

(2002) 11 BOM CK 0036

In the Bombay High Court

Case No : Company Petition No. 674 of 2002 in Company Application No. 228 of 2002

In Re: Amalgamation of Shaily Engineering Plastics Limited and Others

Date of Decision : 18-11-2002

Acts Referred:

Companies Act, 1956 — Section 391, 392, 393, 394, 97

Citation : (2003) 1 ALLMR 668 : (2003) 2 BomCR 514 : (2003) 2 MhLj 22

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : A. Chandurkar, instructed by A.S. Dayal and Associates, C.J. Joy and D.A. Dubey, instructed by T.C. Kaushik, S.R. Kom, Official Liquidator, for the Appellant;

Judgement

1. The petitioner company, being transferee company, Anmol Trading Company Ltd., seeks sanction of the Scheme of Amalgamation u/s 391 and 394 of the Companies Act, 1956 with the transferor companies. The amalgamation is intended for better rationalisation in respect of manufacture of products and business, the assets and properties of the petitioner company and each of the transferor companies to be put to better use and considerable economy with a view to increase the productivity and profitability of the combined unit to the advantage of the company's shareholders and the creditors.
2. It appears that the petitioner company took out a summons for direction being Company Application No. 228 of 2002 and by an order dated 19th April 2002, the convening and holding of the meetings of the shareholders, members and creditors was dispensed with.
3. It further appears that the transferor companies have also taken out a summons for direction in the High Court at Gujarat and orders in respect of the applications filed were passed by that Court.
4. The learned Counsel appearing for the petitioner company has filed affidavit proving service of notice of hearing upon the Regional Director and also affidavit proving publication of notice of the date of hearing of the petition. The petitioner

company has also filed affidavit proving service of notice on shareholders. All the three affidavits have been taken on record and marked as exhibits A, B and C colly. Pursuant to the publication of the company petition, it appears that one Shri N.H. Thakkar addressed a letter to the petitioner company objecting to the scheme of amalgamation and requesting the company to pay off his dues appearing in the books. He had also forwarded a copy of his letter to this Court. It further appears that his misunderstanding was cleared and he addressed another letter dated 13th August 2002 to the petitioner company that there was misunderstanding on his part and since it was cleared he had no objection to the scheme.

5. Pursuant to the notice received, the Regional Director, has filed an affidavit dated 11th September 2002. The Regional Director has averred that after making appropriate enquiries from the concerned Registrar of Companies and after examining the report submitted by the concerned Registrar and after examining various points viz., shareholders' interest, creditors' interest, the Regional Director has recorded that the scheme is not prejudicial to the interest of the creditors and shareholders. He has also recorded that the transferee company shall apply to the Regional Director for change of name and the Registrar of Companies shall consider the application under the Companies Act, 1956. He has also recorded that the transferee company shall apply to the Company Law Board having jurisdiction to shift the registered office of the company from the State of Maharashtra to the State of Gujarat. In para 7 of the affidavit, which is the main bone of contention in this matter, the Regional Director has stated that the transferee company shall file the prescribed form No. 5 with Registrar of Companies along with Central Government, being for increase of authorised share capital of the transferee company in terms of Section 97 of the Companies Act, 1956. Since, the petitioner company has objected to this procedure, the Regional Director has sought appropriate orders in this respect. The said affidavit is taken on record and marked as Exh. "D".

6. Ms. Chandurkar the learned Counsel appearing for the petitioner company has taken serious exception to the requirements prescribed by the Regional Director, that the petitioner should comply with Section 97 of the Act. According to her, it was not necessary for the petitioner company to comply with Section 97 of the Act as Sections 391 to 394 are the self-contained code for the schemes of arrangement, compromise. According to the learned Counsel, the scheme of amalgamation provides for the contingency which is prescribed in Section 97 and, therefore, the transferee company was not obliged to separately comply with the provisions of Section 97 of the Act. The learned Counsel has placed reliance on Section 394(1)(b) of the Act. As a result and consequence of the scheme of amalgamation, the entire share capital of the transferor companies shall stand transferred to the transferee company and as such transfer of the entire share capital of transferor company is only a consequence of the scheme of amalgamation, Section 97 will not be attracted, says the learned Counsel. The increase in the authorised share capital of the transferee company is by virtue of

