

(1995) 11 GUJ CK 0015

In the Gujarat High Court

Case No : Company Petition No. 26, 27 of 1995 and Company Application No. 33, 34 of 1995

**In Re: Apco Industries Ltd.
 In Re: Apco Electricals Ltd.**

Date of Decision : 10-11-1995

Acts Referred:

Companies Act, 1956 — Section 394

Citation : (1996) 86 CompCas 457

Hon'ble Judges : Sharad D. Dave, J

Bench : Single Bench

Advocate : Jayant Patel, For the Central Government, for the Appellant; S.N. Soparkar and Swati Soparkar, for the Respondent

Judgement

S.D. Dave, J.—The present orders shall govern the disposal of these two company petitions, filed before this court, for the purpose of obtaining the sanction to the scheme of amalgamation, proposed to be made between the two companies, namely, Apco Electrical Products Pvt. Ltd. ("the transferor-company") and Apco Industries Ltd. ("the transferee-company"). Company Petition No. 27 of 1995 has been presented by the transferor-company, while Company Petition No. 26 of 1995 has been presented by the transferee-company.

2. The transferor-company is a private limited company, within the meaning of the Companies Act, 1956, having its registered office at Ahmedabad, within the State of Gujarat. The transferor-company was incorporated on March 3, 1978, as a private limited company. Annexure-A happens to be the printed copy of the memorandum and articles of association of the transferor-company. As per the latest audited balance-sheet, as on March 31, 1994, the authorised, issued, subscribed and paid-up share capital of the transferor-company consists of the following :-

Share capital as on March 31, 1994.

Authorised :

5,000 equity shares of Rs. 100 each Rs. 5,00,000

Issued and subscribed :

5,000 equity shares of Rs. 100 each fully paid-up Rs. 5,00,000

The objects for which the transferor-company was incorporated are set out in the memorandum and articles of association of the transferor-company, annexed as annexure-A in the petition. The principle object of the transferor-company is as under :

"To carry on the business of manufacturers, buyers, sellers, distributors, importers, and makers, refiners, processors, or formulators, traders and dealers in PVC battery separators, battery containers, battery terminals, battery charges, automobile regulators, motorcycle alternators and portable power supplies."

The objects incidental or ancillary to the attainment of the main objects include, the object to enter into partnership or any other arrangement for sharing profits, union of interests, co-operation, joint venture, reciprocal concession or otherwise with any person, firm or company carrying on or engaged in or about to carry on or engage in the business transaction which the company is authorised to carry on under the objects clause. The transferor-company had started its operations, somewhere in the year 1979, and has been carrying on the same, since then. The latest audited balance-sheet of the company, as on March 31, 1994, has been annexed with the petition as annexure-B.

3. The transferor-company is engaged in manufacturing of PVC battery separators which are used in the manufacturing of car and other automobile batteries. The transferor-company, being a private limited company, the scope for the expansion and growth was found to be limited and so, the management of the transferor-company has promoted a new public company, namely, the transferee-company. The said transferee-company is a public limited company, promoted by the same management group and this is specifically promoted to commence the manufacturing of glass fiber separators, which would involve very high technology of manufacture. The transferee-company, therefore, has entered into collaboration with Evanite Fiber Corporation of the USA, which appears to be the leading manufacturer of the said product in the entire world. The transferee-company, therefore, would be the pioneer of the said product, in this country. Looking to the above said situation, the directors of both the companies have thought it fit and appropriate to amalgamate both the transferor-company and the transferee-company, in order to secure the maximum benefits in the commercial world. Accordingly, the boards of directors of the companies have resolved that, subject to such sanctions of the court and subject to the consent and permission of the Central Government, the scheme of amalgamation be made between the two companies. The minutes of the meetings of the boards of directors of the companies have been made available along with the scheme of amalgamation, in the petition.

4. The material provisions of the proposed scheme of amalgamation are that, with effect from February 1, 1995 (the appointed day), the entire undertaking

and all the assets and the properties of whatsoever nature of the transferor-company shall be transferred to and vested in the transferee-company, pursuant to the provisions contained in section 394 of the Companies Act, 1956. All the debts, liabilities, obligations and dues of the transferor-company shall be deemed to be transferred to the transferee-company, pursuant to the provisions of the afore-mentioned statute. The scheme also provides that one hundred and fifty fully paid-up equity shares of Rs. 10 each of the transferee-company shall be issued for every fully paid-up equity share of Rs. 100 each held by the members of the transferor-company. It is also further provided in the proposed scheme of amalgamation that new equity shares of the transferee-company to be allotted to the members of the transferor-company shall rank for dividend, voting rights and in all other respects *pari passu* with the existing equity shares of the transferee-company.

