(2006) 03 P&H CK 0136

In the Punjab And Haryana At Chandigarh

In Re: Alpha Drug India Ltd. and Another

Date of Decision : 10-03-2006

Acts Referred:
COMPANIES ACT, 1956 — Section 104, 17, 391, 392, 393

Citation : (2008) 143 CompCas 51

Hon'ble Judges : Hemant Gupta, J

Bench : Single Bench

Judgement

Hemant Gupta, J.—This order shall dispose of Company Petition No. 114 of 2005 filed by M/s. Alpha Drug India Ltd. (hereinafter to be referred as "the first transferor company"), a company incorporated on February 20, 1987, under the Companies Act, 1956 (hereinafter to be referred as "the Act"), and Company Petition No. 113 of 2005 to seek approval of the scheme of amalgamation of the first transferor company with M/s. Punjab Chemicals and Crop Protection Ltd. (hereinafter to be referred as "the transferee company"), a company incorporated on November 19, 1975, under the Act.

2. The authorised share capital of the first transferor company is 4,00,00,000 equity shares of Rs. 10 each whereas issued, subscribed and paid-up share capital of the first transferor company is 3,79,23,448 equity shares of Rs. 10 each fully paid-up 53.70 per cent. of such paid-up shares, i.e., 2,03,64,871 equity shares of Rs. 10 each fully paid-up of the first transferor company are held by the transferee company which is also holding company of the first transferor company.

3. Subsequent to March 31, 2004, the issued, subscribed and paid-up equity capital was reduced and consolidated in respect of the first transferor company pursuant to the orders passed by this court on January 14, 2005, under sections 78 and 104 of the Act. The issued, subscribed and paid-up share capital was reduced from Rs. 37,92,34,480 divided into 3,79,23,448 equity shares of Rs. 10 each fully paid-up to Rs. 7,58,46,900 divided into 3,79,23,448 equity shares of Rs. 2 each fully paid-up. Such reduced share capital was consolidated into fully paid-up share capital of Rs. 2 fully paid-up to Rs. 7,58,46,900 divided into

75,84,690 equity shares of Rs. 10 each fully paid-up. The equity shares of the first transferor company are listed on Bombay and Calcutta Stock Exchanges.

4. The transferee company was incorporated under the Act on November 19, 1975, under the name and style of Punjab United Pesticides and Chemicals Ltd. Its name was subsequently changed to Punjab Chemical and Pharmaceuticals Ltd., with effect from August 22, 1985. The name has further been changed to Punjab Chemicals and Crop Protection Ltd., with effect from August 20, 2004. The authorised share capital of the transferee company is 48,00,000 equity shares of Rs. 10 each and 20,000 (9.8 per cent, redeemable cumulative preference shares) of Rs. 100 each. The issued, subscribed and paid-up capital is 21,70,695 equity shares of Rs. 10 each fully paid-up, subscribed and called up and 21,55,662 equity shares of Rs. 10 each fully paid-up. In the annual general meeting of equity shareholders of the transferee company held on August 18, 2004, bonus equity shares in the ratio of 1:1 held by capitalisation of share premium account was approved. Therefore, the present issued, subscribed and paid-up share capital of the transferee company is 43,26,357 equity shares of Rs. 10 each fully paid-up, subscribed and called up ; 43,11,324 equity shares of Rs. 10 each fully paid-up.

5. The second transferor company, M/s. STS Chemicals Ltd., a company under the Act and having its registered office at Mumbai (hereinafter to be referred as "the second transferor company"). The said companies have proposed a scheme of amalgamation, annexure P1, under Sections 391 to 394 of the Act. Upon amalgamation, each of the shareholders of the first transferor and the second transferor company will be issued shares in the transferee company in the ratios as worked out by the valuers appointed for such purpose. The methods used for valuation of shares of each party to the amalgamation are net asset value, profit earning capacity value and market value of the shares of the listed company. On this basis, the swap ratio works out to 10 equity shares of Rs. 10 each in the transferee company credited as fully paid up for every 54 equity shares of Rs. 10 each fully paid, held by such members in the first transferor company. The valuation report furnished by M/s. Deloitte Haskins and Sells and M/s. Khimji Kunverji and Co., chartered accountants, has been attached with the petition as annexure P8.

