

(2004) 05 BOM CK 0013

In the Bombay High Court

Case No : Company Petition No. 142 of 2004 and Company Application No. 577 of 2003

In Re: De Beers India Minerals (P.) Ltd.

Date of Decision : 06-05-2004

Acts Referred:

Companies Act, 1956 — Section 235, 250, 394

Citation : (2004) 6 BomCR 797 : (2004) 53 SCL 421

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : D.J. Khambatta, for the Appellant; R.C. Master, for the Regional Director, Department of Company Affairs and S.R. Kom, for the Official Liquidator, for the Respondent

Judgement

Anoop V. Mohta, J.—This petition has been filed by the Company De Beers India Minerals Pvt. Ltd. (for short "DBIMPL Transferor-Company No. 1" or the "Petitioner Company") to invoke the provisions of sections 391 to 394 of the Companies Act, to obtain sanction to the Scheme of Amalgamation, along with De Beers India Explorations Pvt. Ltd, (for short "DBIEPL Transferor Company No. 2") and De Beers India Geology Pvt. Ltd. (for short "DBIGPL Transferor Company No. 3") and De Beers India Survey Private Ltd. (for short "DBISPL Transferor Company No. 4") and De Beers India Prospecting Private Ltd. (for short "DBIPPL Transferor Company No. 5") with De Beers India Private Ltd. (for short "DBIPL/Transferee Company"). (All these five transferor-companies are thereafter referred as "Transferor- Companies").

2. The Registered office of the Petitioners Company is situated at Advanced Business Centre, 83 Maker Chambers VI, Nariman Point, Mumbai-21. The Petitioner Company is a Private Limited Company and a Group Company of the Transferee-Company.

3. The Transferor-Company No. 1 was incorporated on 30-5-1997 and is engaged in the business of prospecting and exploration of diamonds, precious stones and other minerals. The Transferor-Company No. 1 is engaged in reconnaissance

activities in Andhra Pradesh and has made necessary applications to the appropriate authorities for additional reconnaissance permits in Chhattisgarh, Karnataka, Andhra Pradesh and Orissa. The Transferor-Company No. 1 has also established a treatment plant, used for processing of mineral samples in Bangalore, Karnataka.

4. The Transferor-Company No. 2 was incorporated on 30-10-1998 and was incorporated for the purposes of prospecting exploring, mining, and quarrying of diamonds, precious stones and other minerals. The Transferor-Company No. 2 has however, not commenced any prospecting, exploring, mining or quarrying activities as of the Appointed Date of this Scheme.

5. The Transferor-Company No. 3 was incorporated on 15-11 -1994 and is engaged in the business of prospecting and exploration of diamonds, precious stones and other minerals. The Transferor-Company No. 3 has lodged applications for reconnaissance permits in Chhattisgarh.

6. The Transferor-Company No. 4 was incorporated on 15-11-1994 and is engaged in the business of prospecting and exploration of diamonds, precious stones and other minerals. The Transferor Company No. 4 is engaged in reconnaissance activities in Karnataka, Andhra Pradesh and Chhattisgarh and has made necessary applications to the appropriate authorities for additional reconnaissance permits in Chhattisgarh, Karnataka and Orissa. The Transferor-Company No. 4 has also established a treatment plant used for processing of mineral samples in Bangalore, Karnataka.

7. The Transferor-Company No. 5 was incorporated on 16-6-1994 and is engaged in the business of prospecting and exploration of diamonds, precious stones and other minerals. The Transferor-Company No. 5 is engaged in reconnaissance activities in Andhra Pradesh and Chhattishgarh and has made necessary applications to the appropriate authorities for additional reconnaissance permits in Andhra Pradesh, Chhattisgarh Karnataka Orissa, Maharashtra, Jharkhand, Madhya Pradesh, Uttar Pradesh and Tamil Nadu. The Transferor-Company No. 5 has also established a treatment plant for processing of mineral samples in Bangalore, Karnataka.

8. The transferee-company was incorporated on 15-11-1994 and is engaged in the business of providing services of geologists and other qualified technicians, as well as, other mining related and corporate services to other Indian De Beers Group Companies.

