

(2012) 06 GUJ CK 0020

In the Gujarat High Court

Case No : CP No's. 56 and 57 of 2012 in Company Application No's. 131 and 132 of 2012

In Re: Elitecore Technologies (P.) Ltd.

Date of Decision : 19-06-2012

Acts Referred:

Companies Act, 1956 — Section 192, 391, 391, 392, 393

Citation : (2012) 110 CLA 208

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : Mihir Joshi, Tanvish Bhatt and P.S. Champaneri, for the Appellant;

Judgement

Abhilasha Kumari, J.—These petitions are filed by two petitioner-companies for sanction of a scheme of arrangement, namely, Elitecore Technologies (P.) Ltd. - the transferor-company/demerged company and Cyberoam Technologies (P.) Ltd. -the transferee-company/resulting company under sections 391 to 394 of the Companies Act, 1956 ("the Act"). It has been submitted that the transferor-company/demerged company was originally incorporated under the Act on 17th December, 1999. On 3rd August 2001, the company was converted into a public limited company and thereafter again converted into a private limited company on 17th August, 2010, whereby the company was issued a fresh certificate of incorporation. As for the transferee-company/resulting company, it was incorporated on 2nd March, 2006 under the name Cyberoam Technologies (P.) Ltd. Thereafter, the name was changed to Fast Track Technologies (P.) Ltd. with effect from 4th October, 2007. The name of the transferee-company/resultant company was again changed to Cyberoam Technologies (P.) Ltd. in 20th June, 2011 and a fresh certificate of incorporation was issued thereafter. The transferee-company/resultant company, namely, Cyberoam Technologies (P.) Ltd. is a wholly owned subsidiary of the transferor-company/demerged company, namely, Elitecore Technologies (P.) Ltd. The Board of directors of both the transferor-company/demerged company and the transferee-company/resultant company, passed resolutions at their respective Board meetings and unanimously approved the scheme of arrangement on 15th March, 2012. The transferor-

company/ demerged company has one secured creditor and eighteen unsecured creditors, each of which have provided their consents in writing to the scheme of arrangement between the companies and the same has been placed on record. The transferee-company/resultant company does not have any outstanding creditors, which stands certified by the certificate of the chartered accountant. The shareholders of both the transferor-company/ demerged company as well as the transferee-company/resultant company have also consented to the proposed scheme of arrangement and the consents of such shareholders, duly certified by the chartered accountant have been produced on record.

2. It has been stated that the transferor-company/demerged company has been engaged in the business of providing information technology products and software solutions, focusing on Network Security ("Cyberoam Division") and Operations Support System and/or Business Support System Solutions for Telecom operators (Telecom Division) and that both of its divisions, namely, the Cyberoam Division and the Telecom Division carry on distinct business activities, through its branches and its subsidiary companies, which have a significant potential for growth. Thus, the nature of risk and competition involved in each of these businesses are distinct from others and consequently, each business or undertaking is capable of attracting a different set of investors, strategic partners, lenders and other stakeholders. There are also differences in the manner in which each of these businesses are required to be managed. It has further been submitted that the transferee-company/resultant company is engaged in the business of software and appliance development/providing networking solutions/security solutions/ e-commerce solutions, related project implementation, sales and marketing of the said products and providing consultancy services. So, in order to enable the management to lend greater focus to the operation of each business, the Board of directors of the transferor-company/demerged company proposed to re-organise and segregate, by way of a demerger of its Cyberoam Division and subsequent transfer of the same to the transferee-company/ resultant company. It has further been submitted that sanction of the scheme of arrangement between the transferor-company/ demerged company and transferee-company/resultant company, shall result in providing a greater focus to the operations of each of the businesses and increase the efficacy of the business operation, profitability and ultimately the return on capital.

3. The transferor-company/demerged company preferred Company Application No. 131 of 2012 for seeking dispensation of the meeting of shareholders and the secured and unsecured creditors, on the basis of their consents to the proposed scheme. The said company application came up for hearing before the court on 3rd April, 2012, whereby this court granted such dispensation.

4. Similarly, the transferee-company/resultant company filed a Company Application No. 132 of 2012 for seeking dispensation of the meeting of equity shareholders, on the basis of written consents to the proposed scheme, the said

company application came up for hearing before the court on 3rd April, 2012, whereby this court granted such dispensation.

