

(2003) 06 BOM CK 0099

In the Bombay High Court

Case No : Company Petition No. 281 of 2003 and Company Application No. 75 of 2003

In Re: German Remedies Ltd.

Date of Decision : 27-06-2003

Acts Referred:

Companies (Court) Rules, 1959 — Rule 78
Companies Act, 1956 — Section 394

Citation : (2004) 1 BomCR 405 : (2005) 125 CompCas 615 : (2003) 4 CompLJ 89 : (2004) 50 SCL 77

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : Mihir Thakur, Sandeep Singhi, Ravi Kadam, Vikram Trivedi and Sunil Trilokchandani, R.C. Master, S.R. Das, Seksaria, A.S. Khera, K.J. Khera, Janak Mathuradas and A.J. Vyas, A.S.P., Official Liquidator, Bherania and S.J. Khera, Objector, for the Appellant;

Final Decision : Allowed

Judgement

D.G. Karnik, J.—The petitioner is a company incorporated and registered under the Indian Companies Act, 1913 and deemed to be an existing company within the meaning of the Companies Act, 1956. Three other companies namely Recon Health Care Limited, Zydus Path line Limited and Zoom Properties Limited along with the petitioner are proposed to be amalgamated and merged with Cadila Health Care Limited (hereinafter referred to as the "transferee company") under a common scheme of arrangement (hereinafter referred to as "the scheme"). On a petition filed by Zydus Path line Limited - one of the transferor companies having registered office in the State of Gujarat, bearing Company Petition No. 28 of 2003, the High Court of Gujarat has approved and sanctioned the scheme. Similarly in Company Petition No. 61 of 2003 filed by Cadila Health Care Ltd. the transferee company having its registered office in the State of Gujarat, the High Court of Gujarat has approved and sanctioned the scheme. The registered office of the petitioner company is situated at Mumbai within the jurisdiction of this court and hence, it has sought approval of the scheme of its merger into the

transferee company.

2. In pursuance of the summons for directions (Company Application No. 75 of 2003) filed by the petitioner, this court directed that meeting of the equity share holders of the petitioner company should be convened on 13th March, 2003 for the purpose of considering and if thought fit approving, with or without modifications, the scheme of arrangement of amalgamation of the petitioner company along with three other companies mentioned above with the transferee company. By the same order dated 7th February, 2003, this court dispensed with the holding of the meetings of the secured or unsecured creditors of the transferor company for the reasons stated in para 11 of the said order.

3. In pursuance of the directions dated 7th February, 2003, a meeting of the equity share holders of the petitioner company was held on 13th March, 2003, 266 persons being equity share holders, their authorised representatives and proxies attended the meeting, 15 equity share holders did not vote. Out of 251 share holders who cast their votes, 219 share holders voted in favour while 17 voted against. Votes of 15 share holders were rejected as invalid. Out of total number of 63,84,008 votes cast at the meeting, 63,82,306 votes were cast in favour of the resolution and 1,068 votes were cast against the resolution while 634 votes were declared invalid. Thus, the resolution approving the scheme was passed by an overwhelming majority of more than 90 per cent in number and 99 per cent in value of the equity shareholders present and voting.

4. After having obtained the necessary approval of the members, the petitioner company has filed this petition for sanction of the scheme u/s 391/394 of the Companies Act. By an order dated 25th March, 2003, the petition was admitted and the petitioner was directed to serve the notice of the date of hearing of the petition on the Official Liquidator as well as on the Regional Director, Department of Company Affairs, Western Region, Mumbai. The petitioner was also directed to publish notice of the date of hearing of the petition in English in Indian Express (all editions) and the Marathi translation thereof in Loksatta. The publication of the notice in Maharashtra Government Gazette was dispensed with. The undertaking given by the petitioner that the petitioner will not object to the creditors being heard at the time of final hearing of the petition was recorded. The petitioner has filed on record the affidavit of Shri Rajesh Parte dated 16th April, 2003 proving the publication of the notices in English in Indian Express (all editions) and Loksatta in Marathi. The petitioner has also filed affidavit of Shri Vinod T. Sawant dated 16th April, 2003 proving the service of notices of hearing on the Official Liquidator and Regional Director.