the scheme of amalgamation and, therefore, it would not be necessary for the transferee company to undergo the procedure prescribed for increase in the authorised share capital as it is not independently seeking to increase its authorised share capital, submits the learned Counsel for the petitioner. The share capital of the transferor company get merged with that of the transferee company as a result of the lawfully permissible scheme of amalgamation of the two companies, submits Ms. Chandurkar. She further contends that having fully complied with the mandatory provisions of Sections 391 to 394, there is no legal requirement to once again formally duplicate the work. She also relied upon an unreported judgment of the Andhra Pradesh High Court in Company Petition No. 56 of 2002 between M/s Godrej Plant Biotech Ltd. and Godrej Aggrovate Limited.

7. Shri Dube, the learned Counsel for the Regional Director submits that requirements of Section 97 is an independent condition to be separately satisfied by the transferee company. The learned Counsel pointed out that the Board of Directors of the transferee company has to pass a resolution after giving due notice of the increase of the share capital which would ensue as a consequence of the scheme of Amalgamation.

8. To appreciate the controversy, it would be relevant to reproduce Section 97 as well as Section 394 of the Act.

Section 97. "Notice of increase of share capital or of members.--(1) Where a company having a share capital whether its shares have or have not been converted into stock, has increased its share capital beyond the authorised capital, and where a company, not being a company limited by shares, has increased the number of its members beyond the registered number, it shall file with the Registrar, notice of the increase of capital or members within thirty days after the passing of the resolution authorising the increase; and the Registrar shall record the increase and also make any alterations which may be necessary in the company's memorandum or articles or both;

(2) The notice to be given as aforesaid shall include particulars of the classes of shares affected and the conditions, if any, subject to which the new shares have been or are to be issued;

(3) If default is made in complying with this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues."

"Section 394. Provisions for facilitating reconstruction and amalgamation of Companies.--(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 purposes 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 another 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 provision 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 purposes 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 interests:

Provided further that no order for the dissolution of any transferor company under Clause (iv) shall be made by the Court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within thirty days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy

thereof to be filed with the Registrar for registration. If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees.

(4) In this section -

(a) "property" includes property, rights and powers of every description; and "liabilities" includes duties of every description; and

(b) "transferee company" does not include any company other than a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act or not."

8-A. Section 97 provides for two contingencies viz., increase in share capital and increase in the number of its members beyond the registered numbers. If both the events occur, the company has to file with the Registrar, notice of the increase of capital or of its members after passing of resolution authorising increase. Under this section the Registrar is obliged to record the increase of the share capital or increase in the number of members and to effect alterations in the company's memorandum or articles or both. According to the Regional Director, in the present case, as a consequence of the amalgamation scheme, the share capital of the transferee company would increase and, therefore, it is mandatory u/s 97 of the Act to send the prescribed notice of the increase of the capital. The transferee company is required to pass a resolution to that effect and communicate the same within 30 days to the Registrar of the Companies who shall modify the records of the transferee company.

8-B. I fail to understand how it can be said that this section will not apply when the increase in the share capital is a consequence of the scheme of amalgamation. It is true that when two companies get amalgamated, the share capital of the transferor company is transferred to the transferee company as a result of which the total authorised share capital of the transferee company is bound to increase as a result of the scheme of amalgamation. There is absolutely nothing in Section 391 to 394 or thereafter in the chapter which carves out an exception to compliance of Section 97 of the Act. It nowhere says that if under the scheme, the share capital of the transferee company increases, it is not necessary to comply with Section 97 of the Act. If any provision of law is not to be complied with, the legislature always makes it clear by providing for such exception or dispensation of the provisions of law to be complied with. The learned Counsel has not pointed out any specific provision of law to that effect. Both the provisions have separate field of operation. Section 97 provides for a procedure to be followed in case of an increase in the authorised share capital. It does not carve out an exception to the increase in share capital as a result of scheme of amalgamation. Section 97 includes even that contingency. This section is absolute in its effect that whenever there is increase in share capital or increase in members, the company has to pass a resolution authorising such increase and it has to notify the said increase to the Registrar. The increase in

