
(2011) 03 DEL CK 0411

In the Delhi High Court

Case No : Company Petition No. 324 of 2009

Bharti Infratel Limited

APPELLANT

Vs

Bharti Infratel Ventures Limited

RESPONDENT

Date of Decision : 29-03-2011

Acts Referred:

Companies Act, 1956 — Section 235, 236, 237, 238, 239

Citation : (2011) 2 CompLJ 400

Hon'ble Judges : Sudershan Kumar Misra, J

Bench : Single Bench

Advocate : Nikhil Bhalla, for the Appellant; Parag P. Tripathi, A.S.G., Nitin Mehta and Anuj Bhandari for Income Tax Department, for the Respondent

Final Decision : Allowed

Judgement

Sudershan Kumar Misra, J.—This joint petition has been filed under Sections 391 to 394 of the Companies Act, 1956 by the Petitioner companies seeking sanction of the scheme of arrangement between Bharti Infratel Limited (hereinafter referred to as transferor company) and Bharti Infratel Ventures Limited (hereinafter referred to as the transferee company).

2. The registered offices of the transferor and transferee companies are situated at New Delhi, within the jurisdiction of this Court.

3. The transferor company was incorporated under the Companies Act, 1956 on 30 November, 2006 with the Registrar of Companies, NCT of Delhi and Haryana at New Delhi.

4. The transferee company was incorporated under the Companies Act, 1956, on 31 December, 2007 with the Registrar of Companies, NCT of Delhi and Haryana at New Delhi.

5. The authorized share capital of the transferor company, as on 31 March, 2009, was Rs. 60,00,00,000 divided into 6,00,00,000 equity shares of Rs. 10 each. The

issued, subscribed and paid up capital of the company was Rs. 54,05,00,000 divided into 5,40,50,000 equity shares of Rs. 10 each.

6. The authorized share capital of the transferee company, as on 31 March, 2009, was Rs. 50,00,000 divided into 5,00,000 equity shares of Rs. 10 each. The issued, subscribed and paid up capital of the company was Rs. 5,00,000 divided into 50,000 equity shares of Rs. 10 each.

7. Copies of memorandum and articles of association of the transferor and transferee companies have been filed on record. The audited balance sheets, as on 31 March, 2009, of the transferor and transferee companies, along with the report of the auditors, have also been filed.

8. A copy of the scheme of arrangement has been placed on record and the salient features of the scheme have been incorporated and detailed in the petition and the accompanying affidavits. It is submitted that the transferee company is a wholly owned subsidiary of the transferor company and the scheme proposes that the telecom infrastructure undertaking of the transferor company be demerged/transferred and be vested in the transferee company. It is submitted by the Petitioner companies that to evolve a structure for more effective participation on the Project MOST (Mobile Operators' Shared Towers), it is considered appropriate to consolidate the telecom infrastructure undertaking, in a distinct company and, thereby, create distinct corporate identity for carrying on the business of providing telecom infrastructure. It is claimed that the scheme of arrangement would benefit the respective companies and other stakeholders of respective companies to reduce set-up and operating costs resulting in cost efficiency coupled with a greater financial flexibility; to improve quality of services to its customers by establishing highest service standards through operational agreements; and to increase speed of roll-out, to increase efficiency and to improve sharing of infrastructure.

9. So far as the share exchange ratio is concerned, the scheme provides that the transferee company is a wholly owned subsidiary of the transferor company. It is further provided that the scheme is intended to restructure, within the group of companies controlled by the transferor company, the holding of the passive infrastructure assets in a more efficient manner consistent with the diverse needs of business. Hence the transferee company shall not be required to issue any shares or pay any consideration to the transferor company or to its shareholders.

10. It has been submitted by the Petitioners that no proceedings under Sections 235 to 251 of the Companies Act, 1956, are pending against the Petitioner companies.

11. The boards of directors of the transferor company and the transferee company in their separate meetings held on 20 January, 2009, and 27 April, 2009, respectively, have unanimously approved the proposed scheme of arrangement. Copies of the resolutions passed at the meetings of the board of

directors of the transferor and transferee companies have been placed on record.

12. The Petitioner companies had earlier filed CA (M) No. 122 of 2009 seeking directions of this Court to dispense with the requirement of convening the meetings of the equity shareholders, secured and unsecured creditors of the transferor company and equity shareholders and unsecured creditors of the transferee company, which are statutorily required for sanction of the scheme of arrangement. Vide order dated 20 July, 2009, this Court allowed the application and dispensed with the requirement of convening and holding the meetings of the equity shareholders, secured and unsecured creditors of the transferor company and equity shareholders and unsecured creditors of the transferee company to consider and, if thought fit, approve, with or without modification, the proposed scheme of arrangement. There is no secured creditor of the transferee company.

13. The Petitioner companies have thereafter filed the present petition seeking sanction of the scheme of arrangement. Vide order dated 28 July, 2009, notice in the petition was directed to be issued to the Regional Director, Northern Region. Citations were also directed to be published in "Statesman" (English) and "Veer Arjun" (Hindi) in terms of the Companies (Court) Rules, 1959. Affidavit of service has been filed by the Petitioners showing compliance regarding service on the Regional Director, Northern Region, and also regarding publication of citations in the aforesaid newspapers on 6 August, 2009. Copies of the newspaper clippings containing the publications have been filed along with the affidavit of service.

14. In response to the notices issued in the petition, Dr. Navrang Saini, Regional Director, Northern Region, Ministry of Corporate Affairs, has filed his report dated 26 October, 2009. Relying on Clause 4.4.1 of part-IV of the scheme, he has stated that, upon sanction of the scheme of arrangement, all the employees of the transferor company engaged in or in relation to the passive infrastructure assets of the transferor company shall continue to remain the employees of the transferor company without any break or interruption in their services.

