
(2003) 03 AP CK 0036
In the Andhra Pradesh High Court
Case No : CP No. 47 of 2003

Andhra Bank Housing Finance Limited	APPELLANT
Vs	
Andhra Bank	RESPONDENT

Date of Decision : 27-03-2003

Acts Referred:

Companies Act, 1956 — Section 2(7), 391, 394, 4(1), 4(4)

Citation : (2003) 3 ALD 654 : (2004) 118 CompCas 295 : (2003) 47 SCL 513

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : V.S. Raju, for the Appellant;

Judgement

T. Ch. Surya Rao, J.—The petitioner M/s. Andhra Bank Housing Finance Limited files this application under Sections 391 and 394 of the Companies Act, 1956 ("the Act" for brevity) seeking sanction of the scheme of arrangement for its amalgamation with another.

2. The facts lie in a narrow compass. The petitioner-company was incorporated on 29-4-1991 and its registered office is situate at Basheerbagh, Hyderabad. The Authorized Share Capital of the petitioner-Company is Rs. 50 crores divided into Rs. 5 crores equity shares of Rs. 10/- each. Its issued, subscribed and paid up capital is Rs. 20 crores divided into Rs. 2 crores equity shares of Rs. 10/- each. The petitioner-company which is the transferor company was incorporated with an object of engaging itself in the business of Housing Finance. As can be seen from the Memorandum and Articles of Association of the Company annexed to the petition, the meeting of the Board of Directors of the Company was convened on 23-12-2002 which passed an unanimous resolution in favour of the proposed amalgamation. The Annual Report of the Company for the year 2001-2002 has been annexed to the petition showing the financial status of the company. The effective date on which the proposed amalgamation comes into operation on the scheme being sanctioned by this Court is with effect from 1-4-2002. In an application filed by the petitioner-company in C.A. No. 140 of 2002, the meeting

of the shareholders of the transferor company was dispensed with by an order of this Court dated 18-2-2003. The application filed by the transferor company having been admitted, this Court directed notice to the Regional Director and Official Liquidator inasmuch as the proposed scheme involves dissolution of the transferor company without undergoing the process of winding up. Public notice has also been ordered by means of advertisement in Economic Times and Andhra Jyothi both in English as well as in vernacular language. Accordingly, the publication was effected in both the papers on 3-3-2003. Pursuant to the general publication, no objections whatsoever have been received from any corner. The Official Liquidator attached to this Court filed his report mentioning inter alia that the proposed scheme of arrangement is not prejudicial to the public interest. The Registrar of Companies inter alia in his report mentioned that since the transferee company is a scheduled bank constituted u/s 3 of the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1980 and governed by the Andhra Bank General Regulation Act, 1998 has obtained the permission of the Reserve Bank of India for the proposed scheme of amalgamation and that since the transferee is not a company registered under the Act, no separate petition has been filed by the transferee company. Ultimately he requested the Court to pass appropriate orders as deemed fit.

3. The scheme of amalgamation has been annexed to the petition as annexure (A5). Inter alia in the scheme it is stated that on the scheme being sanctioned by this Court all debts, term deposits, borrowings, interest accrued, other duties, liabilities, undertakings and obligations of the transferor company without any further act, instrument or deed be and stand transferred to and vested in the transferee company so as to become the liabilities of the transferee company. It is further provided in the scheme that all suits, actions, legal and other proceedings initiated by or against the transferor company on or before the appointed date shall be transferred in the name of the transferee company and shall be continued and be enforced by or against the transferee company. The scheme further postulates that the employees of the transferor company on the appointed date shall become the employees solely of the transferee company without any break or interruption in service and on the same service conditions. The scheme further postulates that from the very effective date the transferor company shall stand dissolved without going through the process of winding up and no shares or consideration shall be issued/paid by the transferee company to the members of the transferor company inasmuch as the transferor company is a 100% subsidiary of the transferee company. The meeting of the secured creditors has not been convened inasmuch as they filed the affidavits giving consent to the proposed scheme of arrangement.

