

(2012) 12 DEL CK 0265

In the Delhi High Court

Case No : Company Petition No. 301 of 2012

In Re: Cecil Webber Engineering Limited and Others

Date of Decision : 19-12-2012

Acts Referred:

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

Citation : (2012) 12 DEL CK 0265

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Deepak Diwan and Ms. Adarika Ghose, for the Petitioners and Mr. K.S. Pradhan, Deputy Registrar of Companies for the Regional Director, for the Appellant;

Final Decision : Allowed

Judgement

Indermeet Kaur, J.—This joint Petition has been filed under sections 391 & 394 of the Companies Act, 1956 by the Petitioner Demerged Companies and Resulting Company seeking sanction of the Scheme of Arrangement of Cecil Webber Engineering Limited (Demerged/Petitioner Company 1), Kamdhenu Enterprises Limited (Demerged/Petitioner Company 2), Pavitra Commercials Limited (Demerged/Petitioner Company 3), Mahendra Shipping Limited (Demerged/Petitioner Company 4) and Udhyam Merchandise Private Limited (Resulting/Petitioner Company 5) u/s 391-394 of the Companies Act, 1956 read with Sections 100-104 of the Companies Act, 1956 which involves De-Merger of Investment Undertaking of the Demerged Companies 1 to 4 into the Resulting Company. The registered offices of the Petitioner Demerged Companies and Resulting Company are situated at New Delhi, within the jurisdiction of this Court.

2. Details with regard to the date of incorporation of Demerged Companies and Resulting Company, their Authorized, Issued, Subscribed and Paid up capital have been given in the Petition.

3. Copies of the Memorandum and Articles of Association as well as the latest audited Annual Accounts for the year ended 31st March, 2011 of the Petitioners Demerged and Resulting Companies have also been enclosed with the Petition.

4. Copies of the Resolutions passed by the Board of Directors of the Petitioner Companies approving the Scheme of Arrangement have also been placed on record.

5. It has been submitted that no proceedings under Sections 235 to 251 of the Companies Act, 1956 is pending against the Petitioner Companies.

6. So far as the share exchange ratio for Arrangement is concerned, the Scheme provides that, upon the Scheme finally coming into effect:

I. As a consideration of the Demerger, the Resulting Company will issue and allot 154,401 equity shares of Rs. 10/- each fully paid up to the shareholders of the Demerged Company 1 as on the Record Date.

II. As a consideration of the Demerger, the Resulting Company will issue and allot 186,583 equity shares of Rs. 10/- each fully paid up to the shareholders of the Demerged Company 2 as on the Record Date.

III. As a consideration of the Demerger, the Resulting Company will issue and allot 146,347 equity shares of Rs. 10/- each fully paid up to the shareholders of the Demerged Company 3 as on the Record Date.

IV. As a consideration of the Demerger, the Resulting Company will issue and allot 8,784 equity shares of Rs. 10/- each fully paid up to the shareholders of the Demerged Company 4 as on the Record Date.

V. The shareholders of the Demerged Companies have an option a safe and fair exit route by surrendering their shares to the respective companies at a price of determined by the Valuers and certified to be "Fair" by Merchant Bankers. The Price determined by the said Valuers are as follows:

a) Cecil Webber Engineering Limited - Rs. 117.15 per Share.

b) Kamdhenu Enterprises Limited Rs. - 109.94 per Share.

c) Pavitra Commercials Limited Rs. - 148.46 per Shares.

d) Mahendra Shipping Limited Rs. - 36.05 per Share.

VI. The Shareholders of Demerged Companies can surrender their shares to the respective Demerged Companies within a period of One month from the Effective Date at the price determined by the Valuer aforementioned and the payment will be made within a period of one month from the date of surrender. The consideration will be paid by the Company by way of Capital Reduction.

7. The Petitioner Companies had earlier filed CA (M) No. 97 of 2012 seeking directions of this Court for dispensation of meetings. Vide order dated 28th May, 2012, this Court allowed the Application and dispensed with the requirement of convening meetings of Shareholders and Secured and Un-secured Creditors of the Demerged Companies and the Resulting Company.

