(2007) 12 MP CK 0008

In the Madhya Pradesh High Court

In Re: Garima Automobiles P. Ltd. and Others

Date of Decision : 03-12-2007

Acts Referred:
COMPANIES ACT, 1956 — Section 391, 394

Citation : (2008) 141 CompCas 13 : (2008) 84 SCL 28

Hon'ble Judges : S. Samvatsar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S. Samvatsar, J.—This petition is filed on behalf of the five companies mentioned in the petition u/s 394 read with Rule 79 of the Companies (Court) Rules, 1959, for sanctioning the scheme of amalgamation as per the scheme enclosed with the petition as annexure 3. As per the said scheme (annexure 3), Garima Automobiles P. Ltd., Kanwal Motors P. Ltd., Charan Leasing and Finance P. Ltd., and Nandalala Motors P. Ltd., after amalgamated with the transferee company M/s. Prem Motors P. Ltd., their assets are to be transferred to the transferee company. On an application filed on behalf of the aforesaid company for making a request for convening meetings of the shareholders and the creditors of the company, this Court appointed Smt. Nandita Dubey as chairperson, and Shri Anand V. Bhardwaj as an alternate chairperson and directed to convene meetings after issuing notices in accordance with the rules. Accordingly, different meetings of shareholders and the creditors of each of the five companies were separately held.

2. After the meetings, chairpersons submitted the report. According to the report, there was unanimous decision of all the shareholders for transferring the resolution of the board of directors of all the companies and all the members accorded their approval for amalgamation and for sanctioning the scheme of amalgamation.

3. The creditors of the companies in their meetings have also not raised any objection for the scheme of amalgamation. On the basis of the report, notices of this petition were issued to the Company Law Board as well as to the official

liquidator. The Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai, has submitted his report on November 26, 2007, in which he has mentioned that he has no objection so far as sanction of the scheme of amalgamation is concerned. He has raised only a technical objection that since five companies are going to amalgamate, five different petitions should have been presented. But in the said objection, the Regional Director has not mentioned any rule or provisions, which requires filing of separate petition.

So far as the official liquidator is concerned, Shri Ashish Saraswat, learned Counsel appearing on behalf of the official liquidator has submitted that he may be supplied with the copies of account books of the company so that he can file objection.

4. Shri R.D. Jain, learned Counsel appearing on behalf of the companies opposed this prayer. According to him, an application for amalgamation of the company is filed, and the official liquidator has no locus standi to oppose the amalgamation. He invited attention of this Court to the provisions of Section 394 of the Companies Act, 1956. According to him, Section 394(1)(a) of the Act requires that an application is to be made u/s 391 for sanctioning of a compromise or arrangement proposed between the company or the amalgamation of any two or more companies, and his application is thus covered u/s 394(1)(a), which does not provide any objection by the official liquidator, therefore, he has no locus standi to oppose for amalgamation. In support of his arguments, he has relied on judgment of the Calcutta High Court in the case of Marybong and Kyel Tea Estate Ltd. In re [1977] 47 Comp Cas 802, wherein the company judge has held that second proviso to Section 394(1)(iv) seems to be intended to apply only in cases where there is commencement of winding up either by presentation of a winding up petition or any resolution of voluntary winding up of a company has been passed. That is the case only where an official liquidator has been appointed or could be appointed by the court, otherwise there would be inconsistency and absurdity of the court appointing an official liquidator in case of a going concern where no winding up petition has been presented or resolution for voluntary winding up has been passed. Further, the first proviso to Section 394(1) contemplates a case of a company which is being wound up and before sanctioning the scheme, the report of the Company Law Board or the Registrar is a condition precedent. This proviso relates to a stage prior to the sanctioning of the scheme by the court whereas the second proviso to Section 394(1) contemplates the stage after sanctioning but before passing an order of dissolution u/s 394(1)(iv) of the Companies Act, 1956, and in my view, the said provision only applies to the company in respect of which an official liquidator has been appointed or could be appointed under the provisions of the Companies Act by the court. It has no application to cases, as in the present application, where the transferor company is a going concern in respect of which no winding up petition has been presented or there is no voluntary winding up pending. In my view, that construction seems to be a reasonable and harmonious construction without any violence to the language or the scheme, object and

purpose of the Companies Act under the provisions of Section 394(1)(vi).

5. Thus, the Calcutta High Court has overruled the objection of the official liquidator in the case of amalgamation by holding that he has no role to play if an application for amalgamation is filed u/s 394(1)(iv). He can challenge the right of locus standi only when any of the company is dissolved without winding up. The Calcutta High Court has held that sanctioning the scheme of amalgamation by itself does amount to dissolve without winding up.

6. In reply to this argument, Shri Ashish Saraswat, learned Counsel appearing on behalf of the official liquidator has relied on the judgment of the apex court in the case of Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax, .

7. From perusal of the aforesaid judgment, I find that in that case the apex court was not considering the scheme of amalgamation, but was considering the levy of Income Tax. In paragraph 4 of the said judgment, the apex court has held that under the scheme of amalgamation, which was the scheme in the case of Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax, , there was provision of dissolution of the company. Thus, question involved in the present case was not there before the apex court. This Court in the case of Kriti Plastics P. Ltd. In re [1992] MPLJ 671 : [1993] 78 Comp Cas 138 (MP), has held that once shareholders of the company unanimously sanctioned the scheme of amalgamation, then objection of the official liquidator on the basis of inspection of the account books cannot be sustained, and it cannot be held that the scheme is not in the public interest. In view of this matter, I find that it is not necessary for the company to supply copy of account books for inspection of the company. The Company Law Board has already granted its consent for the scheme of amalgamation by filing an affidavit dated November 26, 2007. Moreover, the shareholders in their meeting have unanimously approved the scheme, and similarly none of the creditors of the company has raised any objection at the time of meeting held for the said purpose. In view of this, scheme of amalgamation has to be approved, but subject to the following conditions:

(i) That the approval of this amalgamation scheme does not in any way dispense with the formality of execution of instrument or conveyance or other documents for effectively vesting of the property and rights of the transferor companies in the transferee company, nor the approval as a result of the scheme gives any right to the properties which in law are not assignable or transferable to the transferee company. If the transfer has to be effected it has to be effected in accordance with the law of the Transfer of Property Act, 1882, and in those cases where the property is on lease with restriction on the transfer or sub-letting of such a property, the sanction of the relevant authority is sought before its transfer.

(ii) If, as a result of the transfer of any assets or shares of the transferor company to the transferee company a liability of the capital gains tax may arise against any company or its shareholders, this order shall not absolve such company or the shareholders from payment of taxes which may be leviable under the existing taxing laws and as such the taxing authorities shall be free to proceed in the matter of tax irrespective of the present order of amalgamation.

(iii) The present order of amalgamation will not absolve any of the companies or its directors from the liability for breach of any law or control order which might have been committed before the order of amalgamation.

8. In the result, with the aforesaid conditions the amalgamation scheme is approved.

