

(1996) 02 DEL CK 0057

In the Delhi High Court

Case No : Company Petition No. 204 of 1995

Himachal Telematics Limited

APPELLANT

Vs

Himachal Futuristic Communications Limited

RESPONDENT

Date of Decision : 29-02-1996

Acts Referred:

Companies Act, 1956 — Section 391

Citation : (1996) 2 AD 423 : (1996) 86 CompCas 325 : (1996) 62 DLT 138 :
(1996) 37 DRJ 476

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Rakesh Tikku, ROC and Kanupriya, for the Appellant;

Judgement

Vijender Jain, J.

(1) This is a petition under Sections 391 and 394 of the Companies Act, 1956 to sanction the scheme of amalgamation between M/s Himachal Telematics Limited (hereinafter referred to as the "Transferor Company") and M/s Himachal Futuristic Communications Ltd. (hereinafter referred to as the "Transferee Company"). The main object which is sought to be achieved by the proposed scheme of amalgamation is the combining of the multifarious activities presently being carried out by the two companies under separate umbrellas with a view to enable them to have greater control over the production and marketing function. The amalgamation scheme is for better and profitable utilisation of combined resources of both the companies and to present a consolidated projection to the investors. The scheme of amalgamation was approved by the equity shareholders as well as all classes of creditors i.e. secured and unsecured creditors of the transferor as well as transferee company. The scheme has already been approved by the High Court of Himachal Pradesh at Shimla vide order dt. 10.1.96 subject to scheme finally approved by this Court. No objection for scheme of amalgamation has been received from any shareholders or any class of creditors.

(2) The main objects of the petitioner/transferor company are primarily to manufacturer of digital microwave Radios and also to carry on the business of designers, developers, manufacturers, sellers, buyers, importers, exporters, stockists and distributors and/or other dealers in telecommunication equipment and/or mass consumption terminal equipment etc. The authorised capital of the petitioner/transferor company as on 31st March, 1995 was Rs.50,00,00,000 divided into 5,00,000 equity shares of RS.10.00 each and the paid up capital as on 31st March, 1995 was Rs.24,23,07,000 divided into 2,42,50,000 equity shares of RS.10.00 each.

(3) The transferee company was incorporated on 11.5.1987 as a public limited company and is primarily engaged in the business of designers, manufacturers, assemblers, sellers, buyers, importers, exporters, stockists and distributors and/or other wise dealers in telecommunication equipment like electronic rural automatic, electronic private automatic branch exchange, transmission equipment, modems, integrate digital network systems, component, sub-system, wireless telephone, cellular radios, multi-access rural radio telephone system with their accessories and associated equipment, all types of speech secrecy equipment, using various techniques, suitable for telephones, and radio communication equipment, facsimile systems, teleprinters, teletext and videotext systems, electronic typewriters and copying machines and subscriber carrier systems etc.

(4) A copy of the scheme of amalgamation has been filed as Annexure "E" to this petition. The petitioner/transferor company filed an application bearing C.A. No.587/95 u/s 391 of the Companies Act, 1956 seeking a direction from this Court to convene and hold the meetings of the equity shareholders and secured and unsecured creditors for the purpose of considering and if thought fit approving with or without modifications the proposed scheme of amalgamation and to put it into effect. It is also mentioned in the petition that pursuant to the orders dated 21.8.1995 the High Court of Himachal Pradesh, Shimla, had directed the transferee company-HFCL to convene the meetings of their equity, preferential shareholders, secured and unsecured creditors for the purpose of considering and if thought fit approving with or without modifications the proposed scheme of amalgamation and to put it into effect.

(5) This Court appointed Chairmen for conducting the meetings of the equity shareholders, secured and unsecured creditors of the Applicant Company. On 11th October, 1995 clubbed meetings of the shareholders and secured and unsecured creditors of the applicant company were duly held in accordance with the order of this Court.

(6) The Chairperson submitted the report. It is stated that the scheme of amalgamation as modified in the meeting of- creditors was unanimously approved by the shareholders and the creditors of the transferor company in the meetings held for this purpose.

(7) The Official Liquidator has also given its report and it has been stated that the affairs of the transferor company have not been conducted in a manner prejudicial to the interests of its members, creditors or of public interest. However, objection has been raised by the Regional Director, Northern Region, Department of Company Affairs, invoking the aid of Section 42 and 77 of the Companies Act.

(8) According to Mr. Tikku, learned counsel appearing for the Department of Company Affairs, the proposed scheme of amalgamation is hit by Section 42 of the Companies Act. Section 42 of the Companies Act reads as under :-

"42.(L) Except in the cases mentioned in this Section, a body corporate cannot be a member of a company which is its holding company and any allotment or transfer of shares in a company to its subsidiary shall be void."

(9) Another objection which has been raised by the learned counsel for the respondent is that the scheme of amalgamation is also inconsistent with the provisions of Section 77 of the Companies Act. Section 77 of the Companies Act is as under:-

"77.(1) No company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of Sections 100 to 104 or of Section 402.