8. The Petitioner Demerged Companies and the Resulting Company have thereafter filed the present Petition seeking sanction of the Scheme of Arrangement. Vide order dated 4th July, 2012, notice in the Petition was directed to be issued to the Regional Director, Northern Region. Citations were also directed to be published in "Financial Express" (English, Delhi Edition) and "Jansatta" (Hindi, Delhi Edition). Affidavit of Service and Publication has been filed by the Petitioners showing compliance regarding service of the Petition on the Regional Director, Northern Region and also regarding publication of citations in the aforesaid newspapers on 19.09.2012. Copies of the newspaper cuttings, in original, containing the publications have been filed along with the Affidavit of Service and Publication.

9. In response to the notices issued in the Petition, Mr. Rakesh Chandra, Learned Regional Director, Northern Region, Ministry of Corporate Affairs has filed his Affidavit/Report dated 14th September, 2012. Relying on Clause 1.14(a) of Part-B of the Scheme of Arrangement, he has stated that, all the staff/ employees of the Transferor/Demerged Companies, M/s. Cecil Webber Engineering Ltd., M/s. Kamdhenu Enterprises Ltd., M/s. Pavitra Commercials Ltd., M/s. Mahendra Shipping Ltd. engaged in "Investment Undertaking i.e. Strategic Investment Undertaking" shall become the employees of the Transferee company/Resulting Company. viz. M/s. Udhyam Merchandise Private Ltd., without any break or interruption in their services upon sanctioning of the Scheme of Arrangement by the Hon"ble Court.

10. Mr. Rakesh Chandra, Learned Regional Director has stated that the Share Entitlement Ratio/ Exchange Ratio has been determined by M/s. RMG Advisory Private Limited and has not been worked by an independent valuer. Normally, the valuation of shares and swap ratio are calculated by the professional firm of Chartered Accountant. He has placed reliance on a judgment of Hon"ble Supreme Court of India wherein the Court has also observed the fact in the matter of Miheer H. Mafatlal versus Mafatlal Industries. He further stated that the Counsel for the petitioners has submitted a Certificate by M/s. Sibram Tripathy & Co., Chartered Accountants stating that "I fully endorse it & it has been prepared under my instructions, the Valuation Report of RMG Transaction Advisory Private Limited., of whom I am a Director, dated February 1, 2012 addressed to Udhyam Merchandise Private Limited".

11. Further, Mr. Rakesh Chandra, Learned Regional Director also submitted that Para 2.1 and 2.2 of Part -C of the Scheme which provides as under:

The shareholders of the Demerged Companies have an option a safe and fair exit route by surrendering their shares to the respective companies at a price of determined by the Valuers and certified to be "Fair" by Merchant Bankers. The Price determined by the said Valuers are as follows:

e) Cecil Webber Engineering Limited - Rs. 117.15 per Share.

f) Kamdhenu Enterprises Limited - Rs. 109.94 per Share.

g) Pavitra Commercials Limited - Rs. 148.46 per Shares.

h) Mahendra Shipping Limited - Rs. 36.05 per Share.

The Shareholders of Demerged Companies can surrender their shares to the respective Demerged Companies within a period of One month from the Effective Date at the price determined by the Valuer aforementioned and the payment will be made within a period of one month from the date of surrender. The consideration will be paid by the Company by way of Capital Reduction.

12. Further, Mr. Rakesh Chandra also submitted that the Demerged Companies may be asked to follow the procedure of provisions of Section 77A and 100 /101 of the Act for Buy-back of shares and Reduction of Capital.

13. Further, he also submitted that Para 2.4 of Part-C of the Scheme provides that "the Shares of Demerged Companies shall automatically stand delisted from The Delhi Stock Exchange Limited or The Calcutta Stock Exchange Limited or both, wherever the shares of Demerged Companies are listed, on the effective date without any further act or deed". In this respect, he has submitted that all the shares of all the Demerged Companies are listed at The Calcutta Stock Exchange Limited and Delhi Stock Exchange Limited or both and no trading in any of the four companies has taken place for over a decade. All the Demerged Companies may be asked to follow the procedure for de-listing the shares from both the Stock Exchanges, if deemed fit by the Court.

