

(2009) 08 RAJ CK 0034
In the Rajasthan High Court
In Re: ESL India Ltd.

Date of Decision : 04-08-2009

Acts Referred:

COMPANIES ACT, 1956 — Section 391, 392, 393, 394

Citation : (2010) 1 RLW 93 : (2009) 95 SCL 133

Hon'ble Judges : P.C. Tatia, J

Bench : Single Bench

Judgement

Prakash Tatia, J.—Heard learned Counsel for the applicant.

2. The applicant-ESL India Limited, a company incorporated and registered under the provisions of Companies Act, 1956, has submitted this application under Sections 391-394 of the Act. The applicant company has set up a R&D and IT based solution providing undertaking at Udaipur and is supporting the transferee-company as a technology & R&D support provider in the manufacturing of state-of the art Solid State Electronic Energy Meters and Allied Products to cater to single phase, LT and HT customers. The applicant-company wants to amalgamate and merge with the transferee-company - Secure Meters Limited which is also a company registered under the provisions of Companies Act. The contention of the applicant/transferor-company is that it is 100 per cent subsidiary company of transferee-company.

3. The applicant-company has authorised share capital as on 31-3-2009 of Rs. 50 lakhs divided into 5 lakhs equity shares of Rs. 10 each. The issued, subscribed and paid-up share capital of the applicant-company as on 31-3-2009 is Rs. 5 lakhs divided into 50000 equity shares of Rs. 10 each. The applicant-company submits that it be amalgamated with and be vested in the transferee-company. The detailed provisions regarding vesting and transferring of the assets and liabilities of the applicant-company to the transferee-company are contained in the scheme of amalgamation. According to the applicant-company, the significant reasons and benefits of the amalgamation are as under:

(i) The transferee-company holds 100 per cent Equity Share Capital of transferor-company (50000 Equity Shares) and as a result presently the transferor-

company is a 100 per cent wholly owned subsidiary of the transferee-company.

Hence with a view to maintain a simple corporate structure and eliminate duplicate corporate procedures, it is desirable to merge and amalgamate all the Transferred Undertakings of Transferor-Company into the Transferee-Company and thereafter, liquidate the Transferor-Company without winding up through this Scheme of Amalgamation in terms of the provisions of Sections 391-394 of the Companies Act, 1956.

(ii) The amalgamation of all Transferred Undertakings of Transferor-Company into the Transferee-Company shall facilitate consolidation of all the undertakings in order to enable effective management and unified control of operations.

4. The applicant is seeking sanction of this Court under Sections 391-394 of the Act of the scheme of amalgamation submitted with this application. The applicant's prayer in this application is as under:

In the facts and circumstances mentioned hereinabove, the applicant-company herein most respectfully prays as follows:

(a) that this Hon"ble Court be pleased to dispense with the requirement to convene and hold a meeting of Equity Shareholders of the applicant-company, as all the Equity Shareholders of the Applicant-Company and the board of directors of which have unanimously approved the proposed Scheme of Amalgamation (hereinafter referred to as "Scheme" and annexed to the affidavit in support of summons as "Annexure-A" (Colly).

OR

that this Hon"ble Court, if ordering the meeting of Equity Shareholders may give directions to the method of convening, holding and conducting the meeting of Equity Shareholders of the applicant-company and as to the notices and advertisements to be issued in this behalf;

that this Hon"ble Court may give directions for appointment of Chairman and Alternate Chairman for the said meeting of the Equity Shareholders of the applicant-company and that the Chairman be directed to report the result thereof to this Hon"ble Court ;

(b) that this Hon"ble Court be pleased to dispense the Transferee-Company from approaching the Hon"ble High Court of Judicature, Jodhpur for seeking the sanctioning of the Scheme of Amalgamation under Sections 391-394 of the Act.

(c) that this Hon"ble Court be pleased to pass such other and further orders as are deemed necessary in the facts and circumstances of the case.

5. So far as the petitioner's prayer that the transferee-company may be dispensed with from approaching the High Court for seeking the sanctioning of the Scheme of Amalgamation under Sections 391-394 of the Act, it has been submitted by learned Counsel for the applicant that the Mumbai High Court in

the judgments delivered in the cases of (1) *Mahaamba Investments Ltd. v. IDI Ltd.* [2001] 33 SCL 383(Bom.) and (2) *Company Application No. 994/2008* (Lotus Trading Corporation Ltd.); the Delhi High Court in the judgments delivered in the cases of (1) *Dabur Foods Ltd., In re* [2008] 88 SCL 325 and (2) *Sharat Hardware Industries (P.) Ltd. In re* [1978] 48 Comp. Cas. 23 and the Punjab and Haryana High Court in the case of *Punjab Chemicals & Crop Protection Ltd.* 2007-CC1-GJX-0610-PH, have held that the transferee-company can be exempted from approaching the High Court for approval of the scheme of amalgamation in certain circumstances and particularly when the transferor-company is 100 per cent subsidiary company of the transferee-company.

6. I considered the submissions of learned Counsel for the petitioner and perused the judgments referred above.

7. In the case of *Mahaamba Investments Ltd. (supra)*, the question came up before the Mumbai High Court on objection raised by the office that only transferor-company seeking its amalgamation with another company has submitted petition under Sections 391-394 of the Companies Act, 1956 but no petition has been filed by the transferee-company seeking sanction of High Court for amalgamation of the other company in transferee-company. The Mumbai High Court considered the facts of the case and found that the transferee is a holding company of the transferor-company which was 100 per cent subsidiary company of the transferee-company. Clause 10 of the proposed scheme of amalgamation submitted by the transferor-company provided that since the entire share capital of the transferor is held by the transferee and upon the scheme becoming final and effective, the said share capital of the transferor will stand automatically cancelled and no shares will be allotted of the transferee-company to the shareholders of the transferor-company and that will be because the transferee-company holds 100 per cent of the share capital of the transferor-company.

