
(2004) 08 SHI CK 0002

In the High Court Of Himachal Pradesh

Case No : Company Petition No. 13 of 2003

Gountermann Peipers (India) Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-08-2004

Acts Referred:

Companies Act, 1956 — Section 100, 101, 102, 103, 391(2)

Citation : (2004) 2 ShimLC 357

Hon'ble Judges : Lokeshwar Singh Panta, J

Bench : Single Bench

Advocate : Pratap Chatterjee, Gautam Mitra, Dabashish Mitra, K.D. Sood, Sandeep Kaushik and Rajesh Gupta, Company Secretary, for the Appellant; N.K. Thakur, Sr. C.G.S.C. for the Respondent No. 1, R.M. Suri and Shilpa Sood for the Respondent No. 2, Deepak Gupta and Jagdish Vats for the Respondent No. 3 and B.C. Negi, for the Respondent No. 4., for the Respondent

Final Decision : Allowed

Judgement

Lokeshwar Singh Panta, J.—The petitioners have filed Company Petition No. 13 of 2003 under Sections 101, 391(2) to 394 read with Section 81(1A) and Sections 100 - 103 of the Companies Act, 1956 in this Court for obtaining sanction and approval of the Modifying Scheme of Arrangement filed thereto as Ext. A.

2. The object of the aforesaid Company Petition, however, was to obtain sanction of this court to the aforesaid arrangement between the two petitioner Companies and their share holders and creditors whereby and where under the Textile Division of the 1st petitioner No. 1 Company together with all its assets, liabilities and all rights and claims relating thereto was proposed to be transferred to and be vested in petitioner No. 2 Company on the terms and conditions which had been enumerated in the said Scheme of Arrangement. The salient features of the proposed Scheme of Arrangement between both the petitioner-Companies and their respective share-holders and creditors have been spelt out in detail in para-2 of the Company Petition and other paragraphs.

3. The relevant facts of the case are narrated in detail in the judgment dated 10.6.2004 and it is not necessary to reiterate them to burden this judgment.

4. The proceedings in this Company Petition were ordered to remain in abeyance vide order dated June 10, 2004 till the BIFR would decide the reference pending before it which had been prepared by the petitioner No. 1 Company u/s 15 of SICA. No findings were recorded by me in the said order on the merits of the Modified Scheme of Arrangement proposed to be approved by means of this Company Petition.

5. The petitioner-Companies feeling aggrieved against the judgment dated June 10, 2004 of this Court, filed Company appeal No. 5/2004 before the Division Bench of this Court. The Division Bench on July 12, 2004 allowed the appeal and set aside the impugned judgment dated 10th June, 2004. Now the Company Petition has come up before this Bench for disposal on its merits.

6. The petitioner-Companies had earlier filed Company Petition No. 12/2003 in this Court u/s 391(1) of the Companies Act, 1956 praying inter alia, for permission to convene the meeting of the share-holders of both Companies for consideration and approval of the Scheme of Arrangement between two petitioner-Companies and also for consideration of other ancillary matters. The purpose and object of the Scheme was to enable the petitioner No. 2 Company to undertake the business of the established undertaking which would result in an independent and optimum growth and development of the Spinning Mill business and Iron and Steel Roller Division through two separate Companies which would ultimately benefit the Companies, their shareholders, employees, creditors and all other involved in the affairs of the Companies. It was also averred that two projects would be implemented effectively and adequately and that the management of the two projects by two separate Companies would be convenient and advantageous. The demerger of the Companies would result in better administration, operational organization and efficiency with optimum utilization of various resources.

7. Taking into consideration the averments made in Company Petition No. 12/2003, the learned Single Judge of this Court directed the Company to hold the meeting of secured and unsecured creditors and shareholders on 16th November, 2003 at the registered office of petitioner No. 1-Company at Bharatgarh Road, Nalagarh, District Solan for consideration of the Scheme of Arrangement as proposed by the Company.

