

(2005) 08 CAL CK 0066
In the Calcutta High Court
Case No : C.P. No. 111 of 2005

In Re: ATN International Limited

Date of Decision : 08-08-2005

Acts Referred:

Companies Act, 1956 — Section 100, 101, 102, 103, 104

Citation : (2006) 2 CALLT 167

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Judgement

Indira Banerjee, J.—This is an application under Sections 100, 101, 102 and 103 of the Companies Act, 1956, hereinafter referred to as the said Act for confirmation of the Special Resolution for reduction of the share capital of the petitioner, hereinafter referred to as the Company, by reducing the face value of equity shares from Rs. 10 per share to Rs. 4 per share, as resolved in the Extra Ordinary General meeting of the Company held on 17th January, 2005.

2. The company, which was previously engaged in capital market activity and in running a wind power project, now carries on media and entertainment related business.

3. By reason of the crash in the capital market, rush of depositors to prematurely withdraw and/or en-cash their fixed deposits with the Company, and the non functioning of the wind power project of the Company from August 1997 onwards, the Company incurred huge losses. The Company had to dispose of its fixed assets to raise funds to discharge its liabilities towards repayment of public deposits.

4. In view of losses the Company diversified its business, engaged in media and entertainment related activities and launched a cable television channel known as "ATN World". It is claimed that the financial position of the Company is improving after diversification of its business.

5. The earlier business activities resulted in substantial losses, which have eroded the net worth of the Company. According to the Company, its share

capital is not adequately represented by assets. The huge capital base depicted in the balance sheet is not supported by available tangible assets.

6. The Authorised Share Capital of the Company is Rs. 40,00,00,000/-divided into 4,00,00,000 Equity Shares of Rs. 10/- each. The Issued, subscribed and Paid up Share Capital of the Company is Rs. 39,45,00,000/- divided into 3,94,50,000 Equity Shares of Rs. 10/- each fully paid up.

7. Article 4 read with Article 48 of the Articles of Association of the Company authorizes the Company to reduce its share capital in accordance with law by Special Resolution in a general meeting. The relevant articles are extracted hereinbelow for convenience:

4. The Company shall have the power to increase or reduce the capital for the time being of the Company and to divide the shares in the capital into several classes with rights privileges or conditions as may be determined. The company may issue preference shares which shall, or at the option of the Company shall liable to be redeemed.

48. The Company in General Meeting may :

a) Increase its authorised share capital by such amount as it thinks expedient by creating new shares.

b) Consolidate and divide all any of its share capital into shares of larger amount than is existing shares.

c) Cancel any shares which at the date of the passing of the resolution, have not been taken or agreed to be taken by any person and diminish the amount of its capital by the amount of the shares so cancelled.

d) Sub-divide its shares or any of them into shares of smaller amount than is fixed by the Memorandum of Association subject to the provisions of Section 94(1)(d) of the Act.

e) Reduce its capital in any manner authorised by Section 100 of the Act.

The power conferred by this Article may be exercised by an ordinary resolution, except in the case of reduction of capital when the exercise of the power in that behalf shall be by a special resolution. The Company shall give due notice to the Registrar of any such alteration in capital.

8. Pursuant to a notice dated 20th December, 2004 an Extra Ordinary General Meeting of the Company was held on 17th January, 2005. when the following resolution was passed.

RESOLVED that pursuant to the provisions of Section 100 to 104 and other applicable provisions, if any, of the Companies Act. 1956 and subject to confirmation of the Hon"ble High Court at Calcutta, the paid up Equity Share Capital of the Company be and is hereby reduced from Rs. 39,45,00.000/- divided into 3.94,50,000 Equity Shares of Rs. 10/- each fully paid up to Rs.

15,78,00,000/- divided into 3,94,50,000 Equity Shares of Rs. 4/- each full paid up, by canceling its paid up share which has been lost or is unrepresented by available assets to the extent of Rs. 6/- per Equity Share of Rs. 10/- each and by reducing the amount of the all the Equity Shares in the Company's capital from Rs. 10/- each to Rs. 4/ per Equity Share.