8. Similar question came up for consideration of Mumbai High Court in the case of *Bank of India Ltd. v. Ahmedabad Mfg. & Calico Printing Co. Ltd.* [1972] 42 Comp. Cas. 211 in which, considering the judgment of Delhi High Court delivered in the case of *Sharat Hardware Industries (P.) Ltd. (supra)*, the Court held that, "if a scheme by way of transfer of undertaking does not affect the rights of the members or creditors of the transferee-company, as between themselves and the company, or does not involve a reorganisation of the share capital of the transferee-company, no application by the transferee-company u/s 391 or Section 394 would be necessary." After considering the above judgments, the Mumbai High Court in the case of *Mahaamba Investments Ltd. (supra)* held that where no new shares are sought to be issued to the members of the transferor-company by the transferee-company, the scheme will not affect the members of transferee-company. The creditors of the transferee-company are not likely to be affected by the scheme in view of the financial position of the transferee-company, in view of the above, the Mumbai High Court held that filing of separate petition by the transferee-company is not necessary.

9. I also considered the judgment of Delhi High Court delivered in the case of Sharat Hardware Industries (P.) Ltd. (supra) wherein it has been held that it was not necessary for the transferee holding company to obtain approval of its creditor and subsequent sanction of the court having jurisdiction over its place of registration for the scheme, since the scheme did not affect the member and creditor of the transferee holding company. The Delhi High Court even considered other aspect and that is the contingency that the scheme is if approved by the members of the transferor-company but later on the transferor-company refused to give effect to the scheme. On facts, it has been held by Delhi High Court after considering the earlier judgment of Madras High Court delivered in the case of Union Services (P.) Ltd. In re [1973] 43 Comp. Cas. 319, that without the approval of the transferee-company, the scheme could not have been passed by the members of the petitioner-company and secondly, the scheme could not have been put forward as a proposal unless there was an arrangement between both the companies.

10. In the case in hand before this Court, the petitioner also has placed on record the resolution of the Board of Directors of the transferee-company approving the scheme of amalgamation as Annexure-D (ii). Therefore, from the above judgments as well as judgments referred supra, it is clear that in the facts circumstances which are available in this petition, the transferee-company can be dispensed with from approaching the High Court for seeking sanctioning of scheme of amalgamation under Sections 391-394 of the Act.

11. So far as convening of meeting of equity shareholders of the applicant-company for resolving the proposal of scheme of amalgamation, the company is required to hold the meeting and I do not find any just reason to exempt the applicant-company from holding the meeting of equity shareholders. The applicant since had no secured or unsecured creditors, therefore, the meeting of the Equity Shareholders of Applicant-Company shall be convened and held at the Registered Office of the Applicant-Company at Pratapnagar Industrial Area, Udaipur, Rajasthan on 10-9-2009 at 11:30 AM for the purpose of considering and if thought fit approving with or without modifications, the Scheme of Amalgamation proposed to be made between the transferor-company and transferee-company.

12. The quorum for the said meeting of the Equity Shareholders shall be 4 Members entitled to attend the meeting, present in person or by proxy.

13. Shri Tribhuvan Gupta, Advocate and failing him Shri Ravi Bhansali, Advocate shall be the Chairman of aforesaid meeting.

14. At least Twenty One (21) clear days before the day appointed for the meeting and advertisement convening the same be published in:

1. Hindustan Times (English) Jaipur Edition and
2. Rajasthan Patrika (Hindi) All Rajasthan Editions.

15. In addition at least twenty one (21) clear days before the meeting to be convened and held as aforesaid, a notice convening the said meeting at the place and times aforesaid together with a copy of the said Scheme of Amalgamation, a copy of the statement required to be sent u/s 393 of the Companies Act, 1956 and a form of proxy shall be sent by a prepaid letter posted under certificate of posting addressed to each of the Equity Shareholders entitled to attend whose meeting is to be held at their respective registered or last known addresses.

16. The voting by proxy is permitted provided proxies in the prescribed form duly signed by the person entitled to attend and vote at meeting is filed at the registered office of the company not later than forty eight (48) hours before the meeting.

17. The Advocate for the Applicant-company above named do file within three days of this date in the Court the drafts of the advertisement, notices and the statement u/s 393 of the said Act to accompany the notices and the same shall be settled by the Registrar of this Court.

18. The Chairman of each of the meeting shall have all the powers to convene, hold, adjourn and conduct the meeting in a peaceful manner. They shall also have the powers to adjourn the meeting from time to time if so required.

19. The value of each shareholder shall be in accordance with the books of the Company and where the entries in the books are disputed, the Chairman shall determine the value of the same for the purposes of the meeting.

20. It is further ordered that the chairman of above meeting do report to this Court the result of the meeting within one week of the conclusion of the said meeting and the said report shall be verified by the affidavit of Chairman.

21. The Chairman of the meeting shall be paid a sum of Rs. 21,000. In addition to the same, the actual expenditure as may be incurred by him for conducting such meeting shall be reimbursed by the Applicant-Company as his remuneration for the aforesaid assignment.