5. It is in the abovesaid premises that, the petitions praying for the sanction of the scheme of amalgamation, are referred to in the petitions and annexed as annexure-C.

6. Company Application No. 34 of 1995 was filed on February 16, 1995, and the orders were passed on February 22, 1995. Under these orders, there has been the dispensation with the statutory meetings as required under the Companies Act, 1956. In the same way, in the other petition also, Company Application No. 33 of 1995, was presented on the same day, and there have been orders of similar nature, bearing even date. Later on, the company petitions have been filed, for the sanction or the confirmation of the scheme of amalgamation. The orders of admission were passed by this court, in both the petitions, on February 28, 1995. The petitions have been advertised in the newspapers, Indian Express (English) dated March 5, 1995, and Jansatta (Gujarati) and Loksatta (Marathi) dated March 5, 1995. The official liquidator has submitted his report on March 30, 1995.

7. When the reference is made to the report submitted by the official liquidator on March 30, 1995, it appears that there is no objection coming from him. The report of the official liquidator makes it clear that, the auditors appointed for the purpose of the scrutiny of the books of account and affairs of the companies, have submitted the report, concluding that the affairs of the companies have not been conducted in a manner pre-judicial to the interest, either of the members of the companies or to the public interest and that, they are of the opinion that the amalgamation of the aforesaid two companies is in the best interest of the shareholders and public interest u/s 396 of the Companies Act, 1956. The report of the chartered accountants, Ashok J. Mehta and Co., annexed with the report of the official liquidator evidences such a satisfaction of the report. Dr. D. A. Desai, chartered engineer, vide the valuation report dated March 31, 1994, has reported that the purchases/fabrication cost of the plant and machinery on the date of valuation would be, in the sum of Rs. 35,70,178.

8. The scheme of amalgamation is being objected to by the Central Government,

as it becomes clear from the affidavit-in-reply filed on their behalf, by Shri V. K. Parmar, Assistant Registrar of Companies, Gujarat, Ahmedabad. The contentions coming from the learned standing counsel for the Central Government are based upon the said affidavit-in-reply, filed on behalf of the Central Government. But the consideration of the contentions and the averments in the affidavit-in-reply can be deferred, with a view to have the examination of the question regarding the scope and the ambit of the jurisdiction of the company court, while deciding the amalgamation proceedings. In *Re: Sidhpur Mills Co. Ltd.*, , the learned single judge of this court, while pointing out the correct approach for the sanctioning of the scheme for amalgamation says that the scheme should not be scrutinised in the way a carping critic, a hair-splitting expert, a meticulous accountant or a fastidious counsel would do it. But, it must be tested from the point of view of an ordinary reasonable shareholder, acting in a businessman-like manner, taking within his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question. It is also pointed out that, before the scheme is sanctioned, it would be the duty of the court to see that the proposed scheme is a fair and reasonable one, but the initial burden in this respect would be on the petitioner to show that, *prima facie*, the scheme is a fair and reasonable one, such as a prudent and reasonable shareholder would approve of and not object to. The very same principle appears to have been laid down by the Punjab High Court in *Patiala Starch and Chemical Works Ltd.*, *In re* [1958] 28 Comp Cas 111. The court says that the scheme has to be examined by the court with a view to see whether it is such as an independent and honest member of the company, while wisely acting in respect of his own interest, can reasonably approve. In the case of *United Bank of India Ltd. v. United India Credit and Development Co. Ltd.* [1977] 47 Comp Cas 689, the Calcutta High Court has reiterated the very same principle, by saying that, on examination of the scheme of amalgamation presented before the said court, it was satisfactorily established that, the statutory majority were acting *bona fide* and the scheme of amalgamation was such that an intelligent and honest shareholder might reasonably approve. It was also found, on the examination of the scheme before the said court, that there was nothing wrong with the scheme, but, on the other hand, it might prove very beneficial to the shareholders, having regard to the existing business climate in the country and, particularly, in the State of West Bengal. This examination made by the Calcutta High Court, based upon the facts of the case and the provisions of the scheme of amalgamation would go to show that, if the scheme appears to be fair and reasonable and made in good faith and appears to be conducive to the interest of the shareholders, it should, ordinarily, be accepted. In *Navjivan Mills Co. Ltd.*, *In re : Kohinoor Mills Co. Ltd.*, *In re* [1972] 42 Comp Cas 265, this court has made it clear that, there are certain well recognised limitations on the court's power to sanction a scheme. The court would not sanction a scheme, which would be invalid without the court's sanction even if every member or member concerned agreed to it. The second fetter on the court's power is that, the court cannot sanction an act being done, if the law permits it only subject to the conditions

