

(2009) 09 GUJ CK 0023

In the Gujarat High Court

Case No : Company Petition No's. 110, 111 to 116 of 2009

In Re : Amerzinc Products (P.) Ltd.

Date of Decision : 14-09-2009

Acts Referred:

Companies Act, 1956 — Section 391, 392(1), 393

Citation : (2011) 101 CLA 156 : (2011) 105 SCL 682

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : Swati Soparkar, for the Appellant; P.S. Champaneri, for the Respondent

Judgement

Jayant Patel, J.—The present petitions are for seeking sanction to the Scheme of Amalgamation of M/s. Amerzinc Products Private Limited (Petitioner of Company Petition No. 110 of 2009); M/s. Fortune Trade links Private Limited (Petitioner of Company Petition No. 111 of 2009); M/s. Jubilee Trade links Pvt. Limited (Petitioner of Company Petition No. 112 of 2009); M/s. K.S. Trade link Pvt. Limited (Petitioner of Company Petition No. 113 of 2009); M/s. Media Data Processing & Computer Research Services Pvt. Limited (Petitioner of Company Petition No. 114 of 2009); M/s. Paras Trade links Pvt. Limited (Petitioner of Company Petition No. 115 of 2009) (All are Transferor Companies) with M/s. Nabh Trade link Private Limited (Petitioner of Company Petition No. 116 of 2009 Transferee Company). The Scheme is produced at Annexure-C in the present Group of Petitions.

2. In Company Petition No. 110/2009, vide order dated 2-5-2009 passed by this Court in Company Application No. 188 of 2009, as all the equity shareholders had given consent for approval of the scheme, the meeting of the equity shareholders was dispensed with and it was also recorded that there was no secured or unsecured creditor of the company.

3. In Company Petition No. 111/2009, vide order dated 2-5-2009 passed by this Court in Company Application No. 189 of 2009, as all the equity shareholders and preference shareholders had given consent for approval of the scheme, the

meeting of the equity shareholders and preference shareholders was dispensed with and it was also recorded that there was no secured or unsecured creditor of the company.

4. In Company Petition Nos. 112; 113; 114; and 115 of 2009, vide order dated 2-5-2009 passed by this Court in Company Application Nos. 190; 191; 192; and 193 of 2009, as all the equity shareholders and unsecured creditors had given consent for approval of the scheme, the meeting of the equity shareholders and unsecured creditors were dispensed with and it was also recorded that there was no secured creditor of any such transferor-companies.

5. In Company Petition No. 116 of 2009, vide order dated 2-5-2009 passed by this Court in Company Application No. 194 of 2009, as all the equity shareholders as well as the unsecured creditors of the company had given consent for approval of the Scheme, the meeting of the equity shareholders and the unsecured creditors of the company was dispensed with.

6. All these petitions of Transferor Companies and Transferee Company came to be admitted on 5-5-2009 and it was ordered to advertise in two daily newspapers, viz., Indian Express (English daily) and Loksatta Jansatta (Gujarati daily), both Ahmedabad editions and the publication in the Government gazette was dispensed with. Notice was ordered to be issued to the Central Government through Regional Director, Department of Company Affairs in all the petitions. Further in the case of Transferor Companies, notice was also issued to the Official Liquidator for examination into the affairs of the Transferor Companies and the Official Liquidator was permitted to engage Chartered Accountant/s for such purpose.

7. The affidavit dated 12-6-2009 has been filed by Shri Dharmendra M. Rathod, registered Clerk of Smt. Swati Soparkar, learned advocate, stating compliance of the order for publication in the newspapers and together with the said affidavit, relevant extracts of paper publication are also produced. As per the additional affidavit dated 20-8-2009 filed on behalf of the Petitioner-company Transferee Company in response to the publication in the newspapers, the Petitioner or its advocate has not received any objection from any person.

8. In response to the notice issued to the Central Government, Shri R.K. Dalmia, Deputy Registrar of Companies has filed his affidavit based on the communication received by the Registrar of Companies from the Regional Director dated 7-8-2009 and as per the said affidavit, the Petitioner-companies may be directed to submit latest financial statement before the Hon''ble Court at the time of hearing. The said objection would no more survive since the latest financial statement in the form of unaudited provisional balance sheet as on 31-3-2009 are already produced with the concerned petition on behalf of the Petitioner-company.

