

(1991) 11 DEL CK 0022

In the Delhi High Court

Case No : Company Petition No. 122 of 1991

HCL Ltd., In Re HCL Hewlett-Packard Ltd., In Re

Date of Decision : 26-11-1991

Acts Referred:

Citation : (1994) 80 CompCas 228

Hon'ble Judges : A.B. Saharya, J

Bench : Single Bench

Judgement

Arun B. Saharya, J.—An application, being C.A. No. 428 of 1991 was filed on May 29, 1991, by the petitioners u/s 391 of the Companies Act, 1956 (hereinafter referred to as "the Act"), seeking directions to hold meetings of the equity shareholders; secured creditors and debenture holders; unsecured creditors and fixed deposit holders; and statutory creditors of the first petitioner, namely, HCL Limited, a public limited company incorporated under the Act (hereinafter referred to as "the existing company") and the equity shareholders of the second petitioner, namely, HCL Hewlett-Packard Ltd., also a public limited company incorporated under the Act (hereinafter referred to as "the new company") for approving with or without modification, a scheme of arrangement between the existing company and the new company and their respective shareholders.

2. By an order dated May 30, 1991, directions were given for holding separate meetings of the above-mentioned classes. Individual notices were directed to be given to all the shareholders of the two companies and to the creditors of the existing company in accordance with the rules. On C.A. No. 429 of 1991, however, issued of individual notice to unsecured creditors of the existing company of nominal value of less than Rs. 50,000 and fixed deposit value of less than Rs. 10,000 was dispensed with as the numerical value of such creditors is 3.23 per cent. of the aggregate debt and 7.48 per cent. of the unsecured creditors. Notices of the meetings were directed to be published at least 21 days before the date of the meetings in daily newspapers Hindustan Times and Navbharat Times. Separate chairpersons and alternate chairpersons were appointed for each meeting. They were directed to submit their respective

reports within a week after holding the meetings. The coram and the right to vote by proxy was directed to be governed by the memorandum and articles of association of the respective companies. Since there are no creditors of the new company, save and except for preliminary expenses which have been incurred for the existing company, the holding of meetings of creditors of the new company was also dispensed with.

3. Notices of the application were issued to the Central Government, Regional Director, Company Law Board, Kanpur, and to the Registrar of Companies in Delhi and Haryana. Later, by an order dated July 11, 1991, on C.A. No. 474 of 1991, the coram in respect of meeting of statutory creditors of the existing company was also dispensed with; and in so far as the meeting of the secured creditors was concerned, the coram was fixed at two in number and for the meeting of unsecured creditors, it was fixed at five in number.

4. Notices of the meetings, as approved by this court, are stated to have been sent to the various shareholders and concerned creditors of the petitioner companies together with a copy of the scheme of arrangement, the explanatory statement required by section 393 of the Act and a form of proxy. Notices were also advertised in accordance with the directions of this court.

5. Four separate meetings of equity shareholders secured creditors, unsecured creditors and statutory creditors of the existing company were duly convened and held on July 15, 1991. A separate meeting of the shareholders of new company was also held on the same day. The reports of the scrutinizer and chairpersons of each of the meetings have been filed.

6. The chairperson appointed for the meeting of equity shareholders of existing company has reported, inter alia, that an amendment was moved to the scheme of arrangement in relation to annexure "A" which lists down the names of 50 shareholders who have given their consent to transfer the number of shares indicated against their respective names to Hewlett-Packard Company, USA, post reduction and consolidation. The amendment was essentially a substitution of the list annexed with the scheme by another list giving the revised number of shares agreed to be transferred by these 50 shareholders to Hewlett-Packard Company (hereinafter referred to as "the HP Co. "). The scheme of arrangement and the amendment were passed by more than a three-fourths majority of the equity shareholders present and voting at the meeting.

7. Reports filed by chairpersons of the other meetings show that the scheme of arrangement was passed unanimously by the secured creditors; it was passed by more than a three-fourths majority in value of the unsecured creditors; and it was also passed unanimously by the statutory creditors present and voting at the respective meetings. Likewise, the amendment to the scheme of arrangement vis-a-vis annexure "A" was moved at the meeting of the equity shareholder of the new company and it was passed unanimously. The poll results were duly published in newspapers Hindustan Times and Navbharat Times of July 20, 1991,

and July 21, 1991, respectively.

8. It was then on August 2, 1991, that the present petition was filed for sanction of the scheme of arrangement between the existing company and the new company in accordance with the scheme of arrangement as amended (annexure "U") so as to be binding upon the shareholders of both companies as well as the creditors of the existing company.

