(2009) 08 BOM CK 0204

In the Bombay High Court

Case No : Appeal (L.G.) No''s. 463 and 468 of 2009 in C.P. No. 296 of 2009 in C.A. No. 288 of 2009

Anup Kumar Sheth APPELLANT

Vs

Reliance Industries Ltd. and Another RESPONDENT

Date of Decision : 03-08-2009

Acts Referred:

Companies Act, 1913 — Section 153(2)
Companies Act, 1956 — Section 391, 394

Citation : (2010) 154 CompCas 278

Hon'ble Judges : Bilal Nazki, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Devanshu Desai, in Appeal L.G. No. 463 of 2009, for the Appellant; I.M. Chagla and Janak Dwarkadas, Virag Tulzapurkar and Tapan Deshpande, instructed by Amarchand Mangaldas and S.A Shroff and Co., for the Respondent

Final Decision : Dismissed

Judgement

Bilal Nazki, J.—Company Petition No. 296 of 2009 connected with Company Application No. 288 of 2009 has been decided by the learned judge by an order dated June 29, 2009 (Reliance Industries Ltd., In re [2009] 151 Comp Cas 124 (Bom)). Aggrieved by the order, these appeals have been filed. With the consent of learned Counsel for the parties, these appeals have been heard at the admission stage, and are being disposed of.

2. The company petition was filed seeking sanction of amalgamation of Reliance Petroleum Ltd. (transferor company) with Reliance Industries Ltd. (transferee company).

3. The facts which are relevant for the purposes of these appeals, are that the Reliance Industries Ltd., moved the petition before the court to obtain sanction of the scheme of amalgamation of Reliance Petroleum Ltd., with Reliance Industries Ltd. The board of directors of the petitioner-company, on March 2, 2009, had approved the scheme. The scheme had received approval from the Bombay

Stock Exchange and National Stock Exchange on March 2, 2009. On the basis of such approval, the company filed Company Application No. 288 of 2009, seeking direction to convene meetings of its equity shareholders, secured creditors (including debenture holders) and unsecured creditors to seek their approval to the scheme. That application had been filed on March 3, 2009, and the court, on March 6, 2009, directed the petitioner-company to convene requisite meetings on April 4, 2009. Separate meetings of the equity shareholders, secured creditors and unsecured creditors of the petitioner-company were convened and held on April 4, 2009. In the meeting of the equity shareholders, 5,813 equity shareholders holding 106,76,27,438 equity shares attended personally or by proxy or by authorised representatives. Out of these, 5,642 equity shareholders holding in aggregate 106,75,59,806 equity shares constituting 98.861 per cent. in number and representing 99.9998 per cent. in holding equity shares voted in favour of the scheme. On the other hand, 65 equity shareholders holding in aggregate 2,143 equity shares constituting 1.139 per cent. in number and representing 0.0002 per cent. in holding of the equity shares, present in person or by proxy, voted against the scheme. As a result, the scheme was approved by overwhelming majority of the equity shareholders present and voting. The meeting of the secured creditors was attended by 39 secured creditors. Out of them, 38 secured creditors having aggregate outstanding value of Rs. 5,878 crores and constituting 100 per cent. in number representing 100 per cent. in value voted in favour of the scheme. No secured creditors present in person or by proxy voted against the scheme. One vote of a secured creditor having aggregate outstanding value of Rs. 12 crores was declared invalid, and the scheme was approved unanimously by the secured creditors. In the meeting of unsecured creditors, 994 unsecured creditors attended the said meeting. Out of them, 801 unsecured creditors having aggregate outstanding value of Rs. 566.76 crores and constituting 100 per cent. in number representing 100 per cent. in value voted in favour of the scheme. No unsecured creditors voted against the scheme, whereas votes of 193 unsecured creditors having outstanding value of Rs. 13.37 crores were declared invalid, and the scheme was approved unanimously by the unsecured creditors.

4. After the scheme was duly approved by overwhelming majority of the equity shareholders and unanimously by the secured and unsecured creditors, the petition was moved before the court by the transferee company for sanction of the scheme of amalgamation u/s 391/394 of the Companies Act on April 6, 2009. The court ordered publication of notice, and three objectors came to oppose the scheme. One of them was Anup Kumar Seth, who filed his affidavit on May 6, 2009. Jayendra M. Shah filed his affidavit opposing the scheme on May 6, 2009. Shailesh Mehta filed his affidavit on May 7, 2009. Some objectors filed revised affidavit also. The learned company judge noted that on June 26, 2009, the Company Registrar had drawn his attention to the fact that one more objection had been received by the registry by post from one Rasiklal S. Mardia. The court had not taken cognisance of this objection, as it had been brought to the notice

of the court after the conclusion of the hearing in the petition.

