

(2002) 06 MAD CK 0168

In the Madras High Court

Case No : Company Petition No's. 19 and 20 of 2002

Covelong Beach Hotels (India) Limited and Oriental Hotels Limited

Date of Decision : 20-06-2002

Acts Referred:

COMPANIES ACT, 1956 — Section 204, 209A, 234, 235, 236

Citation : (2002) 112 CompCas 17

Hon'ble Judges : C. Nagappan, J

Bench : Single Bench

Advocate : A.K. Mylsamy, N. Umasankar and M.T. Arunan, A.C.G.S.C, for the Appellant;

Judgement

1. The petitioner in C.P.No.19 of 2002 Covelong Beach Hotels (India) Limited is the Transferor Company and the petitioner in C.P.No.20 of 2002 Oriental Hotels Limited is the Transferee Company.

2. The Transferor Company was incorporated on 15.12.1972 under the provisions of the Companies Act, 1956 and has its registered office at Chennai. The Authorised Capital of the Transferor Company is Rs.15,00,00,000/-, consisting of 10,000-11% Redeemable Cumulative Preference Shares of Rs.100/- each and Rs.14,90,00,000/- consisting of 1,49,00,000 equity shares of Rs.10/- each. The issued capital is Rs.4,60,11,990/- consisting of 46,01,199 equity shares of Rs.100/- each. The subscribed and paid-up capital of the Company is Rs.4,59,53,240/- consisting of 45,95,324 equity shares of Rs.10/- each fully paid-up. The object of the transferor company is to carry on the business of hotels, restaurants, cafes, taverns, refreshment rooms, boarding and lodging.

3. The Transferee Company was incorporated on 18.09.1970 under the provisions of the Companies Act, 1956 and has its registered office at Chennai. The Authorised Capital of the Transferee Company is Rs.75,00,00,000/-, consisting of 50,50,000 Redeemable Cumulative Preference Shares of Rs.100/- each and 2,45,00,000 equity shares of Rs.10/- each. The issued, subscribed and paid-up capital of the Company is Rs.16,46,93,820/- consisting of 1,64,69,382 equity shares of Rs.10/- each fully paid-up. The object of the transferee company

is to carry on the business of hotels, restaurants, cafes, taverns, beer house, boarding and lodging.

4. The above petitions have been filed for sanction of the proposed scheme of amalgamation of the transferor company with the transferee company. The objects of the transferor company and the transferee company are similar and a scheme of amalgamation was proposed for the transfer of assets and liabilities of the transferor company to the transferee so that the transferee company would be a company with a much larger asset base with strong financials which would enable higher earnings and also enhancement of intrinsic value of shareholding. The salient features of the scheme of amalgamation are that the appointed date is defined to mean 1st April, 2001. The scheme provides for transfer of all the assets and liabilities of the transferor company to the transferee company. The scheme contains usual clauses for continuation of legal proceedings and transfer of contractual obligations of the transferor company to the transferee. The scheme further provides that all employees of the transferor company in service on the effective date shall become the employees of the transferee company on such date without any break or interruption in service and on the same terms and conditions and the transferee company shall not vary the terms and conditions. The scheme provides that in consideration of the transfer and vesting of the undertaking and the liabilities of the transferor company in the transferee company, the transferee company is required to issue and allot to the equity shareholders of the transferor company equity shares of Rs.10/- each in the ratio of 2 (two) equity shares of the face value of Rs.10/- each in the transferee company for every 5 (five) equity shares of the face value of Rs.10/- each in the transferor company.

5. The Board of Directors of the Transferor company and the Transferee company have passed necessary resolutions approving the scheme of amalgamation. The transferor company filed Company Application No.1247 of 2001 and this Court by order, dated 23.11.2001, directed the convening of Extraordinary General Meeting of the shareholders of the transferor company to be held on 27.12.2001 at 10.00 a.m at Kamarajar Memorial Hall and appointed Mr.M.Jaichandran, Advocate and failing him Ms.R.Anitha, Advocate, as Chairman of the meeting. The Transferee company filed Company Application No.1248 of 2001 and this Court directed the convening of Extraordinary General Meeting of the shareholders of the transferee company to be held on 26.12.2001 at 10.00 a.m at Kamarajar Memorial Hall and appointed Mr.M.Jaichandran, Advocate and failing him Ms.R.Anitha, Advocate, as Chairman of the meeting. Accordingly, both the meetings were held and reports were filed by the Chairman.