9. As per the Audited Balance Sheet of the Petitioner Company (transferor-Company No. 1), as on 31-3-2003 and unaudited Balance-Sheet of the Petitioner Company, as on 31-8-2003, the Capital structure of the Petitioner Company, as on 18-11-2003 on the date of the petition is set out in the Scheme and in the petition also.

The share capital of the Transferor-Company No. 1 as of 18-11-2003, the

authorized capital Equity Shares of Rs. 50,000,000 of 5,000,000 equity shares of Rs. 10 each, issued, subscribed and paid up capital equity shares of Rs. 31,815,000 of 31,81,500 equity shares of Rs. 10 each, fully paid up.

As on 18-11-2003, the issued, subscribed and paid up capital of the Transferor-Company No. 1 as De Beers Mauritius Private Limited shareholding 99.99%, number of shares 3,181,498 and Debsam Limited, Luxembourg, 0.01% number of share.

Salient feature of the Scheme :-

10. As per the Scheme, upon the coming into effect and subject to the provisions of this Scheme, including in relation to the mode of transfer and vesting, all assets and properties of the Transferor-Companies as on the Appointed date, and all the debts, liabilities, advances, duties and obligations of the Transferor-Companies, as on the Appointed Date shall get transferred and shall stand vested in the Transferee-Company with- out any further acts of any parties and without the consent of third parties. It include all the reserves, movable assets and immovable assets, if any whether present and contingent, all other assets (Whether tangible or intangible) of whatsoever nature, investments, lease and hire purchase contracts, powers, authorities allotments, approvals, consents, letters of intent, licenses, registrations, contracts engagements, arrangements, rights, titles, interests, benefits and advantages of any nature whatsoever and wheresoever situated, belonging to or in the ownership, power or possession and in the control of or vested in or granted in favour of or enjoyed by the, including but without being limited to all intellectual properties, if any and rights of any nature whatsoever and licenses assignments, grants in respect thereof, privileges, liberties, contract advantaged, benefits, goodwill, permits, approvals, authorizations, all other services of every kind, nature and description whatsoever, reserves, provisions, funds, benefits of all agreements, arrangements, deposits, advances, recover- able and receivables whether from government, semi-government.

11. The vesting of all such assets of the Transferor-Companies, shall by virtue of the provisions of this Scheme, and the effect of the provisions of this Scheme, and the effect of Sections 391-394 of the Act, be deemed to have taken place at the location of the Registered Office of the Transferee-Company, i.e., in the State of Maharashtra,

12. The Transferee-Company shall under the provisions of the Scheme be deemed to be authorised to execute any writings on behalf of the Transferor-Companies and to implement or carry out all such formalities or compliance referred to above on their part to be carried out or performed.

13. The conduct of business, with effect from the Appointed Date and upto and including the effective date, the Transferor-Companies hereby undertake to hold the said assets with utmost prudence.

14. The Transferor-Companies shall carry on their businesses and activities with reasonable diligence, business prudence.

15. All the profits or income accruing to the Transferor-Companies or expenditure or losses arising or incurred or suffered by the Transferor-Companies shall for all purpose be treated and be deemed to be and accrue as the income or profits or losses or expenditure, as the case may be, of the Transferee Company.

16. Save and except the increase of authorised share capital of the Transferee-Company as stated herein below, the Transferor-Companies and/or the Transferee-Company shall not make any change in its capital structure either by any increase, (by issue of equity share, convertible debentures or otherwise) decrease, reduction, reclassification, subdivision or consolidation, reorganization, or in any other manner except by mutual consent of the respective boards of directors of the Transferor Companies and the Transferee-Company.

17. The Transferor-Companies shall not without the prior approval of the Board of Directors of the Transferee-Company utilize the profits, if any, for any purpose including of declaring or paying any dividend in respect of the period falling on and after the Appointed Date.

18. Until the Effective Date, the Transferor-Companies shall not without the prior approval of the Board of Directors of the Transferee-Company issue or allot any further securities either rights or bonus or otherwise.

