

(2004) 05 BOM CK 0030

In the Bombay High Court

Case No : Company Petition No. 1036 of 2003 and Company Application No. 438 of 2003

In Re: EMCO Ltd.

Date of Decision : 06-05-2004

Acts Referred:

Companies Act, 1956 — Section 394

Citation : (2005) 1 BomCR 451 : (2004) 3 CompLJ 411 : (2004) 54 SCL 76

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : R.M. Kadam and Hemant Sethi, for the Appellant; R.C. Master, for the Respondent

Judgement

Anoop V. Mohta, J.—The present company petition has been filed by the EMCO Ltd. ("EMCO or Transferee Company") having its registered office at N-104, MIDC Area Jalgaon, under the provisions of Sections 391 to 394 of the Companies Act, 1956 (Companies Act), thereby seek sanction of this Court, to the arrangement between Verticalbiz.com (India) Ltd. "Transferor company or Verticalbiz"), whereby the undertaking of the transferor company should be merged in to the petitioner company and the Transferor Company would stands dissolved without winding up.

2. Company Petition No. 1035/2003 has also been filed by the transferor Company (Verticalbiz) and therefore, the facts and reasoning of this petition, are also interlinked and connected with the said petition for all the purposes and accordingly, be treated, as part and parcel of this petition also.

3. The petitioners company's authorized, issued, subscribed and paid up share capital is referred in para 4, which is reproduced as under; Authorized 100,000,000 equity shares of Rs. 10 each fully paid up, Rs. 10,000 lakhs. Cumulative Redeemable preference shares 5,00,000 shares of Rs. 100 each. Rs. 5,000 lakhs. Issued, subscribed and paid up 51,77,372 Equity Shares* of Rs. 10 each fully paid up, Rs. 517.74 in lakhs. 9,000,000 Equity Shares of Rs. 10 each, 4 paid up, Rs. 36 lakhs. Total Rs. 553.74 lakhs. The petitioner company holds

100 per cent equity shares of the transferor company. The Transferor company is wholly owned subsidiary of the petitioner company and all the shares of the Transferor company are presently held by the petitioner company, in its own name or in the name of its nominees. The assets of the petitioner company, as described in para 20 are similarly, the Assets of the petitioner Company are in the sum of Rs. 2,012,417,658, as against liabilities of Rs. 1,204,143,847. Assets are far more than the liabilities, as on 31-3-2003. Secured loans Rs. 837,889,147, Fixed Assets (Net) Rs. 590,473,828, Unsecured loans-Nil, Capital work in progress investments Rs. 15,358,401. Current liabilities and provisions Rs. 369,689,590, Current Assets, Loans and Advances, Rs. 1,406,585,429, liabilities Rs. 366,557,514,. Inventories, Rs. 424,581,826. Provisions Rs. 3,132,076. Sundry Debtors Rs. 767,059,624, Cash and Bank balances Rs. 30,864,866. Other current Assets 337,043, Loans and Advances Rs. 183,742,070.

4. Audited balance sheet, as on 31-3-2003 is also part of record. The memorandum and Articles of Association of the petitioner company authorized them to amalgamate with other company.

5. To achieve the objects based on their respective business and existing infrastructures, management, goodwill and for a maximum utility of existing capital and investment and to meet the challenge arising out of the liberalization of the economy, whittling down of the trade barriers and growing competition, the transferor company has responded with several initiatives which have resulted in quality improvements, costs efficiencies, as well as, efforts towards an international and national level and further to cut the expenses and expenditure and considering this, both the companies have approved to the proposed scheme of arrangement. As per the scheme of arrangement, the undertaking and all the properties, rights, powers, assets, debts, liabilities dues, obligations of the transferor company, shall without any further deed to transfer, vest in the petitioner company. The scheme in question does not affect the rights and interest of the members of the creditors of the petitioners company. The rights of the members of the petitioners company will remain unaffected, as no new shares are being issued, and there is no change in the capital structure. As per the scheme the Share Premium Account of the petitioner company has been utilized, as incorporated in the Scheme. The utilization as aforesaid has been affected, as integral part of the proposed scheme and does not involve either diminution of liability in respect of unpaid share capital or payment to any shareholders of any paid up share capital. Therefore, the interest of the Creditors of the petitioner company are not affected by such reduction. Therefore, the procedure under Sections 101 to 102 of the Companies Act, 1956, also sought to be dispensed with. The positive averments are made that the creditors of the petitioners company are not likely to be affected by the scheme, as financial position of the petitioners company is sound, as the petitioners company have assets, in excess of the liabilities.