6. It is seen from the report of the Chairman appointed to hold the meeting of the transferor company that the meeting was attended either personally or by proxy by 296 shareholders of the company entitled together 42,00,685 shares of Rs.10/- each and he has further stated that the scheme of amalgamation was read over and explained and majority of the shareholders approved the scheme

of amalgamation.

7. It is seen from the report of the Chairman appointed to hold the meeting of the transferee company that the meeting was attended either personally or by proxy by 474 shareholders of the company entitled together to 73,09,525 shares of Rs.10/- each and he has further stated that the scheme of amalgamation was read over and explained and majority of the shareholders approved the scheme of amalgamation.

8. One of the shareholders of the transferor company holding 572 equity shares filed objections in C.P.No.19 of 2002 and the very same person, who is also a shareholder in the transferee company holding 250 equity shares, filed objection in C.P.No.20 of 2002 also, objecting to the approval of the scheme of amalgamation of the transferor company with the transferee company. The objections raised by him in both the objections are one and the same and they are as follows.

(a) The proposed share exchange ratio is grossly unfair and unjust to the small shareholders of the transferor company.

(b) Notice for the Extraordinary General Meeting did not explain the effect of the Merger stating the material interests of the Directors, Managing Director and the Companies who control the shareholding of the transferor company and who have nominated the Directors of the Transferor Company and all the materials indicated in Section 393(1)(a) of the Companies Act, 1956 were not placed before the members in the Notice and at the meeting.

(c) The meeting was held with the maximum number of proxies and such proxies were collected by the management in its favour. The decision arrived at the meeting is vitiated by the back door method adopted by the management.

(d) The meeting did not have the relevant material more particularly the information on the effect of the merger on the shareholders' present and future earnings and was based on false promises.

(e) The majority decision cannot be said to bind the dissenting shareholders, inasmuch as the dissenting members undergo financial loss due to merger and the majority gain financially.

(f) The details of material interest is not included in the notice sent by the Chairman. The latest financial position of the company as required u/s 391(2) is not placed before this Court.

(g) The Board of Directors of the Transferor Company contain 10 Directors and nine of them are interested in merger as promoter Director or as nominees of Companies owning in a group upto 83% of the share capital and therefore the Board resolution is vitiated.

(h) The Shareholding Taj Group Companies have not acted bonafide and in good faith and have prevailed upon the employees who hold shares in the company

and got their votes in their favour.

(i) The Scheme as a whole is unjust, unfair and unreasonable from the point of view of prudent man of business.

9. The first and foremost objection raised by the objector Mr.N.Umasankar is that the proposed share exchange ratio is grossly unfair and unjust to the small shareholders of the transferor company. The Objector appeared in person and contended that such swap ratio is grossly unjust and unfair and on coming to know of the merger, he wrote a letter dated 5-11-2001 to the Chairman of M/s.Tata Sons Limited, being the Chairman of the Taj Group of Hotels and the respective Chairman of the Transferor and Transferee Companies, in which he sought them to take remedial measures by making an open offer by the transferee company to all the shareholders other than the Taj Group to purchase the Transferor Company shares held by the small shareholders at a price not less than Rs.100/- per share, being the price paid by the shareholders at the last rights issue in 1996 and his appeal was not heeded to and he received a reply, dated 22.11.2001, from the transferee company informing of their resolve to go ahead with the merger.

10. Mr.A.K.Mylsamy, the learned counsel for the petitioners, in both the petitions, has submitted that the Objector Mr.N.Umasankar attended the Extraordinary General Meeting of the Transferor Company on 27.12.2001 and spoke in the meeting and proposed an amendment to the scheme of amalgamation in the same lines as suggested by him in his letter, dated 5.11.2001 and the shareholders by majority of 86.14% rejected the amendment and thereafter, the Chairman put the scheme of amalgamation in its original form to vote and more than 90% of the shareholders, present in person and by proxy, approved the scheme.

11. It is not in dispute that Mr.N.Umasankar, Objector herein, was given an opportunity to speak to the shareholders of the transferor company in their meeting on 27.12.2001 and he expressed his views before them and proposed the following amendment to the scheme of amalgamation.

"RESOLVED THAT THE Company buy back the equity shares by an open offer from the shareholders other than the Tata/Taj Group Companies, the Reddy Group and the family of Mr.Syed Yusuff, the original promoter of the Company, but so however, including any shareholder who dissents the proposed merger for the reason of unfair and unjust ratio, for cash at a price of Rs.100 per share plus any additional compensation as the Board may deem fit and proper before further proceeding on the scheme of arrangement as proposed by the Board of Directors by Notice dated 24th November, 2001."

