

(2010) 11 DEL CK 0062

In the Delhi High Court

Case No : Company Petition No. 130 of 2010

Alchemist Limited

APPELLANT

Vs

Alchemist Foods Limited

RESPONDENT

Date of Decision : 01-11-2010

Acts Referred:

Companies (Court) Rules, 1959 — Rule 80
Companies Act, 1956 — Section 391, 392, 393, 394

Citation : (2011) 100 CLA 185 : (2010) 160 CompCas 469

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : P. Nagesh, for the Appellant; Atma Sah, Assistant Registrar of companies, for the Respondent

Final Decision : Allowed

Judgement

Sanjiv Khanna, J.—The petitioner Alchemist Limited (transferor company for short) has filed this second motion under Sections 391, 392 and 394 of the Companies Act, 1956 (Act for short) for demerger of its "food division" and its merger with it's subsidiary Alchemist Foods Limited (Transferee company for short) as per the scheme of arrangement enclosed as Annexure-C to the present petition.

2. The transferor company had earlier filed a Company Application (M) No. 184/2009, which was disposed of vide order dated 15th December, 2009 directing, inter alia, that a meeting of the equity shareholders, preference shareholders, secured creditors, unsecured creditors and fixed deposit holders would be held to consider for approval/disapproval of the scheme (Annexure-C) with or without modification. The Court had appointed Chairperson and alternate Chairperson for the said meetings.

3. Notices were also published in the newspapers "Statesman" (English) and "Veer Arjun" (Hindi). Vide order dated 15th December, 2009, the Court had fixed the requisite coram for the said meetings.

4. The transferor company has filed on record copy of the reports of the Court appointed Chairpersons. As per the report of Mr. Arvind Minocha, Advocate, notices for the meeting were issued to the 9323 equity shareholders through UPC. On the first call requisite coram was not present and accordingly the meeting of equity shareholders was adjourned. On the second call, 22 equity shareholders were present personally or through their proxy and they represented 34.05% of the total paid up equity capital representing Rs. 4,17,05,320/- in value. Two equity shareholders abstained from voting and three votes were declared to be invalid. Seventeen equity shareholders voted in favour of the scheme and they represent paid up equity capital of Rs. 4,17,05,180/- in value terms.

5. Mr. Arvind Minocha, Advocate was also the Chairperson of the meeting of the preference shareholders. In his report, he has stated that notices were issued to 90,950 preference shareholders through UPC for the meeting. However, on the first call, the requisite coram was not present and the meeting was adjourned to be taken up after half an hour. At about 12 noon, 44 preference shareholders were present personally or through proxy and they constituted 0.04% of the total preference shareholders in value terms. 40 preference shareholders had voted in the meeting and all of them have supported the scheme of arrangement and have voted in favour of the scheme.

6. Mr. B.D. Kaushik was appointed as a Chairperson for the meetings of secured and unsecured creditors. Three secured creditors had attended the meeting and all of them have voted in favour of the scheme of arrangement. However, meeting of the unsecured creditors was adjourned as the requisite coram was not present at the appointed time of the meeting. When meeting was called after half an hour, 8 unsecured creditors were present personally or through their representatives. The total value of debt owed to these 8 unsecured creditors was Rs. 9,86,142/-. The unsecured creditors have voted in favour of the scheme.

7. Meeting of the fixed deposit holders was held and a report has been submitted by the Chairperson, Mr. Naresh Sahai Mathur. It is stated in the report that at the appointed time, the requisite coram was not present and meeting was adjourned for half an hour. On the second call, 6 fixed deposit holders attended the meeting either in person or through their representatives. The said six fixed deposit holders representing deposits of Rs. 5,40,000/- in value terms have voted in favour of the scheme and have approved the scheme of arrangement.

8. The Regional Director in their reply has stated that the coram present in the meetings of unsecured creditors and the fixed deposit shareholders shows lack of response. This is no doubt true and raises suspicion. However, the chairpersons in their respective report have stated that they had sent notices under certificates of posting to the equity shareholders, preference shareholders, secured creditors, unsecured creditors and fixed deposit holders. It is pointed out that the scheme of arrangement has been duly approved by the National Stock Exchange and the Bombay Stock Exchange, where the transferor company is

listed. It is also stated that the secured creditors have unanimously approved the scheme. Lastly, it is pointed out that as per the scheme of arrangement, only the "food division" as defined in the scheme, is being amalgamated with the transferee company and the transferor company will continue to do its principal business as they were doing earlier. The transferee company is a subsidiary of the transferor company. In fact no harm or loss will be caused to the transferor company. De facto there is no loss in value. In view of the aforesaid explanation and the facts of the present case, the objection raised by the Regional Director is rejected.

9. The second objection raised by the Regional Director is with regard to the appointed date; 1st April, 2008. It is pointed out that the transferee company was incorporated on 8th April, 2008 and, therefore, there is contradiction in the scheme of arrangement. It is submitted that the asset i.e. "food division" of the transferor company cannot be transferred to the transferee company on the date when the transferee company was not in existence and had not been incorporated.