6. Company Application No. 438/2003, wherein order dated 8-10-2003, was

passed, to convene the meeting of equity shareholders, and to pass Special Resolution for confirming the utilization of share premium account.

7. The meeting of secured and unsecured creditors were dispensed with, in view of the averments made in para 20 of the affidavit in support of Company Application No. 438/2003. The notices of meeting were sent to individuals with copy of the scheme and a form of proxy, as per law and accordingly, it was advertised also. The affidavit in support of the same is also filed on the record. The meeting was held on 22-11-2003, accordingly, in the Chairmanship of Mr. A.P. Kothari. The Majority shareholders voted in favour of the scheme of arrangement. In the said meeting the special resolution confirming utilization of share premium account was passed. The resolution as recorded in the petition, has been approved by the requisite majority. The Chairman's report dated 12-12-2003 is placed on the record.

8. Both the companies are not registered under the monopolies and Restrictive Trade Practice Act and no investigation is pending against either of these companies under Sections 235 to 251 or any other provisions of the Companies Act, 1956. The petition was therefore, filed with requisite material on 16-12-2003. The affidavit of proving service dated 24-3-2004 is also on the record.

9. By common affidavit dated 10-3-2004, in Company Petition Nos. 1035 of 2004 and 1036 of 2004, the Regional Director, Western Region, Department of Company Affairs, after going through the Report of the Registrar of Companies, submitted that the Scheme is not prejudicial to the interest of the creditors and shareholders.

10. There are objections in the petition, these objectors are as under ;

(i) Swami Vessels Pvt. Ltd., Jalgaon (intervener, creditors), alleged debt - Rs. 15,68,223.

(ii) Jain Parmar Electronics partnership firm, through Suresh J. Parmar, alleged debt - Rs. 17,29,138.

(iii) Transport Corporation of India Ltd., Secundrabad, through Ashok Mishra (Intervener, creditor), debt - Rs. 12,74,000.

(iv) Freeman Products (India), Shivaji Nagar Ludhiana, through Shri Sunil Kumar Agarwal (intervener, creditors) debt of Rs. 65,246.

(v) M.R. Malpani, Subhash Chowk, Parli-Vaijanath (Intervener, creditor) alleged debt of Rs. 55,00,000,

(vi) Ujwal Udyog, MIDC area, Jalgaon (Intervener, creditor) outstanding amount - Rs. 15,80,343.

They relied on Kaveri Entertainment Ltd., In re. [2003] 57 CLA 127 and thereby contended that the Court has power to refuse the sanction of the scheme, unless

all the creditors have given full opportunity and creditors, due be directed to be paid and/or at least directions should issued to secure their respective claims. The Objectors relied on paras 5 and 7 of that Judgment and submitted to reject the scheme, as no proper notice or due notices were issued to the creditors and the scheme is not in the interest of the creditors or class of the creditors, to which they are representing.

11. The learned Counsel for the petitioners however, relied on three judgments.

Maddi Lakshmaiah v. Duncan Agro Industries [2001] 34 SCL 250 and relied on the following facts and decision given by the Calcutta High Court.

"Facts:-The appellants, in this appeal, invoked the power of the Court u/s 392 of the Companies Act, 1956, to obtain payment of their alleged claim. According to the appellants, after the merger between DAIL and NIC, they supplied tobacco to TABAC or DAIL on the basis of an "understanding or arrangement" that DAIL would be responsible for payment for the supplies. It was not obviously an admitted position. In other words, it would be necessary for the appellants to prove their alleged claim. The Court below having held against the appellants, the question for decision in this appeal was whether, on the facts, the appellants were entitled to invoke power of the Court u/s 392 to release the said alleged debt.