After deliberation, the proposed amendment to the scheme of amalgamation was put to vote by the Chairman and out of 303 members, present in person and proxy, 261 members holding 99.62% of the shares voted against the amendment to the scheme and 31 members holding 0.26% of the shares voted for the

amendment. The amendment to the scheme proposed by the Objector herein was defeated by an overwhelming majority of the shareholders. Mr.N.Umasankar has raised the very same objection before this Court and it is relevant to note that he is the only person who has filed objection in this Court against the approval of the scheme and he is not supported by any other shareholder.

12. The learned counsel for the petitioners produced the Valuation Report in which the Chartered Accountants S.B.Billimoria & Co., and N.M.Raiji & Co., who have been appointed as Valuers, had proposed the exchange ratio. The said valuers have applied two well known methods, namely, (a) the yield method and (b) the underlying asset approach. According to them, the market value approach is not used for the calculation of swap ratio as though the transferor is a listed company, its shares are not frequently traded and further Coromandel Hotels Limited is the wholly owned subsidiary of Oriental Hotels Limited and therefore the market value is not available and hence the market value method was not used for Oriental Hotels Limited. The yield method per share has been calculated on the estimate of profit before tax based on the examination of past profits and the average capital employed in the past three years and the yield value per share is determined. Under the asset approach method, the net asset value of the Company was determined and it was divided by the number of shares to determine the asset value per share.

13. It is not in dispute that M/s.S.B.Billimoria & Co. and M/s.N.M.Raiji & Co. (Valuers) are reputed Chartered Accountants. The Objector has stated in his objections that the Chartered Accountants, who have carried out the valuation, are either Directors or Auditors of the Tata-Taj Group Companies and therefore they are not independent Chartered Accountants. The above allegation is vague and general. It is not the case of the Objector that the valuers are the statutory auditors of either the transferor or transferee companies. Imputations of bias cannot lightly be made against the professional chartered accountant who is expected to discharge the duties according to the obligations cast on him by the statute and the well established principles of professional conduct and etiquette. Hence this contention of the Objector is devoid of merit.

14. The learned counsel for the petitioners relied on the decisions of the Apex Court in Hindustan Lever Employees case and Mafatlal Industries case to highlight the jurisdiction of the Court u/s 394 of the Companies Act. The role of the Court and the scope for interference when it is called upon to sanction the compromise or arrangement which includes within its sweep a scheme for amalgamation has been sufficiently laid down by the Supreme Court in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., . His Lordship Majmudar, J, speaking for the Bench, observed as follows.

"However, the further question remains whether the court has jurisdiction like an appellate authority to minutely scrutinize the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes

have approved the scheme as required by section 391, sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the court. The court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently, the company court's jurisdiction to that extent is peripheral and supervisory and not appellate. The court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But, subject to that, how best the game is to be played is left to the players and not to the umpire."

The broad contours of jurisdiction of the court called upon to consider the scheme of amalgamation were spelt out at page 601 in the form of nine propositions as follows (page 819 of 87 Comp Case):

"1.The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by section 391(1)(a) have been held.

2.That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by section 391, sub-section (2).

3.That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of the class.

4.That all necessary material indicated by section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by section 391, sub-section (1).

5.That all the requisite material contemplated by the proviso to sub-section (2) of section 391 of the Act is placed before the court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same.

6.That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

7.That the company court has also to satisfy itself that members or class of

members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirement of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the court there could be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."

These parameters, it was pointed out, are not exhaustive, but only illustrative of the "contours of court's jurisdiction"

Their Lordships of the Supreme Court referred with approval to the observations of the Madras High Court in *Kamala Sugar Mills Ltd., In re* (1984) 55 Comp Cas 308 (headnote):

"Once the exchange ratio of the shares of the transferee-company to be allotted to the shareholders of the transferor-company has been worked out by a recognized firm of chartered accountants who are experts in the field of valuation and if no mistake can be pointed out in the said valuation, it is not for the court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of the two companies or to say that the shareholders in their collective wisdom should not have accepted the said exchange ratio on the ground that it will be detrimental to their interest."

15. In *Hindustan Lever Employees' Union Vs. Hindustan Lever Limited and others*, their Lordships of the Apex Court have laid down as follows.

"Head Note: When in case of amalgamation of Company admittedly more than 95% of the shareholders who are the best Judge of their interest and are better conversant with market trend agreed to the valuation determined it could not be interfered by Court as, certainly, it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The Court is least equipped for such oversights. Nor indeed, is it a function of the Judges in our constitutional scheme. It cannot be said that the internal management, business activity or institutional operation of public bodies can be subjected to inspection by the Court. To do so, is incompetent and improper and, therefore, out of bounds."

