

(2002) 04 BOM CK 0055

In the Bombay High Court

Case No : Company Petition No. 132 of 2002 with Company Application No. 606 of 2001

In Re: ICICI Ltd.

Date of Decision : 11-04-2002

Acts Referred:

Companies Act, 1956 — Section 391, 392, 393, 394

Citation : (2002) 4 BomCR 450 : (2002) 3 MhLj 5

Hon'ble Judges : D.K. Deshmukh, J

Bench : Single Bench

Advocate : C.J. Joy and M.M. Goswami and R.P. Singh, Company Prosecutor, G.S. Reddy, Hiren Vyas, Janak Mathuradas and Aspi Bhesania, M.S. Karnik, T.R. Andhyarujina, Tushar Bhavsar, Virendra V. Tulzapurkar, R.M. Kadam and S.H. Parikh and B.I. Meena, Official Liquidator, for the Appellant;

Judgement

D.K. Deshmukh, J.—This petition has been presented by ICICI Ltd. under the provisions of Sections 391 to 394 of the Companies Act, 1956 ("the Act"), for the purpose of obtaining sanction of this Court to the arrangement embodied in the scheme of amalgamation of the petitioner/company, ICICI Capital Services Ltd. and ICICI Personal Financial Services Ltd. with ICICI Bank Ltd. The petitioner and two other companies are the transferor companies and they are to be amalgamated with the ICICI Bank Ltd., the transferee company. The petitioner company was incorporated on 5-1-1955 as a public limited company under the Indian Companies Act, 1913, The petitioner company was originally incorporated as the Industrial Credit and Investment Corporation of India Limited and its name was changed to ICICI Ltd, on 11-9-1998. The registered office of the petitioner company is situate at ICICI Towers, Bandra Kurla Complex, Mumbai-400 051. The present authorised share capital of the petitioner company is Rs. 69,50,00,00,000 divided into 1,600,000,000 equity shares of Rs. 10 each, 5,000,000,000 preference shares of Rs. 10 each and 350 preference shares of Rs. 10,000,000 each. The issued capital is Rs. 7,85,34,54,480 divided into 7,85,345,448 equity shares of Rs. 10 each and Rs. 3,50,00,00,000 divided into 3,50,00.001 per cent preference share of Rs. 1,00,00,000 each. The subscribed

capital is Rs. 11,34,86,24,831.81 with the calls in arrears on the equity shares aggregating to Rs. 48,29,648.19, ICICI capital was incorporated on 12-9-1994 as a public limited company under the Act. ICICI capital was originally incorporated as SCICI Securities Ltd. and its name was changed to ICICI Capital Services Ltd. on 9-9-1997, ICICI capital was originally a wholly-owned subsidiary or erstwhile SCICI Ltd. Consequent to the amalgamation of erstwhile SCICI Ltd. with the petitioner company in 1997, ICICI capital became the wholly-owned subsidiary of the petitioner company. The registered office of ICICI capital is situate at ICICI Towers, Bandra Kurla Complex, Mumbai 400 051. The present authorised, issued, subscribed and paid up share capital of ICICI capital is Rs. 5,00,00,000 divided into 5,000,000 equity shares of Rs. 10 each ICICI PFS was incorporated on 27-3-1997 as a public limited company under the Act. ICICI PFS was originally incorporated as ICICI Credit Corpn. Ltd. and its name was changed to ICICI Personal Financial Services Ltd. on 22-3-1999. The registered office of ICICI PFS is situate at ICICI Towers, Bandra Kurla Complex, Mumbai-400 051. The present authorised share capital of ICICI PFS is Rs. 1,50,00,00,000 divided into 1,50,000,000 equity shares of Rs. 10 each. The issues, subscribed and paid up capital of ICICI PFS is Rs. 5,00,00,000 divided into 5,000,000 equity shares of Rs. 10 each.