Held:- The provisions of Section 392 of the Companies Act, 1956, may be invoked strictly to ensure effective working of the compromise and/or arrangement. Indeed the High Court has been conferred "power of widest amplitude" to monitor and effect the purpose. It is significant that, in this case, there was no allegation by the appellant that the sanctioned scheme was not properly working, or that the scheme should be set aside. The appellants have merely sought, in these proceedings, to release an alleged debt, attempting those the provisions of Section 392 of the Act, as a lever, which, it must be held, as futile and frivolous."

He further relied on Kaveri Entertainment Ltd., In re [2003] 117 Comp. Cas. 250 (Bom.)

He also relied on Ion Exchange (India) Ltd., 2002 (1) MLJ

"Two other claims have been placed on the record of these proceedings. A Company call Rotext Technical Services Private Ltd. has a claim of Rs. 4,39,397 against the transferee. The Company is at liberty to pursue the remedies open to it in law, to recover its claim. A claim made by another company- Prodosite Anticorrosives Ltd. has been settled and consent terms have been filed in these proceedings which are taken on record."

It would not open to this Court to enter into the correctness of the computation. Be that as it may, what emerges from the figures which have been provided for the perusal of the Court on affidavit is that even upon the merger, the Transferee Company will continue to have a resource base which would be more than

adequate to meet all the claim of the creditors.

12. All above creditors/interveners are of EMCO Ltd. i.e. transferee company. They are objecting to the present scheme/arrangement in question, on the ground that this arrangement is to defeat the legitimate claim of the creditors, objectors, interveners. The present application is not bona fide. Therefore, unless transferee company, i.e., EMCO pays entire outstanding as per demand raised and made, by these interveners, creditors, such scheme of arrangement should not be sanctioned. They further prayed that an appropriate order or direction be issued to the Company to pay the entire outstanding of the respective creditors and unless and until the transferee company pays the entire outstanding, such scheme of arrangement should not be sanctioned. They also submitted that in the alternative, provision should be made for such creditors by the transferee company for said balance amount or due. The objectors, advocates relied on the provisions of Sections 391 and 394 and other provisions of the Companies Act and the judgments, as in Kaveri Entertainment Ltd. 's case (supra). The reliance is on the foundation that all the creditors have not been given due notices and proper notice and they are not allowed to represent their case at appropriate time, as notices itself were dispensed with by the order of this Court. They therefore, contended that in view of the Kaveri Entertainment Ltd.'s case (supra), this scheme of arrangement should also be rejected. The meeting of such creditors is necessary. The majority of the creditors are kept in the dark of the proposed scheme of arrangement and therefore, this is not in consonance of the object and purpose of the provisions of the Companies Act. The majority decision of the creditors and/or its approval, as per the law, is necessary and therefore, this scheme of arrangement should also be rejected. Mr. Kadam, Counsel, appearing for the petitioner referred the Division Bench Judgment, as in Kaveri Entertainment Ltd.'s case (supra), whereby the Division Bench of this Court has reversed the said Judgment as relied by the creditor, intervener i.e., Kaveri Entertainment Ltd.'s case (supra). The relevant para of the said Judgment is reproduced as under;

"We find that the learned Single Judge has totally misdirected himself in passing the impugned order. It is further to be seen here that in any case the learned Single Judge was not at all justified in dismissing the petition. Even if it is assumed that the learned Single Judge was justified in holding that order dispensing with individual notices to the creditors below Rs. 5 lakhs was not proper, it was always open to the learned Single Judge to recall that part of the order and direct the company to issue individual notice even to those creditors to whom company owes less than Rs. 5 lakhs and then fix the matter for final hearing. It was stated by learned Counsel appearing for the petitioner that on behalf of the petitioner company an offer was made that, if the court so directs individual notices on those creditors can always be served at this stage. We find that there are no reasons disclosed in the impugned order for not following that course of action.

