(2012) 09 MAD CK 0133

In the Madras High Court

Case No : C.P. No''s. 7 and 8 of 2012

Eye Foundation Ltd. APPELLANT

Vs

Lasik Centre (India) P. Ltd. RESPONDENT

Date of Decision : 06-09-2012

Acts Referred:
Companies Act, 1956 — Section 21, 23, 235, 236, 237

Citation : (2013) 113 CLA 93 : (2013) 176 CompCas 345

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : Ramani and Shankar, for the Appellant; M. Jeyakumar for the Deputy Official Liquidator and Philip Ravindran Jesudoss, ACGSC for the Regional Director, for the Respondent

Judgement

K.B.K. Vasuki, J.—Heard learned counsel for the petitioner in both the petitions, the learned Additional Central Government Standing Counsel and the Deputy Official Liquidator. M/s. Eye Foundation Ltd. (hereinafter called as "the transferor company") is the petitioner in C P. No. 7 of 2012. The petitioner-company was incorporated on June 29, 2011, as a limited company under the provisions of the Companies Act, 1956 and its registered office is situated at No. 582A, D.B. Road, R.S. Puram/Coimbatore-641 002, which comes within the jurisdiction of this court. A copy of the memorandum and articles of association of the transferor company has been filed as annexure B. The authorised share capital of the transferor company is Rs. 3,00,00,000 divided into 30,00,000 equity shares of Rs. 10 each and is subsequently increased to Rs. 7,50,00,000 divided into 75,00,000 equity shares of Rs. 10 each and the issued, subscribed and paid-up share capital of the transferor company is Rs. 7,50,00,000 comprising of 75,00,000 equity shares of Rs. 10 each, as evident from Forms Nos. 2 and 5 filed with the Registrar of Companies, Tamil Nadu, Coimbatore produced as annexure C in typed set.

2. Lasik Centre (India) P. Ltd. (hereinafter called as "the transferee company")

the petitioner in C.P. No. 8 of 2012. The transferee company was originally incorporated under the Companies Act, 1956, in the State of Tamil Nadu on May 6, 1997 and its registered office is situated at No. 582A, D.B. Road, R.S. Puram, Coimbatore-641 002. A copy of memorandum and articles of association of the transferee company has been produced as annexure B. The authorised share capital of the transferee company is Rs. 1,60,00,000 comprising of 16,00,000 equity shares of Rs. 10 each. The issued, subscribed and paid-up share capital of the transferee company is Rs. 1,60,00,000 comprising of 16,00,000 equity shares of Rs. 10 each, as evident from the copy of the latest audited balance-sheet and annual return of the petitioner-company and Forms Nos. 2 and 5 filed with the Registrar of Companies, Tamil Nadu, Coimbatore produced as annexures C and D respectively in the typed set.

3. Now, by the proposed scheme, the transferor company is sought to be amalgamated with the transferee company. The scheme of amalgamation proposed has been produced as annexures D and E respectively in both the petitions. The board of directors of the transferor company and the board of directors of the transferee company in the meeting held on December 5, 2011, have approved the scheme of amalgamation and the resolutions approving the scheme of amalgamation by the directors of the transferor company and the transferee company have been produced as annexures E and F respectively in both the petitions.

4. After the scheme of amalgamation was approved by the respective board of directors, the transferor and transferee companies have approached this court with Company Applications Nos. 969 and 970 of 2011 for dispensing with the convening and holding of meeting of equity shareholders to consider the scheme of amalgamation with or without modification. Both the transferor and transferee companies have 7 and 2 equity shareholders respectively, out of which two in both the companies do belong to the same family and all of them expressed their consent for the implementation of the scheme, as evident from the consent affidavits enclosed as annexures F and G respectively in the typed set of documents filed in both the petitions. Both the transferor and transferee companies have no secured creditors, as evident from the auditor''s certificate enclosed at pages 123 and 161 respectively in both the petitions. In view of the same, this court passed an order on December 20, 2011, dispensing with convening and holding of the meeting of the equity shareholders of the transferor and transferee companies.

5. Both the transferor and transferee companies are engaged in the business of providing medical services in the field of Ophthalmology. It is stated in the petitions that the amalgamation is proposed in order to combine the activities of two entities into a single entity for operational and economic convenience and to deprive optimum commercial advantage and is beneficial to both companies, its shareholders and all concerned.

