

(2006) 03 DEL CK 0071

In the Delhi High Court

Case No : Company Petition No. 30 of 2006

In Re: Ashim Investment Co. Ltd.

Date of Decision : 07-03-2006

Acts Referred:

Companies Act, 1956 — Section 235, 251, 391, 391(2), 394

Citation : (2007) 138 CompCas 89 : (2007) 76 SCL 358

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Rajiv Nayar, Nishant Joshi and Apurv Kurup, for the Appellant; R.D. Kashyap, for the Respondent

Judgement

Sanjiv Khanna, J.—The present petition under Sections 391-394 of the Companies Act, 1956 (hereinafter referred to as the "Act") has been filed for approval and sanction of the scheme of reconstruction, arrangement and demerger between J.K. Laxmi Cement Ltd. (hereinafter referred to as the "transferor company") and Ashim Investment Company Ltd. (hereinafter referred as the "transferee company").

2. The registered office of the transferor company is located at Basantgarh, District Sirohi, Rajasthan, and an appropriate petition has been filed in the High Court of Judicature of Rajasthan at Jodhpur.

3. The registered office of the transferee company is located at Link House, 3, Bahadur Shah Zafar Marg, New Delhi, and is within the territorial jurisdiction of this Court.

4. The transferee company has placed on record a scheme of amalgamation, the salient features of the said scheme and the circumstances necessitating the scheme have been explained in the petition.

5. The transferee company was incorporated on 25-1-1975. Its present authorised share capital is Rs. 15,00,00,000 divided into 1,30,00,000 equity shares of Rs. 10 each, 75,000 cumulative redeemable preference shares of Rs. 100 each and 12,50,000 unclassified shares of Rs. 10 each. The issued,

subscribed and paid-up capital is 1,00,00,000 equity shares of Rs. 10 each, i.e., 10,00,00,000.

6. The transferee company who is the petitioner herein had filed an application under Sections 391 and 394 of the Act which was registered as C.A. (M) 173/2006. The said application was disposed of vide order dated 13-1-2006 dispensing with the requirement for convening the meetings of equity shareholders and secured creditors of the transferee company. 98.64 per cent equity shareholders representing the paid up share capital of the transferee company had given their written consent that was placed on record. A certificate from the auditors was also filed that there were no secured or unsecured creditors in the transferee company.

7. The transferor company was incorporated on 6-8-1938 as Straw Products Ltd. and its name was changed to J.K. Corp. Ltd. in the year 1994. Subsequently, its name was again changed to J.K. Laxmi Cement Ltd. on 6-10-2005. Its present authorised share capital is Rs. 1,25,00,000 divided into 12,50,000 equity shares of Rs. 10 each and Rs. 5,00,00,000 divided into 50,00,000 preference shares of Rs. 10 each. The issued, subscribed and paid up share capital of the transferor company is Rs. 55,31,03,000 divided into 5,53,10,300 equity shares of Rs. 10 each.

8. It is stated in the present petition that the transferor company has informed the transferee company vide its letter dated 23-1-2006 that the court convened meetings of the secured creditors, unsecured creditors and equity shareholders of the transferor company, amendments and modifications to the scheme of reconstruction, arrangement and demerger have been approved unanimously.

9. It is also averred in the petition that the board of directors of the transferee company in their meeting held on 23-1-2006 have accepted the modifications in the scheme as approved by the secured creditors, unsecured creditors and the equity shareholders of the transferor company held on 17-1-2006.

10. It is further stated in the petition that the transferor company has moved a confirmation petition before the High Court of Judicature of Rajasthan at Jodhpur and approval and sanction of a scheme of arrangement and demerger which incorporates the amendments, as approved by the secured creditors, unsecured creditors and equity shareholders of the transferor company.

11. The transferee company has filed the present petition for sanction of the scheme for reconstruction, arrangement and demerger under Sections 391-394 of the Act read with Companies (Court) Rules, 1959.

12. The transferee company has stated on oath that no investigation proceedings has been instituted and/or is pending against it under Sections 235-251 of the Act.

13. Directions were given vide order dated 31-1-2006 for citations to be published in Statesman (English) and Jansatta (Hindi) that present petition for

approval and sanction of the scheme of reconstruction, arrangement and demerger would be taken up for hearing. Affidavit has been filed by the transferee company stating that the said publications have been made.

14. Notice of this petition was also issued and duly served on the Regional Director, Department of Company Affairs, Noida, and the Official Liquidator attached to this Court.

15. The Official Liquidator has stated that it has no objection to the proposed scheme.

16. The Regional Director has filed its report raising the following objections:

1. The authorised share capital of the respondent company of Rs. 15,00,000 is not sufficient to allot new shares to the members of the transferor company and, Therefore, the transferee company should be directed to increase its authorised share capital after following the procedure prescribed under the Act.

2. In view of the demerger scheme, the subsidiary companies of the transferor company shall become subsidiaries of the transferee company. The said subsidiary companies personally hold equity shares in the transferee company and in terms of the scheme would be entitled to allotment of further equity shares. This it is submitted will amount to violation of Section 42 of the Act, which provides that a body corporate cannot be a member of a company that is a holding company and any allotment or transfer of shares of the transferee company to the subsidiary companies would be void. It is, accordingly, submitted that the conditions of Section 42(3) of the Act should be complied with.