8. As many as eight Advocates of this Court whose names are mentioned at page-3 of the judgment dated June 10, 2004 were appointed as Chairmen and Alternate Chairmen by this Court vide order dated 17.10.2003 to hold a meeting of the creditors and submit their respective reports to the Court along with the result of the meeting within seven days of the conclusion of the meeting. The reports were ordered to be duly supported by the respective affidavits of the Chairmen/Alternate Chairmen. The respective Chairmen held the meeting and

submitted their reports to the Court. As per the report submitted by Mr. Naresh Sood, Advocate-Chairman, as many as 62 (sixty two) creditors of petitioner No.1 Company including secured creditors, namely, IDBI, ICICI, Exim Bank, West Bengal Industrial Development Corporation (for short WBIDC), State Bank, Indore, Allahabad Bank and other unsecured creditors voted in favour of proposed modifications being adopted and carried into effect to the Scheme of Arrangement. However, State Bank of India (SBI) and Industrial Investment Bank of India (IIBI) secured creditors have opposed the Modified Scheme of Arrangement. The Modified scheme of Arrangement was prepared, adopted and carried into effect by more than 3/4 (three fourth) majority. Thereafter the Modified Scheme dated 16th November, 2003 was submitted before this Court. Petitioner-Companies accordingly have filed the present Company Petition for final sanction of the Modified Scheme of Arrangement.

9. It appears from the record that when the Company Petition No. 13 of 2003 came up before this Court on 10.12.2003, "SBI had filed its objections to the Scheme of demerging the two Companies. The petitioner-Companies filed reply to the said objections. Affidavit of the Regional Director, Northern Region, Department of Company Affairs has also been filed. Subsequently, "IIBI" had also filed their objections.

10. SBI-objector has challenged the Modified Scheme of Arrangement, inter alia on the grounds mentioned at page 6 of the earlier judgment dated June 10, 2004 and those objections in my view need not be repeated in this judgment and to that extent this order may be read as part of the earlier judgment. 11. Reply to the objection of SBI has been filed by Shri Rajesh Gupta, Company Secretary and Senior Manager (Accounts) of the 1st-petitioner No. 1 Company. The objections raised by SBI and IIBI to the Scheme of Arrangement of demerger of two companies and replies and replication exchanged by the parties in this company petition have been noticed at pages 6 to 19 of the judgment dated June 10, 2004.

12. Now the learned Counsel for the parties have been heard at length on the merits of the matter. The report marked Ext. "A" placed on record by Mr. Naresh Kumar Sood, Advocate-Chairman reveals that the meeting held on November 16, 2003 was attended by 78 (Seventy Eight) creditors of the Company either personally and/or by authorized representative and/ or by proxy. As many as 62 (sixty two) creditors including IFCI, IDBI, Exim Bank, State Bank of Indore, Allahabad Bank, ICICI and WBIDC had voted in favour of proposed modification. Those 62 creditors are having outstanding amount of Rs. 5,62,08,42,918 representing 91.45% of total votes polled against the objections of two creditors having an outstanding amount of Rs. 52,58,26,267 representing 8.55% of total votes polled. The proposed modification was approved, adopted and carried into effect by more than 3/4 (three fourth) majority.

13. I have examined the Modified Scheme of Arrangement (Ext. "A") filed with this Company Petition. Clause 4.3 of the Scheme primarily provides that with

effect from the appointed date, all the liabilities including debts, contingent liabilities, duties and obligations of every kind, nature and description of GPIL relating to the demerged undertaking shall also under the provisions of Sections 391 and 394 of the Companies Act without any further act or deed be transferred to or be deemed to be transferred to GPITL so as to become as from the appointed date the debts, liabilities, contingent liabilities, duties and obligations of GPITL and it shall not be necessary to obtain the consent of any third party or other person who is a party to any contract or arrangement by virtue of which such debts, liabilities, contingent liabilities duties and obligations have arisen in order to give effect to the provisions of the scheme.

14. Clause 4.4 provides that the transfer and vesting of the demerged undertaking of GPIL as aforesaid, shall be subject to the existing securities, charges and mortgages, if any subsisting, over or in respect of the property and assets or any part thereof unless otherwise agreed by the relevant creditors of GPIL. Proviso to this clause says that any reference in any security, documents or arrangements (to which GPIL is a party) to the assets of the GPITL offered or agreed to be offered as security for any financial assistance or obligations, shall be construed as reference only to the extent the said assets are pertaining to the demerged undertaking as are vested in GPITL by virtue of this clause.