9. The Official Liquidator has filed the report dated 29-7-2009 in the case of Transferor Companies together with the report of the concerned Chartered

Accountants and has stated in the report of the Official Liquidator that the affairs of the transferor-companies have not been conducted in a manner prejudicial to the interest of its members or public interest. The pertinent aspect is that though the opinion of the Chartered Accountant was not solicited by the Official Liquidator, the Chartered Accountant has further mentioned that the amalgamation is in the larger interest of its members, creditors and public at large. Such an opinion is not expected to be given by the Chartered Accountant, unless it is called for specifically by this Court. Therefore, the said opinion of the Chartered Accountant to that extent does not deserve to be considered and the opinion only to the extent of conducting the affairs of the company as to whether it is prejudicial to the interest of its members or public at large or not, is required to be taken into consideration.

10. The aspect of the appointed date provided in the scheme of amalgamation deserves consideration. In the present group, the scheme at Annexure-C shows that in the definitions, the appointed date is provided as under:

The "Appointed Date" means 1-4-2008.

11. As per the provisions of the Companies Act, the Parliament has vested such powers with this Court for modification in the Scheme if so required.

12. Reference to the provisions of Section 392(1) of the Companies Act in this regard would be relevant. Section 392(1) reads as under :

392. (1) Where the Court makes an order u/s 391 sanctioning a compromise or an arrangement in respect of a company, it--

(a) shall have power to supervise the carrying out of the compromise or an arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

13. The another section, which may have relevancy is Section 394(1) of the Act, which provides that 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 mentioned in Clauses (i) to (vi) of the said Sub-section.

14. As such, it is undisputed position that this Court, while exercising the powers for sanctioning of the scheme, has also power to alter or modify the scheme and such would also include the modification or alteration in the appointed date and therefore no further discussion may be required on the said aspect.

15. In order to examine the said aspect further, the scope of the judicial power in a matter for sanctioning of the scheme would also be relevant. In case of *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.*, at para 28, the Apex Court observed as

under:

Before sanctioning such a scheme even though approved by a majority of the concerned creditors or members the Court has to be satisfied that the company or any other person moving such an application for sanction under Sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso to Sub-section (2) of that section. So far as the meetings of the creditors or members, or their respective classes for whom the Scheme is proposed are concerned, it is enjoined by Section 391(1)(a) that the requisite information as contemplated by the said provision is also required to be placed for consideration of the concerned voters so that the parties concerned before whom the scheme is placed for voting can take an informed and objective decision whether to vote for the scheme or against it. On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a Court of law. No Court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the concerned company, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme.

(Emphasis supplied)

16. It deserves to be recorded that by now the accounting year, for the purpose of Income Tax and other fiscal laws, is codified by statute and every such accounting year begins from 1st April of a particular year and ends on 31st March of the next year. It is not that such codification of the accounting year would put complete embargo upon the choice or the discretion to be exercised by the company or its office bearers for entering into the scheme of merger or amalgamation. However, keeping in view the identification of the accounting year, at least for fiscal purpose, by the various enactments like Income Tax, Central Excise, etc., the liability during that year is to be considered and discharged as provided under the respective statute/s. The scheme if is to meet with the said requirement, the same can be considered as not in conflict with such aspects. But if the scheme is to be brought about which results into creating

conflict with the period provided for a particular accounting year, it may come in conflict therewith. Such conflict may further ensue on taxation liability and other statutory liability which normally is to be considered for and during that particular accounting year.

17. The another aspect which may be relevant would be the entertainment of the prayer for sanctioning of the scheme to a class of litigant who has not moved the statutory process well in time during the said period of such accounting year. If the scheme is to be given effect from the beginning of an accounting year, nothing prevents such company to put the statutory process in motion by moving appropriate application to this Court or otherwise. If the extraordinary unavoidable circumstances are so demonstrated, it may require different consideration. However, in absence thereof, if the scheme is put into the motion by initiation of the statutory proceedings after the end of a particular accounting year and thereafter in the next accounting year the statutory process is initiated, it may be a valid reason on the part of the Court to consider that such company has not approached to this Court well in time seeking sanction to the scheme of amalgamation which is proposed by the company. It is well-settled that though delay is not to operate as a bar to exercise of the power by the Court, such delay would be required to be considered not only on the aspect of alteration of the rights of the parties but may also be required to be considered on the aspect as to whether such litigant or such company as the case may be, has approached to this Court at the earliest or well in time or within reasonable period or not. If the Court finds that any litigant has merely allowed time to go or that he has not moved the Court within reasonable time and has allowed the period to go to the extent that the whole accounting year is over and the consequence as per the relevant statute for fiscal laws may also be allowed to operate and thereafter has moved this Court. Court may find that keeping in view the said aspects, the appointed date as provided in the scheme may be altered keeping in view the aspect that there is no further complications to the proper observance of other relevant statute under the fiscal laws and the scheme works in consonance with the liabilities as may accrue under the fiscal laws for that particular accounting year.