14. The Learned Regional Director also submitted that the Demerged Companies 1 to 3 viz. M/s. Cecil Webber Engineering Ltd., M/s. Kamdhenu Enterprises Ltd. and M/s. Pavitra Commercials Ltd., and M/s. Udhyam Merchandise Private Ltd., (Resulting Company) are Non-Banking Finance Companies and registered with Reserve Bank of India and according to circular no. DNBS. CO. PD. 4243/03.10.001/2011-12 dated 15.03.2012, the Non-Banking Companies needs prior approval of the Reserve Bank of India in case of "take-over, merger, acquisition relating to any deposit taking NBFC". In this respect, he has stated that they may be asked obtain approval from the Reserve Bank of India before sanctioning of the Scheme of Arrangement.

15. He has also submitted that the Demerged Company 4, M/s. Mahendra Shipping Limited, has given loan to a private company which requires permission u/s 295 of the Companies Act, 1956 from the Central Government. The Resulting Company vide its Letter dated 05.09.2012 has stated that they are examining the applicability of Section 295 of the Act and if, the fact so emerges as to its applicability, they agree to file an Application for Compounding. The Registrar of Companies, Delhi has been asked to examine the above issue.

16. In response to the above observations of the Learned Regional Director, Learned Counsel for the Petitioner Companies, submitted vide his Affidavit dated 25.09.2012 that :

? RMG Transaction Private Limited, the Valuation Company comprises of directors

who are all professionals comprising of finance, accountancy and corporate law fields and are eminently qualified in their respective fields. I further agreed to provide him the certificate of Mr. Sibaram Tripathy, Chartered Accountant and Director of RMG Transaction Advisory Private Limited under whose supervision the valuation assignment was carried out. Enclosed herewith is the copy of the Certificate which was provided to the Regional Director (Annexure A) and which has been acknowledged by the Regional Director and therefore needs no further comments.

? With regard to the observation made by the Learned Regional Director in Para 5 of his Affidavit, I would like to submit :

a) Firstly, this Scheme involves Demerger of the Investments Undertakings of the Demerger Companies 1 to 4 into the Resulting Company and as we have expressed at para 1.23 of the Scheme that "Demerger of Investment Undertakings of Demerged Companies into Resulting Company may consist of cross holding among Demerged Companies and Resulting Company. Any such cross holding between Demerged Companies and resulting Company, on the record date, if any, shall stand cancelled. The approval of this Scheme by Hon"ble High Court shall be sufficient compliance with the provisions of Section 100 to 104 of the Companies Act, 1956, rule 85 of the Companies (Court) Rules, 1959, and other applicable provisions, if any, relating to the reduction of share capital on cancellation of cross holdings.

Further, as per clause 2.1 and 2.2 of the scheme, the shareholders have been given a safe and fair exit route by surrendering their shares to the respective companies at a price of determined by the Valuers and certified to be "Fair" by Merchant Bankers and the Shareholders of Demerged Companies can surrender their shares to the respective Demerged Companies within a period of One month from the Effective Date at the price determined by the Valuer aforementioned and the payment will be made within a period of one month from the date of surrender.

b) Moreover, all the shareholders of these companies have accepted this integrated scheme of arrangement and have given their written consents to this Composite Scheme of Arrangement u/s 391-394 read with Section 100-104 of the Companies Act, 1956. This is an option which may or may not be exercised by the shareholders depending upon their discretion and does not involve a compulsory reduction of capital. The Creditors have also given their consents to the Scheme after having fully read the clauses therein. Where an arrangement necessitated reduction of capital and the scheme was approved by shareholders and creditors who also consented to the reduction of capital, the resolution for reduction of capital was confirmed by the Court. [Rassi Cement Ltd. (1999) 98 Com Cases 835 : (2000) 36 CLA 399 : (2000) CLC 33 : (1999) 22 SCL 363 (AP).

c) Secondly, It is a settled principle that "Section 391 is a complete code by itself. Once a Scheme of a compromise or arrangement falls squarely within the

four corners of the section, it can be sanctioned, even if it involves doing acts (including reduction of capital) for which the procedure is specified in other sections of Act. Where a reduction of capital is a part of a scheme of arrangement the requirements of the Companies Act, 1956 as regards reduction of capital are not applicable because court can sanction reduction as part of the scheme. (In Re: Asian Investments Ltd. and others, . Where a reduction of share capital in the resulting/transferee company is a direct consequence of a scheme of arrangement, there is no need to follow the procedure laid down in Rule 85 of the companies (Court) Rule, 1959 read with Section 100 of the Companies act, 1956. (In Re. Titanium Equipment & Anode Mfg. Co. Ltd., CP 114/97-118/97) (unreported).