6. The board of directors of the first transferor company in its meeting held on May 12, 2005, examined and approved the scheme of amalgamation containing the aforesaid swap ratio of 54 shares of the first transferor company for 10 shares of the transferee company. The amalgamation is being considered for carrying out the business of all the companies under one common umbrella, by way of pooling of interests, so as to derive the benefits of synergies and economies of scale, from amongst others. The meetings of the equity shareholders, unsecured and secured creditors of the first transferor company was convened on July 23, 2005, in pursuance of the summons for directions sought by it in Company Petition No. 80 of 2005 vide order dated May 26, 2005.

This court appointed a chairman and an alternate chairman for such meetings convened in terms of the directions of this court. As per the report of the chairman, the meeting of the equity shareholders of the first transferor company was held on July 23, 2005. The said meeting was attended by 22 equity shareholders. The scheme was approved by 20 equity shareholders. Two equity shareholders voted against the proposed scheme, i.e., 8.69 per cent. of equity shareholders of the first transferor company. The meeting of unsecured creditors of the first transferor company was attended by 20 unsecured creditors and the scheme was adopted unanimously by the unsecured creditors. The meeting of the secured creditors was attended by three secured creditors and the scheme of amalgamation was approved by all the secured creditors of the first transferor company present and voting.

7. It is also pointed out that in pursuance of the orders passed by the High Court of Judicature at Bombay, the meetings of the equity shareholders, the unsecured and the secured creditors was convened on July 26, 2005, in respect of the second transferor company. In all the three meetings, the scheme was adopted unanimously. Similarly, separate meetings of the equity shareholders, the unsecured and the secured creditors of the transferee company were convened on July 22, 2005, in pursuance of the orders passed by this court in Company Petition No. 81 of 2005 and such meetings were attended by 74 equity shareholders, 56 unsecured creditors and 2 secured creditors, respectively. The scheme was adopted unanimously by the equity shareholders, unsecured and secured creditors.

8. In the present petitions, notices were issued to the Regional Director (Northern Region), Ministry of Company Affairs, Noida, and the official liquidator. Notice was also ordered to be published in The Tribune (English), Punjabi Tribune and the Punjab Government Gazette. The Regional Director has furnished his report by way of affidavit dated September 28, 2005, whereas the official liquidator has also given his report. The Regional Director has submitted in his affidavit that detailed calculations in support of the valuation report prepared jointly by M/s. Khimji Kunverji and Co. and M/s. Deloitte Haskins and Sells, chartered accountants, have not been submitted by the petitioner-companies and, therefore, the office of the Regional Director is not in a position to ascertain the fairness of the ratio of exchange proposed in the scheme. It has also been pointed out that paragraph 15.2 of the scheme provides increase in authorised share capital and such share capital can be increased by following the procedure prescribed under the relevant provisions of the Act and on payment of requisite fees to the Registrar of Companies and stamp duty to the State Government. Similarly, as per paragraph 15.1 of the scheme, certain clauses are proposed to be added in the memorandum of association of the transferee company without any further act, deed or instrument. Therefore, the object clauses of the memorandum of association of a company can be permitted to be altered after following the procedure under the relevant provisions of the Act. Referring to paragraph 11.2 of the scheme, it was pointed out that the balance in reserve and

surplus accounts of the transferor companies, after giving effect to the reduction of share capital and premium in the first transferor company are proposed to be transferred to the corresponding reserves in the transferee company. In other words, identity of reserves, except as mentioned above, of the transferor companies shall be preserved. It is pointed out that the balances of amalgamation reserve, capital reserve and capital redemption reserve cannot be considered as general reserves as the general reserves are free for distribution to the shareholders of a company in the form of dividends/bonus shares, whereas amalgamation reserve, capital reserve and capital redemption reserve cannot be utilised for distribution to the shareholders.