5. The present petitions were admitted by this court on 10th April, 2012. They were duly advertised in the newspapers of Ahmedabad edn., namely, "Sandesh" - Gujarati daily and "Indian Express" - English daily on 13th April, 2012. Publication in the Government Gazette was dispensed with. An affidavit of publication was filed on 18th April, 2012, confirming the said publication. No one has come forward with any objection to the said petitions after the publications.

6. In the interregnum, speaking to minutes were also filed by both the transferor-company/demerged company and the transferee-company/resultant company seeking deletion of paragraph 7 in both the orders passed in company petitions, whereby notice was directed to be issued to the office of the official liquidator. The speaking to minutes came up for hearing before this court on 16th April, 2012. Accordingly, an order was passed on 16th April, 2012 deleting paragraph 7 in the respective orders dated 10th April, 2012 passed in Company Petition No. 56 of 2012 and Company Petition No. 57 of 2012, respectively and the issuance of notice to the office of official liquidator was dispensed with, as the transferor-company/demerged company is not being wound up pursuant to the proposed scheme of arrangement.

7. Notice was served upon the Central Government and Mr. P S Champaneri, learned Assistant Solicitor General of India appeared for the Central Government. An affidavit of service dated 2nd May, 2012 has been filed by Mr. Kashmir Lal Kamboj, Regional Director, along with the report submitted by the Registrar of Companies ("RoC"), Gujarat, along with the letter of, No. ROC/Guj/Elitecore/Cyberoam/STA/(K)/2011-12/413 dated 30th April, 2012. The petitions have been opposed on the ground of the same are not in compliance of sections 94 and 97 read with section 192 of the Act. Further, the RoC, Gujarat has submitted his report, vide letter No. ROC/Guj/Elitecore/Cyberoam/ STA/(K)/2011-12/413 dated 30th April, 2012 and as per the said report, no complaint and/or representation has been received against the petitioner-companies including any complaint/representation in respect of the proposed scheme of arrangement. The Regional Director has also submitted the report of the RoC in Company Petition No. 56 of 2012 connected with Company Application No. 131 of 2012, and Company Petition No. 57 of 2012, connected with Company Application No. 132 of 2012, which have been examined by him and has stated that there appears to be no other objection to the proposed scheme of arrangement and that the scheme does not, prima facie, appear to be prejudicial to the interest of the shareholders of the petitioner-companies and the public at large.

8. In response to the objections raised by the Regional Director, the petitioner-companies filed a common rejoinder/affidavit stating that pursuant to the Scheme, the authorised share capital of the demerged company, which originally aggregated to Rs. 51,55,10,500 divided into 5,15,51,050 equity shares of Rs. 10 each, would stand reduced to Rs. 10,55,10,500 divided into 1,05,51,050 equity

shares of Rs. 10 each, and the authorised share capital aggregating to Rs. 41,00,00,000 divided in to 4,10,00,000 equity shares of Rs. 10 each would stand transferred to the resultant company, thereby increasing the authorised share capital of the resultant company to Rs. 41,10,00,000, divided into (i) 1,61,00,000 equity shares of Rs. 10 and (ii) 2,50,00,000 Compulsorily Cumulative Convertible Preference Shares of Rs. 10 each. It has also been submitted that such transfer of authorised capital and consequent increase in the share capital of the resultant company has been undertaken under sections 391 to 394 of the Act, which are a complete code. Thus, having duly complied with the provisions of sections 391 to 394 of the Act and obtained due consent from the shareholders and creditors, the petitioner-companies, viz., the demerged company and the resulting company have duly adhered to, and complied with, the provisions of the Act and any further compliances as sought by sections 94 and 97 read with section 192 of the Act are necessitated. It has further been submitted that the transferor-company/demerged company has increased its authorised share capital after having duly complied with the provisions of the Act and the Bombay Stamp Act, 1958 and payment of registration charges and stamp duty. Thus, the transferor-company/demerged company, once having duly paid the amounts on such increased share capital, further duty and charges cannot be levied when part of the same share capital becomes the share capital of the transferee-company/resultant company by effect of law. It has, therefore, been submitted that such transfer of the authorised share capital is well within the purview and integral part of the scheme of arrangement duly sanctioned by the shareholders and creditors and is not in contravention of the provisions of the Act.

9. The Regional Director has filed an additional affidavit in response to the rejoinder filed on behalf of the petitioner-companies raising further objections, viz., (i) there is no system and manner provided under Act to ascertain the unit-wise/undertaking-wise authorised share capital in case of demerger, thus, business-wise bifurcation is not lawful; (ii) there is no mechanism in the provisions of Act to devise and/or reduce the authorised capital of any company and to give credit in respect of fees and stamp duty already paid, to any other company under the circumstance; (iii) there is no provision in the Act for decrees/reduction in the authorised share capital of a company; (iv) the MCA21 system does not allow the RoC to effect such reduction in the authorised share capital, in absence of specific provisions in the Act; and (v) the scheme of arrangement is not in accordance with the provisions of Act and should not be granted sanction by the court.