15. Mr. Rajesh Gupta, Company Secretary and Senior Manager (Accounts) of petitioner No. 1 Company in reply to the objection of the "SBI" has stated that the State Bank of India has provided the financial assistance to the 1st petitioner-Company against its textile Project only. None of the financial assistance provided by the SBI is in any way related to the Roll Division of the 1st petitioner-Company. He has made categorical statement that after the implementation of the proposed Modified Scheme of Arrangement, the Roll Division of the 1st petitioner-Company will provide corporate guarantee to the objector. Further, it is contended that 100% sales realization was used to be adjusted by SBI towards irregularities in the account during August 2000 to December 2000 and by December 2000, "SBI" had realised Rs. 24.59 crores. SBI started retaining 25% of export realization and 5% of domestic realization upto October 2003 subject to minimum Rs. 1.00 crore per month. The 1st petitioner-Company has repaid to SBI Rs. 75.22 crores upto October, 2003. Out of total PBIDT of Rs. 81.40 crores of Textile Unit during the aforesaid period of 39 months, a sum of Rs. 75.22 crores have gone to SBI as per the audit accounts of the 1st petitioner-Company. It was further contended that in the joint meeting of lenders held in June, 2002, SBI agreed in principle to carve out the debited amount of FCL installments into a separate term loan account. As per the statement made by Mr. Rajesh Gupta, Company Secretary in the reply, the proposed Modified Scheme of Arrangement between both the petitioner-Companies will not jeopardise the interest of any creditors.

16. In replication filed by SBI, it is stated that the Scheme of Arrangement would adversely affect the financial viability and the debit burden of the Textile Division

would increase affecting the interest of the objector Bank adversely. The objector-Bank is only demanding the repayment of the overdues towards the loan facilities extended to the 1st petitioner-Company as per the terms and conditions agreed between the parties.

17. The learned Senior Counsel for the petitioner-Companies contended that SBI had never raised its objection about the hive off of Textile Division into a separate Company either at the meeting held with other lenders or in any meeting held with executives of the Companies and the modification to the Scheme in the meeting of shareholders and creditors was proposed by the IDBI and seconded by IFCI, ICICI and others and carried through vast majority at the respective meetings is sustainable.

18. To appreciate this contention, I have examined the pleadings and the documents placed on record.

19. The summary record of the proceedings of the joint meeting held on September 22, 2003 at the office of IDBI at Mumbai placed on record by the SBI along with affidavit of Smt. Inderjeet Bakshi, Assistant General Manager, State Bank of India. The summary record reveals that SBI was agreeable to the suggestion of sharing the recoveries from the Company among all institutions/Banks on pro-rata basis and for the purpose, an escrow account could be opened with SBI and made operative from October 1, 2003. The Modified Scheme of Arrangement has been approved by the overwhelming majority of the creditors and Directors. The Scheme would facilitate the rationalisation of the financial structure of both the Companies. Both the projects would be implemented effectively and that the management of the two projects by the two separate Companies would be convenient and advantageous, keeping in view the future independent management set up with focus on stipulation. The demerger of the Companies would result in better administration, operational organization and efficiency with optimum utilization of all the resources. All the shareholders and creditors of both Companies have taken cautious decision for the demerger of the two Companies and the SBI has not pleaded that any fraud was committed by the majority of the shareholders and creditors to hive-off the shares of the SBI. The Modified Scheme of Arrangement has been supported by 98% share holders and 93% directors.