and the agreement seeks to dispense with those conditions. The third fetter on the court's power is that, the court would not, ordinarily, sanction a scheme which includes something which can ordinarily be effected by resort to other provisions of the Companies Act. It is, specifically, stated that, even within these limitations, the court would, generally, allow the greatest freedom in devising schemes to suit their requirements, and will approve those schemes, if they are fair to all whose interests are affected. In *Mahavir Weaves Pvt. Ltd., In re* [1995] 83 Comp Cas 180; [1995] 36 (1) GLR 66, the learned single judge of this court has said that, in the case of private limited companies, if all the concerned shareholders have put up an agreed scheme, the court and the Company Law Board should not come in the way of amalgamation.

9. Therefore, the question regarding the sanction of the scheme of amalgamation, as being presented before me, requires to be examined, in view of the above said principles of law. Reverting to the affidavit-in-reply filed on behalf of the Central Government, it is stated that the transferee-company is incorporated on January 16, 1995, and the transferor-company is sought to be amalgamated with it, with effect from February 1, 1995, i.e., within a period of 15 days of the incorporation of the transferee-company. It is said that an existing closely held private limited company is sought to be amalgamated with a just born company, having no assets, no business, no performance, and no past record. But, this contention fails, when the justification for the amalgamation, as stated in the petitions is studied. It is said that the transferor-company, being a private limited company, the scope for expansion and growth is limited and, therefore, the management of the transferor-company has promoted the transferee-company, which is a new public limited company. As indicated above, it is also the case of the petitioner-companies for the sanction of the scheme of amalgamation that, the transferee-company, being a public limited company, has been able to secure the collaboration programme with a foreign-based company. Therefore, the short time-lag after the incorporation of the transferee-company, within which the transferor-company is being sought to be amalgamated, should not come in the way of the sanction of the scheme of amalgamation. Similar objection appears to have been raised in the affidavit-in-reply, by saying that, if the transferee-company is also to be engaged in the very same business, there is no justification for forming a new company, because the transferor-company already exists. But the very same answer would quiet this contention because, after the amalgamation, the transferee-company, which is a public limited company would be able to secure the requisite growth and domain under the collaboration programme, with a foreign company.

10. The second contention emerging from the affidavit-in-reply and emphasised before me, with great vehemence, is that, the fixed assets of the transferor-company have been revalued and now, they assume the proportion of Rs. 65,49,642. It was sought to be submitted that, probably, this is due to the inflationary assessment of the fixed assets of the transferor-company. But, it requires to be appreciated that, no such contention has been taken. It is never

urged that the valuation expert, who has prepared and presented the re-valuation report was guilty of making and presenting an inflated assessment of the fixed assets of the transferor-company. Naturally, therefore, this contention cannot be countenanced.

11. Much has been said regarding the promoter's contribution when the transferee-company, after the amalgamation, will go for the public issue. It was urged that the revalued fixed assets of the transferor-company would be represented as the promoter's contribution. But, it shall have to be appreciated that, the revaluation has been made, as on March 31, 1994, and, there is no specific averment that, the valuer was guilty of making an inflated revaluation of the fixed assets of the transferor-company. It is also sought to be urged that the bonus shares can be issued only out of free reserves built out of the genuine profits. In other words, it is sought to be contended that, the reserves created by the revaluation of fixed assets cannot be capitalised in such a way and the bonus shares could not be issued. It is also contended that, all the companies including the private limited companies closely held as well as unlisted public companies are prohibited from issuing bonus shares out of the revaluation reserves. Arguing in the same line, it has been contended that, the bonus shares cannot be issued by capitalisation of the revaluation reserve and that the revaluation reserve is not a free reserve. It is also contended that the dividend cannot be declared out of the revaluation reserve as the same is to be excluded from the definition of "reserve". The whole effort on the part of learned counsel for the Central Government, was to point out that, a game is being played on the basis of the revaluation reserve. But, it shall have to be appreciated that, at present, no such eventualities are going to occur. If such eventualities are to occur in future, and if the transferee-company, after amalgamation, is to go for the public issue, the SEBI guidelines would come into play and the requisite care shall have to be taken to see that there is absolutely, no violation of the said guidelines. At present, on a hypothesis, it cannot be concluded that, because of the rise in the reserve by revaluation, the SEBI guidelines and other provisions and the relevant provisions of the Companies Act, 1956, are to be violated.

