(2010) 07 KAR CK 0046

In the Karnataka High Court

Case No : C.P. No''s. 35 to 37 of 2010

In Re: Flextronics Design Consumer Electronics (India) (P.) Ltd.

Date of Decision : 15-07-2010

Acts Referred:

Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 — Regulation 9B

Citation : (2010) 102 SCL 439

Hon'ble Judges : H.N. Nagamohan Das, J

Bench : Single Bench

Advocate : K.S. Mahadevan, V. Sreenivasa Raghavan, Y.D. Harsha, for the Appellant;

Final Decision : Allowed

Judgement

H.N. Nagamohan Das, J.—Petitioners in these petitions are the transferor-companies and they have prayed for sanctioning of scheme of amalgamation with M/s. Flextronics Technologies (India) Private Company - transferee-company as per Annexure A.

2. The first transferor-company (petitioner in Co. P. No. 35/2010) was incorporated on 9-4-2003 under the provisions of the Companies Act, 1956 with the Registrar of Companies, Karnataka at Bangalore under the name and style of Avnisoft Systems Private Limited. Thereafter the name of the first transferor-company was changed to Flextronics Design Consumer Electronics (India) Private Limited with effect from 14-3-2006. The first transferor-company is having its registered office at 570/571, 2nd floor, Sarjapura Main Road, 3rd Block, Koramangala, Bangalore - 560 034. The authorised share capital of the first transferor-company is Rs. 23,50,00,000 divided into 2,35,00,000 equity shares of Rs. 10 each. The issued, subscribed and paid-up capital is Rs. 3,77,97,000 divided into 37,79,700 equity shares of Rs. 10 each.

3. The main objects of the first transferor-company as set out in its Memorandum and Articles of Association as per Annexure B is to carry on the business of designs, developing and selling of software programmes and

programmed products and etc.

4. The latest audited balance sheet of the first transferor-company made up to 31-3-2009 is produced as Annexure C.

5. The second transferor-company (petitioner in Co. P. No. 36/2010) was incorporated on 13-9-2006 under the provisions of the Companies Act, 1956 with the Registrar of Companies, Karnataka at Bangalore under the name and style of Solectron India Private Limited. The second transferor-company is having its registered office at 185, Ground Floor, Cambridge Road, Second Cross, Ulsoor, Bangalore - 560 008. The authorised share capital of the first transferor-company is Rs. 20,00,00,000 divided into 2,00,00,000 equity shares of Rs. 10 each. The issued, subscribed and paid-up capital is Rs. 6,59,73,910 divided into 65,97,391 equity shares of Rs. 10 each.

6. The main objects of the second transferor-company as set out in its Memorandum and Articles of Association as per Annexure B is manufacturing of electronic products and components and providing related services in information technology sector and etc.

7. The latest audited balance sheet of the second transferor-company made up to 31-3-2009 is produced as Annexure C.

8. The third transferor-company (petitioner in Co. P. No. 37/2010) was incorporated on 27-7-2004 under the provisions of the Companies Act, 1956 with the Registrar of Companies, Karnataka at Bangalore under the name and style of GTI Power Systems India Private Limited. Thereafter the name of the third transferor-company was changed to Coldwatt India Private Limited with effect from 1-4-2005. The third transferor-company is having its registered office at No. 28-A, Electronic City, Hosur Road, Bangalore - 560 100, Karnataka. The authorised share capital of the first transferor-company is Rs. 1,00,00,000 divided into 10,00,000 equity shares of Rs. 10 each., The issued, subscribed and paid-up capital is Rs. 50,47,500 divided into 5,04,750 equity shares of Rs. 10 each.

9. The main objects of the third transferor-company as set out in its Memorandum and Articles of Association as per Annexure B is to carry on the business of software development, manufacturing and trading of all types of telecom power systems and industrial power systems and etc.