2. The transferee company was incorporated on 5-1-1994 as a public limited company under the Act. The Transferee company was originally incorporated as ICICI Banking Corpn. Ltd. and its name was changed to ICICI Bank Ltd. on 10-9-1999. The registered office of the transferee company is situate at Landmark, Race Course Circle, Vadodara - 390 007, Gujarat. The present authorised share capital of the transferee company is Rs. 3,00,00,00,000 divided into 3,00,00,00,00 equity shares of Rs. 10 each. The issued, subscribed and paid up capital is Rs. 2,20,35,86,800 divided into 2,20,358,680 equity shares of Rs. 10 each.

3. The petitioner has specified in the petition in detail the circumstances and the reasons that have necessitated the Scheme and the advantages of the amalgamation scheme.

4. It is pointed out by the petitioner that when the transferee company was incorporated in the year 1994, the petitioner was holding 75 per cent of the equity shares capital of the transferee bank and the balance 25 per cent of the equity shares capital of the transferee bank was held by the erstwhile SCICI Ltd. Following the amalgamation of the erstwhile SCICI Ltd. with ICICI, ICICI Bank became a wholly-owned subsidiary of ICICI. The RBI imposed a condition that ICICI reduces its shareholding in ICICI Bank in stages, first to not more than 75.0 per cent of its equity shares capital and ultimately to not more than 40.0 per cent of its equity share capital. Thereafter in line with the Reserve Bank directives the petitioner reduced its shareholding in the transferee bank to approximately 46.4 per cent of its equity share capital through sale of equity shares of transferee company in the Indian secondary market. As a result, the

transferee bank ceased to be the subsidiary of the petitioner. As on 30-9-2001, the petitioner company had 46.0 per cent of the equity share capital of the transferee bank. The scheme of amalgamation provides for the petitioner to transfer on the appointed date all the shares of the transferee company held by it to an individual trustee or a board of trustees to hold the ICICI Bank shares in trust together with all additions or accretions thereto upon trust exclusively for the benefit of the petitioner company and its successor. The scheme proposes that within a period of 24 months from the effective date, these shares shall be transferred or disposed of and sale proceeds are to be remitted to the petitioner company or its successor. The scheme provides that upon coming into effect of the scheme and in consideration of the transfer of and vesting of the undertaking and the liabilities of the transferor companies in the transferee company in terms of the scheme, the transferee company shall without any further application, act, instrument or deed, issue and allot to the equity shareholders of ICICI whose names are recorded in the register of members of ICICI on a date to be fixed by the board of directors of the transferee company or a committee of such board of director, equity shares of the face value of Rs. 10 each, credited as fully paid up, in the ratio of equity share of the face value of Rs. 10 each in the transferee company for every 2 equity shares of the face value of Rs. 10 each held in ICICI.

5. The scheme further provides that the order of the Court sanctioning the scheme shall be made subject to the approval of the RBI, as the transferee company is a banking company under the Banking Regulation Act.

6. The petitioner company had filed an application in this Court being Company Application No. 606 of 2001 for requisite directions for convening meeting of the equity shareholders of the petitioner company. By orders dated 20-12-2001 passed by this Court in the said company application, the petitioner company was directed to convene a meeting of the equity shareholders of the petitioner company for the purpose of considering and if thought fit approving with or without modification, the arrangement embodied in the scheme. The said Order further directed Shri N. Vaghul, the Chairman of the petitioner company, in his absence Shri Ashok Ganguly, a Director of the petitioner company, and in his absence Shri R. Sashasaycc, a director of the petitioner company to act as the Chairman of the said meeting and to report to result thereof to this Court, by an order dated 20-12-2001, meeting of the creditors of the petitioner company to seek their approval to the scheme was dispensed with by this Court.

7. Notice of the meeting was sent individually to the equity shareholders of the petitioner company as directed and required by the order dated 20-12-2001, together with a copy each of the scheme, the statement required by Section 393 and the form of proxy. Along with the said notice, the petitioner company also sent to its equity shareholders and holders of ADRs. an information statement dated 20-12-2001 setting out additional information in connection with the scheme. The notice of the meeting was also advertised as directed by the said Order in Business Standard (Mumbai Edition) and Marathi translation thereof in

Sakal on 1-1-2002 Shri V. Vaghul, the Chairman of the meeting, has already filed the requisite affidavit under rule 76 of the Companies (Court) Rules, 1959, on 11-1-2002 in respect of the service and appearance of advertisement of the said notice in the said newspapers.

