescribed under section 230 of the Companies Act 2013 for effective management and unified control of operations to avoid duplication of administrative activities, reduce multiplicity of records and statutory compliances.

8. The Regional Director has filed his Report dated 13th March, 2023 inter-alia making the following observations in paragraphs 2 (a) to (i) which are reproduced hereunder:

Para

Observation by the Regional Director

Undertaking of the Petitioner Company/Rejoinder

2(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(ND AS-8) etc.

So far as the observation in paragraph 2 (a) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner

Companies submits that the Transferee Company undertakes that in addition to compliance of AS-

14 for accounting treatment, the Transferee Company shall pass such accounting entries as may be necessary in connection with the Scheme to comply with other applicable accounting standards

such as AS-5 as applicable.

2(b)

As per the Definition of the Scheme.

" Appointed Date" means 1 April, 2021 or such other date as may be proposed and approved by the Hon'ble Regional Director (Western Region) or Hon'ble National Company Law Tribunal (as the case may

be) or as may be directed by the Hon'ble

Regional Director (Northern Region) or Hon'ble National Company Law Tribunal;

And

“Effective Date” naans the date on which the last of the approvals/ events specified in Clause 5 of Part V of the Scheme are obtained/ have occurred. The words "scheme becoming effective" or similar words in the Scheme shall be construed accordingly;

So far as the observation in paragraph 2 (b) of the Report of the Regional Director is concerned, the Petitioner Companies through their Counsel submits that the Appointed Date is 1st April, 2021. The Counsel further submits that the Petitioner will comply with the requirements as to Appointed Date and clarified vide circular no. F. No.7/12/2019/CL-1 dated 21.08.2019 issued by the Ministry.

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.

The Petitioners may be asked to comply with the requirements as clarified vide circular no. F. No, 7/12/2019/CL-I dated 27.08.2019 issued by the Ministry of Corporate Affairs.

2(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 authoised capital subsequent to the amalgamation and therefore, petitioners to undertake that the transferee company shall pay the difference of fees and stamp duty.

So far as the observation in paragraph 2 (c) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the setting

off of fees paid by the Transferor

Company on its Authorised Share Capital shall be in accordance with provisions of section 232(3)(i) of the Companies Act, 2013.

2(d)

The Hon'ble Tribunal may kindly seek the undertaking that this Scheme is approval 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.

So far as the observation in paragraph 2 (d) of the Report of the Regional Director is concerned, the Petitioner Companies undertake that this Scheme is approved by the requisite majority of members and notice was served to creditors as per the order given by the NCLT.

2(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.

So far as the observation in paragraph 2 (e) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the Petitioner Company shall ensure compliance of all the provisions of Income Tax Act and Rules

thereunder.

2(f)

In the provided Audited Balance Sheet as on 31.03.2022 of the Transferor Company, Security Premium of Rs. 2,30,00,000/- at premium of Rs. 1,150/- per share (Nominal Value of Rs. 100/- per share) is showing in the Balance Sheet, however, details of the allottee is not showing on the portal, therefore petitioner company may be directed to place on record the details of

the allottee and valuation of shares at the

time of issue at high premium.

ln view of the above, if agreed, Hon'ble NCLT may ask the Transferor Company to satisfy that Income Tax Department has properly assessed the increase of share capital from time-to-time u/s. 68 of the Income Tax Act, 1961 and also payment of Income Tax by existing shareholders, if they have purchased shares at lower price than issued price from original allotees or seek the reply from Income tax department about issue of share capital at high premium on

So far as the observation in paragraph 2 (f) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the Petitioner Company the Securities Premium Account was raised by the Transferor Company as on

07/02/2004 and that thereafter the

income Tax Department had assessed the increase of share capital u/s 68 of the Income Tax Department

2(g)

It is observed from the portal that Transferor Company has not fled its Annual return for the year 2020-21 and 2021-2022 anil Balance Sheet for the year 2018-19,2019-20, 2020-21 and 2021-

2022, however, along with the documents provided to this Directorate, Audited financials account for the year 2021-2022 has been provided, therefore, petitioner company may be directed to clarify the compliance of provisions of Companies Act, 2013 and may also be directed to file pending Annual returns and Balance Sheets before sanctioning of the scheme so that no regulatory authority including Income Tax Department shall face ambiguity in absence of financial statements & Annual returns, which are required to be filed on MCA-21 portal in compliance of Provisions of Companies Act,

2013. Transferee Company shall also

undertake that the transferee company shall file compounding/ adjudication application before ROC.

So far as the observation in paragraph 2 (g) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the Petitioner Company they have filed the with the Income Tax Department for the year 2018-19, 2019-20 and 2021-22. Annexed hereto and marked as Exhibit 1 colly are the acknowledgement copies of the Income Tax Submissions. The Petitioner Companies further submits that they undertake to file the same as and when the Version 3 of the MCA portal is updated. The Petitioner Company further submits that the Transferee Company further undertake to file compounding/adjudication application before ROC, Mumbai if required.

2(h)

It is observed from latest Audited financials for the year ending 31.03.2022 provided by the Transferor company that transferor company has following corporate body shareholders having more than 10% shareholding, but form Ben-2 has not been filed:-

So far as the observation in paragraph 2 (h) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the Petitioner Company they have not filed the BEN-2 form due to migration of MCA website from Version 2 to version 3 and that they further undertake that the ROC may adjudicate the Petitioner Company for non-filling of BEN-2.

Name of the Company

Name

of the shareho lders

Perce ntage of shar ehold ing

Status of Ben- 2

Windmere Hospitality (India0 Private Limited (Transferor Company)

Blue Zephyre Ltd.-

U.A.E

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.w. companies (Significant Beneficial Owners) Rules, 2018.

2(i)

That on examination of the report of the

Registrar of Companies, Mumbai dated

07.09.2022 (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 31.03.2018 and Transferee Company has filed till 31.02.2022, 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. Interest of Creditors should be protected.

iii. As per the provisions of Section 230(3)(i) 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, it any after setting-off the fees already paid by the transferor company on its

authorized capital, must be paid by

the transferee company on the increased authorized capital subsequent to the amalgamation.

iv. May be decided on its merits.

So far as the observation in

paragraph 2(i)(i) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that it is the facts of the case.

So far as the observation in paragraph 2 (i)(ii) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the interest of creditors will be protected.

So far as the observation in paragraph 2 (i)(iii) of the Report of the Regional Director is concerned, the Learned Counsel for the Petitioner Companies submits that the setting off of fees paid by the Transferor Company on its Authorised Share Capital shall be accordance with provisions of section 232(3)(i) of the Companies Act, 2013

9. The observations made by the Regional Director have been explained by the Petitioner Companies in Para 9 above. 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.

10. The Official Liquidator has filed his report on 30th January, 2023 in the Company Scheme Petition No. 07 of 2023, inter alia, stating therein that the affairs of the Transferor Company have been conducted in a proper manner not prejudicial to the interest of the Shareholders of the Transferor Companies and that the Transferor Company may be ordered to be dissolved by this Tribunal.

11. 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.

12. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition No. 07 of 2023 is made absolute in terms of clauses (a) to (c) of the said Company Scheme Petition

13. The First Petitioner Company be dissolved without winding up.

14. Petitioners are directed to file a copy of this Order along with a copy of the Scheme of Amalgamation with the concerned Registrar of Companies, electronically along with E-Form INC-28, in addition to physical copy within 30 days from the date of receipt of the Order from the Registry.

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

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

17. The Appointed Date is 1st April, 2021.

18. Ordered Accordingly.