(2) No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company:

PROVIDED that nothing in the sub-section shall be taken to prohibit -

(A) the lending of money by a banking company in the ordinary course of its business; or

(B) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, including any director holding a salaried office or employment in the company; or

(C) the making by a company of loans, within the limit laid down in sub-section (3), to persons (other than directors, managing agents, secretaries and treasurers or managers) bona fide in the employment of the company with a view to enabling those persons to purchase or subscribe for fully paid shares in the company or its holding company to be held by themselves by way of

beneficial ownership.

(3) No loan made to any person in pursuance of clause (c) of the foregoing proviso shall exceed in amount his salary or wages at that time for a period of six months.

(4) If a company acts in contravention of sub-sections (1) to (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one thousand rupees.

(5) Nothing in this section shall affect the right of a company to redeem any shares issued u/s 80 or under any corresponding provision in any previous companies law.

(10) The sum and substance of the arguments advanced by the learned counsel for the respondent before me is that the transferee company has got a subsidiary Hfcl Trade Invest Ltd., which is holding shares of the transferor company and after the scheme of amalgamation is sanctioned by this Court, the transferee company will be holding the shares of its subsidiary company which is not in conformity with the provision of Section 42 of the Companies Act. Similar objection has been raised pursuant to the effect of Section 77 of the Act.

(11) On the other hand, learned counsel for the petitioner, Dr. Singhvi, has contended that dealing with the argument regarding violation of Section 77 of the Companies Act, no violation would result as a result of sanctioning the scheme of amalgamation. Dr. Singhvi has contended that there is no share which is being bought of its own by the transferee company and on this short ground itself the objection regarding Section 77 is untenable in law.

(12) DR.SINGHVI has contended that Sections 391 to 394 of the Companies Act are sufficient code to take into consideration any eventuality which crops up after the scheme of amalgamation has been presented to the Court and if the Court is satisfied that the scheme does not adversely effect the interest of shareholders or otherwise do not effect the public interest, the Court has plenary as well as residuary power of the Act to sanction the scheme. In support of his contention Dr. Singhvi has cited S.K. Gupta and another vs. K.P. Jain and another AIR 1979 Sc 734, Mansukhlal Vs. M.V. Shah, Official Liquidator, Liquidator of Hathisingh Mfg. Co. Ltd. 1976 46 Comp Cas 279 and Mehtab Chand Golcha Vs. Official Liquidator Golcha Property (Pvt) Ltd. and another 1981 51 Comp Cas 103. Dr. Singhvi has further contended that as a matter of fact while dealing with the provisions of Section 391 and 394 of the Companies Act, the legislature has invested wide amplitude of power to this Court and has also cited Pmp Auto Industries Ltd. case, wherein the learned judge of Bombay High Court has used the phrase "Single Window Clearance" as reported in 1994 80 Comp Cas 289.

(13) I have given my careful consideration to the submissions made by learned counsel for both the parties. There is no doubt that the powers given to the Court under Sections 391 to 394 of the Act pursuant to Chapter V which starts

with arbitration, compromise, arrangements and reconstructions ,are of wide amplitude for carrying out of compromise and/or arrangement and also the consequential power to make the supervision effective by removing obstacles. The very heading of Chapter V suggests that the powers which are invested in Courts not only deals with power of compromise, but it also deals with power where arbitration has taken place, arrangements have been entered into between two or more corporate entities or any scheme of reconstruction has been placed before the Court. Obviously the legislature was mindful of the fact that in relation to these kinds of arrangements where two distinct corporate bodies would like to enter into an agreement, arrangement for the purpose of reconstruction or for any purpose which is conducive to the interest of shareholders, there has to be no obstacles and that is why Section 394 of the Companies Act provides with wide amplitude of powers to the Court. Section 394 of the Companies Act is as follows :-

"394.(1) Where an application is made to the Court u/s 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court -

(A)that the compromise or arrangement has been proposed for the purpose of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(B)that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to any company (in this section referred to as "the transferee company");

THE Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters;

(I)the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(II)the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person ;

(III)the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(IV)the dissolution without winding up, of any transferor company;

(V)the dissolution to be made for any persons who, within such time and in such manner as the Court directs dissent from the compromise or arrangement; and

(VI)such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

[PROVIDED that no compromise or arrangement proposed for the purpose of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest"]

(14) So vast are the powers under Sections 392 and 394 of the Act, according to Supreme Court which dealt with in detail to the following effect in S K Gupta's case (supra)