9. The petitioner has filed an affidavit dated February 16, 2006, in response to the affidavit filed by the Regional Director. It has been pointed out that the working documents prepared by the valuers for arriving at the exchange ratio have been duly submitted to the office of the Registrar of Companies. It is further submitted that the ratio of exchange proposed in the scheme has been advised by two independent internationally renowned firms of chartered accountants after review of overall position of the company. The method of valuation adopted by the valuers included net asset value, profit earning capacity value and market value of the shares. Still further, the members of the company have passed a resolution in the extraordinary general meeting of the company held on July 22, 2005, giving their consent to the increase in the authorised share capital of the company. The transferee company has also filed Form No. 5 dated August 18, 2005, with the Registrar of Companies on August 22, 2005, following the procedure prescribed u/s 97 of the Act with respect to notice for increase in the authorised share capital of the company and has made a payment of Rs. 5 lakhs, being the prescribed fee thereof. Still further, the object clause of the memorandum of association of the transferee company has been amended after following the prescribed procedure u/s 17 of the Act. A copy of Form No. 23 dated August 18, 2005, has been produced along with the said affidavit. Still further, in respect of balances of amalgamation reserve, capital reserve and capital redemption reserve to treat as general reserve, it was submitted that since the scheme of amalgamation prescribes treatment to be given to the reserves of the transferor companies after amalgamation, the same is required to be followed in terms of paragraph 23 of the Accounting Standard (AS) 14 issued by the Council of the Institute of Chartered Accountants of India. Therefore, no exception can be taken for creation of such reserve by the Regional Director. In view of the stand in the affidavit, objections raised by the Regional Director are not such which disentitle the petitioners to get approval to the scheme of amalgamation.

10. However, the main thrust of objections against the proposed scheme of amalgamation is by the Punjab State Industrial Development Corporation (hereinafter to be referred as "the Corporation") holding 8.69 per cent. of shareholding in the first transferor company. The said Corporation has filed objections by way of Company Application No. 864 of 2005 in Company Petition

No. 114 of 2005. It has been explained by the Corporation that the Corporation is a wholly owned State Government undertaking of the Government of Punjab set up with the objective of promoting medium and large scale industry in the State. In furtherance of its objectives, the Corporation makes investment by way of equity as well as term loans in industrial ventures in the State. It has been pointed out that the first transferor company has been promoted by the Corporation jointly with one Shri V. K. Garg, the private promoter, after a financial collaboration agreement dated August 19, 1986, had been entered into between the Corporation and the private promoter. The original cost of the project was Rs. 28.62 crores which was finally revised to Rs. 45.82 crores. In the year 1995, 14.12 per cent. shares of the company were acquired by M/s. DSM Andeno B.V. (hereinafter to be referred as "DSM"). An agreement was executed by M/s. DSM with private promoter on October 2, 1995, to acquire 30,72,580 shares at Rs. 15.50 per share. In the year 1997, 1,61,62,713 additional shares were acquired by M/s. DSM for Rs. 10 each through an agreement dated July 3, 1997. With the acquisition of these shares, the shareholding of M/s. DSM went up to 50.72 per cent.

11. It is the case of the Corporation that in terms of the financial collaboration agreement dated August 19, 1996, the private promoter was obliged to buy back the equity shareholding of 32,94,750 fully paid-up shares of the Corporation at the end of five years from the date of commencement of commercial production. A dispute arose between the private promoter and the Corporation in respect of the obligation to buy back the shares. The said dispute is stated to be pending in separate arbitration proceedings. It has been pointed out by the Corporation that on November 3, 1997, the private promoter entered into a share purchase agreement with M/s. DSM for the purchase of the shares of the private promoter in the company and M/s. DSM undertook to buy back 32,94,750 shares owned by the Corporation. However, the Corporation objected to such transfer. M/s. DSM sold its entire shareholding in the company to the Punjab Chemicals and Pharmaceutical Ltd., at the rate of Rs. 0.1325 per share. In terms of the provisions of SEBI (SAST) Regulations, 1997, a public offer of 20 per cent, of the shares was made at a price of Rs. 5.50 per share. The transferee company acquired the said shares which raised its total shareholding to 2,03,64,871 amounting to 53.70 per cent. of the total paid-up capital of the company.

12. It is the case of the Corporation that a proposal was mooted by the transferee company to restructure the company with a view to do window dressing to the balance-sheet, as also to stall efforts of the Corporation in discharging its duties and responsibilities in public interest. The management of the transferee company proposed a reduction in the share capital. A proposal was mooted whereby the entire shareholding was proposed to be reduced by 1/5, i.e., the shareholder holding five shares will be left with one share only. Thus, the shareholding of 32,94,750 was reduced to 6,58,950. The said reduction of the share capital was confirmed by this court vide order dated January 14, 2005, even though the same was objected by the Corporation.