20. The learned Senior Counsel for the petitioner-Companies contended that the provisions of the Companies Act have been complied with and the overwhelming majority of the creditors and directors have approved the scheme pursuant to the reports submitted by the Chairmen/Alternate Chairmen appointed by this Court and the majority shareholders have not exhibited any adverse interest against the minority shareholders i.e. SBI and IIBI, having similar interest as members of the same class, and the majority shareholders and Directors have not acted with any oblique motive to whittle down such a class interest of the minority. In support of this submission reliance is placed in a case *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, In the said case, their Lordships have dealt

with the scope of interference of the Company Court in sanctioning proceedings as provided under Sections 391 and 393 of the Companies Act. The relevant provision of Sections 391 and 393 of the Act are reproduced in paragraph-28 of the report. The parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction Scheme of Compromise and Arrangement have been summed up as follow : (AIR Para 28-A P. 520).

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, subsection (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 that 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 subsection (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 of 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 would 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.

In the identical facts and circumstances of the case involved in the present company petition, the learned Single Judge of Bombay High Court in *Ion Exchange (India) Ltd. In re : (Bombay) 2001 1 Comp cas 115* has approved a scheme of amalgamation of two wholly owned subsidiaries with their holding company.

21. Mr. R.M. Suri, learned Senior Counsel appearing on behalf of the SBI-objector contended that demerger of the two Companies is not bona fide and the proposed demerger envisages taking away the cash flows of the Roll Division which is in profits from the objectors. He next contended that the loan was given by the SBI on the basis of the major promoter of petitioner No. 1-Company, Shri Promod Mittal presently the Chairman and Managing Director having 7,49,520 shares and Sh. V.K. Mittal, Joint Managing Director, who had 7,38,297 shares and after the demerger the major promoter of the Company Shri Promod Mittal would cease to be a share holder and consequently Shri Pramod Mittal, who stood as guarantor of the loan facilities granted to the petitioner No. 1-Company would get discharged as such. Thus, according to the learned Senior Counsel, the security cover provided for to safeguard the interest of the objector Bank by the promoters of the Company has been eroded. I am afraid to accept this contention of the learned Senior Counsel. As noticed herein-above, majority of about 98% share holders and about 93% Directors have supported the demerger of the two Companies and the SBI-objector has not shown that the majority members ever have coerced the minority members to accept the demerger of the two Companies. Mr. Rajesh Gupta, Company Secretary and Senior Manager (Accounts) of the petitioner No. 1 Company in reply to the objections of the SBI has made specific and categorical statement in sub-para (viii) at page 334 (Part-II of the paper book) that at present neither Shri Pramod Mittal is the Managing Director nor Shri V.K. Mittal is the Joint Managing Director of petitioner No. 1 Company and both of them would continue to remain shareholders as well as promoters of both the petitioner-Companies even after the implementation of the Modified Scheme of Arrangement. In the face of the said unequivocal statement the apprehension of SBI that Shri Pramod Mittal and Shri V.K. Mittal, Managing Director and Joint Managing Director respectively of petitioner No. 1 Company have ceased to be shareholders does not sound to reason.

22. I have examined the ratio of the decided cases on which reliance has been placed by the learned Senior counsel for SBI objector. In *Bedrock Ltd., In re : 2000 Vol. 101 Company Cases 343*, the learned Single Judge of the Bombay High Court on the facts of that case observed that the Scheme of Arrangement or compromise was ostensibly to dispose of unutilised assets to pay off creditors and in reality to profiteer from proceeds thereof and the Scheme was not found

bona fide. In Mohan Exports India Ltd., In Re: 1999 Vol. 95 Company cases 53, the learned Single Judge of Delhi High Court has refused to give sanction of the Court to the Scheme of Amalgamation or compromise on the ground that the said Scheme was meant solely to effect transfer or valuable assets of transferor company to transferee company without payment of Government dues and as such the Scheme was not found bona fide. In Rama Petrochemicals Ltd., In re: 2000 100 Comp Cas 807, the learned Single Judge of the Punjab High Court has declined to give sanction to the Scheme of Arrangement for the reason that the Scheme was a device to transfer immovable properties of the two different business organizations without satisfying the provisions of law. In Kamani Employees Union and others 2000 109 Comp cas 659 the learned Single of the Bombay High Court refused to give sanction to the Scheme of Amalgamation on the ground that the manner of holding the meetings and voting were not found proper, the interest of the Directors were not disclosed and the employees interest was also not protected in the Scheme of Amalgamation. In St. Mary's Finance Ltd. v. R. G. Jayaprakash and Ors. 2000 99 Comp Cas 359, the Scheme was proposed by the Director who promoted sister Company to whom substantial loan was given by the Company and the notice of meeting for consideration of such Scheme was sent to the Creditors of the Company, without disclosure of full and fair interest of the Directors as members of the Company which is held to be prerequisite and statutory essentiality in terms of Section 393(1)(a) of the Companies Act, 1956.