9. By an order dated August 5, 1991, notice to the Central Government was again issued and directions were given for publication in accordance with the rules to be effected in newspapers in which the earlier application was advertised. In response to the notice and public advertisement, except an affidavit of Mr. K. M. Gupta dated September 13, 1991, filed on behalf of the Central Government in pursuance of the provisions made u/s 394A of the Act, no objections from any one to sanction of the scheme of arrangement have been received. Initially, advertisements were issued for hearing on September 16, 1991. That day, the case could not be taken up for certain unavoidable reasons. So, fresh publication of advertisement was directed to be made in daily newspapers, namely, Hindustan Times and Navbharat Times for hearing of October 23, 1991. Despite fresh publication, no objections have been received.

10. The stand taken by the Central Government by way of Mr. K. M. Gupta's affidavit may be noted. Paragraphs 4 and 5 of the affidavit, relevant for the present purpose, are reproduced below :

"4. That the Central Government has the following observations to make with reference to the aforesaid petition :

(a) That it has been observed from the Scheme that the "appointed date" has been fixed by both the petitioner companies as July 1, 1990, by which all business of HCL Division be transferred in the transferee-company with effect from July 1, 1990, although the transferee-company was incorporated only on May 15, 1991.

It is, Therefore, not quite clear how the transferee-company with effect from the "appointed date" take-over the business of the transferor-company when the transferee-company, viz., HCL Hewlett-Packard Limited was not in existence.

(b) That it is further observed from the scheme that the transferor-company is going to reduce its share capital and no petition before the High Court regarding the reduction of the said capital appears to have been moved.

5. That subject to the aforesaid observations, the Central Government has no objection to the scheme of arrangement which may be decided by the court on its merits."

11. The existing company was incorporated on April 17, 1986, and is engaged in the manufacturing, marketing, maintenance and selling of micro and mini range of computers, engineering workstations for computer aided design (CAD/CAM

applications), plain paper copiers, micro film reader printers, Epabx systems, PC based telex systems, electronic tele-printers, computer peripherals and tests and measuring instruments. It has manufacturing facilities located in Noida (U.P.), Dehradun (U.P.), Madras and Dundahera (Haryana). The latest available balance-sheet of the company for the accounting year ending June 30, 1990, is annexure "C" to the petition. It has entered into a joint venture agreement dated April 2, 1991, with HP Co., inter alia, for the purpose of combining the respective computer manufacturing, marketing, servicing and sales activities in India of the existing company and HP Co. The joint venture agreement contemplates that HP Co. will participate in the existing company where computer, CAD/CAM and peripheral divisions are only to be retained. The residual division (consisting of reprographic communication and instrument division) together with the investments shall be spun off to the new company in which HP Co. shall not participate.

12. The new company was incorporated on May 15, 1991. The main objects of this company are identical with those of the existing company. It has been formed, inter alia, for the purpose of taking over the residual division of the existing company on the same being spun off in pursuance of the joint venture agreement between the existing company and HP Co.

13. Mr. Shroff, learned counsel for the petitioners has explained that the scheme of arrangement is in furtherance of the joint venture agreement. Under the scheme, the existing company would be vertically split and the CAD/CAM and peripheral divisions of the existing company shall be retained in itself while the residual divisions along with the investments held by it shall be spun off and transferred to the new company. Each shareholder of the existing company shall be allotted 32 equity shares of Rs. 10 each as fully paid-up in the new company for 100 equity shares of Rs. 10 fully paid-up as held by such member in the existing company as on a record date. There will be a reduction in the capital paid-up of the existing company to the extent of Rs. 3.20 per equity share of Rs. 10 each. The equity shares of Rs. 6.80 each so reduced shall be consolidated into equity shares of Rs. 10 each. 26 per cent. shares of the existing company after reduction and consolidation would be acquired by HP Co. from the shareholders of the existing company for an aggregate consideration of Rs. 46.30. The scheme of arrangement contemplates division of the assets and liabilities in accordance with the bifurcation of the line of manufacture and business is stipulated in the scheme. It is stated the assets of both the existing company and the new company are, more than adequate to meet the creditor's demand and other liabilities as it evident from the split balance-sheet as on June 30, prepared by M/s. Price Waterhouse, a firm of chartered accountants (annexure "E" to the petition).

14. The scheme of arrangement is divided into six parts. Part I contains definitions of the expressions used in the scheme. Part II, under the heading "HCL Divisions", indicates the divisions of the existing company to be spun off to

the new company. Part III describes the divisions to be retained by the existing company described as "HCL-HP Division". Part IV explains division and distribution of Liabilities, inter se, the existing company and the new company. Part V and Part VI envisage reorganisation of the capital of the existing company and the new company and the general terms and conditions. A perusal of the scheme of arrangement shows that it provides for division and distribution of assets and liabilities and rights and obligations, inter se, the existing company and the new company and their respective shareholders, creditors and employees in great detail.