10. The latest audited balance sheet of the third transferor-company made up to 31-3-2009 is produced as Annexure C.

11. The transferee-company was incorporated on 12-1-2001 under the name and style of Flextronics Technologies (India) Private Limited under the provisions of the Companies Act, 1956 with the Registrar of Companies, NCT of Delhi and Haryana. Thereafter the registered office of the transferee-Company was shifted to Karnataka in the year 2002 as per the order of the Company Law Board, New Delhi, and certificate of registration issued by Registrar of Companies, Karnataka,

on 3-12-2003. The Registered office of the transferee-company was again shifted from Karnataka to Tamil Nadu in the year 2008 as per order of the Company Law Board, Chennai, and certificate of registration issued by the Registrar of Companies, Tamil Nadu, on 10-2-2009. Transferee-company was incorporated to carry on the business of providing technological advanced electronics and manufacturing services to original equipment manufacturers and others in telecommunications, networking, computer, consumer electronics and medical device industries and etc., Presently the transferee-company is providing technologically advanced electronics manufacturing services and information technology related services in the nature of human resource process outsourcing, pay roll management services etc. Presently the registered office of the transferee-company is situated at Flat No. 3, Phase II, Sipcot Industrial Park, Sandavellure C Village, Sriperumbadur Taluk, Kanchipuram District, Tamil Nadu. The Memorandum and Articles of Association of the transferee-company and the latest audited balance sheet are produced at Annexures D and E to the petitions.

12. This Court vide order dated 15-2-2010 passed in C.A. Nos. 78/2010 and 79/2010 dispensed with the holding of meeting of the shareholders. It is stated in the said applications that there are no secured and unsecured creditors to the first and second transferor companies. In C.A No. 80/2010 this Court vide order dated 15-2-2010 dispensed with the holding of the meetings of the shareholders and creditors.

13. The Board of Directors of the transferor-companies and transferee-company have approved and adopted the proposed scheme in its respective meetings held on 11-1-2010 by virtue of which the transferor-companies 1 to 3 are proposed to be merged with the transferee-company namely Flextronics Technologies (India) Private Limited.

14. This Court vide its order dated 17-3-2010 directed notice to the Regional Director and Official Liquidator in all the petitions. Further this Court directed the petitioners to take out advertisement of these petitions in THE HINDU'' and ''KANNADA PRABHA ''newspapers in their Bangalore editions on or before 31-3-2010 fixing the date of hearing as 21-4-2010. Accordingly, the petitioners have taken out the advertisements in the ''THE HINDU'' and ''KANNADA PRABHA'' newspapers on 29-3-2010 and filed copies of the said papers along with memo dated 1-4-2010.

15. Pursuant to the notice issued to the Regional Director, the Registrar of Companies, Bangalore has filed an affidavit dated 19-6-2010 on behalf of the Regional Director with the following observations:

3.1 As the transferor-companies are having registered office in the State of Karnataka and the transferee-company is having its registered office in the State of Tamil Nadu, the scheme is subject to approval of the Hon''ble High Court at Madras also.

2. The transferor-company-1 is the subsidiary of a foreign company, the

compliance of the provisions of FEMA are to be made by the companies.

4.1 It is submitted that there is also provision of automatic route of Reserve Bank for issue of shares by an Indian company under Foreign Direct Investment Scheme in Regulation No. (2) prescribed in the Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 vide notification dated 3-5-2000 which reads as follows:

(i) An Indian company which is not engaged in any activity, or in manufacturing item included in Annexure A to this Schedule, may issue shares or convertible debentures to a person resident outside India, referred to in paragraph 1 up to the extent specified in Annexure B, subject to compliance with provisions of the Industrial Policy and Procedures as notified by. Secretariat for Industrial Assistance (SIA) in the Ministry of Commerce and Industry, Government of India from time to time.

Provided that:

(i) the activity of issuer company does not require an industrial license under the provisions of the Industries (Development & Regulation) Act, 1951 or under the locational policy notified by Government of India under the Industrial policy of 1991 as amended from time to time.

(ii) the shares or convertible debentures are not being issued by the Indian company with a view to acquiring existing shares of any Indian Company.

Explanation - A company which proposes to embark on expansion programme to undertake activities or manufacture items included in Annexure B to this schedule may issue shares or debentures out of fresh capital proposed to be issued by it for the purpose of financing expansion programme, up to the extent indicated in Annexure B, subject to compliance with the previsions of this paragraph.