4. Having regard to the above factual matrix it is obvious that the present application has been filed only by the transferor company for the sanction of the scheme of arrangement for amalgamation with another. The other being the Andhra Bank which is a body corporate, the transferor company is 100% subsidiary of the body corporate. Evidently, no application has been filed by the

Andhra Bank either to appoint a Chairman for the purpose of convening the meeting of its shareholders or to dispense with such meeting. It has also not filed any application for the sanction of the scheme either before this Court or before another Court having the necessary territorial jurisdiction. Since the Andhra Bank with which the transferor company seeks to amalgamate is a body corporate and since it has not filed any such similar application for the sanction of the scheme, having regard to the counter filed by the Registrar of Companies that the Andhra Bank is not a company registered under the Act, can there be an amalgamations of the transferor company with a body corporate is the first question. The next question that arises for determination is as to whether a similar such application seeking sanction of the scheme of an amalgamation need be filed by the Body Corporate.

5. It is appropriate, therefore, to refer to Section 394 of the Act at the first instance. Section 394 reads as under:

"Provisions for facilitating reconstruction and amalgamation of companies :

(1) Where an application is made to the Court u/s 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court-

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company");

the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to

secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest;

Provided further that no order for the dissolution of any transferor company under Clause (iv) shall be made by the Court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within (thirty) days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to (five hundred) rupees.

(4) In this section-

(a) "property" includes property, rights and powers of every description; and liabilities includes duties of every description; and

(b) "transferee company" does not include any company other than a company within the meaning of this Act; but "transferor company" includes anybody corporate, whether a company within the meaning of this Act or not".

6. A perusal of the said provision shows that if it is shown to the Court that an arrangement has been proposed for the amalgamation of any two or more companies, the Court having regard to the provisions contained in Section 391 of the Act and the procedure envisaged thereunder and the proviso incorporated u/s 394, Sub-section (1) is satisfied that the proposed arrangement for amalgamation is not in any manner prejudicial to the interests of its members or to public interest shall sanction the scheme. It is obvious, therefore, that the section requires the sanction of the scheme for amalgamation of two companies. In the instant case, the transferor company is a company having been registered

duly under the Provisions of the Act. Admittedly it is 100% subsidiary of Andhra Bank which is the holding company. Andhra Bank is a body corporate, as it is obvious from Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980. The expression Body Corporate has also been defined under the Companies Act in Section 2(7). It is an inclusive definition which includes the company incorporated outside India which includes any other Body Corporate other than which the Central Government may, by notification in the Official Gazette specifies in regard thereto. Either under the definition enjoined under the acquisition Act or under the definition given u/s 2(7) of the Companies Act, it is obvious that Andhra Bank, which is a holding company is a Body Corporate.

7. Sub-section (4) of Section 394 of the Act defines what is "property" and what is "transferee company" and "transferor company" for the purpose of that section in Clauses (a) and (b). Clause (b) of Sub-section (4) of Section 394 is extracted hereinabove.

8. It is apparent from a perusal of the said provision that the transferee company shall invariably be a company within the meaning of the Act. However, the transferor company includes a "body corporate" regardless of the fact that the said "body corporate" is a company within the meaning of the Act or not. Therefore, for the purpose of Section 394 of the Act, the transferee company does not include any company other than a company within the meaning of the Act. The word "company" has been defined in Section 3 of the Act. That means a company which has been registered under the Act. However, the expressions "holding company" and "subsidiary" have been defined u/s 4 of the Act. Therefore, it is appropriate here to consider Section 4 of the Act which reads as under:

SECTION 4 OF THE COMPANIES ACT:

"Meaning of "holding company" and "subsidiary".

4. (1) For the purposes of this Act, a company shall, subject to the provisions of Sub-section (3), be deemed to be a subsidiary of another if, but only if,--

(a) that other controls the composition of its Board of directors; or

(b) that other-

(i) where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;

(ii) where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or

(c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

Illustration

Company B is a subsidiary of Company A, and Company C is a subsidiary of Company B. Company C is a subsidiary of Company A, by virtue of Clause (c) above. If Company D is a subsidiary of Company C, Company D will be a subsidiary of Company B and consequently also of Company A, by virtue of Clause (c) above, and so on.

(2) For the purposes of Sub-section (1), the composition of a company's Board of directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other person, can appoint or remove the holders of all or a majority of the directorships; but for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say-

(a) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power as aforesaid;

(b) that a person's appointment thereto follows necessarily from his appointment as director (managing agent, secretaries and treasurers), or manager of, or to any other office or employment in, that other company; or

(c) (that the directorship is held by an individual nominated by that other company or a subsidiary thereof.)