5. The objections, which were taken before the learned company judge, have been repeated before this Court in these appeals, and the only objection raised was that there was undue haste, as it was contended by learned senior counsel for the appellants that the board meeting was held on February 27, 2009, in which a decision was taken to amalgamate the two companies. It was Friday. Within two days, i.e., by Monday morning on March 2, 2009, the report of the valuation was ready. The fairness report also was ready on the same day, obviously before 10.15 a.m., as the Board met again at 10.15 a.m., on March 2, 2009. The whole thing was completed between February 27 to March 2, 2009. In between, there was only weekend days of Saturday and Sunday. Learned Counsel has submitted that there was undue haste for reasons beyond comprehension. He has also submitted that valuation could not have been done within two days, which were general off days ,and even if the valuation was done in those two days, the fairness report could not have been obtained, had the authors of the report applied their mind as a short period of time was available to them. He has further contended that in any event, the persons, who valued, were not the persons who gave the fairness report. Therefore, the record should have shown that both the valuers and those who gave the fairness report, had applied their mind. Learned Counsel for the respondents, on the other hand, has submitted that at no point of time any allegations were levelled against the companies which evaluated or prepared the fairness report. Both the companies are highly reputed companies. These objections were dealt with by the learned company court in paragraph 13 of the judgment as follows (page 137 of 151 Comp Cas):

The question is : whether the experts have given their opinion without analysing the relevant matter. Looking at the report, it is not possible to come to that conclusion. The report refers to aspects which according to the experts would require consideration for arriving at decision regarding appropriateness of the share swap ratio. It is not the case of the objectors that the said considerations were extraneous as such. Nor the objectors are in a position to point out as to how the opinion recorded by the experts regarding swap ratio can be termed as absurd or manifestly wrong. Suffice it to observe that the reports given by the experts which were the basis to accord approval by the board of directors cannot be said to suffer from the vice of non-application of mind. The fact that the entire process was completed in short spell, may at best indicate that the experts gave their opinion on urgent basis, We cannot be oblivious to the fact that with the development in computer technology, the working of calculation can be programmed. If the basic figures are fed in the computer, the calculations howsoever complicated would become readily available. Moreover, even due to the development in communication technology on account of fax, e-mail, video conferencing, etc., communication is instant. Significantly, the offices of the petitioner-company as well as of the experts is located in Mumbai. Suffice it to observe that the experts gave their opinion on urgent basis presumably because of the insistence of the petitioner-company, who in turn was keen to speed up the entire merger process. The fairness of the scheme cannot be doubted with reference to those facts. It is not the case of the objectors that the experts'' opinion (reports) were not placed before the board of directors when the decision was taken by the board of directors, albeit at 10.15 a.m. the same day. In other words, the fact that on the same day, the board of directors proceeded to give approval to the proposed scheme does not per se mean that the decision of the board of directors suffers from non-application of mind.

6. In any case, both the reports are opinion of experts, and in the absence of any material contradicting the conclusions reached with respect to valuation and fairness, it will be difficult for this Court to come to a finding that the conclusions drawn by those experts were absurd. We are conscious of the fact that the companies maintain their accounts meticulously and up-to-date ,and with computerisation in place, it is a matter of minutes when one can get the necessary data ready for the purpose of valuation. Now, it depends upon the skill, expertise and efficiency of a particular company dealing with such matters as to in what time they would be able to do so. The petitioner has not even shown to the court as to what was the market value of the shares at the relevant point of time, as that would give us some idea as to whether the valuation was fair. The methods employed by the valuers were (1) net asset value method, (2) manageable profit basis method, (3) history and current market price method and (4) discounted cash flow method. It is not disputed that these methods were the methods which were standard methods, but what is agitated before this Court by learned Counsel is that after applying these methods, the valuers have not mentioned the details before them to come to their conclusion while applying these methods. We do not think, as Mr. Chagla points out, that this is an area in which we should allow ourselves to be drawn into because it is a highly technical area, and we may not be able to come to a conclusion on our own.

7. Learned counsel for the petitioner has submitted that these reports hide more than they disclose in their conclusion. He has pointed out certain paragraphs from the report. "For instance, we have computed the net asset value of the equity shares of RIL and equity shares of RPL. We have used the provisional balance-sheet as at December 31, 2008, for RIL and provisional balance-sheet as at December 31, 2008, for RPL and made suitable adjustments as deemed appropriate."

8. Learned counsel has submitted that what were the suitable adjustments which were deemed appropriate by the assessors have not been disclosed. We believe that these adjustments must have been made on the basis of standard practices. Also, the petitioner has not been able to show that these adjustments were inappropriate in any way. In any case, the balance-sheets of both the companies as at December 31, 2008, would be available even to the petitioner. Similarly, some other paragraphs have been pointed out, but we are of the firm view that we cannot take a view different from the view of the experts.

9. Learned counsel appearing on the other side has submitted that the shareholders, who have challenged the amalgamation, are less than even 1 per cent., and more than 99 per cent. of shareholders have accepted the amalgamation. He has also submitted that the petitioner has not even shown to which company the share exchange ratio is unfair, as the appellant, Anup Kumar Sheth, has claimed in his affidavit that he holds shares in both companies. In fact, in paragraph 1 of his affidavit, he has said that he was holding 40 equity shares in the petitioner-company and 100 equity shares in Reliance Petroleum Ltd. If the exchange ratio was unfair to Reliance Industries, it would have been more than fair to the other company. He has also drawn our attention to various judgments of the Supreme Court to canvass that the scope of inquiry in this Court is limited.