18. Mrs. Soparkar, learned Counsel appearing for the Petitioner relied upon the decision of Delhi High Court in HCL Ltd., In re [1994] 80 Comp. Cas. 228 and more particularly the observations made on pages 234 and 235 and contended that the scope of appointed date and the scope of effective date is different in the scheme. It was submitted that the appointed date has the relevancy for accounting purpose so as to assess the valuation of the assets of the company and to have the share exchange ratio and the effective date will be the date from which the scheme shall be given effect. It was therefore submitted that even if this Court sanctions the scheme as on today, the effective date will be only when such a declaration is filed as per the Companies Act with the RoC and the same will be the effective date. It was submitted that, therefore, keeping in view the distinction between the appointed date and the effective date, the appointed date

as mentioned in the present scheme may not be altered by this Court.

19. The aforesaid decision nowhere rules that whatever may be the appointed date, the Court has to accept it. Further the aspects, of alteration of the appointed date on account of expiry of the accounting year and no statutory process initiated during the said period, were not before the Delhi High Court. Therefore the said decision, would not apply to the facts of the present case.

20. In case of *Bombay Gas Co. (P.) Ltd. v. Central Government* 1997 89 Comp. Cas. 195, the question before the Bombay High Court was as to whether the appointed date could be provided prior to the date of incorporation of the concerned company or not. Therefore the said decision may not have direct bearing to the issue to be considered by this Court.

21. Mr. Soparkar, learned Counsel for the Petitioner drew the attention of the Court to the decision of this Court in case of *Union of India v. Ambalal Sarabhai Enterprises Ltd.* 1984 55 Comp. Cas. 623 (Guj.) and submitted that in the said case it was the contention of the Income Tax Department that if the appointed date is kept earlier, the resultant effect would be that the loss of the transferor-company would be permitted to be set off and in spite of the same, this Court did not find it unreasonable and the scheme was allowed to go on with the very appointed date. In furtherance to his submission he relied upon the observations made at pages 649 to 652 of the said decision.

22. In the very decision this Court at page 652 found that the purpose for which the amalgamation is proposed, is not to defeat the tax and it was further observed that if the amalgamation as proposed is not sanctioned, the loss suffered by the transferor company would be carried forward and would be adjusted against profits which it has made in the subsequent year. Therefore the Court found that shifting the date would not result into against the public interest. In the said decision, the Court had no occasion to consider the exercise of the discretion by the Court after the prescription of the accounting year by statute under the fiscal laws. Further the Court had also no occasion to consider the aspect of discretion to be exercised upon the delay by the litigant in approaching before the Court within the reasonable time by such company concerned.

23. In case of *Marshall Sons & Co. (India) Ltd. v. ITO* [1997] 88 Comp. Cas. 52811 SCL 6 (SC), when the High Court sanctioned the scheme no order was passed for altering the appointed date and the scheme was sanctioned. Thereafter the Income Tax Department wanted to take a different view as if the company was in existence. Therefore the Apex Court took the view that if the scheme is sanctioned, the effect would be as per the scheme and the Income Tax Department cannot take a view de hors the scheme which is to create a statutory fiction once the scheme is sanctioned by the Court.

24. Mr. Soparkar, learned Counsel for the Petitioner had relied upon the unreported decision of Madras High Court in Company Petition No. 32 of 2001

decided on 19-4-2001 and more particularly the observations made at para 6 of the said order and he contended that it was observed that there is no prohibition for giving transfer date to have retrospective effect and therefore he submitted that there is nothing wrong if the appointed date is kept of an earlier period than the process initiated for seeking sanction to the scheme.

25. Perusal of the order of Madras High Court shows that in the very paragraph, the Court found that there is cause for delay and for condonation of the delay. Therefore it cannot be accepted as an absolute proposition that Court shall accept the cause for delay in every case or shall condone the delay in every case.

26. Mr. Soparkar also drew the attention of this Court to the decision of this Court in case of *In Re: Sidhpur Mills Co. Ltd.*, and contended that the approach of the Court would not be to find defects in the scheme but would be to consider the scheme positively unless it is demonstrated as unfair or illegal.