8. It is stated that on 30-1-2002, meeting of the equity shareholders of the petitioner company was duly convened and held. It was attended either personally or by proxy by 1,195 equity shareholders of the petitioner company holding 591,050,382 equity shares of the value of Rs. 5,91,05,03,820. Upon the resolution being placed for voting, 898 equity shareholders of the petitioner company holding 5,90,411,578. Equity Shares representing 77.7 per cent in number of equity shareholders and 99.9 per cent in the value of the equity shares, present and voted in favour of the resolution and 258 equity shareholders holding 6,34,065 equity shares representing 22.3 per cent in number of equity shareholders and 0.1 per cent of the value of the equity shares, present and voted against the resolution, 4,739 votes were declared as invalid. Thus, the scheme was approved and the aforesaid resolution passed by an overwhelming majority, which is in excess of the statutory requirement. By order 20-12-2001, a meeting of the preference shareholders of the petitioner company seeking approval of the scheme was dispensed with subject to the condition that the petitioner company will obtain consent in writing from Russel Credit Ltd. the sole holder of the entire preference share capital of the petitioner company prior to the date of the filing of the petition, Accordingly, the said preference shareholder has by letter dated 3-1-2002 given his consent to the scheme. Two other transferor companies, ICICI capital and ICICI PFS had also submitted appropriate applications to this Court for dispensing with the requirement of convening meeting of their shareholders, as all the shareholders of both the companies have given their consent to the scheme. The applications made by the two companies were granted by this Court. The transferee company had also taken requisite steps by filing proper applications before the Gujarat High Court, and those applications were granted by the Gujarat High Court. The transferee bank filed a petition seeking sanction to the scheme before the Gujarat High Court and the Gujarat High Court by its order dated 7-3-2002 passed in Company Petition No. 21 of 2002 has granted its approval to the scheme of amalgamation of the transferor company with the transferee company. By this petition, thus, in substance the petitioner company seeks sanction of this Court to the scheme of amalgamation.

9. To this petition, four shareholders of the petitioner company have lodged objections in accordance with the provisions of the rules. They are (1) Shri G.S. Reddy; (2) Shri Hiren Vyas; (3) Shri AspiBhesania; and (4) Shri Janak Mathuradas. Apart from these three shareholders of the petitioner, Shri Deepkumar Shah, Shri Manoj Gupta and Shri Tamal Kumar have also raised objections. But these objectors have not complied with the provisions of the rules and the requisite notice was not served on the petitioner. They are also not present at the hearing. Therefore, those objections cannot be taken into

consideration. In any case, in substance, the objection that has been raised by these four objectors is similar to the objection raised by the above referred three shareholders, who have raised objections after complying with the provisions of the rules. One of the objections raised is that the approval of the RBI has not been secured as required by the provisions of the Banking Regulation Act. Bare perusal of the provisions of Section 44A of the Banking Regulation Act, however, shows that this objection has no substance, in as much as, the provisions of that section come into play only in case the transferee and transferor, both the companies are Banking Companies. In the present case, though the transferee company is a banking company, none of the transferor companies are banking companies. The objection has, thus, no force.

10. Though the objector Mr. Reddy raised objection to the manner in which the meeting of the shareholders convened pursuant to the Court order was conducted by the Chairman, in my opinion, the manner in which the meeting was conducted is not of much significance, considering that there is no objection that the meeting was not validly convened or that the voting is not taken in accordance with law or that the figures of the voting that have been disclosed in the petition are not true. It is clear from the petition and the documents filed with the petition that the overwhelming majority of the shareholders have voted in favour of the scheme. The principal objection of all the four objectors was to share exchange ratio which has been fixed in the scheme. For the purpose of arriving at this share exchange ratio, the petitioner company appointed J.M. Morgan Stanley as external valuer. The transferee bank appointed DSP Merrill Lynch as external valuer. The petitioner company and the transferee bank jointly appointed accounting firm Deloitte Haskins & Sells to recommend the final share exchange ratio to the board of directors of the petitioner company and the transferee bank. A copy of the report prepared by Deloitte Haskins & Sells has been placed on record. The said firm has arrived at the fair exchange rate by applying five methods. In the report it has observed thus:--

Arriving at the fair basis for the amalgamation of the two companies would require determining the fair value of the shares of one company in terms of the fair value of the shares of the other company. There are several commonly used and accepted methods for determining the fair value of the shares of a company such as :

(i) Net Asset value or Break up value method :

(a) based on the book value of the assets and liabilities.