17. I have considered the said objections raised by the Regional Director (NR). Regarding the first objection, I find that the question is covered and settled by a series of judgments of this Court and other High Courts. In the case of Hotline Hot Celdings (P.) Ltd., In re [2005] 127 Comp. Cas. 165 : 57 SCL 367 (Delhi) - it was held that the procedure prescribed under the Act for enhancement of share capital need not be followed as Sections 391-394 are complete code in themselves and a court can sanction reduction or increase in authorised share capital as a part of the scheme itself. In HCL Technologies (Mumbai) Ltd. in C.P. No. 214/2005, dated 28-10-2005, A.K. Sikri, J., has held as under:

Observation of the Regional Director is that the authorised share capital of the company can be increased only after following the procedure, prescribed under the relevant provisions of the Companies Act, 1956 and the payment of requisite fee to the Registrar of Companies and Stamp Duty to the State Government and, Therefore, this clause should not be allowed. I do not find any merit in this objection as I have already dealt with this aspect in number of judgments in which I held in a scheme of amalgamation provision can be made for transfer of the authorised share capital of the transferor company to the transferee company (CP No. 62/ 2004, decided on 7-7-2004).

18. There is no merit in the second contention also. Section 42 of the Act-

provides that a subsidiary company cannot hold shares or be a member of its holding company. Section 42(3) provides an exception to the general rule and permits a subsidiary company to continue as member of the holding company. Existing shareholding of the subsidiary company in the holding company will be protected u/s 42(3) of the Act but the subsidiary companies will not have any voting rights.

19. With regard to existing shares and future allotment of shares, the scheme of reconstruction, arrangement and demerger in para 4.3.5 of part 4 provides that the shares held by the subsidiary companies in the transferee company will be allotted to one or more persons who shall hold shares together with additions and accretions in trust for the said subsidiary companies and the trustee(s) shall within a period of 5 years from the date of allotment thereafter or such extended period as may be agreed, shall transfer or dispose of the shares of the subsidiary company in the transferee company. Till such time, the trustee(s) will be entitled to exercise the voting rights of the shares.

20. Moreover, I find a similar issue had come up before this Court in the case of Himachal Telematics Ltd. and Himachal Futuristics Communications Ltd., In re Himachal Telematics Limited Vs. Himachal Futuristic Communications Limited, and it was held that Section 42 cannot be read in context of amalgamation of companies. Power of the court under Sections 391-394 is not curtailed and is not subject to Section 42 of the Act. The said decision of the Delhi High Court has been followed by Gujarat High in Court in New Vision Laser Centres (Rajkot) (P.) Ltd., In re [2002] 111 Comp. Cas. 756 : 36 SCL 697 and it has been held that provisions of Sections 391-394 are not controlled by Section 42 of the Act. A similar view has also been taken in the case of Karnataka High Court in Consolidated Coffee Ltd., In re [1999] 97 Comp. Cas. 1 : 21 SCL 11.

21. During the course of arguments, it was noticed that the scheme of reconstruction, arrangement and demerger had been modified in the meeting convened on 23-1-2006 for the secured creditors, unsecured creditors and equity shareholders of the transferor company. It was, Therefore, put to the learned Counsel for the petitioner whether fresh consent/no objection certificates or meeting of shareholders and creditors of the transferee company was required in view of the amendment/ modification to the aforesaid scheme.

22. Learned Counsel for the petitioner has drawn my attention to the no objection/consent certificates filed in C.A. No. 173/2005. In the consent/ no objection certificates, the shareholders have given their consent to any amendment or modification to the scheme of reconstruction, arrangement and demerger between the transferor company and the transferee company. Reference is also drawn to the scheme itself and in particular to paragraph 5.5 by which the board of directors of the transferor and transferee company have been authorised to give assent to any modification or amendment to the scheme. It is further stated that the board of directors of the transferee company in its meeting held on 23-1-2006 at New Delhi has accepted that the modifications and

amendments suggested.

23. It is further submitted that the amendments/modifications made were technical in nature and do not in any manner substantially modify the scheme of reconstruction, arrangement and demerger as originally framed. By the first amendment, details of demerger undertaking have been clearly specified in an annexure. By the said second amendment/ modification, the investment division of the transferor company has been specified and demarcated by giving details of the residual part that will remain business, properties, assets and liabilities of J.K. Laxmi Cement Limited. Other modifications/amendments relate to concurrence of IDBI and other secured creditors on any issue that affects the interest of the secured creditors. No such objection has been raised by the Official Liquidator and the Regional Director, probably in view of the technical amendments made in the proposed scheme that are/more in the nature of clarifications to prevent any ambiguity and doubt.

24. In view of the aforesaid and having regard to the averments made in this petition and the materials placed on record and the affidavit filed by the transferee company and looking into the nature of objections raised, I am satisfied that the prayer made in the petition deserves to be allowed.

I do not find any legal impediment to the grant of sanction of the scheme for reconstruction, arrangement and demerger. Hence, sanction is hereby granted to the above mentioned scheme of reconstruction, arrangement and demerger under Sections 391(2) and 394 of the Act. The petition stands disposed of in terms of the aforesaid order.