13. The Corporation expressed its apprehension of further reducing the shareholding of the Corporation. It is pointed out that the shareholders were baffled on account of rise in the transferee company shares price and fall in the first transferor company share price. The results of both companies were declared on April 27, 2005, but this strange phenomena was happening immediately after re-listing of the first transferor company shares on April 5, 2005. It has been pointed out that share prices of the transferee company and the first transferor company which were in the ratio of 1: 2 on April 6, 2005 drop to 1: 2.5 on April 13, 2005 and 1: 2.8 on April 21, 2005. It further dropped to 1 : 3.6 on April 28, 2005 and 1: 3.9 on May 9, 2005. On May 11, 2005, the ratio was down further to 1: 4.19. It is alleged that the rise in the share value of the transferee company and fall of the share value of the transferor company was a clear case of insider trading. The Corporation enumerated violation of corporate governance/ethics on the following four counts:

I. Not informing stock exchange about board meeting by both companies.

II. Misleading of shareholders by changing the name of PC and CPL and capital reduction of ADIL.

If the intention was to amalgamate both companies they should not have done all this.

III. Possible insider trading by people close to management.

IV. Action detrimental to minority shareholders of ADIL.

14. Since the proposal considered by the board of directors of the first transferor company, had a detrimental effect on the Corporation, the nominee-directors of the Corporation opposed the scheme in the board meeting held on July 23, 2005. It is the grievance of the Corporation that the board of directors of the first transferor company approved amalgamation even though there has been a dissenting view. It is pointed out that the market value of the shares is not being taken into consideration nor any security is being offered to the Corporation so that its investment is not jeopardized. The note of dissent dated May 23, 2005, has been appended as annexure A12. During the course of arguments, opposing sanction to the scheme of amalgamation, learned Counsel for the Corporation has primarily relied upon the note of dissent.

15. Shri Boparai, learned Counsel representing the Corporation, has vehemently argued that the consultants for determining the value were appointed by the transferee company and not by the transferor companies and, therefore, the valuation report is heavily loaded towards the interest of the shareholders of the transferee company. It was alleged that the valuers were appointed by the transferee company to value the shares of the first transferor company and that the market value of the stock. It is pointed out that the weighted price average is unjust and unfair and is more inclined to the shareholders of the transferee company vis-a-vis the first transferor company as the scrips of the transferee

company post bonus scaled up but that of the first transferor company slipped down because of bad swapping ratio. It has been pointed out that the shareholders of the first transferor company are at a disadvantage while the gainers are the promoters of the first transferor company and the transferee company.

16. I have heard learned Counsel for the parties at length and found no Sub- stance in the objections raised by the objector-Corporation. The objection that the valuer has been appointed by the transferee company is refuted on facts. It is pointed out that the appointment of the valuer for conducting valuation of the transferor and the transferee companies was ratified by the board of directors of the transferor company held on May 12, 2005. With the ratification of the appointment of the valuer by the board of directors, the objections raised by the Corporation are not sustainable. Even otherwise, the valuers are well known professionals. In Hindustan Lever Employees'' Union v. Hindustan Lever Ltd. [1995] 83 Comp Cas 30 (SC) while considering the scope of the jurisdiction of the company court in respect of the valuation arrived at by the valuer, it was found 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 good as it would have been if another method had 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 High Court has found that the chartered accountant who performed this function of valuation though was a director of the petitioner-company, he did so as a member of a renowned firm of chartered accountants. It was further found that it was not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The court is least equipped for such oversights. Nor, indeed, it is a function of the judge in our constitutional scheme.

17. Still further, in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., , it was found that the court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. The company court''s jurisdiction to that extent is peripheral and supervisory and not appellate. The court acts like an umpire in a game of cricket who has to see that both play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. However, if the court finds that the scheme is unconscionable or an illegal scheme or is otherwise unfair and unjust to the class of shareholders or creditors for whom it is meant, the court would never countenance such scheme. The

principles which are to be taken into consideration have been delineated. The broad illustrative principles are the following (page 819):

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, Sub-section (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 materials contemplated by the proviso to Sub-section (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.

18. It is alleged that the decision of the majority is unjust and unfair to the minority. As found above, the valuation report was prepared by the two firms of chartered accountants. Such chartered accountants have taken into consideration the entire background of the company, their operation and shareholding pattern. The fair value of the equity share was assessed keeping in view the net asset value, comparable companies multiples value or profit earning capacity value and market value of the shares of the companies as quoted on stock exchanges. The said chartered accountants have found that they are not arriving at the absolute values of the shares of each company but at their comparative values to facilitate the determination of a ratio of exchange by providing appropriate weightages to the values arrived at under each methodology. It has been considered that post merger, the business of the companies are intended to be continued on a going concern basis and there is no intention to dispose of the assets. It was considered appropriate to give a higher weightage of two each to the values determined under the comparable companies multiples method and the market price method, as compared to a lower weight of one to the net asset value methodology in calculating the relative values of the first transferor company and the transferee company.