While it is not in doubt that the court has to be satisfied that a fair procedure had been adopted and an honest attempt was made to arrive at a fair and reasonable share exchange ratio in the interests of the general body of shareholders and creditors, the court should nevertheless refrain from embarking on an exercise of evaluation on its own to test the correctness of the figures reached by the experts. The court has to take note of the fact that its role in according approval to the scheme of amalgamation u/s 394 is nothing more than a supervisory role.

16. The learned counsel for the petitioners submitted that the transferor company has made a Rights Issue in 1996-97 and at that time the prevailing price of the share was Rs.90/- per share and after 1999, the shares of the transferor company even though listed, were not traded in the market and on the other hand, the shares of the transferee company are being traded continuously in the market and the swap ratio of 2:5 is based upon the valuation reports of the Chartered Accountants which has been approved by overwhelming majority of the shareholders.

17. The valuation of the shares of both the companies has been done by two reputed firms of Chartered Accountants, based on which the swap ratio has been arrived at. Out of 296 shareholders present in person and proxy at the Extraordinary General Meeting of the Transferor Company held on 27.12.2001, 257 shareholders, present in person and proxy, holding 99.62% of shares cast 42,43,817 votes in favour of the scheme and 35 shareholders, present in person and proxy, holding 0.35% of shares cast 15,046 votes against the scheme. It is clear from the above that the scheme was approved by overwhelming majority of shareholders of the Transferor Company. In other words, shareholders in their commercial wisdom have accepted the said exchange ratio after deliberation as noticed earlier. Hence the contention of the objector that the share exchange ratio is grossly unfair and unjust to the small shareholders of the transferor company does not merit acceptance.

18. All other objections under (b) to (i) can be discussed under one head. The Objector has contended that the material indicated in Section 393(1)(a) of the Companies Act was not placed before the members in the Notice and at the meeting. The Transferor Company, in their counter affidavit filed for the objections, have stated that the Statement circulated to the members u/s 393 has set out the relevant information as contemplated with regard to the Scheme of Amalgamation and the shareholding pattern of the Directors in both the Companies have been set out and the balance sheets of both the Transferor and the Transferee Companies set out the financial position as on 31.3.2001 and, therefore, it is not necessary to mention in the statement u/s 393 about the individual holdings of Tata or Reddy group. They have specifically denied the allegation of the Objector that the provisions of Companies Act were not complied with. According to the Chairman, he sent individual notices to all the shareholders by certificate of posting enclosing a copy of the scheme of amalgamation, explanation statement u/s 393 and the proxy form and he has

filed affidavit of service before this Court. The Statement u/s 393 of the Companies Act, sent to the shareholders, sets out in detail the shareholding of the Directors of the Company and it is further stated in it that the copies of various documents, including valuation report, are open for inspection at the Registered Office of the Company. Hence, the contention that the relevant material was not placed before the shareholders is not correct.

19. Mr.N.Umasankar, Objector herein, further contended that the management of the transferor company collected large number of proxies and the general body meeting was held with the maximum number of proxies and hence the decision arrived at the meeting is vitiated. The transferor company denied this allegation in their counter and the learned counsel for the petitioners submitted that the very fact the shareholders present in person and proxy in more number would indicate that most of the shareholders were keen in attending the meeting and participating at the discussion and they have all voted for the scheme. Law permits the shareholders either to be present in person or by proxy in the general body meeting. Hence, the allegation made by the Objector does not stand to scrutiny.

20. The other objection raised by Mr.N.Umasankar is that the Board of Directors of the transferor company are interested in the merger as promoter Director or as nominees of Companies owning in a group upto 83% of share capital and, therefore, the Board resolution is vitiated. The transferor company repudiated this allegation and it has submitted that the Board of Directors of the transferor company consist of 10 Directors, out of which, five Directors were present at the Board Meeting, which considered the Scheme of Amalgamation and those five Directors were not in any way involved or interested in the proceedings and a general disclosure has been made in the records of their interest as contemplated under the Companies Act. They have further denied the allegation that all the Directors of the transferor company are nominees of Taj Group. According to them, the shareholders of the transferor company have appointed its Directors at the General Body Meeting and they are not the nominees of other companies. Hence, the contention of the Objector that the Directors of the transferor company are interested in the merger as promoter Director or as nominees of other companies is not substantiated.