Taking over all view of the matter, in our opinion, there was at all no justification for the learned Single Judge to dismiss the petition. In these circumstances, therefore, the order dated 20-3-2003, passed in Company Petition No. 1117 of 2002 is set aside. Company Petition No. 1118 of 2002 is set aside. That petition is also granted in terms of prayer Clauses (a) to (f)."

13. In view of this, even otherwise on merit in the present case, as affidavit of service is filed on record and as objector/intervener/creditors are and through their respective Lawyers, are objecting the scheme of arrangement, in my view the case of creditors and objection of dispensing the meeting as or majority decision of the creditors, cannot detain the Court from proceeding further with the scheme in question. The admitted position in this matter is also that the said meeting was dispensed with by the Court's order. It may be mentioned here that during the course of argument the basic submission of all the creditors/intervener/objectors are that they are only interested in recovery of their dues and/or amounts from the transferee company i.e. EMCO Ltd. There is no objection of any kind or of any creditors against the transferor company. The scheme of arrangement and its merit, if we test, from this point of view that the creditors have no objection, if their money is paid. Then in a way they are not objecting to the basic scheme of arrangement in question. In fact they have no objection, if the scheme is sanctioned subject to the respective payments of the respective creditors. Considering, the rival objection and contentions raised, by the parties, now as creditors have appeared before the Court and submitted their objections to the scheme of arrangement in question, I see there is no reason now to direct the parties to issue fresh individual notices or held meeting of such creditors again. I am considering the scheme of arrangement in question that it is fair, reasonable, sound and not contrary to the public interest or public policy. It may be mentioned here that except the objectors, interveners, who appeared through their respective advocates, made above submissions, as recorded, no one appeared and objected the scheme. No claim appeared or submitted in submission in support of their opposition on behalf of M/s. Freeman Products (India), Ludhiana and M.R. Malpani, Subhash Chowk, Parli-Vaijnath. Mere sending their representation, objection on the record of the court or to the petitioner Company that itself is not sufficient. The practice and procedure of the Company Court is well known. The objections are not in the format and are not sent at appropriate time. Even otherwise, after, considering, the merits of these two objections and as contended by the petitioner's Counsel, mere bald statement and without supporting any evidence in support of their objections and/or claim, this Court cannot adjudicate or even decide such objections or pass any order on such objection, which are sent directly to the office of the Court. The amount referred in these two objections are disputed and are denying by the petitioner company. Therefore, on this sole ground itself, these two objections of intervener creditors are rejected and cannot be considered while sanctioning scheme of arrangement in question.

14. The petitioner company by its affidavit dated 8-4-2004, resisted the

objection of the said Jain Parmar Electronic Pvt. Ltd. and placed on record the material to show that the said amount is not payable and due and disputed the exaggerated amount as claimed by M/s. Jain Parmar Electronic, as same was with sole purpose to mislead the Court and to recover their alleged due by obstructing the sanctioning of the present scheme. The petitioner company has again relied on C.A. certificate for their financial position and for the positive networth, dated 7-4-2004. Basically of the EMCO Ltd. subsidiary Company, as on 31-12-2003. The petitioners further contended that in the affidavit that, as per the said C.A. certificate, after the said merger in the networth of the petitioners company and its subsidiary company i.e., Verticalbiz.com (India) Ltd. would be Rs. 66,26,24,338. The equipments are still lying with the objectors. Therefore, there is no question of paying the alleged amount, as demanded by M/s. Jain Electronics, as referred above. The petitioners company contended that in fact the applicant is liable to pay the damages to the company for withholding the capital equipments. In view of this, the petitioner, submitted that intervenor has no locus standi to intervene the proceeding. Considering, the affidavit of the petitioner on record and controversy raised by both the parties, at this stage, this disputed amount cannot be adjudicated or finalized by the Court, while sanctioning the scheme in question. Subject to the settlement of their respective dispute, and dues, parties are entitled to initiate or take out appropriate proceedings before appropriate forum. In my view, at this stage, this objection also cannot be considered and it is rejected.