15. The Regional Director has further submitted that the individual assets and liabilities and values thereof pertaining to "passive infrastructure assets" of the transferor company proposed to be transferred to the transferee company are not mentioned in the scheme. He has further submitted that since the shareholders and creditors of the companies have approved the scheme of arrangement as such, it should have been part of the scheme so that their details are known to the shareholders and creditors of both the companies.

16. In response to the above objection, the Petitioner companies in their rejoinder stated that the transferee company is 100% subsidiary of the transferor company and that the proposed transfer of the "passive infrastructure assets" is to restructure the holding of assets within the group companies controlled by the transferor company in a more efficient manner consistent with the diverse needs of the business. It has been further submitted that the present

scheme is not a scheme of arrangement with respect to the creditors of the companies and none of the creditors of the transferor company are being transferred to the transferee company by way of present scheme. Further, the "passive infrastructure assets" are being transferred without any consideration and the value of investment of the shareholders of the transferor company shall not deplete in any manner as the value of the investment by the transferor company in the transferee company shall enhance corresponding to the said transfer.

17. In support of the aforesaid submission, learned Counsel placed reliance on the judgment of this Court in *Re Bharti Airtel Ltd. Vs. Bharti Infratel Ltd.*, decided on 26 November, 2007 wherein this Court had rejected the similar objection raised by the Regional Director, Northern Region. In view of the above, the objection raised by the Regional Director does not survive.

18. The Regional Director, while referring to paragraph 3.1.1 of part-III of the scheme regarding the share exchange ratio, has further submitted that the Petitioner -companies have failed to submit a valuation report and that both the transferor and transferee companies may be directed to obtain a valuation report from a recognized firm of chartered accountants.

19. In response to the above objection, the Petitioner companies in their rejoinder have submitted that the transferee company is 100% subsidiary of transferor company and in lieu of the transfer of "passive infrastructure assets", no equity shares are to be issued by the transferee company to the shareholders of the transferor company, and, therefore, there is no need for obtaining the valuation report from a recognized firm of chartered accountants with respect to the scheme. In support of above submission, the Petitioner companies relied on the judgment of this Court in *Re: Bharti Airtel Ltd. Vs. Bharti Infratel Ltd.*, wherein a similar scheme of arrangement involving demerger of passive infrastructure assets into a group company, wherein no consideration were paid nor any shares were issued by the transferee company to the transferor company, was sanctioned. In view of the above, the objection raised by the Regional Director does not survive.

20. The Regional Director, while referring to paragraph 2.3 of part-II of the scheme, has further submitted that the transferee company may be directed to obtain the necessary approvals from the Department of Telecommunications for transfer of licenses after sanction of the scheme by this Court, pursuant to the Department of Telecommunications" letter No. 820-I/2003-LR dated 9 June, 2003, in which the Department of Telecommunications has clarified that the licensee may transfer the licenses with prior written approval of the licensor even in cases of amalgamation under Sections 391/394 of the Companies Act, 1956.

21. In response to the above objection, the Petitioner companies in their rejoinder have submitted that in terms of the Department of Telecommunications" letter No. 820-I/2003-LR dated 9 June, 2003 only post

facto approval is required in case any telecom license agreement between a telecom service provider and Department of Telecommunication is being transferred by way of merger or demerger. It is further submitted that no telecom license agreement between the transferor-company and Department of Telecommunication is being transferred to the transferee company pursuant to this scheme and, that the aforesaid letter has no application to this scheme. In view thereof, the objection raised by the regional director does not survive.

22. The income tax department appeared in the matter and filed their objections to the scheme of arrangement by way of an affidavit of Mr. Raghuveer Singh Dagur, Deputy Commissioner of Income Tax, Circle-2(1), New Delhi, which are akin to the objections filed by them in the matter of Vodafone Essar Ltd. and Others Vs. Vodafone Essar Infrastructure Ltd., viz., Company Petition No. 334/2009. On 22 September, 2010, Mr. Parag P. Tripathi, learned ASG appearing with Mr. Nitin Mehta and Mr. Anuj Bhandari, stated on behalf of the income tax department that they adopt the arguments that have been addressed in Company Petition No. 334 of 2009 and that they do not wish to address any further arguments in this matter.

23. The objections filed on behalf of the income tax department stand dismissed in terms of the orders passed in Company Petition No. 334 of 2009 and no separate orders are required to be passed in this behalf in this petition.

24. No objection has been received to the scheme of arrangement from any other party. Learned Counsel for the Petitioners in his affidavit dated 17 November, 2009, has submitted that they have not received any objection pursuant to citations published on 6 August, 2009.

25. In view of the approval accorded by the equity shareholders, secured and unsecured creditors of the Petitioner companies to the proposed scheme of arrangement, and there being no surviving objection to the same by the Regional Director, Northern Region, there appears to be no impediment to the grant of sanction to the scheme of arrangement. Consequently, sanction is hereby granted to the scheme of arrangement under Sections 391 and 394 of the Companies Act, 1956. The Petitioner companies will comply with the statutory requirements in accordance with law. Certified copy of this order be filed with the Registrar of Companies within five weeks. It is also clarified that this order will not be construed as an order granting exemption from payment of stamp duty as payable in accordance with law. Upon the sanction becoming effective from the appointed date of arrangement, that is 1 April, 2009, the "Passive Infrastructure Assets" of the transferor company shall stand merged in the transferee company.

26. The petition is allowed in the above terms.