19. If any suit, appeal or other proceeding of whatever nature by or against the Transferor-Companies be pending, the same shall not abate or be discontinued or be in any way prejudicially affected by reason of amalgamation by anything contained in this Scheme, but the said suit, appeal or other legal proceedings may be continued prosecuted and enforced by or against the Transferee-Company in the same manner and to the same extent as it would or might have been continued, prosecuted and enforced by or against the Transferor-Companies as if this Scheme had not been made.

20. The services of all the permanent employees of the Transferor-Companies shall stand transferred to the Transferee-Company on the terms and conditions not less beneficial to such employees than those subsisting with reference to the respective Transferor-Company. The position, rank and designation of the employees would be decided by the transferee-Company and any change in the position, rank or designation in the Transferee-Company which is different from the position, rank or designation of any such employees in the respective Transferor-Company immediately prior to the Effective Date, would not be regarded as less beneficial terms and conditions of service for the purpose of this clause.

21. The Transferor Companies shall not vary, except in the ordinary course of business, the terms and conditions of the employment of their respective employees without the consent of the Board of Directors of the Transferee-

Company.

22. In regard to Provident Fund and Superannuation Fund or any other special fund created or existing for the benefit of such employees of the Transferor-Companies, upon the Scheme becoming effective, the Transferee-Company shall stand substituted for the Transferor-Companies for all purposes whatsoever relating to the administration or operation of such schemes or funds in relation to the obligations to make contributions to the said funds in accordance with the provisions of such schemes or funds in the respective Trust Deeds or other documents. It is the aim and intent of the Scheme that all the rights, duties, powers and obligations of the Transferor-Companies in relation to such schemes or funds shall become those of the Transferee-Company. In the event that the Trustees are constituted as holders of any securities. Trust funds of Trust monies, in relation to any Provident Fund Trust, Gratuity Trust or Superannuation Trust of the Transferor Companies, such funds shall be transferred by such Trustees of the Trust of the Transferor-Companies, to separate Trust and the Trustees of the Transferee-Company if set up for the same purpose and object and shall be deemed to be a transfer of trust property from one set of Trustees to another set of Trustees in accordance with the provisions of the relevant labour laws, Indian Trust Act, 1882 and the Indian Income Tax Act, 1961 and relevant Stamp Legislations as applicable. In such case appropriate Deeds of Trusts and/or documents for transfer of Trust properties shall be simultaneously executed upon the sanction of the Scheme in accordance with the terms hereof, by the Trustees of such Trusts in favour of the Trusts of the Transferee- Company so as to continue the benefits of the employees. For the purpose the Trusts created by the Transferor-Companies shall be transferred and/or continued by the Transferee-Company, if permitted by law, failing which the Transferee-Company shall establish similar trusts ensuring that there is continuity in this regard. The Trustees including the board of directors of the Transferor-Companies and the Transferee- Company shall be entitled to adopt such course in this regard as may be advised provided however that there shall be no discontinuities or breakage in the service of the employees of the Transferor-Companies.

All in all, significant aspects of valid and sound Scheme have been incorporated and approved.

23. The Scheme is conditional on and subject to;

(a) Approval of the Scheme by the requisite majority of the respective members of and such class of persons of the Transferor-Companies and the Transferee-Company as may be directed by the High Court of Judicature at Bombay.

(b) Sanctions and orders under the provisions of section 391 read with section 394 of the Act being obtained by the Transferor-Companies and the Transferee-Company from the High Court of Judicature at Bombay.

(c) The approval of the Government of India and/or Reserve Bank of India under the Foreign Exchange Management Act, 1999 for issue of shares of the

Transferee-Company to the Non Resident share- holders of the Transferor-Companies where such approval of consent is necessary.

24. This Scheme, although to come into operation from the Appointed Date, shall not become effective until the last of the following dates, namely ;

(a) That on which the last of the aforesaid consents, approvals, permissions, resolutions and orders as mentioned above shall be obtained or passed;

(b) That on which all necessary certified copies of orders under sections 391 and 394 of the Act shall be duly filed with the appropriate Registrar(s) of Companies.

(c) The last of such date shall be the "Effective Date" for the purpose of this Scheme.

(d) All other sanctions and approvals as may be required by law in respect of this Scheme being obtained.