21. The Objector further contended that the transferor company is a profitable company declaring a steady dividend and though the transferee company is also having its profits, it is declining and hence the scheme of merger will be unfair to the shareholders of the transferor company. It is the contention of the transferor company that both the companies have been making profits year after year and the profitability of the transferor company is only 2.96 crores and it is declining year after year and all the relevant factors have been taken into account by the respective Board while approving the scheme of amalgamation. The object of both the Companies is one and the same and it is to carry on the business of hotels, restaurants, cafes, taverns, beer house, boarding and lodging and the

reason for merger is stated as one of creation of a company with much larger asset base and net worth with strong financials and the merger would result in cost reduction and duplication of activities on account of commonality in the business of both the companies. The shareholders of both the companies have approved the scheme in overwhelming majority. The scheme of amalgamation is in the realm of corporate and commercial wisdom of concerned parties and Court cannot sit in judgment over the view of the parties.

22. Lastly, the Objector raised a contention which was not raised in his memorandum of objections. He contended that under the declaration given pertaining to Sections 238 to 251 of the Companies Act, the petitioners have not disclosed the pendency of prosecution proceedings in EOCC No.105 of 2001 on the file of the Additional Chief Metropolitan Magistrate, Economic Offences-I, Egmore, Chennai-8, initiated by the Registrar of Companies against the transferee company and its Directors. It is admitted that the Registrar of Companies has filed a complaint against the transferee company and its Directors for the alleged violation u/s 204 of the Companies Act and the Case in EOCC No.105 of 2001 is pending. It is the contention of the Objector that the transferee company has been accused of having appointed the Indian Hotels Company Limited to an office or place of business or profit for a period of more than five years at a time and the prosecution arose out of an inspection carried out by the Registrar of Companies u/s 209A of the Companies Act and therefore it will fall under the Sections 235 to 251 and the like and hence the declaration made by the petitioners in the petitions that no proceedings or any other proceedings under Sections 235 to 251 of the Companies Act are pending against the petitioner or the transferee company is false one. The petitioners in paragraph 9 of their respective petitions have stated that no investigation or any other proceedings under Sections 235 to 237 of the Companies Act are pending against either of them. The learned counsel for the petitioners submits that there is mistake in mentioning the section number and instead of Section 251 section 237 is wrongly mentioned and seeks for condoning the mistake. It only appears to be a bonafide mistake. u/s 234(6), if the Registrar is of the opinion that the information or explanation furnished by the company discloses an unsatisfactory state of affairs, he shall report in writing to the Central Government. Similarly, u/s 234(7), if the materials placed before the Registrar of Companies disclose that the business of the company is being carried on in fraud of its creditors or for unlawful purpose, he may report in writing to the Central Government. The Central Government u/s 235, having received the report of the Registrar, either under Sub-sections (6) or (7) of Section 234, may appoint an Inspector to investigate the affairs of the company and report thereof. Sections 235 to 251 relate to such investigation of the affairs of the company. It is not the case of the Objector that the Central Government appointed Inspector to investigate into the affairs of the transferee company. Admittedly, it is the Registrar of the companies, who has lodged the complaint in EOCC No.105 of 2001 for alleged violation u/s 204 of the Companies Act and the case is being contested by the

transferee company and its Directors and it is pending. Hence, the contention of the Objector that Sections 235 to 251 and the like mentioned in Section 391(2) shall mean and include the inspection of the Registrar u/s 209A of the Act is unacceptable and deserves to be rejected.

23. The Regional Director of Department of Company Affairs, Chennai, has filed an affidavit stating that the Scheme provides protection to the interest of transferor company upon amalgamation.

24. On a perusal of the record, it appears that the requisite statutory procedure has been complied with. The scheme does not appear to be contrary to any public policy and the scheme, as a whole, is found to be just, fair and reasonable from the point of view of prudent men of business and the scheme has been approved by the overwhelming majority of the shareholders of both the companies and there is no objection by the creditors of transferor company for the amalgamation. The proposed scheme of amalgamation is not violative of any provision of law.

25. Accordingly, the Scheme of Amalgamation as presented for approval is sanctioned. Both the Company Petitions are ordered as prayed for. The transferor company shall be dissolved without winding up on the filing of the report by Official Liquidator. The transferee company is directed to hand-over the Books of Accounts of the transferor company to the Official Liquidator to submit his report. It is open to the petitioner companies to approach this Court for any direction, if any difficulty arises in the implementation of the scheme of amalgamation. The Additional Central Government Standing Counsel is entitled to a fee of Rs.2,500/- in each of the Company Petitions.