

(1996) 03 CAL CK 0039
In the Calcutta High Court
Case No : C.P. No. 419 of 1994

E.I.T.A. India Limited and others

Date of Decision : 20-03-1996

Acts Referred:

Companies Act, 1956 — Section 17, 17(1), 172(3), 39(2), 391

Citation : AIR 1997 Cal 208 : (1997) 1 CALLT 414 : (1996) 2 ILR (Cal) 352

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Judgement

1. This is an application for confirmation of the Scheme of amalgamation of the petitioner Nos. 2 to 7 with the petitioner No. 1, On 28th September, 1994 an order was passed directing separate meeting of the members of the petitioner companies to be held for the purpose of considering and if thought fit approving with or without modification the said scheme of Amalgamation. The said order was made in Form No. 35 under Rule 67 on an ex parte application of the applicants. The meetings were duly held under the Chairmanship of the Chairman appointed by this Court and the scheme was approved by the members of the petitioner companies at their respective meetings unanimously. Thereafter, the application was made u/s 391(2) for confirmation of the said Scheme on the basis of the report filed by the Chairman.

2. This application for confirmation was opposed at the first instance by Narayan Prasad Lohia representing group of shareholders of the Transferee Company. After the matter was heard for two days Learned Counsel on behalf of the said Narayan Prasad Lohia submitted that he has instruction not to oppose the application. His further submission is recorded in the minutes of the order dated 27-2-1996 which is set out hereinbelow:

"The Court: Mr. S. K. Gupta learned advocate on behalf of Mr. Narayan Prasad Lohia and his group submits that talks of settlement is going on between the family members and he expects that amicable settlement will be achieved and good relationship may be established between the members of the family and as such he does not oppose this application.

Mr. Anindya Mitra, learned advocate submits that the company is not aware nor concerned with such settlement between the members of Narayan Prasad Lohia family and the same is not relevant for deciding this matter. He further submits that the company does not admit that any talks of settlement is going on.

This matter stands adjourned till 4th March, 1996 when it will appear at the top of this list."

3. The learned advocate for the Central Government who appeared originally submitted that he had instruction not to oppose/ . the application. Thereafter, the Central Government was represented by another advocate Mr. Susanta Kundu who has made his submissions raising several objections. The main contention of Mr. Kundu, learned advocate for the Central Government is that the Transferee Company does not carry on business in shares as are done by the Transferee Companies. The Transferee company namely, E.I.T.A. India Ltd. carries on business transport mainly. Moreover, the amalgamation clause, namely, Clauses 8-7 in the Memorandum & Articles of Association does not permit the present amalgamation.

4. Transferor Company No. 1 has no amalgamation clause in its Memorandum a Articles of Association, the Transferor Company Nos. 2 and 6 have such a clause in its Memorandum & Articles of Association and the Transferor Company Nos. 3, 4 and 5 have clauses permitting it to enter into partnership and/or any arrangement.

5. The further contention of Mr. Kundu is that the Memorandum being the charter of the company defines the limitations of its power and the company has no power to do any act not authorised expressly or impliedly by its Memorandum and any act so done is ultra vires and incapable of ratification, even if every member of the company assents to it. He has relied upon the following decisions:--

(1) Pacific Coast Coal Mines v. Arleuthnot reported in 1917 AC 607.

(2) Ashlevry Railway Carriage & Iron Company v. Riche reported in (1875) 7 HL 653. Mr. Kundu has further submitted that Section 17 of the Companies Act, 1956 specifically provides for alteration of Memorandum and Section 17(1)(g) of the Act enables a company to alter its Memorandum by inclusion of a clause for amalgamation. This section provides a complete procedure for the same safeguarding the interest of the affected parties. It was previously within the powers of the Company Court but by the Companies (Amendment) Act, 1974 the "Court" has been substituted by "Company Law Board", It has come into force on 1st February, 1975. Therefore, it has been submitted that the present case is governed by the said provision.

6. Mr. Kundu has also submitted that some of the Transferor Companies provide for "arrangement" which is not equivalent to amalgamation.