RESOLVED FURTHER that the amount of Rs. 23,67,00,000/- being the amount reduced and/or cancelled from the Equity Share Capital of the Company be set off to the extent of Rs. 4,73,88,893/- out of the accumulated losses of the Company, Rs. 3,27,36,000/- be set off and/ or adjusted against the depreciation on Wind Power Project not provided for. Rs. 9,94,78,000/- be set off and/or adjusted against non performing assets and the balance available amount of Rs. 5,70,97,107/- be set off and/or adjusted against diminution in the value of investments of Rs. 8,21,84,000/-.

RESOLVED FURTHER that for the purpose of giving effect to the foregoing, the Board be and is hereby authorized, inter alia, from time to time, to take all such steps as are statutorily or otherwise required to be taken, and to agree and accept such conditions and/or modifications (if any) as the Hon"ble Court or any other authority may impose while confirming the reduction.

9. Sections 100 to 103 of the said Act are set out hereinbelow for convenience:

100. Special resolution for reduction of share capital--

(1) Subject to confirmation by the Court, a company limited by shares or a company limited by guarantee and having a share capital, may if so authorized by its articles by special resolution, reduce its share capital in any way; and in particular and without prejudice to the generality of the foregoing power, may

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid up share capital which is lost, or is unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up share capital which is in excess of the wants of the company;

and may, if and so far as it necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as "a resolution for reducing share capital.

101. Application to Court for confirming order, objections by creditors, and settlement of list of objecting creditors.

(1) where a company has passed a resolution for reducing share capital, it may apply, by petition, to the Court for an order confirming the reduction.

(2) where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital for the to any share holder of any paid up share capital, and in any other case if the Court so directs, the following provisions shall have effect, subject to the provisions of Sub-section (3):

(a) every creditor of the company who at the date fixed by the Court is entitled to aoy debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction;

(b) the Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are .to be excluded from the right of objecting to the reduction;

(c) where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount:

(i) if the company admits the full amount of the debt or claim, or, thought not admitting it. is willing to provide for it. then, the full amount of the debt or claim;

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then, an amount fixed by the Court after the like enquiry and adjudication as if the company were being wound up by the Court.

(3) where a proposed reduction of share capital involves either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid up share capital, the Court may, if, having regard to any special circumstances of the case, it thinks proper so to do, direct that the provisions of Sub-section (2) shall not apply as regards any class or any classes of creditors.

102. Order confirming reduction and powers of Court on making such order,

(1) The Court, if satisfied with respect to every creditor of the company who under Sections 101 is entitled to object to the reduction that either his consent to the reduction has been obtained or his debt or claim has been discharged, or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

(2) Where the Court makes any such order, it may-

(a) if or any special reason it thinks proper so to do, make an order directing that the company shall, during such period commencing on, or at any time after, the date of the order, as is specified in the order, add to its name as the last words

thereof the words "and reduced"; and

(b) make an order requiring the company to publish as the Court directs the reasons for reduction or such other information in regard thereto as the Court may think expedient with a view to give him proper information to the public, and, if the Court thinks fit, the causes which led to the reduction.

(3) Where a company is ordered to add to its name the words "and reduced", those words shall, until the expiration of the period specified in the order, be deemed to be part of the name of the company.

103. Registration of the order and minute of reduction.

(1) the Registrar -

(a) on production to him of an order of the Court confirming the reduction of the share capital of a company; and

(b) on the delivery to him of a certified copy of the order and of a minute approved by the Court showing, with respect to the share capital of the company as altered by the order, (i) the amount of the share capita, (ii) the number of shares into which it is to be divided, (iii) the amount of each share, and (iv) the amount, if any, at the date of registration deemed to be paid up on each share; shall register the order and minute.