"WHEN a scheme is being considered by the Court, in all its ramifications, for according its sanction, it would not be possible to comprehend all situations, eventualities and exigencies that may arise while implementing the scheme. When a detailed compromise and/or arrangement is worked out, hitches and impediments may arise and if there was no provision like the one in Section 392 the only obvious alternative would be to follow the cumbersome procedure as provided in S. 391(1), viz., again by approaching the class of creditors or members to whom the compromise and/or arrangement was offered to accord their sanction to the steps to be taken for removing such hitches and impediments. This would be unduly cumbersome and time consuming and, Therefore, the legislature in its wisdom conferred power of widest amplitude on the High Court under S.392 not only to give directions but to make such modification in the compromise and/or arrangement as the Court may consider necessary, the only limit on the power of the Court being that such directions can be given and modifications can be made for the proper working of the compromise and/or arrangement. The purpose underlying S.392 is to provide for effective working of the compromise and/or arrangement once sanctioned and over which the Court must exercise continuous supervision and if over a period there may arise obstacles, difficulties or impediments, to remove them, again, not for any other purpose but for the proper working of the compromise and/or arrangement. This power either to give directions to overcome the difficulties or if the provisions of the scheme themselves create an impediment, to modify the provision to the extent necessary, can only be exercised so as to provide for smooth working of the compromise and/or arrangement. To effectuate this purpose the power of widest amplitude has been conferred on the High Court and this is a basic departure from the scheme of the U.K. Act in which provision analogous to S.392 is absent. The sponsors of the scheme under S.206 of the U.K. Act have tried to get over the difficulty by taking power in the scheme of compromise or arrangement to make alterations and modifications as proposed by the Court. But the Legislature foreseeing that a complex or complicated scheme of compromise or arrangement spread over a long period may face unforeseen and unanticipated obstacles, has conferred power of widest amplitude on the Court to give directions and if necessary, to modify the scheme for the proper working of the compromise or arrangement. The only limitation on the power of the Court as already mentioned, is that all such directions that the

Court may consider appropriate to give or make such modifications in the scheme, must be for the proper working of the compromise and/or arrangement."

(15) Therefore, where Court is prima facie satisfied from material on record and on the opinion of Company Law Board or Department of Company Affairs that the affairs of the Company have been conducted in a manner which is not prejudicial to the interests of its members or of public interest, Court will sanction such scheme. A compromise or arrangement or a scheme of amalgamation may not be sanctioned by the Court if the affairs of the company are conducted in a manner prejudicial to the interest of its members or public interest.

(16) In the case before hand, the stand of the respondent is not that the affairs of the company are not being conducted in a manner which is prejudicial to the interests of its members. The stand, as has been contended before me by Mr. Tikku, is that the objection raised by respondent regarding Sections 77 and 42 of the Act would fall in the category of amalgamation not conducive in public interest. I am afraid, the argument of the learned counsel for the respondent is not well founded. The objection raised before this Court pursuant to Section 42 of the Act is that as a consequence of the scheme of amalgamation, there would be violation as transfer of shares from subsidiary company to transferee company would result and the same would be hit by Section 42. That objection, which I will deal with later, is not an objection in public interest. If the scheme of amalgamation is inconsistent with other, provisions of Companies Act, then the legislature in its wisdom ought to have added in the proviso to Section 394 afterwards "public interest" or anything inconsistent with other provision of this Act. That being not the situation, in the plain language of Section 394, the Court cannot permit the respondent to read further condition which has not been intended in the Section. Three affidavits have been filed by the respondent except taking objection to the scheme being hit by provision of Section 42 and 77 of the Companies Act, it has not been mentioned how the scheme is against public interest. Rather in one of the affidavit filed by the respondent the stand of the respondent is that scheme is otherwise in public interest.

(17) Adverting to the submission of the learned counsel for the respondent that the scheme, if approved, would hit Section 42 of the Companies Act. Rule of interpretation of a statute is that statute has to be read harmoniously. If there is no controlling provisions in the subsequent Sections of the Act, then no other meaning can be assigned to the language of a Section. Where a company is in the process of incorporation, Section 42 falls in that part of the Companies Act, which deals with incorporation of company and matters incidental thereto. This part deals with Memorandum of Association, names of the companies, Article of Association, change of the registration of companies and Section 41 and 42 deals with membership of the company. From the plain reading of the Section it cannot be said that this Section is intended to be read with Section 391, 392 or 394 at the time when the scheme of amalgamation is pending before the Court for

approval and when the shareholders and the creditors have approved the same and the respondent has also filed an affidavit that the affairs of the company are not conducted in a manner prejudicial to the shareholders or prejudicial to public interest.

(18) In view of the afore going discussions, I do not find any merit in the contention of the learned counsel for the respondent that Section 42 of the Act would be applicable to the Scheme of Amalgamation

(19) It is? so stated that no investigation or proceedings under Sections 235 to 251 of the Companies Act, 1956 are pending against the petitioner company.

(20) Considering all the relevant facts and circumstances, the reasons set out by the petitioner in support of the amalgamation, the unanimous approval given by the shareholders and the creditors and in view of the aforesaid discussions and in absence of any objections from the Official Liquidator, I hereby accord sanction to the said scheme of amalgamation Annexure-"E" (to the petition) providing for amalgamation of the transferor company with the transferee company and declare that the said scheme shall be binding on all the members, shareholders and creditors of the petitioner company w.e.f. appointed date i.e. 1.4.1995. It is open to any person interested to move this Court for appropriate directions as may be considered necessary in future.

(21) The petition is accordingly allowed and disposed of.