19. Though it is the stand of the Corporation that detailed calculations were not given to the Corporation but the fact remains that the Corporation has never demanded any such details which might be considered relevant by the Corporation. The joint valuation report was available for the equity shareholders and such report has been produced by the petitioner-company before this court as well. Reference is made only to annexure P12 wherein the board of directors was considering the option for enhancing shareholders worth by the organisation of business by way of acquisition/ merger. Though a note of dissent has been given but the Corporation has not produced any valuation by any other chartered accountants for the consideration of this court to show that the valuation report given by the chartered accountants appointed by the transferee company is incorrect either in law or on facts. Therefore, the argument raised that the valuation report cannot be accepted is not tenable in law. There is nothing on the record to doubt the credibility of the firms of the chartered accountants or that they have not carried out their professional duties in a fair and reasonable manner. In the absence of any counter report or in the absence of any allegation of not handling the valuation aspect in a fair and professional manner, it will not be reasonable for the court to infer that such report is not just, fair and reasonable.

20. The other argument raised by the Corporation was that the scheme of amalgamation is contrary to the public policy as it affects the State Government undertaking. However, such objection is again without any material and substance on record. It was pointed out that in July, 2003, the transferee company has negotiated purchase of shares of the first transferor company at the rate of 13 paise per share. As per the said value, the shares of the Corporation were of total value of Rs. 40 lakhs but as on today, after the

transferee company has pumped in money and expertise, the share of the first transferor company is being quoted in the stock exchanges at the rate of Rs. 38 to Rs. 40. Such value is quantified at Rs. 2 crores 50 lakhs in respect of shareholding of the Corporation. Even if post merger, the objector is given 10 shares of the transferee company in lieu of 54 shares of the first transferor company, the total value as per current rates on the stock exchanges would be Rs. 2 crores 42 lakhs at Rs. 200 per share of the transferee company. Thus, there is no substantial loss to the Corporation even though the quantity of the shares might have reduced but the quality is better.

21. The allegation of the Corporation that there was inside trading of the shares, which is apparent from the fact that the value of the shares of the first transferor company came falling during the period from April 5, 2005, to May 12, 2005, but correspondingly the value of the share of the transferee company increased, is again not relevant. The Corporation has not produced the valuation of the shares of the first transferor company at the time of agreement entered upon by M/s. DSM with the private promoter or the price prevalent in the stock exchanges at the time of acquisition of shares by the promoter of the transferee company from M/s. DSM. The allegation that the price paid by the private promoter is abnormally low remains unsubstantiated in the absence of any fact brought on record for the said purpose. The allegation of inside trading is based upon mere conjecture. Any fluctuation in the market value of the share of the first transferor company during the relevant period cannot be attributed to inside trading without any further proof. Still further, this court is least equipped to examine such question in the absence of any data. It is for the experts or for the statutory bodies to examine such allegations. There is no material on the record of this case to arrive at a conclusion that there was inside trading which led to unfair pricing of the shares of the first transferor company.

22. Since the objections raised by the Regional Director have been either addressed by the company or have been found to be without any merit, as well as the objections raised by the Corporation have been found to be without any substance, therefore, there is no impediment in approving the scheme of amalgamation. Mere fact that the Corporation is a minority shareholder of the first transferor company does not give it a right to overshadow the will of the majority. There is nothing on the record which can lead to the inference that the scheme is unfair and unjust which may warrant interference by this court. In view of the above, I am satisfied that all the statutory requirements have been duly complied with. Accordingly, the proposed scheme of amalgamation, annexure P1, is hereby sanctioned subject to the orders that may be passed by the concerned High Court on the petition of M/s. STS Chemicals Ltd. (the second transferor company).

23. The order sanctioning the scheme shall be duly notified by public notice in The Tribune (English), Punjabi Tribune and Punjab Government Gazette within 30 days. Any person interested shall be at liberty to approach this court in the

above matter for any directions that may be necessary.

24. Both the petitions stand disposed of in terms of the aforesaid order.