(2) On the registration of the order and minute, and not before, the resolution for reducing share capital as confirmed by the order shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(4) The Registrar shall certify under his hand the registration of the order and minute, and his certificate shall be Conclusive evidence that all the requirements of this Act with respect to reduction of share Capital have been complied with, and that the share capital of the company is such as is stated in the Minute.

(5) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein.

(6) Substitution of any such minute as aforesaid for part of the memorandum of the company shall be deemed to be an alteration for the memorandum within the meaning and for the purposes of Section 40.

10. Mr. S.B. Mookerjee appearing on behalf of the petitioner Company with Mr. Ratnanko Banerjee submitted that reduction in share capital was necessary to bring about a parity between the actual value of the assets of the Company and the capital base as reflected in the Balance Sheet.

11. Mr. Mookerjee further submitted that the proposed reduction of share capital would not prejudice any creditor of the company in any manner whatsoever. The

proposed reduction does not involve the diminution of any liability in respect of unpaid share capital or payment to any shareholder of any paid up share capital.

12. Mr. Mookherjee argued that the Special Resolution for reduction of the share capital of the Company was unanimously carried by the shareholders of the company at its Extra Ordinary General Meeting. Pursuant to the order dated 14th March, 2002 referred to above, the petition was advertised in Dainik Biswamitra and the Financial Express. Compliance of Section 101(2) of the said Act was dispensed with by the said order. In spite of advertisements, no creditor or shareholder of the Company has come forward to oppose the proposed reduction of share capital.

13. By the aforesaid order dated 14th March, 2005 notice of the petition was directed to be served on the Central Government through the Regional Director, Eastern Region, although, admittedly, no such notice is necessary.

14. The proposed reduction has strongly been opposed by the Regional Director. The grounds of opposition as pleaded in the Affidavit-in-Opposition are extracted hereinbelow:

The Joint Director (Legal), attached to the Office of the Regional Director, Ministry of Company Affairs, Nizam Palace, Kolkata -700020 issued letters on 01/04/2005 and 09/06/2005. The said letters were issued to the Managing Director of the company, the Company and its Advocate. The Company has replied under its letter through its Advocates, M/s. Khaitan & Co. dated 20/04/2005 . and 20/06/2005. The said letters are enclosed hereto as annexure "B" collectively. The RBI has also sent a letter in the above context being letter dated 07/06/2005 enclosing a copy of the order of the Hon"ble High Court dated 12/10/2004 passed in C.P. No. 230 of 2001. The said letter along with the copy of the order of the Hon"ble Court is enclosed and marked as annexure "C" collectively. The said correspondences have been examined in this Directorate and the reasons set forth in the replies were not found to be satisfactory as per the RBI's clarification and as per the records of the Central Government. In this connection, I say that RBI is necessary and proper party and it should be impleaded as party to the petition for the end of justice.

I say that the company has been investigated under Sections 235 of the Companies Act, 1956 pursuant to the Ministry's order dated 20/05/2004. The investigation was conducted by Shri S.K. Agarwal. Joint Director (Inspection) of the concerned Directorate of the Government of India, who has submitted his report of the Investigation to the Ministry of Company Affairs, but this fact has been omitted in the petition for Reduction of Capital for reason best known to the petitioner which appears to be material facts knowingly omitted in the petition. The Ministry of Company Affairs. New Delhi vide letter dated 26-05-2005 has already ordered for filing prosecution u/s 211, 349, 350 read with Section 209(3) (b) of the Companies Act, 1956 a copy of letter of the Ministry of Company Affairs dated 26/05/2005 is enclosed hereto and marked as annexure - "D". I

say that the proposed Reduction of Capital will prejudice any action under the Companies Act, 1956. if he share capital is allowed to be reduced and this will wipe out the evidences of the mis-management and/or misuse of the funds collected from the public and banks which had rendered the company into losses.