23. In my considered view, the ratio of the decisions in the above said cases, will not substantiate the objections of SBI in the peculiar facts and circumstances of the present case. Thus, the objections of the SBI-objector are not tenable and sustainable.

24. Mr. B.C. Negi, learned Counsel appearing on behalf of the IIBI objector contended that petitioner No. 2 Company is admittedly incurring huge losses and the debt of the division is also huge and it would not be in a position to service the dues of its lenders and thus the risk of invocation of guarantee by the lenders of the petitioner No. 2 Company cannot be overruled which in turn would jeopardize the realization prospects of the lenders including IIBI-objector.

25. On examination of the reply filed by Mr. Rajesh Gupta, Company Secretary and Senior Manager (Accounts) of petitioner No. 1 Company to the objection filed by IIBI, it is stated that the total outstanding amount of IIBI as on the date of meeting of creditors held on 16.11.2003 to approve the Scheme was only Rs. 7,58,26,267 (Rupees Seven crore fifty eight lakhs twenty six thousand two hundred sixty seven) only against the total outstanding amount of Rs. 6,37,30,93,037 (Rupees Six hundred thirty seven crore thirty lakhs ninety three thousand thirty seven) and IIBI outstanding amount constitutes to 1.19/% only of the total outstanding amount as on that date. The Modified Scheme of Arrangement as approved by the shareholders and creditors of both the petitioner-Companies does not in any manner affect the interest of IIBI as a

creditor in respect of amount lent by it for acquisition and installation of a particular imported machinery which is at present with the Roll Division of the GPIIL and will continue to be with the Roll Division of the 1st petitioner-Company even after the implementation of the Scheme. A categorical statement has been made in the reply that there is no arrangement or compromise with any of the creditors of the GPIIL and the rights and liabilities of all the bona fide creditors including IIBI will continue to remain intact. The nominee of the IIBI will continue to act as Director of the petitioner No. 1-Company. The Modification Scheme of Arrangement was proposed by IDBI and seconded by other financial institutions which inter alia include Exim Bank, WBIDC, Allahabad Bank and State Bank of Indore, who have provided financial assistance in respect of Roll Division of petitioner No. 1 Company and none of them objected to the Modified Scheme of Arrangement. The representative of IIBI had never expressed his objection/ reservation about the modifications of the scheme of Arrangement. The Modified Scheme of Arrangement has been approved by 91.45% in terms of value as against 8.55% and in terms of number 62 creditors equivalent to 97.87% voted in favour of modifications and Modified Scheme of Arrangement against 2.13%. In the factual situation the objection raised by the IIBI-objector is not found valid and sustainable.

26. No other point was raised by the learned Counsel for the parties.

27. In my view, therefore, the Modified Scheme of Arrangement proposed deserves to be granted or rather permitted.

28. In the result, the Modified Scheme of Arrangement mark Ext. "A" with the Company Petition is hereby sanctioned in terms of Sections 391 - 394 read with Section 81(1A) and Sections 100 - 103 of the Companies Act, 1956. The Scheme shall be binding w.e.f. 1st day of January, 2003 on both the petitioner-Companies, their respective shareholders, creditors and all other concerned. The Company petition stands allowed.

29. Company applications 47/2003, 10 and 15 of 2004 shall stand disposed of accordingly.

30. The order be communicated by the petitioner-Companies to the Registrar of Companies within six weeks from the date of receipt of a copy of this order. The Scheme proposed would take effect from January 1, 2003. The registrar of Companies shall preserve all documents relating to the transferor-company and shall tag them with the transferee- company and consolidate the Scheme. However, the parties are left to bear their own costs.