(3) In determining whether one company is a subsidiary of another-

(a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to the provisions of Clauses (c) and (d), any shares held or power exercisable-

(i) by any person as a nominee for that other company (except where the other is concerned only in a fiduciary capacity); or

(ii) by, or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity;

shall be treated as held or exercisable by that other company;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded;

(d) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary (not being held or exercisable as mentioned in Clause (c)) shall be treated as not held or exercisable by that other, if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and

the shares are held or the power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) For the purposes of this Act, a company shall be deemed to be the holding company of another if, but only if, that other is its subsidiary.

(5) In this section, the expression "company" includes anybody corporate, and the expression "equity share capital" has the same meaning as in Sub-section (2) of Section 85.

(6) In the case of a body corporate which is incorporated in a country outside India, a subsidiary or holding company of the body corporate under the law of such country shall be deemed to be a subsidiary or holding company of the body corporate within the meaning and for the purposes of this Act also, whether the requirements of this section are fulfilled or not.

(7) A private company, being a subsidiary of a body corporate incorporated outside India, which, if incorporated in India, would be a public company within the meaning of this Act, shall be deemed for the purposes of this Act to be a subsidiary of a public company if the entire share capital in that private company is not held by that body corporate whether alone or together with one or more other bodies corporate incorporated outside India."

9. Sub-section (1) of Section 4 defines what is a subsidiary company. There is no difficulty here in this case inasmuch as admittedly the transferor company is subsidiary company. Sub-sections (4) and (5) of Section 4 are germane in the context for consideration. A perusal of both the provisions shows that a company becomes holding company of another only if that other company is its subsidiary, inasmuch as the transferor company herein is the subsidiary, Andhra Bank becomes holding company by virtue of Sub-section (4) of Section 4. For the purpose of the said section, the expression "company" includes anybody corporate as per Sub-section (5) thereof. Therefore, Andhra Bank which is a body corporate becomes holding company inasmuch as the transferor company is its 100% subsidiary. It comes within the realm of expression "company" although it is a body corporate for that purpose. However, as discussed hereinabove, the situation seems to be otherwise on an apparent consideration of Sub-section (4) of Section 394 of the Act inasmuch as the transferee company does not include any company other than a company within the meaning of the Act and the transferor company can include a body corporate. Sub-section (4) of Section 394 and Section 4 of the Act shall have to be read together harmoniously so as to give effect to the object and scheme of the Act. What is required under Clause (b) of Sub-section (4) of Section 394 is the transferee company shall be a company within the meaning of the Act, but the transferor company can be a body corporate, whether that body corporate is a company or not within the meaning of the Act. When we read both the provisions together, there appears to be no difficulty inasmuch as the transferee company which is a holding company

which includes a body corporate is a company for the purpose of the Act. In my considered view, it seems that the transferee company also includes a body corporate but that body corporate shall be a company within the meaning of the expression "company" under the Act. There also the transferee company includes a body corporate but that body corporate need not necessarily be a company within meaning of the expression "company" under the Act.

10. Here is a case where the transferor company is obviously 100% subsidiary of the Andhra Bank, a body corporate. Therefore, Andhra Bank becomes the holding company qua its subsidiary as can be seen from Sub-section (4) of Section 4 of the Act. For that purpose, the expression "company" includes a body corporate as per Sub-section (5) thereof. Therefore, on an analysis Andhra Bank which is a body corporate is the holding company qua its subsidiary transferor company here. Although it is a body corporate it comes within the realm of the expression "company" as is obvious from Sub-section (5) of Section 4. Andhra Bank for the purpose of this Act when an application is filed seeking amalgamation of the subsidiary with its holding company, although Andhra Bank is a body corporate, comes within realm of expression "company".

11. Turning to the next question whether the holding company shall also file a petition seeking sanction of the scheme, there is nothing in Section 394 of the Act which shows that an application is got to be made by the transferor company and transferee company separately in the first instance as what is required to be seen from that section is whether the proposed scheme is in any manner prejudicial to the interests of the members of the company or to public interest. The scheme is the same for both the transferor company and transferee company. The legal position seems to be no more *res Integra*,

12. The learned Counsel appearing for petitioner-company seeks to place reliance upon a Judgment of the Bombay High Court in *Mahaamba Investments Ltd v. IDI Limited* (2001) 105 CC 16, a Judgment of the Delhi High Court in the Matter of *Sharat Hardware Industries Private Ltd.* (1978) 48 CC 23, a Judgment of the Bombay High Court in *Bank of India Ltd. v. Ahmedabad Manufacturing and Calico Printing Co. Ltd.* 1972 42 CC 211; and unreported Judgments of the Bombay High Court in the Matter of *M/s. Voltas International Limited* and In The Matter of *Scheme of Amalgamation of Clique Holdings Private Limited*.