In the circumstances, refer in above, I humbly submit that the proposed Reduction of Capital will not be in the interest of the Central Government and the stake holders and depositors, hence, the Central Government objects to the Reduction of Capital of the company.

15. Mr. I.P. Mukherji appearing on behalf of the Regional Director submitted that the Government had ordered prosecution of the company and its officers for violation of Sections 211, 349, 350 read with Section 209(3)(b) of the said Act after investigation under Sections 215 of the said Act.

16. Mr. Mukherji further submitted that the affairs of the company were being investigated pursuant to a report of the Registrar under Sections 234(6) and 234(7) of the said Act. Furthermore, the Reserve Bank of India had initiated proceedings against the Company.

17. Mr. Mukherji submitted that the creditors are required to be heard before the application is finally heard and disposed of. The order dated 14th March, 2005 dispensing with notice under Sections 101(2) is required to be recalled.

18. u/s 100 of the said Act the Company, if so authorised by its Articles, might by Special Resolution, reduce its share capital, if so permitted by its Articles and thereby (i) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; (ii) cancel any paid up share capital which is lost or is unrepresented by available assets, either with or without extinguishing or reducing liability on any of its shares or (iii) pay off any paid up share capital which is in excess of the wants of the Company, with or without extinguishing or reducing liability on any of its shares and may also, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares. The purposes listed above are only illustrative and not exhaustive.

19. Where a Company has adopted a Special Resolution for reducing the Securities Capital, it may by petition to the Court apply for confirming the reduction. Where however, the proposed reduction involves diminution of liability in respect of unpaid share capital or involves the payment to any shareholder of any paid up share capital, or in any other case, if the Court so directs, every creditor of the Company would be entitled to object to the reduction and the Court would settle the list of creditors so entitled to object and for that purpose ascertain the names of creditors and the nature and amount of their debts or claims.

20. Where a creditor, entered in the settled list of creditors, does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the Company securing payment of its debt or claim. Where a

proposed reduction of capital either involves diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid up share capital, the Court may if, having regard to the special circumstances of the case, it thinks proper so to do direct that the provisions of Section 100(2) shall not apply as regards any class or any classes of creditors. In the instant case, the proposed reduction does not involve any diminution of liability or payment to any share holder.

21. In any case, a learned single Judge of this Court has by an order dated 14th March, 2005 dispensed with compliance of Section 102(2) of the said Act. Directions were, however, issued for advertisement of notice of the petition as also for service of a copy of the petition to the Central Government through the Regional Director. Pursuant to the order dated 14th March, 2005, referred to above, the petition had duly been advertised. No creditor or shareholder has opposed this petition.

22. There being no requirement for any notice to the Central Government the locus standi of the Regional Director to oppose the reduction has been questioned, Even though notice on the Regional Director may not be necessary for confirmation of a resolution for reduction of the securities premium account, this Court has by its aforesaid order dated 14th March, 2005 directed service of notice on the Central Government through the Regional Director. The Regional Director is obliged to draw the attention of this Court to any legal infirmity in the proposed reduction. This Court, therefore, needs to examine the grounds on which the proposed reduction has been opposed.

23. There are no restrictions in the said Act on the purposes for which the share capital of a Company might be reduced. The said Act only prescribes the procedure for reduction. The confirmation of Court for proposed reduction of share capital is necessary for safeguarding the interests of creditors and the minority shareholders. In an application for confirmation of the proposed reduction all that the Court is required to see is that the proposed reduction is fair, equitable and reasonable, the procedure by which the resolution is carried is legally correct and that no creditor or shareholder is prejudiced.

24. The Court has a discretion whether or not to confirm the reduction of share capital. The Court would not, however, refuse to exercise its discretion to confirm the proposed reduction, where the proposals for reduction are properly explained, the reduction is for a discernible purpose, the share holders are treated equally and the creditors are safeguarded. All the aforesaid tests appear to have been satisfied in this case. It is nobody's case that the reduction proposals are not properly explained.