6. The Regional Director, Ministry of Corporate Affairs, Chennai has, in his

affidavit dated June 6, 2012, raised certain objections. The first objection raised in paragraph 7 of the affidavit regarding payment of additional filing fee and stamp duty in the case of amalgamation of two companies resulting in increase of share capital of the transferee company is, as rightly argued by learned counsel for the petitioner in both the petitions, already raised and decided by the Division Bench of our High Court in the judgment reported in The Regional Director, Ministry of Company Affairs and The Registrar of Companies Vs. Cavin Plastics and Chemicals (P) Ltd., wherein, the Division Bench has answered the issue in the negative and held in paragraph 12 as follows (page 481):

We have also gone through the decision of the Calcutta High Court in In Re: Areva T and D India Limited, relied upon by the appellant. In the said judgment, the Calcutta High Court has held that the right to increase its paid-up capital to its authorised limit, is a right unique to each company and incapable of being transferred, just as the fee paid for registration of the company is also incapable of being transferred and, consequently, a separate fee would be payable u/s 95 read with section 97 of the Act. We are unable to agree with the reasoning of the learned single judge. The issue is not whether the fee, which is already paid by the transferor company would automatically be transferred to the transferee company. But, what is intended by section 391 of the Act is to reconstitute the company without the company being required to make a number of applications under the Companies Act for various alterations which may be required in its memorandum and the articles of association for functioning as a reconstituted company under the scheme. Not only is section 391 of the Act a complete code in itself, but it is intended to be in the nature of a ''single window clearance''.

7. Following the said decision, the learned brother Judge of our High Court in the judgment reported in In Re: Convansys (India) P. Ltd., and Computer Sciences Corpn. India P. Ltd., In re), is also pleased to reject such contention and ordered the petitions as prayed for. Thus, the first objection raised by the Regional Director is answered as per the decision referred to above/in favour of the petitioner in both the petitions.

8. The Regional Director also in paragraphs 9 and 10 of the affidavit, raised objection against change of name of the transferee company to M/s. Eye Foundation Ltd., which is the name of the transferor company, on the strength of two circulars issued by the Ministry of Corporate Affairs on May 30, 2011 and July 8, 2011, in this regard. In my considered view, the same is inapplicable to the case in hand as the name sought to be adopted by the transferee company is the name of the transferor company and the relevant provisions of law applicable to the change of name are sections 21 and 23 of the Companies Act. Our High Court, Karnataka and Bombay High Courts, in the following cases cited on the side of the petitioner, dispensed with the compliance of section 21 on the ground that section 391 of the Companies Act invests the court with powers to approve or sanction a scheme of amalgamation/arrangement and in doing so, if there are any other things which for effectuation, require a special procedure to be

followed except reduction of capital, then the court has power to sanction them, while sanctioning the scheme itself and section 391 is a complete code in the nature of a "single window clearance" system: (i) order passed by our High Court in C.P. Nos. 177 and 178 of 2008 in Mehala Machines Ltd:, rep. by the managing director (transferor company) and M/s. San-marco Texmac P. Ltd., rep. by director (transferee company); (ii) Mysore Cements Limited Vs. NIL, and (iii) In Re: Pmp Auto Industries Ltd.,

9. Our High Court has in paragraph 8 of its judgment, dealt with the objection regarding change of name and necessity for compliance of sections 21 and 23 of the Companies Act which reads as follows:

8. It may be noted that as pet clause 15 of the scheme, upon the scheme becoming effective, the name of the transferee company shall be changed to Mehala Machines India P. Ltd. Normally but for the scheme presented u/s 391 of the Companies Act to effect such a change in the name of a company, the procedure, u/s 21 of the Companies Act has to be complied with. So too the provisions of section 44 of the Companies Act. However; in terms of the scheme passed by the requisite majority as laid down u/s 391 of the Act complying with the procedure, laid down thereon, I do not find that there exists any necessity to have a repeated exercise of the same in terms of section 21 of the Act. It may be noted that Chapter V is a complete code by itself on the subject of arrangement/ compromise and reconstruction comprehensive enough to include a change in the name consequent on the amalgamation or arrangement. Similar view was taken by this court in C P. Nos. 133 to 135 of 2006, dated August 19, 2006, in the matter of K.P.R. Mill P. Ltd. Thus; the objection raised by the Regional Director is satisfactorily explained.

10. The Bombay High Court in the judgment above cited, while dealing with the scope of powers of this court u/s 391 of the Companies Act, observed as follows (page 299 of 80 Comp Cas):

Basically, the court is given wide powers u/s 391 of the Companies Act to frame a scheme for the revival of the company. Section 391 of the Companies Act is a complete code under which the court can sanction a scheme containing all the alterations required in the structure of the company for the purpose of carrying out the scheme, except reduction of share capital which requires a special procedure to be followed by virtue of rule 85 of the Companies (Court) Rules. In the absence of rule 85, procedure for alterations in the memorandum and articles of association of a company prescribed under other provisions of the Companies Act is not required to be followed before sanctioning a scheme involving such alterations. The whole purpose of section 391 is to reconstitute the company without the company being required to make a number of applications under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme.

11. The Bombay High Court has observed so, while considering the objection regarding absence of any clause in the objects clause of the memorandum of association of the company and is of the view that it is permissible for this court to sanction a scheme u/s 394, even if the scheme contemplates a consequential alteration in the objects clause of memorandum of association of the company, as such, the objection raised by the Company Law Board has no substance and is rejected.