7. He has also contended that both the Transferor and Transferees Companies

have no fixed assets. It is also his contention that both the Transferee Company and some of the Transferor Companies are having the creditors and they should be informed that the order of amalgamation should be binding upon them. In the present case the creditors were never consulted as no meeting of creditors was held. The further contention of Mr. Kundu is that the share-ratio of 10:1 between the Transferor Companies and the Transferee Company requires scrutiny. The Equity Share of Rs. 10/- each of the Transferee Company has been valued at Rs. 79.09 per Equity Share by M/s. Bhuteria & Co., Chartered Accountants and the said Chartered Accountants has valued the Equity Share of Rs. 10/- each of the Transferor Companies below Rs. 10/-, that is, Rs.9.88, Rs.7.86, Rs.9.89, Rs.9.96, Rs.9.98 and Rs. 9.95 respectively and their earning per share is also different. Mr. Kundu has further submitted that there is no rationale behind the fixation of share-ratio at 10:1. Every case is to be decided on its own merits as the fact would be different in different cases.

8. It has accordingly been submitted by Mr. Kundu that the fixation of share-ratio is unjust and unfair.

9. While considering an application for sanction u/s 391(2) it has to be considered if the statutory requirements have been complied with. While considering the relevant provisions of the Statutes it has to be seen whether meetings have been duly convened and held and if the Scheme has been approved by the requisite majority. It is only when the scheme has been so sanctioned that the petitioners (here the companies) can apply for confirmation of the Scheme under Section 391(2).

10. The Chairman appointed, for the meeting has to perform the following duties:--

- (i) to issue or cause to be issued notices individually to the members;
- (ii) to issue or cause to be issued the advertisements convening the meetings;
- (iii) to preside over the meeting and to submit a report to the Court on the result to the meeting.

The order u/s 391(1) in Form 35 also following the practice of the Court provides that the Notice of the meeting and the Explanatory Statement u/s 393 shall be settled by the Assistant Registrar (Company) of this Court. The said Notice and the Explanatory Statement were settled in the instant case by the said Officer of Court.

11. Individual notices were sent to all the members as directed by the order of Court. The Notices of meetings were also advertised in "The Statesmen" on October 10, 1994 and in "Jansatta" on October 8, 1994 as directed by Court. No shareholder of the transferor companies has complained of non-receipt of Notice of any defect in the Explanatory Statement. Among the members of the Transferee Company only N. P. Lohia has complained of non-receipt of notice, trickiness of the Explanatory Statement. The Notices having been sent to the

members, the non-receipt thereof will not invalidate the proceedings of the meeting vide S. 172(3) of the Companies Act. The Explanatory State ment gives all relevant facts and cannot be said to be tricky. The ratio of Exchange has been stated but the details of the calculation are not required to be given. The fact that the Notice and the Explanatory Statement have been settled by an officer of Court is also a relevant factor and as such no exception can be taken to the same.

12. In this connection judgment and decision of the Supreme Court in the case of Hindustan Lever Employees" Union v. Hindustan Lever Ltd., reported in (1994) 4 Comp.LJ 267 relied upon on behalf of the petitioner may be taken note of. In the aforesaid decision it was held by Supreme Court in paragraph 3 at page 275 of the said judgment as follows:

3. "But what was lost sight of (was) that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company Court does not exercise an appellate jurisdiction. It exercises a jurisdiction founded on fairness. It is not required to interfere only because the figure arrived at by the valuer was not as better as it would have been if another method would have been adopted. What is imperative is that such determination should not have been contrary to law and that it was not unfair for the shareholders of the company which was being merged. The Court's obligation is to be satisfied that valuation was in accordance with law and it was carried out by an independent body. The High Court appears to be correct in its approach that this test was satisfied as even though the chartered accountant who performed this function was a director of TOMCO, but he did so as a member of renowned firm of chartered accountants. His determination was further got checked and approved by two other independent bodies at the instance of shareholders of TOMCO by the High Court and it has been found that the determination did not suffer from infirmity. The Company Court, therefore, did not commit any error in refusing to interfere with it. May be as argued by the Id. counsel for the petitioner that if some other method would have been adopted, probably the determination of valuation could have been a bit more in favour of the shareholders. But since 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 Courts 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. We do not think 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. Nevertheless, the broad parameters of fairness in administration, bona fides in action and the fundamental rules of reasonable management of public business, if breached, will become justifiable. Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, . It is seen

on Backley on Companies Act, 14th Ed. pp. 473 and 474 and Palmer on Company Law, 23rd Ed. Para 79.16)"