Section 391 invests the Court with powers to approve or sanction a scheme of arrangement which is for the benefit of the company. Not only is Section 391 a complete code in itself as is the view of various High Courts, it is intended to be in nature of "Single window Clearance" system to ensure that the parties are not put to avoidable, unnecessary and cumbersome procedure of making repeated applications to the Court for various other alterations or changes which might be needed effectively to implement the sanctioned scheme whose overall feasibility and fairness has been judged by the Court u/s 394. Section 101 of the Companies Act, 1956, itself, provides that the procedure thereunder may be dispensed with by the Court if it thinks fit and proper to do so. The Court can after scrutinizing the Fiscal Health of the Company and considering the ramifications of the Scheme and considering the resolution passed by the shareholders, pass an Order dispensing with the procedure u/s 101 for reduction of capital. (In Re. Investment Corporation of India Ltd., Bombay High Court, 1985)

? That the Delhi Stock Exchanges and Calcutta Stock Exchanges are virtually non-operational for over a decade and no trading in any of the four companies has taken place for over a decade.

The management has considered it a wastage of time, manpower and unnecessary financial expenses that these companies should remain listed and wish to delist the shares of Demerged Companies from Stock Exchanges by providing the shareholders an exit route by giving them an option to surrender their shares to the respective Demerged Companies at a price determined by valuers and certified fair by the Merchant Bankers.

Following the procedure of the Stock Exchanges for delisting is a long and cumbersome exercise and involves enormous costs which would be detrimental to the Company and the minority public shareholders and reduce the valuation for exit price. Accordingly, all the shareholders of the petitioner companies have given their consents to this arrangement. The Central Government through Regional Director has to watch the interests of the public and to comment whether the Scheme is detrimental to the public. Once the Scheme has been consented to by 100% public shareholders, his observation that the Companies

may be asked to follow the procedure for delisting if deemed fit by the Hon'ble Court is not tenable.

It is also to be noted that all the shareholders holding equity shares of the category which sought to be automatically delisted are being given the exit opportunity determined by valuers and certified to be fair by Merchant Bankers, therefore it is not prejudicial to their rights and this has been approved by the Board of Directors of all the petitioner companies in their meeting held on 14th February, 2012 and by all the shareholders and creditors of all the petitioner companies vide their respective consent letters. The Hon'ble Court has the powers to either by the Order sanctioning the arrangement or by a subsequent order, make provision for all or any of such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out. (Section 394(1)(vi) of the Companies Act, 1956).

? The Learned Regional Director is referring to a Circular No. DNBS. CO. PD. 4243/03.10.001/2011-2012 dated 15-03-2012 (Annexure B-1) which is applicable to NBFCs accepting Deposits. As the Petitioner Companies have not accepted any public deposits, this notification will not be applicable.

The Petitioner Companies vide Para 11 of the Letter addressed to the Regional Director dated 07.08.2012 had categorically indicated that the Petitioner companies have not accepted deposits

Further, there is a Master Circular dated July 2, 2012 (annexed herewith and marked as Annexure B-2), which provides that (relevant extracts reproduced):

Change in Management and Mergers / Amalgamations:

It has been observed that the change in management also takes place by way of amalgamation / merger of an NBFC with another NBFC or a non-financial company and as such, these mergers/amalgamations would tantamount to the change in the management, as aforesaid.

It would be obligatory on the part of such an NBFC Company seeking change in management or merger or amalgamation with any other company to give an option to every depositor to decide whether to continue the deposits with the company under the new management or the transferee company or not.

The company would also be obliged to make the payment to the depositors who seek the repayment of their deposits. The Bank would view the non-compliance of the above instructions very seriously and penal action would be initiated against the defaulter company on the merits of each case.

The following changes are effected in the above instructions in January, 2006:

i. Merger and Amalgamation in terms of the High Court Order:

a) Where merger and amalgamation takes place in terms of the High Court Order

in pursuance of Sections 391 and 394 of the Companies Act, 1956, the company shall inform the Bank about merger or amalgamation along with the Court's Order and approving the same within a period of one month from the date of the order. As the public notice is given by the companies under the Companies Act 1956 and Rules made thereunder, no further public is required to be given by the companies in terms of the Bank's Circular as mentioned above.

b) However, there will be no change in other instructions contained in the paragraph 5(iii) (b) of the Company Circular DNBS(PD).CC. NO. 12/02.01/99-2000 dated January 13, 2000.