(ii) As per Regulation (5) of prescribed in Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 provides for determination of Issue Price wherein it prescribed that Price of shares issued to persons resident outside India under this Schedule, shall not be less than;

(a) the price worked out in accordance with the SEBI guidelines where the issuing company is on any recognised stock exchange in India, and

(b) fair valuation of shares done by a chartered accountant as per the guidelines issued by the erstwhile Controller of Capital Issues, in all other cases.

(iii) Clause (B) of Regulation 9 of Schedule I provides that not later than 30 days from the date of issue of shares, a report in Form FC-GPR together with:

1. a certificate from the Company Secretary of the company accepting investment from persons resident outside India certifying that

(a) all the requirement of the Companies Act, 1956 have been complied with;

(b) terms and conditions of the Government approval, if any, have been complied with;

(c) the company is eligible to issue shares under there Regulations; and

(d) the company has all original certificates issued by authorised dealers in India evidencing receipt of amount of consideration in accordance with paragraph 9;

2. a certificate from Statutory Auditors or Chartered Accountant indicating the manner of arriving at the price of the shares issued to the persons resident outside India.

(iv) Further, para (7) of the Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 drawn under Foreign Exchange Management Act, 1999 deals with issue and acquisition of shares after merger or demerger or amalgamation of India companies as follows:

(1) Where a scheme of merger or amalgamation of two or more Indian companies or a reconstruction by way of demerger or otherwise of Indian company, has been approved by a Court in India, the transferee-company or, as the case may be, the new company may issue shares to the shareholders of the transferor-company resident outside India, subject to the following conditions, namely;

(a) The percentage of shareholding of persons resident outside India in the transferee or the new company does not exceed the percentage specified in the approval granted by the Central Government, apply to the Reserve Bank, or specified in these regulations.

Provided that where the percentage is likely to exceed the percentage specified in the approval or the Regulations, the transferor-company or the transferee-company or new company may after obtaining an approval of the Central Government, apply to the Reserve Bank for its approval under these Regulations.

(b) the transferor-company or the transferee or new company shall not engage in agriculture, plantation or real estate business or trading in TDRs; and

(c) the transferee or the new company files a report within 30 days with the Reserve Bank giving full details of shares held by persons resident outside India in the transferor and the transferee or the new company, before and after the merger/amalgamation/reconstruction, and also furnishes a confirmation that all the terms and conditions stipulated in the scheme approved by the Court have been complied with.

16. The petitioners have filed affidavits dated 3-7-2010 undertaking to comply with the observations made by the Registrar of Companies in his affidavit.

17. The Official Liquidator has filed reports seeking permission to appoint Chartered Accountants for scrutiny of the books of account and records of the

transferor-companies to find out whether the companies have maintained all the records as defined in the Companies Act, 1956. This Court vide its order dated 15-4-2010 appointed Sri P.S. Ananda Rao, Chartered Accountant for the said purpose. Thereafter the said Chartered Accountant has submitted his reports. Based on the said reports, the Official Liquidator has filed his reports stating that the Chartered Accountant appointed by this Court has examined the books of account, other records and has not made any adverse finding in the functioning of the companies and has given opinion that the affairs of the transferor-companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to the public.

18. Pursuant to the advertisements of the hearing of the petitions none of the shareholders, creditors, employees or any other persons have appeared before Court to oppose the scheme of amalgamation.

19. All the employees of the transferor-companies in service on the effective date shall become the employees of the transferee-company on such date without any break or interruption in service and on the terms and conditions not less favourable than those subsisting with the respective transferor-companies. As already noticed supra no employee of the transferor-companies has appeared before the Court to oppose the scheme of amalgamation.

20. In the circumstances, the petitioners/transferor-companies have made out a case for sanctioning the scheme of amalgamation - Annexure-A. Hence the following order:

(i) Petitions are hereby allowed subject to the sanctioning of the scheme by the High Court of Madras in respect of the transferee-company and also, the transferor-companies complying with the observations made by the Registrar of Companies as undertaken by them in the affidavits filed before this Court.

(ii) The scheme at Annexure-A is hereby sanctioned and the same is binding on the petitioners/transferor-companies and their shareholders and creditors.

(iii) Petitioners/transferor-companies shall serve a copy of this order on the Registrar of companies in the State of Karnataka and Tamil Nadu within 30 days from the date of receipt of copy of this order.