15. So far as the Central Government's representation is concerned, Mr. K. M. Gupta has affirmed that the Central Government "has no objection to the scheme of arrangement". This, however, is made subject to two "observations".

16. The first observation is about the "appointed date". This expression is defined in the scheme itself :

"The "appointed date" means the commencement of business of the "existing company" on the 1st day July, 1990."

17. This date, Mr. Shroff has explained, has been taken for the identification and quantification of the assets and liabilities of the existing company and the new company consequent upon the proposed spin off. This identification has been done on the basis of the audited balance-sheet of the existing company for the financial year ending June 30, 1990. The "appointed date" is relevant for the purpose of fixation of the share valuation/share exchange rate which HP Co. would offer to the existing shareholders after the bifurcation and spinning off of the divisions as the price is payable per share post-consolidation and reduction. The scheme nowhere seeks transfer artificially of new assets in July, 1990. All the assets which are sought to be transferred to the new company were in fact in existence on the "appointed date". There is, as such, no deeming fiction in so far as the existence of assets is concerned for the purposes of transfer to the new company despite its incorporation only on May 15, 1991. The observation made by the Central Government overlooks the distinction between the "appointed date" and the "effective date" under the scheme. The definition of the latter expression makes clear. It reads thus :

"The "effective date" means the later of the date on which all the consents and approvals referred to in Part VI, clause 9, of this scheme are obtained and/or the date on which the certified copy of the order passed by the Hon"ble High Court at Delhi sanctioning this scheme of arrangement is filed with the Registrar of Companies, Delhi."

18. This provision in the scheme of arrangement is in conformity with the provisions made in the Act as well. The first observation is, Therefore, found to be illusory.

19. Next, the observation regarding reduction of share capital also is of little

consequence. The provisions made in the scheme of arrangement clearly show that there is no diminution of liability in respect of unpaid share capital or payment to any shareholder of any paid-up share capital so as to attract the procedure envisaged u/s 101(2) of the Act. In the existing company, the shares are fully paid-up and the proposal is one whereby some divisions of the existing company are being spun off into the new company. There is really no reduction in capital as the bifurcation involves both the assets and the liabilities to go with the divisions which are being spun off. The divisions which are to spin off into the new company would discharge these liabilities to the creditors. The creditors of the existing company would become the creditors of the new company and the new company, upon which the assets and liabilities would devolve under the scheme of arrangement, is to discharge the liabilities from the assets which are available and represented in the divisions transferred. The cash and bank balances are also partially bifurcated as is evident from the split balance-sheet. It is unnecessary, in these circumstances, to make an order directing the existing company to add to its name as the last words thereof the word "and reduced".

20. Ergo, in the representation of the Central Government u/s 394A of the Act, nothing is found to interdict the petition. At the hearing, no one appeared for the Central Government. Apparently, it was not interested in pursuing the representation.

21. Here, it may be noted that the amendment to the memorandum and articles of association of both the petitioner-companies and inter-change of their names are also envisaged so as to enable effectuation of the scheme. For this purpose, members of both the existing company and the new company have passed the required resolutions at the extraordinary general meeting of each company held on July 16, 1991. Certified copies of those resolutions (annexure "S" and annexure "T") have placed on record.

22. Hence, it is found that no objections to the proposed scheme of arrangement have been received; and that the two "observations" made in the Central Government's representation are insignificant. In accordance with section 391(2) of the Act, the requisite majority in number representing three-fourths in value of the creditors and members of the existing company as well as the members of the new company agree to the arrangement. The petitioners have disclosed to the court all material facts relating to the existing company and the new company. The latest information about the financial position of the two companies has also been placed on record. No Investigation in relation to either of the petitioner-companies is pending. Therefore, I hereby sanction the scheme of arrangement and declare that the same shall be binding on the said two companies, on the shareholders and the creditors of the existing company and on the shareholders of the new company.

23. Further, it is directed that the assets, liabilities and reserves shall vest in the existing company and the new company in accordance with the split balance-sheet as on June 30, 1990, as certified by M/s. Price Waterhouse.

24. The Registry shall draw and issue the formal order in accordance with the rules. The audited balance-sheet of the existing company as on June 30, 1990 (annexure "C"), the split balance-sheet as on June 30, 1990 (annexure "E"), together with scheme of arrangement as sanctioned (annexure "U") shall form part of the order.

25. Further, the petitioners are directed to file, with the Registrar of Companies, a certified copy of the order within 14 days from this date.

26. The "effective date" will be the date when the certified copy of this court's order is filed with the Registrar of Companies.

27. Petition allowed.