10. The aforesaid date is only for the purpose of identifying the assets and liabilities, which form part of the "food division" and for quantification of the value of the food division. Thus, the appointed date is the date which has been mentioned only for the purpose of identification of the assets, which have to be transferred and for valuation purposes. A similar objection was considered by this Court in the case of *Re HCL Ltd., In Re HCL Hewlett-Packard Ltd., In Re*, and it has been observed as under:

16. The first observation is about the "appointed date". This expression is defined in the scheme itself: "The "appointed date" means the commencement of business of the "existing company" on the 1st day July, 1990.

17. This date, Mr. Shroff has explained, has been taken for the identification and quantification of the assets and liabilities of the existing company and the new company consequent upon the proposed spin off. This identification has been done on the basis of the audited balance-sheet of the existing company for the financial year ending June 30, 1990. The "appointed date" is relevant for the purpose of fixation of the share valuation/share exchange rate which HP Co. would offer to the existing shareholders after the bifurcation and spinning off of the divisions as the price is payable per share post-consolidation and reduction. The scheme nowhere seeks transfer artificially of new assets in July, 1990. All the assets which are sought to be transferred to the new company were in fact in existence on the "appointed date". There is, as such, no deeming fiction in so far as the existence of assets is concerned for the purposes of transfer to the new company despite its incorporation only on May 15, 1991. The observation made by the Central Government overlooks the distinction between the "appointed date" and the "effective date" under the scheme. The definition of the latter expression makes clear. It reads thus:

The "effective date" means the later of the date on which all the consents and approvals referred to in Part VI, Clause 9, of this scheme are obtained and/or the date on which the certified copy of the order passed by the Hon'ble High Court at Delhi sanctioning this scheme of arrangement is filed with the Registrar of Companies, Delhi.

18. This provision in the scheme of arrangement is in conformity with the provisions made in the Act as well. The first observation is, therefore, found to be illusory.

11. It is clarified that the transfer of the assets will take effect only from the effective date as defined in the scheme. The transferor company will not be entitled to refund of taxes paid or refile returns under the tax laws. To this extent Clause 3.7 of the Scheme is accordingly modified on the basis of the present order.

12. Learned Counsel for the petitioner has drawn my attention to the order dated 5th August, 2010 passed by the Punjab and Haryana High Court allowing the second motion in the case of transferee company.

13. Another objection raised by the Regional Director is in respect of merger of the authorized share capital and resultant increase in the share capital of the transferee company. A similar objection was raised before the Punjab and Haryana High Court in the case of the transferee company and was rejected relying upon the decision in the case of Motorola India Private Limited 2006(2) PL R 191. It was held that scheme of arrangement as per Sections 391 - 394 represents one window arrangement and all issues relating to the arrangement can be approved by the Company Court. Once the shareholders have resolved to approve the scheme, the procedure prescribed for increasing the authorized share capital stands complied with. However, the transferee company is required to pay the requisite fee to the Registrar of Companies and stamp duty to the State Government as leviable in law. In the case of Ashim Investment Co. Ltd. (2007) 138 Comp. Case 9 (Delhi), I had considered the similar objection and the same was rejected in the following words:

17. I have considered the said objections raised by the Regional Director (NR). Regarding the first objection, I find that the question is covered and settled by a series of judgments of this Court and other High Courts. In the case of Hotline Hot Celdings (P.) Ltd., In re (2005) 127 Comp. Cas. 165 : 57 SCL 367 (Delhi) - it was held that the procedure prescribed under the Act for enhancement of share capital need not be followed as Sections 391-394 are complete code in themselves and a court can sanction reduction or increase in authorised share capital as a part of the scheme itself. In HCL Technologies (Mumbai) Ltd. in C.P. No. 214/2005, dated 28-10-2005, A.K. Sikri, J., has held as under: Observation of the Regional Director is that the authorised share capital of the company can be increased only after following the procedure, prescribed under the relevant provisions of the Companies Act, 1956 and the payment of requisite fee to the

Registrar of Companies and Stamp Duty to the State Government and, therefore, this clause should not be allowed. I do not find any merit in this objection as I have already dealt with this aspect in number of judgments in which I held in a scheme of amalgamation provision can be made for transfer of the authorised share capital of the transferor company to the transferee company (C.P. No. 62/2004, decided on 7-7-2004).

14. In view of the aforesaid position, the third objection raised by the Regional Director is rejected.

15. The petitioner i.e. the transferor company has placed on record copy of the citations, which were published under Rule 80 of the Company Court (Rules) 1959. An affidavit has also been filed that no objection has been received from the general public opposing the scheme of demerger/arrangement. As per the Registry, no objection has been received opposing the scheme of demerger/arrangement. The Regional Director has not stated that any person has approached him opposing the scheme of demerger/arrangement.

16. In view of the above, I allow the present petition and the scheme of arrangement as per the terms of the above order is approved. This order will not be construed as an order granting exemption from payment of stamp duty, if payable. Similarly, the transferor company will be liable to pay fee or charges, if any, payable under the Act, Rules etc.