15. The objector Mr. Swami is also on the same foundation, The petitioner's Counsel, objected the demand, as well as claim made by Swami Vessels Pvt. Ltd. The petitioner company by its affidavit dated 20-4-2004, resisted the said objectors, creditors claim and its opposition and contended that the demand of Rs. 15,68,223 and interest of 19 per cent is not correct. In fact the settled amount and dues have been paid by Jalgaon Unit on 19-3-2004, and the same was communicated vide letter dated 31-3-2004. The petitioner company have placed on record the necessary documents to support the same. The petitioner company have also taking steps to reconcile the account, so far as, Thane Unit is concerned. However, they have denied the amount, as claimed, as the same is exaggerated and the demand is made with ulterior purpose and to mislead this Court. The statements and the claim made by the objectors are baseless and are false and are with a view to extract exaggerated amount from the petitioner in the circumstances. The Objectors, intervenors have made this application with a mala fide intention by suppressing true and correct facts and the facts that they had received the amount due by the Jalgaon Unit of the petitioner company. The petitioners have pointed out the certificate of C.A. dated 7-4-2004 to demonstrate the positive networth of EMCO Limited and subsidiary company, as on 31-12-2003. In view of this, company, submitted that the intervenor has no locus standi to intervene in the proceedings. After considering the affidavit, on record and after hearing the parties, I am of the view, that the said objection at this stage cannot be agitated to settle their disputed claims. The objections to

the petition with sole purpose to recover their dues or amount due cannot be said to be bona fide. These objections are with ulterior motive to twist the arm and to recover their disputed amount. Such objection cannot be considered, to reject scheme of arrangement in question.

16. The objection of Transport Corporation of India Ltd., who appeared through the advocate, submitted that the amount, as raised and demanded by the said objector, if paid, they have no objection, if scheme is sanctioned. The advocates further submitted that while sanctioning the scheme, at least direction should be issued against the company, to make the provisions for their claim. He also made submission that there is no provision in the transferee company or in the scheme to make the payment to such creditors. To this Advocate for the petitioner company, submitted that this claim is not admitted and it is in dispute, the principle amount is Rs. 6,50,000, whereas, interest claim is Rs. 6,24,000. The petitioner company is in sound financial position and even if, his case is considered, they have a provision or funds on record, to make the payment, if dispute is settled by appropriate forum or Court. Therefore, at this stage, for this disputed dues there is no question of delaying the sanction of such arrangement in question.

17. Mr. Viswajit Sawant, advocate, appearing on behalf of Jain Parmar Electronics also made the same submission and he relied on the judgment of Mr. Justice Karnik in Kaveri Entertainment Ltd's case (supra) as referred above, in support of his case which is already considered.

18. Mr. Sawant, submitted that applicant firm is registered, as per Industrial Undertaking and, therefore, their claim should be directed to be paid before passing any order of sanction to such arrangement. The creditor, intervener here, also objected on the merit of the scheme of arrangement. Basically on the ground that creditors meeting has not been held and admittedly, dispensed with and therefore, no proper objection could be raised to the proposed scheme. The reference is made to the liability of the petitioner company. The reference is also made that there are creditors worth Rs. 2.60 crores inclusive of small scale industrial undertaking. Therefore, all the liabilities and dues and obligations of the transferor company will be taken over by the transferee company, transfer of assets of the transferee company should be made subject to the charges. The objection is also that the transferor company is not at all concerned with the nature of the business of the transferee concerned and it is proposed to run the business without any knowledge of the same. If the employees of the transferor company become employee of the transferee company, the wage burden of the transferor company, as well as, all other dues liabilities of the transferor company will be absolved, from paying. No provisions whatsoever has been made to meet the liability of unsecured creditors. The petitioner is not going to benefited from the proposed amalgamation and will be of loss and will ensure to the detriment of the creditors. The Petitioner's Counsel in view of the submissions, made in the petition, as well as, statement and chart recorded of their assets, rights and the