12-A. In the instant case there cannot be any dispute that all these formalities under the Statutes have been complied with and the petition has been properly made u/s 391(2) of the Companies Act. It is well-settled that if the statutory formalities have been complied with and the scheme is fair and reasonable and there is no fraud involved then the Court would proceed to give effect to the business of the decision of the shareholders of the company. In other words, unless the Court finds that the scheme is fraudulent or unreasonable the Court would proceed to sanction the scheme. In this connection reference may be made to Palmer's Company Law 24th Edn. para 79.14. If the Court is satisfied that all the statutory formalities have been complied with and the scheme is fair and reasonable and that there is no fraud involved in propounding the Scheme, the petitioners are taken to have discharged their onus and the scheme ought to be sanctioned by the Court. The onus lies heavily on those who oppose the sanction of the scheme to show that the scheme is unfair, unreasonable or fraudulent. In this connection the following decisions relied upon by the learned advocates for the petitioners may be taken note of : in *Re: Hindustan General Electric Corporation Ltd.*, and *In Re: Sussex Brick Co. Ltd.* reported in 1961 (1) Chancery 289. The duty of Court in an application for consideration of an application u/s 391(2) was considered by this Court in the case of *In Re: Hindustan General Electric Corpn. Ltd.* (supra). In the aforesaid decision it was held that the function and duties of the Court in the matter of sanctioning of schemes are well known. Any scheme which is fair and reasonable and made in good faith will be sanctioned if it could reasonably be supposed by sensible people to be for the benefit of each class of the members of creditors concerned. It is also the duty of the Court to see that the resolution were passed by the statutory majority. The majority of the three-fourth must be of persons who were present and who took part in the voting. Mere presence would not be enough. The onus of proving unreasonableness or unfairness about the scheme or of want of good faith is on those who object to the sanction of the scheme. This onus is not discharged by vague and general assertions devoid of any particulars.

In the case of *In re : Sussex brick Co. Ltd.*, reported in 1961 (1) Chancery 289 it was held inter alia, that although it might be possible to find faults in a scheme that would not be sufficient ground to reject it. It was further held that a scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies to the extent of 100 per cent. It is the consistent view of the Courts that no scheme can be said to be fool-proof and it is possible to find faults in a particular scheme but that by itself is not enough to warrant a dismissal of the petition for sanction of the scheme. The Courts have gone further to say that a scheme must be held to be unfair to the meanest intelligence before it can be rejected. It must be affirmatively proved to the satisfaction of the Court that the scheme is unfair before the scheme can be rejected by the Court. It is not

necessary to refer to many cases on this point but reference in this connection may be made to the decision In re: English Scottish & Australian Chartered Bank reported in 1893 (3) Chancery 385.

13. The fact that the transferor and the transferee companies carry on dissimilar business is no ground why the Court should not sanction a Scheme of Amalgamation. In this connection reference may be made to the judgment and decision in the cases In re: P.M.P. Auto Industries Ltd.; In re: Morarji Goculdas Spinning & Wvg. Co. Ltd., In re: S.S. Miranda Ltd. reported in (1994) 80 Comp Case 289. It was held in this decision that the power to amalgamate is a statutory power given to a company expressly under the provisions of Section 391 of the Companies Act and hence this objection cannot be sustained.

14. The contention of the Central Government that inasmuch as the Memorandum of Association of some of the petitioners do not contain express power to amalgamate with another, company, the petition is not maintainable and cannot be accepted. In this connection the judgment and decision of the Division Bench of this Court in the case of Hari Krishna Lohia Vs. Hoolungooree Tea Co. Ltd. and Another, may be taken note of. In the aforesaid decision the Division Bench held that the power to amalgamate is a statutory power and this power may be exercised notwithstanding the fact that the Memorandum of Association of a particular company may not contain express power to amalgamate with another company. Accordingly, the contention of the learned advocate of the Central Government on this point fails. The other contention of the learned advocate Mr. Kundu for the Central Government with reference to the Directors' Reports on the Balance-sheet and Profit & Loss Account of the transferor companies for the year ended March 31, 1994 that these companies are not profit making companies and they have not recommended any dividend to the shareholders. In the premises, inasmuch as these companies are not faring well the proposed scheme of amalgamation should not be sanctioned.