12. Learned counsel, Mrs. Swati Soparkar, who appears for the transferor-company, makes it abundantly clear that if and when the transferee-company after amalgamation would go for the public issue, necessary care shall be taken to see that a complete disclosure in this respect is made for the protection of the investors. Accepting this concession coming from learned counsel, Mrs. Soparkar, it is made clear that, in case of such future eventualities, the necessary disclosure, in this respect, shall be made before the SEBI and other relevant authorities. The draft prospects to be forwarded to the SEBI, before going for the public issue, shall contain a specific reference to this aspect, namely, the revaluation reserve as reported by the valuation expert. At present, it shall have to be borne in mind that, the guidelines for disclosure and investor protection issued by the SEBI do not apply to the issue of securities by existing private/existing closely held and other unlisted companies. The above said clear mention

in the necessary literature would ensure that, there would be a true, faithful, sincere and correct disclosure of all the aspects of the companies, including the revaluation reserve, which would eliminate anything against the interest of the investors.

13. It is sought to be urged that the exchange ratio of 150 shares to be allotted by the transferee-company for each share held of the transferor-company is, apparently, on a high side. But, it requires to be appreciated that the exchange ratio has been fixed, taking into consideration the apparent rise in the fixed assets of the company as valued and reported by the expert valuer. As indicated above, there is no reason to believe that the valuer can be said to be guilty of submitting an inflated valuation report, which would not correctly reflect the revaluation reserve. In this connection, a reference is made to the Kerala High Court decision, in the case of Malayalam Plantation (India) Ltd. v. Mathew Philip [1986] TLR 1753, in which the learned single judge has taken a view that, when there was no evidence of fraud or mala fides on the part of the persons making the valuation and when the standard method of valuation is adopted, the objection to the valuation should be overruled. Here also, in the instant case before me, there is not only no evidence of fraud or mala fides on the part of the valuer, but even there is no such whisper in the affidavit-in-reply, filed on behalf of the Central Government. In view of this factual and legal position, the contention does not appear to be open to the Central Government. The exchange ratio, therefore, cannot be said to be unreasonable or unfair. This requires to be said and emphasised regard being had to the revaluation reserve of the assets of the transferor-company.

14. Thus, it appears that, the petitions require to be allowed and the scheme of amalgamation, as presented along with the same require to be sanctioned. The same is hereby accordingly allowed and sanctioned.

15. Therefore, with effect from the 1st day of February, 1995 (the appointed day), the entire undertaking and all the properties and movable and immovable assets of whatsoever nature of the transferor-company shall stand or deemed to have been transferred to and vested in the transferee-company, pursuant to the provisions of section 394 of the Companies Act, 1956. In the same way, all debts, liabilities, dues and obligations of the transferor-company shall be deemed to be transferred to the transferee-company. One hundred and fifty fully paid-up equity shares of Rs. 10 each of the transferee-company shall be issued for every one fully paid-up equity share of Rs. 100 each held by the members of the transferor-company. The new equity shares of the transferee-company to be allotted to the members of the transferor-company shall rank for dividend, voting rights and in all other respects, *pari passu* with the existing equity share-holders of the transferee-company. The transferor-company shall stand dissolved without winding up, with effect from the appointed day. The said salient provisions in the scheme of amalgamation with all other provisions of the scheme are hereby sanctioned and approved.

16. The petitioners are directed to file the copy of the present orders with the Registrar of Companies, within a period of thirty days and the Registrar of Companies shall treat the transferor-company as dissolved, with effect from the appointed day. The petitioners shall bear the cost of respective petitions and shall also pay the fees of the learned additional standing counsel/senior standing counsel, appearing on behalf of the Central Government, which is quantified at Rs. 3,000 (rupees three thousand only) in each of these two petitions.

17. The company petitions stand disposed of in the above said manner.