liability, again pointed out that this objection has no force and at least creditors, whose claim is in dispute, at this stage cannot object to the scheme on above raised grounds. The third person cannot raise any objection to the sanction of such arrangement. The Company's commercial wisdom their need and their objectives cannot be decided or trusted upon by third person. The decision referred in Kaveri Entertainment is already overruled by the Division Bench. The claim and dues of the objectors are in dispute and cannot be decided at this stage, while granting the scheme of arrangement in question. Third person cannot now raise objection about holding of meeting of creditors and or cannot take the decision that such claim of arrangement is not in the interest of company in question. Third party like creditors in question cannot enforce and say that the scheme is not in the interest of petitioners or its shareholders. One cannot over look that the scheme of arrangement which has taken into consideration the right, debt, liabilities of the transferor company and from the effective date are bound to comply with the scheme of arrangement, in such circumstances, creditors cannot allow to sanction such scheme of arrangement. The creditors or interveners are free to take appropriate steps to substantiate their company claim or dues. If claims are in disputed or not admitted, in my view, on that reason the scheme of arrangement cannot be hauled.

19. So far, as objector Ujwal Udyog is concerned, the petitioner company has filed its reply dated 20-4-2004, and resisted the whole claim of Ujwal Udyog and contended that the submissions are baseless. The petitioner made further statement again that it is solvent company and its financial position are sufficient to meet such debts. The company have also placed on record the certificate of Chartered Accountant, K.P. Joshi and Company, dated 7-4-2004, to demonstrate the positive networth (Assets and liabilities) of the petitioner company and its subsidiary company i.e. Verticalbiz.com (India) Ltd., as on 31-12-2003. The statement is also made in the affidavit by the petitioner company that, as per the meeting on 15-3-2004 the total outstanding was settled and amount was accordingly paid by the payment voucher, dated 17-3-2004 and another amount was settled by cheque dated 29-4-2004 and intervener company have in fact accepted the said payment vide letter dated 10-4-2004. In view of this, the application and objection of Ujwal Udyog is not fair. In my view, also in view of above affidavit, statement made by the parties, this objection is also rejected.

20. Considering, the over all view of the scheme of the arrangement in question, as well as the affidavit filed to oppose the objection as raised by the respective creditors and even after considering, the merit of the objection raised by the creditors, I am convinced that such creditors cannot object the sanctioning of the arrangement in question. In my view also if liabilities or dues are in dispute and unless those disputes or liabilities are settled, in appropriate Court or forum pending those proceedings, sanction of such scheme of arrangement cannot be hauled or stopped or delayed. All creditors or parties are free to take appropriate steps to recover those amounts, if those amounts were settled or crystallized by appropriate forum or Court. I am not considering at this stage, the case of any

undisputed amount between the creditors and company. In the present case, petitioner's affidavit, as well as, material placed on record are sufficient to demonstrate, that the petitioner company have not admitted the said amount and in fact disputing vehemently the said exaggerated amount. The financial position of the company was recorded above, is sufficient to cover those liabilities or dues, if any. At this stage, in my view this itself cannot be the reason to halt sanction of scheme of arrangement.

21. After considering the material on record, in view of the majority decision taken by the concerned parties in the concerned meeting, after due deliberation and consultation, and the company is solvent and in sound financial position, such scheme cannot be rejected. One cannot overlook further that sanction of such scheme are always with liberty. Parties at given point of time can approach to the Court for appropriate order or direction, if necessary.

22. Considering the judgments cited above by the petitioner company and, as referred above and after following the settled principles of law, as well as, the view I have already taken in L & T Ltd. company petition No. 120/2004 and 121/2004 (Anoop V. Mohta, J.). I am inclined to sanction the scheme for the reasons stated above. The objections as raised are rejected.

23. The petition is allowed in terms of prayer Clauses (a) to (k) with liberty.

24. Costs of Rs. 2,500 to the Regional Director to be paid by the petitioner within a period of four weeks from today.