12. The learned single judge of the Karnataka High Court has, in Mysore Cements Ltd., In re (2009) 150 Comp Cas 623, agreed with the view expressed by the Bombay High Court. The Karnataka High Court, while dealing with the objection regarding change of name, applied the view of Bombay High Court in the case above cited and negatived the objection that a separate formality need to be followed u/s 21 of the Act for change of name or the object clause of the memorandum of association of the resulting company on the ground that the petition filed under sections 391 and 394 of the Act, is like a "single window clearance" system and the petitioner cannot be burdened with taking various applications which are cumbersome in nature:. However, the Karnataka High Court directed the petitioner to file necessary forms as prescribed in law in the office of the Registrar of Companies to place on record the changes with regard to the name of the company.

13. Applying the same view to the facts of the present case, similar direction is issued to the petitioner in both the petitions in respect of the proposed change of name of the transferee company as that of the name of the transferor company and the same will take care of the objections raised in paragraphs 9 and 10 of the affidavit filed by the Regional Director.

14. It is stated in paragraph 12 of the Regional Director''s affidavit that as the main object of the transferor and transferee companies are not similar, the transferee company should amend its objects suitably upon the scheme becoming effective to carry out the business of the transferor company. This aspect is well answered in the judgment of our High Court and other High Courts as stated supra.

15. The Bombay High Court is of the view that the fact, the objects of the transferor companies were different from those of the transferee company, could not, per se, be a fetter to the sanctioning of the scheme of amalgamation. It is held so by following the earlier judgment of our High Court in In Re: W.A. Beardsell and Co. (P.) Ltd. and Mettur Industries Ltd. wherein, the observation laid down is that it is not necessary that there should be unison in the objects of the two companies to enable amalgamation between two companies. The Bombay High Court, having accepted the contention of learned counsel for the petitioner that identity of objects is neither required by statute nor precedent and the companies involved therein being under the same management, the business of the transferor company could be most conveniently carried out in conjunction with the business being carried out by the transferee company by effectively

utilising the expertise and sales network established by the transferor company. Similar question arose in the case dealt with by the Karnataka High Court and the Karnataka High Court, by following the principles laid down by our High Court and Bombay High Court, rejected such objection and granted necessary sanction for the scheme.

16. The Division Bench of our High Court in The Regional Director, Ministry of Company Affairs and The Registrar of Companies Vs. Cavin Plastics and Chemicals (P) Ltd., has also expressed the same view by applying the legal principles laid down in catena of judgments of the Supreme Court, our High Court and other High Courts referred to in the preamble portion of the judgment and observed that the company is not required to make number of applications under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme. Following the same, the objection raised herein is overruled.

17. The next objection raised in paragraph 11 of the affidavit is that as per paragraph 18 of the scheme, the transferor company shall be declared to be dissolved without winding up with effect from the appointed date. Whereas, all the employees of the transferor company in service on the effective date shall become the employees of the transferee company on the effective date, as such, it is but necessary to declare that the transferor company shall be dissolved without winding up from the effective date and not from the appointed date as stated in the scheme of amalgamation. This court finds considerable force in the objection so raised. The reading of the scheme reveals that as the appointed date and effective date are different, the dissolution of the transferor company with effect from the appointed date and transfer of employees of the transferor company to the transferee company with effect from the effective date cannot be said to be in the interest of employees. Hence, for the purpose of effective implementation of the scheme, this court is inclined to direct the transferor company to be dissolved without winding up from the effective date.

18. In this case, publications were already effected in pursuance of the order of this court dated January 18, 2012 and so far no objections have been received by this court. Pursuant to the order of this court dated January 18, 2012, the official liquidator has also submitted a report to the effect that the affairs of the transferor company have not been conducted in a manner prejudicial to the interest of its members or public interest and that there are no investigation or proceedings pending against the transferor company or the transferee company under sections 235 to 251 or any other provisions of the Companies Act, 1956. It has also been stated that the directors of the transferor company have not committed any misfeasance, diversion of funds, etc., attracting provisions u/s 542/ 543 of the Companies Act, 1956 and they have not acted against the interest of the company, shareholders or stakeholders of the transferor company. The report of the official liquidator does'' not disclose any adverse remarks either

against the manner of functioning of the companies nor against the individual directors or against the fairness of amalgamation of the scheme.

19. This court perused the scheme of amalgamation filed by the petitioner in both the petitions and finds no objectionable feature, which is detrimental or disadvantageous either to the employees, members or creditors of both the transferor or transferee companies. The scheme is not violative of any statutory provisions. The scheme is also fair, just, sound and is not against any public policy or public interest. All the statutory provisions are complied with. Hence, both the company petitions are ordered thereby, approving the scheme of amalgamation of the transferor company M/s. Eye Foundation Ltd./petitioner in C.P. No. 7 of 2012 with the transferee company M/s. Lasik Centre (India) P. Ltd./ petitioner in C P. No. 8 of 2012 with effect from the effective date as defined in clause 2.5 of the scheme of amalgamation. The transferor company shall stand dissolved without being wound up from the effective date. The necessary formalities, if any, are to be complied with, within 30 days from the date of receipt of a copy of this order. The fee for counsel for the Ministry of Corporate Affairs is fixed at Rs. 2,500.