25. No Shareholder or creditor has opposed the reduction. The argument of the Regional Director that the proposed reduction would prejudice investigation or action against the Company and wipe out evidence of mismanagement and misuse of funds collected is totally vague and does not stand to reason.

26. The Regional Director has failed to explain the possible manner in which any investigation or any action against the company for contravention of the said Act could be prejudiced by confirmation of the proposed reduction.

27. Confirmation by this Court of proposed reduction of the share capital, approved by the shareholders by Special Resolution, cannot possibly render a hitherto illegal act legal. Nor is the company or its officers absolved of the consequences of past acts.

28. As argued by Mr. Mookerjee, any investigation and/or any legal proceedings against the Company or any of its office might continue in accordance with law, notwithstanding reduction of share capital. The Regional Director has not been able to pinpoint any illegality in the proposed reduction. Proceedings if any, initiated by Reserve Bank of India for alleged contravention of any provision of the Reserve Bank of India Act, 1934 would take its own course in accordance with law.

29. On the other hand, the proposed reduction would rationalize the capital structure and give a truer and more accurate reflection of the capital assets of the Company.

30. It is not the case of the Central Government that the reduction will prejudice any creditor or shareholder or that any shareholder has been treated unequally. Nor is it the case of the Central Government that the proposed reduction would be against public interest. There is no allegation of any procedural irregularity in adoption of the resolution for the proposed reduction. On the other hand, the proposed reduction will only give a more realistic reflection of the value of the capital and assets of the Company.

31. As held by this Court by its Judgment and order dated 8th August, 2005 in CA 215/2005 C.P. 154/2005 (Ushacomrn India Private Ltd.) the rule of accounting as per the Accounting Standards 26(72) and 5(5) is not inflexible. The relevant Accounting Standards permit deviation, if allowed by any other Accounting Standards. Reduction of share capital with a view to adjust and/or balance dissipation of assets is permitted by Section 100(1)(b) of the said Act. The said section, in my view allows reduction of paid up capital so that paid up capital or any part thereof is not unrepresented by available assets.

32. It is nobody's case that the proposed reduction is prejudicial to the interest of any shareholder or any creditor or prejudicial to public interest. As held by a Division Bench of the Andhra Pradesh High Court in the case of Hyderabad Industries Ltd. reported in 2003 Company Cases 458 relied upon on behalf of the Company this Court does not sit in appeal over the decision of the shareholders of the Company taken in an extraordinary general meeting.

33. In passing an order confirming reduction of share capital all that the Court is required to do is to satisfy itself that the dues of every creditor entitled to object are discharged or determined or secured. No other obligation is cast on the Court

in view of the express provision of Section 102(1). This Court can at best impose terms and conditions for reduction. The reasons for the reduction and other material information with regard thereto have duly been disclosed. There is nothing on record to show that any prejudice has been caused to anybody by reason of the proposed reduction. As observed above, the contention of the proposed reduction being prejudicial to investigation or proceedings is wholly unsubstantiated by any material particulars.

34. There will be an order in terms of prayers (a) to (f) of the petition. Time for filing the certified copy of the order with the Register of Companies, West Bengal in terms of prayer (c) is fixed for 4 (four) weeks from date.

35. The Registrar of Companies, West Bengal is directed to issue the Certificate of Registration in respect of reduction of capital within 4 (four) weeks after receiving the certified copy of this order.

36. Liberty is given to the petitioner after receiving such Certificate to publish Notice of Registration of reduction of capital once each in "Financial Express" and in "Dainik Viswamitra" within 2 (two) weeks thereafter.

The Department, Registrar of Companies, West Bengal and all parties concerned "shall act on a signed copy of the minutes of this order on the usual undertakings.

Mr. Mukerji, the learned Advocate, appearing on behalf of the Regional Director, prays for stay of operation of this order. The prayer for stay is considered and refused.