10. One of the judgments is in the case of German Remedies Ltd., In re [2003] 4 Comp. LJ 89 : [2005] 125 Comp Cas 615 (Bom). In this judgment, the Bombay High Court held (page 622 of 125 Comp Cas):

It is not for the court to sit in appeal over the valued judgment of the equity shareholders who are supposed to be commercial men. Commercial men who know their common benefit and interests underlying the proposed scheme, with open eyes, have okayed the swap ratio of 7 to 4 as above by an overwhelming majority of 90 per cent. in numbers and 99 per cent. in value of the members present and voting. The limited jurisdiction of the court is only to see whether the ratio is so wrong or the error is so gross as would make the scheme unfair or unjust or oppressive to the minority of the members or any class of them.

11. Similarly, reliance was placed on Kamala Sugar Mills Ltd., In re [1984] 55 Comp Cas 308 (Mad).

12. Learned senior counsel for the petitioner has, however, relied on a judgment of this Court in J.S. Davar and Another Vs. Shankar Vishnu Marathe and Others, , the relevant portion whereof reads thus (page 461):

(22) On a review of these authorities and from the provisions in Section 153(2) of the Indian Companies Act, 1913, it seems to us clear that the consent of the majority of creditors or shareholders to a scheme does not conclude the issue whether the scheme should be sanctioned. The jurisdiction of the court which is called upon to sanction a scheme transcends the mere consideration that a majority of those affected by the scheme is willing to submit to the scheme. The creditors of a company may agree to accept a fraction of the amount due to them from the company and yet, on considerations of more lasting importance, like public or commercial morality, the court may refuse to accept the verdict of the majority. It may also refuse to accept the scheme on the ground that it is not reasonable or that it is not feasible or that there is no chance that it will yield to a smooth and satisfactory execution. By ''reasonable'' is generally meant that the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of the class which they represent. The court will also not sanction

the scheme if the facts which would have influenced decision of the majority were not known or disclosed to the majority, or if the sponsors of the scheme have misrepresented the true position of the company. Finally, if the acceptance of the scheme would lead to the stifling of an inquiry into the conduct of the delinquent directors, the court would be slow to give its sanction to the scheme. Considerations such as those mentioned above must be taken into account by a court before a scheme is sanctioned but in the very nature of things, it is not possible to enumerate exhaustively the circumstances which a court is entitled to take into consideration.

13. It is true that this Court, in its judgment, held that (page 461) : "the jurisdiction of the court which is called upon to sanction a scheme transcends the mere consideration that a majority of those affected by the scheme is willing to submit to the scheme". It laid down tests for rejecting a scheme which has the support of the majority. None of the grounds exists in the present case which have been laid down as grounds for rejecting a scheme in this judgment.

14. Learned senior counsel has also relied on Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., . The Supreme Court held in paragraph 39 (page 835 of 87 Comp Cas):

It was submitted that the exchange ratio of equity shareholders so far as the transferee company is concerned works very unfairly and unreasonably to them. As per the proposed scheme five equity shares of the transferor company are to be exchanged for two equity shares of the transferee company. So far as this contention is concerned it has to be kept in view that before formulating the proposed scheme of compromise and amalgamation an expert opinion was obtained by the respondent-company as well as the transferor company, namely, MFL on whose board of directors, the appellant himself was a member. M/s. C. C. Chokshi and Co., a reputed firm of chartered accountants, having considered all the relevant aspects suggested the aforesaid exchange ratio keeping in view the valuation of shares of respective companies. It must at once be stated that valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy.

15. It was also contended that the learned company judge had refused to entertain the matter which was brought to his notice before the matter was decided. This was by one Rasiklal S. Mardia, who has also filed Appeal (Lodging) No. 463 of 2009, which was also called, and learned Counsel appearing for him was also heard. We have seen the letter, which was received. It was not, as a matter of fact, an application. It was a letter to the learned Chief Justice of High Court of Bombay, and it stated : "Please find enclosed herewith the copy of my letter of even date addressed to the hon''ble Chief Justice of Gujarat High Court. The contents of the letter are self-explanatory and I do not repeat the same for the sake of brevity". Thereafter, it stated : "From the reproduced news report ,I found that Reliance Industries Ltd., has also filed the amalgamation petition before the hon''ble Bombay High Court". This letter could not be treated as a

response to the notice issued by the learned court in the company petition.

16. In this view of the matter, we do not find merit in the appeals, which are accordingly dismissed.

17. At this stage, a prayer was made for continuing the status quo. For the reason that the two courts have held the amalgamation to be perfect, we do not think that it will be appropriate to grant prayer at this stage.