the share capital or increase in the number of members may be for any purpose or may be as a result of the scheme of amalgamation or any other arrangement arrived at between the two companies. Section 394(b) no doubt provides for transfer of the entire property of the transferor company to the transferee company. It does not make an exception in any respect. Under the said provision, the consequence of the amalgamation is provided for, that the entire property of the transferee company shall stand transferred to the transferee company. Section 97 would enter thereafter. After the scheme of amalgamation, the share capital of the transferee company would increase and, therefore, a separate board resolution is provided for. Section 97 does not take any objection to the ensuing result of the amalgamation. It merely casts an obligation on the transferee company to pass a resolution in respect of increase in capital or increase in the number of members and notify the said resolution to the Registrar of Companies to enable him to effect necessary alterations in the records of the department. We have to give effect to other provisions made by the Legislature. If we are to accept the submissions of Ms. Chandurkar that Section 97 need not be complied with, when there is scheme of amalgamation, Section 97 would be reduced to redundancy. Such a construction of two provisions is not permissible. In fact, there is absolutely no clash or conflict between the said two provisions. Section 97 is only a procedural part which a company has to comply with, when there is an increase in the share capital or increase in the number of its registered members, regardless of how such increase takes place.

9. It is not possible to hold that Section 97 can be ignored by the transferee company when its share capital is bound to increase after the scheme of amalgamation. Section 97 is only calling upon the transferee company to pass a resolution to that effect and give notice to the authority so that the records can be updated.

10. I fail to understand how the judgment of the Andhra Pradesh High Court is helpful to the learned Counsel in any way. The learned Judge was not at all called upon to interpret Section 97 in the light of Section 394. From the said judgment, it does not appear that the learned Judge was faced with the issue which is raised before me that a transferee company is not required to comply with Section 97 of the Act when there is increase in the share capital as a result of the scheme of amalgamation. In the said case before the learned Judge, it appears that the objection raised by the Central Government was in respect of absence of provision in the memorandum of association to enter into any agreement or arrangement between the company or any contract with any other company etc. The learned Judge found that the memorandum of association of that company did contain such provisions and, therefore, the learned Judge held that the objection of the Central Government was not tenable. The learned Judge while dealing with the objections raised by the official liquidator in that matter in respect of compliance of Section 95 to 97 has not decided that whenever, there is increase in share capital as a result of amalgamation of two companies, Section

97 need not be complied with. There is absolutely no doubt that as a result of amalgamation, the share capital of the transferee company stand's increased. That, however, does not mean that the transferee company is exempted from complying with Section 97 of the Act. I do not see any difficulty in the way of the transferee company to comply with Section 97 of the Act. The transferee company has to pass a resolution of the board of directors to increase the share capital by mentioning that it was as a result of the scheme of amalgamation. It has to merely forward this resolution to the Registrar with a request to alter the records.

11. I, therefore, do not find any substance in the contention raised by Ms. Chandurkar that the transferee company is not required to comply with Section 97 of the Act. The Regional Director has not raised any other objection. He has merely cautioned the transferee company to comply with Section 97 of the Act which the petitioner in the circumstances must comply.

12. The scheme of amalgamation is sanctioned subject to the petitioner company complying with Section 97 of the Act. The petition is made absolute as above in terms of prayer Clauses (a) and (b).

13. Cost of Rs. 2,500/- to the Regional Director and Official Liquidator each to be paid by the petitioner within four weeks.

14. All concerned to act on a copy of this order duly authenticated by the Company Registrar. Drawn up order and certified copy is expedited.