13. In the first case, a learned single Judgment of the Bombay High Court was of the view that where the proposed amalgamation is in respect of holding and subsidiary companies and the subsidiary company is sought to be merged with the holding company and when the members of the creditors of the transferee company are not affected, the petition by transferee company is not necessary.

14. In the second case, the Delhi High Court was of the view that having regard to the fact that the transferee company had in a meeting of its shareholders agreed to and approved the scheme, it was not necessary for the transferee company to obtain approval of its creditors or subsequent sanction of the Court

having jurisdiction over its place of registration for the scheme and the scheme did not affect the members or creditors of the transferee company.

15. In the third case, a learned single Judge of the Bombay High Court has considered the crucial point as to whether both the companies should apply for sanction of the Court. On that crucial point it was held thus:

"Having regard to the fact that Sections 391 and 394 of the Companies Act make no distinction between a transferor company and a transferee company, the test for determining whether the provisions of those sections are attracted or not must be the same, both in the case of the transferor company as well as in the case of the transferee company, viz., whether as between the company and its members or creditors, the proposed arrangement or compromise affects the rights of those members or creditors, or any class of them. In the case of the transfer of its undertaking, property and liabilities by one company to another, the transaction may or may not affect the rights of its members or creditors. If it does affect the rights of its members or creditors, either because it involved a reorganisation of its share capital or otherwise, it would certainly fall within the term "agreement", and, in that event, proceedings by the transferee company in the appropriate Court under Sections 391 and 394 would be necessary. It must follow that if a scheme by way of transfer or an undertaking does not affect the rights of the members or creditors of the transferee company, as between themselves and the company, or does not involve a reorganisation of the share capital of the transferee company, no application by the transferee company under Sections 391 or 394 would be necessary."

Having regard to the facts in that case where the transferee company would be required to issue a new type of equity shares not issued by then, viz. 8% convertible bonds of Rs. 100/- and 8% redeemable bonds of Rs. 116/-, the learned Judge was of the view that the scheme of transfer of the undertaking, properties and liability to the transferor company would necessarily affect the rights as between the transferee company and its members and creditors and in that view of the matter, the learned Judge sanctioned the scheme subject, however, to the sanction of the same from the appropriate High Courts by both the transferor company and the transferee company. It is obvious, therefore, that so long as the scheme does not affect the rights of the members of the transferee company or its creditors and it does not involve a reorganisation of the share capital of the transferee company, there is no need or necessity to file an application by the transferee company u/s 391 or 394 of the Act.

16. In the fourth judgment, placing reliance upon the first judgment referred to supra of the Bombay High Court, it was held that since the transferor company is 100% subsidiary of the transferee company, there was no need to file a separate petition by the transferee company.

17. As regards the last judgment, it was a case of subsidiary and holding companies.

18. A consistent view has been taken by the Bombay High Court, that if the scheme of amalgamation is in between the subsidiary and holding companies, holding company need not file a separate application. In the first instance, holding company, namely, Andhra Bank obtained the necessary permission from the Reserve Bank of India as it is governed by the provisions of Banking Companies Regulation Act, 1949. The proposed scheme of amalgamation is not in any manner prejudicial to the members of either the subsidiary or holding companies or prejudicial to public interest. It does not affect the rights of the members of the transferee company or its creditors. The scheme to be sanctioned is the self-same scheme either for the transferor company or for the transferee company. The subsidiary company here is the 100% subsidiary of the Andhra Bank. For the above reasons, in my considered view, there is nothing to file a separate application by the holding company seeking sanction of the scheme.

19. For the foregoing reasons, I see no legal impediment for according necessary sanction for the scheme of amalgamation between a subsidiary company and the holding company and the petition is, therefore, ordered.

20. The certified copy of this order shall be filed before the Registrar of the Companies within 30 days from the date of receipt of the same. The order shall be drafted in Form 42.