24A. The share capital of the Transferor-Company No. 2 as of 18-11-2003 is Authorized Capital, Equity Shares of Rs. 2,500,000 of 250,000 equity shares of Rs. 10 each, issued, subscribed and paid up Equity Shares of Rs. 1,41,430 of 141,843 equity shares of Rs. 10 each, fully paid up.

As on of 19-11-2003, the issued, subscribed and paid up capital of the Transferor-Company No. 2 is held as of De Beers Mauritius Pvt. Ltd. share holding 99.99% number of shares 141,841 and Debsam Limited, Luxembourg, shareholding 0.01% number of shares 2.

25. As per the audited balance-sheet of the Transferor-Company No. 3 as on 31-3-2003 and unaudited balance-sheet as on 31-8-2003 the share capital of Transferor-Company No. 3 as on 18-11-2003 is set out below :

Authorized capital, Equity share capital of Rs. 5,000,000 of 500,000 equity shares of Rs. 10 each, issued, subscribed and paid up equity shares Rs. 3,049,210 of 304,921 equity shares 10 each fully paid up.

26. As of the date of this petition the issued subscribed and paid-up capital of the Transferor company No. 3 is held as under; De Beers Mauritius (P.) Ltd. Shareholding 99.99% total share 304,919 Debsam Ltd. Luxembourg, shareholding 0.01% total share 2.

27. As per the audited balance sheet of the Transferor-Company No. 4 as on 31-3-2003 r/w unaudited balance sheet as on 31-8-2003, the share capital of the Transferor-Company as on 18-11-2003 is set out below :

Authorized Capital, Equity Shares of Rs. 140,000,000 of 14,000,000 Equity Shares of Rs. 10 each, Issued, Subscribed and Paid-up Equity shares of Rs. 124,754,730 of 12,475,473 equity shares of Rs. 10 each fully paid up.

28. The issued, subscribed and paid up capital of Transferor-Company No. 4 has increased with effect from 17-11-2003 and the Authorized Capital of Transferor-

Company No. 4 has increased with effect from 13-6-2003.

29. As of the date of this Petition, the issued, subscribed and paid-up capital of the Transferor-Company No. 4 is held as under :

De Beers Mauritius Private Ltd., shareholding 99.99%, No. of shares 1,24,75,471. Debsam Ltd., Luxembourg shareholding 0.01%, number of shares 2.

30, The share capital of the Transferor-Company No. 5 as on 18-11-2003, based on audited balance sheet of the Transferor-Company as on 31-3- 2003 and unaudited balance sheet of Transferor company as on 31st August, 2003 is set out as under :

Authorized Capital, Equity Shares of Rs. 80,000,000 of equity shares 8,000,000 of Rs. 10 each, Issued, Subscribed and paid-Up Equity Shares of Rs. 68,417,830, equity shares 6,841,783 equity shares of Rs. 10 each fully paid-up.

31. The Issued, Subscribed and Paid up Capital of Transferor-Company No. 5 was increased with effect from 17-11-2003 and the Authorized Capital of the Transferor-Company No. 5 was increased with effect from 13-6-2003.

32. As on the date of this Petition, the issued, subscribed and paid-up Capital of the Transferor-Company No. 5 is held as under :

De Beers Mauritius Pvt. Ltd. shareholding 99.99%, number of shares 68,41,781. Debsam Ltd., Luxembourg, shareholding 0.01% number of shares 2.

33. The Transferee-Company as pointed out earlier is a Private Limited Company and its capital Structure as on 18-11 -2003, based on the audited balance sheet as on 31-3-2003 and unaudited balance sheet as on 31-8- 2003, is set out as under :

Authorized Capital, Equity Shares of Rs. 23,000,000, 23,00,000 equity shares of Rs. 10 each, Issued, Subscribed and paid up Equity shares of Rs. 19,441,350, 19,44,153 Equity shares of Rs. 10 each fully paid up.

34. As of the date of the petition, the issued, subscribed and paid-up capital of the Transferee-Company is held as under :

De Beers Mauritius Pvt. Ltd., shareholding 99.99%, number of shares 19,44,151. Debsam Ltd., Luxembourg shareholding 0.01% number of shares 2.