10. This court has heard Mr. Mihir Joshi, learned senior advocate with Mr. Tanvish Bhatt, learned advocate for Wadia Ghandy & Co., for the petitioners, Mr. P S Champaneri, learned Assistant Solicitor General of India and has considered the report of the Regional Director.

11. With regard to the objections contained in the additional affidavit filed by the

Regional Director, Mr. Mihir Joshi, learned senior advocate, has submitted that insofar as the first objection is concerned, the shareholders' fund comprising of shareholders' capital, reserves and surplus of the demerged company will no longer be fully represented by the available assets. To reflect the same as an integral part of the scheme, the shareholders' fund comprising of share capital, reserves and surplus will have to be reduced or utilised, as the case may be. In any case, the shareholders have approved the scheme, therefore, this objection may not be countenanced. Further, reconstruction entails business-wise bifurcation, which is within the purview of the arrangements contemplated under sections 391 to 394 of the Act and the same is permissible. Regarding the second, third and fourth objections, the learned senior advocate has submitted that section 391 is a complete code in itself and once the scheme of arrangement falls squarely within the four corners of this section, it can be sanctioned, even if it involves doing acts for which the procedure is specified in other sections of the Act. It is submitted that it is now established and accepted in a number of cases by various High Courts and this court that the principle of single window clearance permits all other formal requirements of the Act, such as approval of change of objects or any other alteration of the memorandum of association and all other consequential or incidental changes required for implementing the scheme, to be formalised in a single petition. It is further submitted that there is no requirement of paying registration fees and stamp duty, as the demerged company has already paid the requisite registration fees and stamp duty payable under the statute. Having once duly paid the amounts on periodic increases in share capital, further duty and charges cannot be levied when part of the same share capital becomes the share capital of the resulting company by effect of law. In support of this submission, reliance has been placed upon the following judgments : (i) *Bazley Finvest Ltd., In re.* [2006] 70 CLA 119 (Guj.)/[2005] 64 SCL 480; (ii) *Alchemist Ltd. and Alchemist Foods Ltd., In re.* [2011] 100 CLA 185 (Del.)/[2010] 160 CC 469; (iii) *Aegis Healthcare (P.) In re.* [2009] 88 CLA 43 (Guj.)/[2008] 146 CC 53; and (to) *Ashim Investment Co. Ltd., In re.* [2006] 73 CLA 37 (Del.)/[2007] 138 CC 89.

12. Mr. P S Champaneri, learned Assistant Solicitor General of India, has submitted that the judgments in *Bazley Finvest Ltd.* and *Aegis Healthcare (P.) Ltd.* (supra), have been rendered in cases of amalgamation, whereas the present case is that of demerger.

13. No other contentions have been raised by way of pleading or oral submissions before this court.

14. Having heard the learned counsel for the respective parties and upon consideration of the submissions made by them and the judgments cited at the Bar, this court is of the considered view that none of the objections raised by the Regional Director are sustainable. Though the judgments in *Bazley Finvest Ltd.* and *Aegis Healthcare (P.) Ltd.* (supra.) have been rendered in cases of amalgamation, however, the judgments in the cases of *Alchemist Ltd.* and

Alchemist Foods Ltd. and Ashim Investment Co. Ltd. (supra) are in the cases of demerger. Moreover, in Bazley Finvest Ltd. (supra.), this court has approved the ratio in the case of Ashim Investment Co. Ltd. (supra), which is a case of demerger. The principle of law laid down by the courts in these judgments, namely, that section 391 is a complete code and the principle of single window clearance permits all other formal requirements of the Act, required for implementing the scheme to be formalised in a single petition would, in the view of this court, apply to cases of demerger as well as amalgamation.

15. In view of the above, this court is satisfied that the scheme of arrangement would be in the interest of the companies and their members and creditors and the prayers in terms of para 20 of the Company Petition No. 56 of 2012 and para 19 of Company Petition No. 57 of 2012 are hereby granted. The petitions are disposed of, accordingly. So far as the costs to be paid to the learned Central Government Counsel are concerned, the same are quantified at Rs. 7,500 per petition. The same may be paid to Shri P S Champaneri, learned Assistant Solicitor General of India.