5. The Official Liquidator has filed a report dated 17th April, 2003 stating that the affairs of M/s. Zoom Properties Limited and the petitioner have not been conducted in a manner prejudicial to the interest of their members or public interest. Shri Kom, Official Liquidator appearing in person states that the Official Liquidator has no objection for sanctioning the scheme. Shri Chakradhara Paik, Regional Director, Western Region, Department of Company Affairs, Mumbai has

filed affidavit dated 16th April, 2003 stating that the scheme is not prejudicial to the interest of creditors and share holders of the transferor company. Shri Master, learned counsel for the Regional Director states that the Regional Director has no objection for sanctioning the scheme. The petitioner has filed an affidavit sworn in by Shri Rajesh Parte on 25th March, 2003 annexing thereto the latest Balance Sheets and Profit and Loss Account of the transferor as well as transferee companies for the nine months' period ending 31st December, 2002 together with auditor's certificates of limited review.

6. The objectors and the petitioner company have filed affidavits in support, in opposition and in rejoinders. The objectors were heard. The objections raised by them are summarised below :

1. The report of the Chairman appointed to the meeting of the equity share holders annexed to the petition at Exhibit G is incomplete and is not in consonance with Rule 78 of Company (Court) Rules.
2. The scheme is not genuine and bona fide and is a cloak under which the transferee company and its promoters/directors want to grab the properties of the transferor company.
3. The valuation report made by the valuers is not legal, proper and accurate. The valuers have not taken into consideration the fact of closure of Andheri plant of the transferor company and consequent valuation of the real estate.
4. The swap ratio of 7 equity shares of Rs. 5 each of the transferee company in exchange for every 4 equity shares of Rs. 10 each of the transferee company is unfair and improper. The swap ratio should have been more liberal in favour of the members of the transferor company.

Re: Objection No. 1

7. Rule 78 of the Company (Court) Rules, 1959 requires Chairman of the meeting to submit his report of the result of the meeting in Form No. 39 giving all the details including the names and address of the members who attended the meeting. The objectors submitted that the Chairman's report gives the number of share holders, their authorised representatives and proxies who attended the meeting but, does not give the individual names and address of the members and therefore, the report is not consonance with Rule 78 and Form No. 39. In *IndusInd Enterprises & Finance Ltd. [Company Petition No. 1085 of 2002 dated 5-6-2002]* following the decision of the Calcutta High Court in *Darjeeling Commercial Co. Ltd. v. Pandam Tea Co. Ltd. [1983] 54 Comp. Cas. 814*, this court held that court should not take pedantic and strict view while considering the rules and the forms but, court should be liberal and substantial compliance of the procedural rules would be enough. The petitioner has filed on record the names and addresses of the members their authorised representatives and proxies who attended the meeting also giving the manner in which they voted along with the affidavit dated 25th April, 2003 sworn in by Ms. Romy Kaizhi

Bilkodivala, Chairman of the meeting. Thus, there has been a substantial compliance of Rule No. 78. Initial deficiency, if any, in not giving the names and addresses of the members in the Chairman's Report submitted to the court is cured. Thus, the scheme cannot be rejected on account of this technicality.

Scope & limits of Court's jurisdiction

8. Before sanctioning a scheme, even though approved by the statutory majority of the concerned creditors or members, the court has to be satisfied that the requisite statutory procedure has been followed, that the scheme is just, fair and reasonable to the persons who are likely to be affected by it, because it would bind not only the majority of the share holders or creditors but, also the dissenting minority of the shareholders or creditors. Therefore, the scheme must be just and fair to them. It must also not be unconscionable, illegal or otherwise unjust to the share holders or creditors or any class of them. The court does not act as a rubber stamp and does not act merely by the ipse dixit of the majority of the shareholders but, can reject the scheme if it finds it to be unfair, unjust or unreasonable to the share holders or creditors or any class of them. This scrutiny of course is done in broad common sense manner and the court has no jurisdiction like an appellate authority to minutely scrutinise the scheme with a view to find faults in it. It is the commercial wisdom of the parties to the scheme who have taken an informed decision, about the usefulness and propriety of the scheme by supporting it by the requisite majority. The court certainly cannot act as a court of appeal and sit in judgment over the informed view of the concerned parties to the scheme of arrangement as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. The Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But, subject to that how best the game is to be played is left to the players and not to the umpire. The broad contours of jurisdiction of the Company Court are laid down by the Supreme Court in para 28A of its judgment in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* [1996] 10 SCL 70. They are :

- "1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
2. That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by Section 391(2).
3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the

concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391(1).