The Petitioner companies undertake to inform the Reserve Bank along with the Court's Order within a period of one month from the date of the Order.

? The Learned Regional Director had only pointed out in his Affidavit that the "Resulting Company has vide its Letter dated 05.09.2012 has stated that they are examining the applicability of Section 295 of the Act and if the fact emerges to as to its applicability, they agree to file an application for compounding" and has not pointed out the following paragraph stated in the Letter by the petitioners dated 05.09.2012:

Please also note that the Auditors in their Audit Report for the Financial year 2010-2011 have expressed their views that the rate of interest and other terms of conditions of the loan granted are not prejudicial to the interest of the Company and accordingly in our view this Transaction does not have any bearing on the Scheme of Arrangement.

17. At the hearing on 28.09.2012, the Learned Counsel for the petitioner companies sought some time to file an appropriate reply to the observation of the Learned Regional Director as in Para 9 of his Affidavit. Accordingly, two weeks time was granted for filing the appropriate reply and the case was listed for hearing on 19.12.2012.

18. Thereafter, the Petitioner companies filed an application for preponement of hearing along with affidavits dated 06.10.2012. The application was dismissed.

19. Thereafter, M/s. Mahendra Shipping Limited, Petitioner Company 4, filed an Affidavit dated 30th October, 2012 and placed all supporting documents on record in response to the observation of the Regional Director at Para 9 of his affidavit. Further, the petitioner company also submitted that an application u/s 621A of the Companies Act, 1956 for compounding of the offence u/s 295 of the Companies Act, 1956 had been filed with the Registrar of Companies.

20. Thereafter, M/s. Mahendra Shipping Limited, Petitioner Company 4, filed an Affidavit dated 14th December, 2012 and submitted that an application u/s 621A of the Companies Act, 1956 for compounding of the offence u/s 295 of the Companies Act, 1956 was also filed with the Company Law Board, Northern Region and matter has been heard before the Bench and fines have been imposed and the company has paid the fines in full and the Letter and Demand

Drafts acknowledged by the Company Law Board was placed on record of the Court.

21. In view of the submissions made by the Learned counsels of the petitioners and the documents submitted by the petitioner, the objections of Learned Regional Director thus no longer survive.

22. No objection has been received to the Scheme of Arrangement from any other party. Mr. Narendra Kumar Jain, Authorised Signatory of the Resulting Company, has filed an affidavit dated 26th September, 2012, confirming that neither the Petitioner Companies nor their Legal Counsel has received any objection pursuant to citations published in the newspapers.

23. In view of the approval accorded by the Shareholders and Creditors of the Petitioner Companies; representation/reports filed by the Regional Director, Northern Region to the proposed Scheme of Arrangement, there appears to be no impediment to the grant of sanction to the Scheme of Arrangement. Consequently, sanction is hereby granted to the Scheme of Arrangement under sections 391 and 394 of the Companies Act, 1956. The Petitioner Companies will comply with the statutory requirements in accordance with law. Certified copy of the order be filed with the Registrar of Companies within 30 days from the date of receipt of the same. In terms of the provisions of sections 391 and 394 of the Companies Act, 1956 read with Section 100-104 of the Companies Act, 1956, and in terms of all the clauses of the Scheme, the property, rights and powers of the "Investments Undertaking i.e. Strategic Investment of the Demerged Companies 1 to 4" be transferred to and vest in the Resulting Company without any further act or deed and consequential reduction of share capital and subsequent delisting of equity shares of the listed companies from the stock exchanges shall take place as per the Scheme. It is, however, clarified that this order will not be construed as an order granting exemption from payment of stamp duty or taxes or any other charges, if payable in accordance with any law; or permission/compliance with any other requirement which may be specifically required under any law.

24. Learned Counsel for the Petitioners states that the Petitioner Companies would voluntarily deposit a sum of Rs. 1,00,000/- in the Common Pool fund of the Official Liquidator within three weeks from today. The statement is accepted. The Petition is allowed in the above terms.

Order Dasti.