15. It has been submitted that this contention is devoid of any merit and is contrary to facts. Full details of the financial position of each of the petitioner companies has been set out in the petition. The transferee company is admittedly a very solvent and profit making company. The summary of the financial position of EITA, the transferee company, shows that a sum of Rupees 23,59,72,637 is in excess of its liabilities.

16. So far as the transferor companies are concerned, the financial position of "Akay" has been shown at page 14 of the petition which shows that a sum of Rs. 68,92,807/- is in excess of its liabilities.

17. Similarly in the case of "Diverse" the financial position has been disclosed. at page 20 of the petition, which shows that a sum of Rs. 91,64,706.95 P. is in excess of its liable.

18. So far as the "Militant" is concerned a summary of its financial position has been set out at page 25 of the petition which shows that a sum of Rs.

66,58,143/- is in excess of its liabilities.

19. At page 30 of the petition, the financial position of "primary" has been summarised and it shows that a sum of Rupees 81,34,976/- is in excess of its liabilities.

20. At page 35 of the petition a summary financial position of "Quicker" has been set out and it shows that a sum of Rupees 63,85,091.94 P. is in excess of its liabilities.

21. At page 41 of the petition a summary of the financial position of "Sahoyogita" has been set out and it shows that a sum of Rupees 83,45,554/- is in excess of the liabilities.

22. Thus, each of the petitioner companies is solvent and there is no impediment in these companies amalgamating together.

23. The other contention of the learned advocate Mr. Kundu for the Central Government is that the ratio of exchange as proposed is not fair and should not be sectioned by this Court. It may be noted that none of the shareholders of the petitioner companies i.e. the Transferor Companies or the Transferee Company have raised any objection with regard to the alleged unfair ratio of exchange.

24. There is no dispute that the ratio of exchange of shares has been fixed by reputed firm of chartered Accountants who have experience in the field. No two valuations are likely to be identical. In fact, valuation is matter of opinion. If the ratio of exchange has been fixed by experienced and reputed firm of Chartered Accountants then in the absence of any charge of fraud against them the Court will accept such valuation and ratio of exchange. This view has been taken by the Courts in several decisions of which the following may be mentioned :--

(1972) 42 ComP Cas 145 : (1973 Tax LR 1674 (Bom), M. G. Investment Company Limited;

(1980) 50 Com Cas 51 : (1979 Tax LR 2141, (Bom), Piramal Spg. & Mtg. Limited;

(1992) 73 Com Cas 63, Ucal Fuel Systems Ltd.;

1994 (4) CLLJ 267, Hindustan Lever Limited.

It is also well-settled when the majority of the share-holders accepted the valuation and there is no reason why their business decision should be interfered with and the Court would proceed on the basis of that the ratio of exchange as fair ratio of exchange. Section 394(1)(v) provides that the provision may be made for any person who within such time and in such manner as the Court directs dissented from the compromise or arrangement.

25. A minority cannot hold the majority to ransom. In the instant case, however," the scheme was approved at the meeting of the members. There is no dissent, the Central Government, therefore, cannot raise such objection at this stage.

26. The judgment and decision in the case of Bengal Tea Industries Ltd. v. Union of India reported in (1989) 93 CWN 542 relied upon on behalf of the petitioners may also be taken note of. In the aforesaid decision it was held by the Division Bench to which I was a party that in the absence of any challenge from the shareholders of the transferor company who are primarily and exclusively the question of ratio of exchange of shares, the Court is not inclined to interfere in the matter at the instance of the Regional ; Director, Company Law Board, However, in the absence of any objection from the shareholders, the Central Government has no right to raise the point.

27. In the instant case as already noted none of the creditors and shareholder of the petitioner companies has raised any objection to the scheme of amalgamation in the meetings duly held, convened pursuant to the direction of the Court. Accordingly the contention of the Central Government fails. It is on the record that all the statutory formalities have been complied with and, in my view, the scheme, if approved, will be beneficial for all concerned. Accordingly, the scheme approved by the members stands confirmed. There will be orders in terms of prayers (a) to (i) of the petition. The petitioner will pay the costs to the Central Government assessed at 60 GMs.

28. All parties concerned including the Registrar of Companies, West Bengal and the Official Liquidator, High Court, Calcutta are to act on xerox signed copy of the operative portion of this judgment and order on the usual undertaking.

29. Order accordingly.