27. It is true that the approach of the Court would not be to find out defects in the scheme but thereby it can hardly be contended that Court is to foreclose its judicial scrutiny to any scheme which is put up for sanction before it. On the contrary, as observed by the Apex Court in case of *Miheer H. Mafatlal (supra)*, Court has not to act as a mere rubber stamp to put a seal to the scheme. If such judicial scrutiny is foreclosed or curtailed as sought to be canvassed, the very purpose of clothing the powers to this Court to grant sanction to the scheme would be frustrated. It is a different matter that in a given case Court may accept the scheme or Court may decline the scheme but the Court is to exercise the judicial scrutiny all the scheme. It is improper on the part of the Petitioner to raise such a contention on the face of the observations of the Apex Court reproduced hereinabove in case of *Miheer H. Mafatlal (supra)*.

28. Mr. Soparkar, learned Counsel for the Petitioner further contended that if this Court alters the "appointed date", it may result into further complication inasmuch as, the transferor company in anticipation of sanction which may be granted for the scheme, has not got the accounts approved through its General Board and if the appointed date is changed the accounts shall remain unapproved and it may invite further penal consequences. He also contended that the books of transferor company are examined by Official Liquidator through Chartered Accountant up to the appointed date. Therefore, if the appointed date is altered nobody is there to look after for the period after the appointed date mentioned in the scheme. Therefore he submitted that appointed date may not be altered.

29. Firstly if such a contention is accepted, it would mean that under no circumstances the Court can alter the appointed date on the face of the statutory power to make modification in the scheme. Further such date in the scheme is to be finalized as ordered by this Court. If any company has taken it for granted that whatever is prayed by it to the Court is to be granted by the Court and has allowed the period to go on, such can hardly be contended as a valid ground to

foreclose judicial scrutiny to the scheme or conduct of such company nor any additional right can be read therefrom.

30. Moreover, even if it is considered for the sake of examination that such a situation may arise, then also it would be required for the concerned company to take necessary action for approval, auditing of books of account etc. as may be required for giving effect to the order of this Court. In any case neither company nor its shareholder or creditor can plead ignorance of laws for the power of this Court under the Act for sanctioning of a scheme. Hence such contentions cannot be countenanced.

31. In view of the aforesaid, it appears that if the scheme is moved for sanction in case where the company has allowed the relevant accounting year to be over and no action whatsoever has been initiated for statutory process of convening of the meeting, such an approach deserves to be deprecated and the complications, which may ensue on account of back dating of the appointed date prior to the period during which the statutory process is initiated in the said accounting year under the fiscal law, are also required to be taken care of. Further, in any event even on equitable consideration the power cannot be invoked by the litigant who has not approached this Court well in time and within reasonable time. If the Court finds that here is the litigant who has not moved this Court well in time and there is no sufficient cause for explanation of delay, the Court may decline for invoking of the powers or may put such litigant to the terms, which the Court may find out proper, considering the facts of the case.

32. If the facts of the present case are examined in light of the aforesaid, it appears that it is an admitted position that the statutory process for convening of the meeting has been initiated after the ends of the accounting year of 2008-09 i.e., in April, 2009. However, it was contended by the learned Counsel for the Petitioner that the Board of Directors took the decision for the scheme of amalgamation in March 2009 and thereafter the action has been initiated immediately though the accounting year was over and therefore it was submitted that the delay is sufficiently explained and this Court may maintain the appointed date as mentioned in the scheme.

33. As regards the meeting of the Board of Directors is concerned, the same is an internal management of the Petitioner-company. The relevant date would be the initiation of the statutory process for convening of the meeting by moving to this Court. If the contention is entertained that the Board had passed the resolution in the end of March and thereafter this Court is moved at the earliest though accounting year is over, it would leave room for large number of uncertainty and it may also leave room for manipulations. Therefore, it appears to the Court that if the statutory process is not initiated for convening of the meeting, the appointed date in the scheme normally should not be accepted beyond the date of beginning of such accounting year. No other explanation has come on record which may require this Court to take a different view for maintaining the same appointed date as mentioned in the scheme.

34. In view of the aforesaid, the scheme deserves to be modified to the extent that the appointed date shall be 1-4-2009 and not 1-4-2008 as provided in the scheme. Hence, order accordingly.

35. No other adverse circumstances are brought to the notice of this Court.

36. Hence, the present Scheme of Amalgamation is sanctioned as per the provisions of the Companies Act.

37. Petitions are allowed to the aforesaid extent.

38. The fees of the Central Government Standing Counsel shall be paid by the petitioning Companies which is quantified at Rs. 2,500 for each petition. The fees of the Official Liquidator is quantified at Rs. 1,500 in each petition, preferred by the transferor Companies. It will be open to the concerned petitioning Company to pay the cost of Central Government to the learned Assistant Solicitor General/ Standing Counsel, Shri P.S. Champaneri, as well as to the Official Liquidator by "Account Payee" cheques directly.