5. That all the requisite material contemplated by the proviso of Sub-section (2) of Section 391 is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirement of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval of the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot" refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction." (p. 99)

Re: Point Nos. 2, 3 and 4

9. Let me now consider the scheme keeping in mind the limited jurisdiction of the court. The objectors submitted that the Andheri plant of the transferor company was closed and the workers therein were offer voluntary retirement scheme. Consequently, the assets of the transferor company in respect of its Andheri plant were to be sold. Therefore, those assets had to be valued on the basis of the value of the real estate and not as a going concern. According to the objectors, the valuers had not taken into consideration this fact and had not valued the real estate of the transferor company. Copy of the valuation report was tendered. On page 2 of the report, under the caption "Sources of information" the valuers have stated :

"The Andheri plant of German Remedies is being closed. Consequent upon the closure, there would be realisation from sale of assets. Saving in costs and VRS and closure cases to be incurred for which purposes they have relied upon the information provided to us by the management at the GRM."

The criticism that the valuers had not taken into consideration the fact of closure of the Andheri plant is not factually correct. The allegation that the company had not disclosed to the valuers that assets of the transferor company regarding its Andheri plant were to be sold is also not factually correct.

10. The valuers had made valuation by considering three methods of valuation namely the Net Asset value, Profit Earning Value and the Market Value of the shares of the companies as quoted on the Stock Exchange. The valuers have arrived at the valuation on the basis of relative valuation of shares of both the companies based on the aforesaid methodologies and various qualitative factors relating to each company, business dynamics and growth potential of business. Valuation is not an exact science. Different methods are applied for valuation. Valuations made by different methods may widely differ and valuers generally consider appropriate to adopt weighted average of the valuation determined by different methodologies to arrive at the fair market value. What weightage should be given to which factor would depend upon the facts and circumstances of the case. In the present case, two renowned firms of valuers have considered different methods and have made an unanimous report. They have suggested the swap ratio of 7 equity shares of Rs. 5 each in the transferee company for 4 equity shares of Rs. 10 each of the petitioner company. The objectors submitted the fair swap ratio should have been 2 to 1 (8 to 4) or more instead of 7 to 4 as suggested by the valuers. According to the objectors, the ratio was unfavourable to the equity share holder of the petitioner company. As stated earlier, it is again to be kept in mind that the exchange ratio is in the realm of commercial wisdom of well-informed equity share holders. It is not for the court to sit in appeal over the valued judgment of the equity share holders who are supposed to be commercial men. Commercial men who know their common benefit and interests underlining the proposed scheme, with open eyes, have okayed the swap ratio of 7 to 4 as above by an overwhelming majority of 90 per cent in numbers and 99 per cent in value of the members present and voting. The limited jurisdiction of the Court is only to see whether the ratio is so wrong or the error is so gross as would make the scheme unfair or unjust or oppressive to the minority of the members or any class of them. In my opinion, it is not shown that the swap ratio is unfair and unjust to the members of the petitioner-company. The valuers have taken into consideration the relevant factors. The allegation that the promoters wanted to grab the property of the transferee-company stems from a misbelieve or mistrust. The necessary consequence of any scheme of merger of any two companies is that the assets including properties of the transferor would become the property of its transferee company unless otherwise provided in the scheme. In any event the properties of the transferor-company would not become personal properties of the promoters or directors of the transferee-company. The

allegation that the promoters/directors want to grab the properties and valuable real estate , of the petitioner-company is incorrect. The properties would not become the personal properties of the directors but, would become the properties of the transferee-company of which the objectors would automatically become members on the scheme being sanctioned. In the circumstances, the objections are not legal and valid. The Gujarat High Court has already sanctioned the composite scheme in respect of one of the four transferor-companies and the transferee-company. I see no reason to take a different view.

11. In the circumstances, the scheme of arrangement of merger of the transferor company, annexed to the petition as Exhibit E is sanctioned and the petition is allowed in terms of prayer Clauses (a) to (i).

12. The petitioner shall pay costs of Rs. 2,500 each to the Official Liquidator and the Regional Director.