35. All the Companies Transferor-Company and Transferee-Company, within the frame work of their Memorandum of Article of Association resolved unanimously and approved the Scheme to proceed further with the Scheme in question in accordance with the law with the following objectives :

Objectives of the Scheme :-

That the benefits, inter alia, of the proposed amalgamation would be as under:

(a) The Transferor Companies and the Transferee-Company are all companies within the same group of companies ("Group") and are under the same management. The Transferor and Transferee- Companies were incorporated separately to comply with certain regulatory requirements prevailing at that time. A consolidation of the Transferor and Transferee Companies by way of amalgamation would therefore lead to a more efficient utilization of capital and create a stronger base for future growth of the Group in general and the amalgamated entity in particular.

(b) The proposed amalgamation will result in administrative and operational rationalization, organizational efficiencies, reduction in over- head and other expenses and optimal utilization of various resources. It will prevent cost duplication that can erode financial efficiencies of the holding structure and the resultant operations would be substantially cost efficient. Consequently, the Transferee- Company will offer a strong financial structure to all creditors including the creditors of the Transferor-Companies, facilities re- source mobilization and achieve better cash flows. The synergies created by the amalgamation would lower the cost of borrowing, increase operational efficiency and integrate business functions. This would contribute substantially towards enhancement of share- holders value of the Transferor-Companies and Transferee-Company.

(c) The proposed amalgamation will reduce managerial overlaps, which are necessarily involved in running multiple entities.

(d) The proposed amalgamation will strengthen and consolidate the position of the Transferee-Company to participate more vigorously and profitably in a competitive market. It will also result in the growth in profitability for shareholders of the Transferee-Company.

The effective date as agreed of the Scheme is 1-4-2003.

Fair, Just and sound Scheme :-

36. The basic essential of such Scheme have been taken care by all the companies, which includes, the effect of amalgamation Companies, assesseees, properties, debts, liabilities, advances, duties, obligations shall get transfer and vested in Transferee-Company without any further act of any parties or without the consent of third parties. Usual consequences of said amalgamation are also taken care of, which includes all rights, liabilities, contracts, advantages, benefit, goodwill, permits, licenses, recovery and receivable, or position or contrary. The mode of vesting all movables have also been agreed. The care is also taken of conduct of business, transfer of employees of the Transferor-Company, Transferee- Company with all benefits of such services, including all respective trust, money funds. It is agreed that the Transferor-Company shall be dissolved without being wound up without further acts by the parties. The special care of issue of shares by the Transferee-Company is also been noted and accordingly agreed to allow equity shares of Transferor-Company in agreed proportion. The

proportion is based on the opinion, expression, appreciation, confirmation by the professionals of the Company. The rights of declaration and pay of dividends have also been taken care of. The accounting treatment has been taken into consideration. The usual provisions of filing application to the High Court for modification and amendment to the Scheme and conditions of approval and sanction of the Scheme including costs have been dealt with in detail.

37. The Board of Directors of the respective Companies, including Transferor-Company and Transferee-Company, unanimously in their respective meetings held on 26-11-2003, passed respective Resolutions.

38. The Petitioners-Company, the Transferor-Company No. 1 therefore, had filed an application No. 577 of 2004 for obtaining requisite directions for dispensation of the Meetings of the Equity Shareholders and the Secured Creditors and the Unsecured Creditors of the Petitioner-Company. By order dated 9-1-2004 in the said Company Application, this Court ordered accordingly, as the consent of the shareholders for approval of the Scheme had been met with and that since the Petitioners have no Secured and Unsecured Creditors all these meetings were dispensed with,

39. There are no proceedings u/s 235 and section 250 of the Companies Act, 1956 against the Transferor-Companies, Transferee- Company and the Petitioner Company. The Petitioner Company, as averred do not have any creditors, secured or unsecured. It is further averred that pursuant to the amalgamation of the Transferor-Companies with the Transferee-Company, its debt, repayment capacity will not be adversely affected. Therefore, the Scheme and the amalgamation contemplated thereby, will not adversely affect the interest of the creditors of the Companies and in fact it will be in the interest of the Creditors. The shareholders of the Petitioner Company namely De Beers Mauritius Pvt. Ltd. and Debsam Ltd., Luxembourg have at their respective meetings, by resolutions passed and unanimously approved the Scheme by its resolution dated 2-12-2002 and 20-12-2002 respectively.

40. That the Directors of the Petitioners Company are deemed to be interested in the Scheme to the extent of their directorship in the Transferor-Companies and/ or the Transferee-Company. None of the Directors of the Transferor-Companies or the Petitioner Company hold shares either Transferor-Companies or the Petitioner Company. A list of common directorships of the directors of the Transferee-Company and/ or the Transferor-Company is also part of record.

41. By order dated 20-2-2004 the petition was admitted and fixed for hearing on 1-4-2004 and accordingly, other directions of issuance of notices of hearing were issued, which includes the notices under sections 394A and 394(1) to the respective authorities, i.e., Regional Director, Department of Company Affairs and Official Liquidator, High Court, Bombay.

42. The affidavit of service, as per the procedure, dated 29-3-2004 is filed by the Petitioner through one Mr. J.P. Dis'za made necessary averments of the

publication of the notice of hearing of the petition as required including affidavit of service to the Regional Director, as well as, Official Liquidator as per procedure.

43. The Official Liquidator by its common report dated 29-3-2004 after considering the auditors report, which was based on the scrutiny of the books of account and other relevant documents of Members of the Transferor-Company, endorsed that the affairs of the Transferor-Company namely M/s, De Beers India Exploration Private Ltd., De Beers India Geology Pvt. Ltd., De Beers India Surveys Pvt. Ltd., De Beers India Prospecting Pvt. Ltd., De Beers India Pvt. Ltd. have not been conducted in a manner prejudicial to the interest of its members or public interest.

44. The Regional Director of Western Region, Department of Company Affairs by its affidavit dated 31-3-2004, after considering the merits of the affairs from the concerned Registrar of Company also endorsed that the Scheme is not prejudicial to the interest of the Creditors and Shareholders.

45. All the petitions filed by all the Companies including Transferor- Company and transferee-Company called out for hearing. Mr. Khambatta appearing for the petitioner requested to consider and allow to amend the prayer Clauses (g) (i), in view of the fact that even though those averments are part of the record, but inadvertently that prayer clause could not be incorporated. Other sides, i.e., Regional Director as well as, Official Liquidator have no objection, if, the amendment is allowed. Considering the averments made, in the petition and as this amendment is of formal in nature and in view of the submissions already made the same was allowed to be incorporated. Accordingly, the amendment was carried out as per order dated 12-4-2004 in all the petitions and prayer Clause (g) (i) has been incorporated.

46. The Commercial exigencies and need of particular company and its shareholders and reason for the respective decisions or resolutions, and in absence of any serious objection or prejudice to anybody, the Court would not like to reassess or give its opinion or view on merit and or the wisdom of the Scheme. The scope of judicial review in such matters is very limited. This is not an Appellate jurisdiction, therefore, unless whole Scheme is unfair, unreasonable, contrary to law and public policy, any interference is impermissible.

47. Heard parties and after going through the Scheme of arrangement as well as merits of the said Scheme as discussed in above paras, and as no objections have been received on record or pointed out by any parties and as the Regional Director, as well as, Official Liquidator have expressed and endorsed that the Scheme is not prejudicial to the interest of the shareholders and the public interest and the affairs of the companies are also not prejudicial or affect the public interest of the shareholders and as there is no objection received or pointed out by the counsel appearing for the parties, there is no reason to disapprove the Scheme in question as the necessary requisite formalities of law have been complied with based on material and requisite documents on record.

There is nothing against law or public policy. The Scheme is sound, fair, reasonable and based on exigencies of time as per companies business and related national and international market and strategy. The necessary compliances and care is taken from all aspects and Scheme is approved unanimously by the respective shareholders, creditors and as no objection of any kind or sort received or raised by any party, the petition is allowed in terms of prayer Clauses (a) to (h), with liberty. Proceed in accordance with law.

48. Costs, of Rs. 2,500 each to the Regional Director and as well as the Official Liquidator to be paid by the petitioners within four weeks from today.