(b) based on the intrinsic worth of the assets and liabilities.

(ii) Yield Value or Profit Earning Capacity value :

(a) based on the past working results.

(b) based on potential earning capacity with reference to projected working results.

(iii) Based on the projected working results under the Dividend Discount Method representing the Free Cash Flow available to the equity shareholders.

(iv) Market value of the shares of the company as quoted on stock exchanges-.

The firm has arrived at fair exchange ratio separately by applying each of these 5 methods. They have further observed as follows :

"On a consideration of all the relevant factors and circumstances, in our opinion, the fair basis for the amalgamation of ICICI with IB would be 1 (One) equity share of IB of Rs. 10 each fully paid up for every existing 2 (Two) equity share of ICICI of Rs. 10 each fully paid up."

11. The emphasis of the objection was that the valuation of the share has not been properly done and fair exchange ratio arrived at by the valuers and which has been proposed in the scheme is not proper. Therefore, it was also suggested by the objector that the RBI has called for a report to assess the fair exchange ratio for the merger and therefore, this Court should call for that report. Accordingly, the notice was sent by this Court to the RBI. The RBI, has accordingly filed an affidavit dated 25-3-2002. It is paragraph 4 of that affidavit, which is relevant and it reads as under:--

Though the Reserve Bank does not have a function in respect of a merger between ICICI Ltd. and ICICI Bank u/s 44A of the Banking Regulation Act, as press reports were appearing on the merger proposal and taking into account the public discussion on the issue of swap ratio and as reference was made by ICICI Bank to Reserve bank for its approval, the Reserve Bank thought it prudent to appoint M/s A. Ferguson & Company, Chartered Accountants firm to assess the swap ratio for the merger for the internal reference of the Reserve Bank. M/s. A. Ferguson & Co. submitted their report on 9-1-2002. The swap ratio arrived by them was based on three methods viz., market value basis, asset value basis and maintainable profit basis. In its Report after computing the fair exchange ratio based on the three methods, the firm worked out four scenarios with different weightage for the three methods to compute the swap ratio. The firm concluded that based on their working, the swap ratio using a combination of three methods employed as at 31-3-2001 would be between 1.54 (one point five four) fully paid up equity shares of ICICI Ltd. of Rs. 10 each for every fully paid up equity share of ICICI Bank Ltd. for Rs. 10 each and 1.75 (one point seven five) fully paid up equity shares of ICICI Ltd. of Rs. 10 each for every fully paid up equity shares of ICICI Bank Ltd. of Rs. 10 each. Further, the firm was of the opinion that the selection of the ratio would require attention to aspects such as avoidance of the odd lots and fractions to make the scheme more investor-friendly. Accordingly, a ratio addressing such aspects near or within the aforesaid range would be appropriate.

12. So far as jurisdiction of the Court in so far as sanction to the scheme of amalgamation is concerned, following observations from the judgment of the Supreme Court in the case of Hindustan Lever Employees' Union v. Hindustan

Lever Ltd. [1994] 4 C LJ. 267 are relevant. In paragraph 3 of the judgment the Supreme Court has observed thus :--

"3. But what was lost sight of (was) that the jurisdiction of the court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction, it exercises a jurisdiction founded on fairness, it is not required to interfere only because the figure arrived at by the valuer was not as better as it would have been if another method would have been adopted. What is imperative is that such determination should not have been contrary to law and that it was not unfair for the shareholders of the company which was being merged. The Court's obligation is to be satisfied that valuation was in accordance with law and it was carried out by an independent body. ..." (p. 275)

13. In my opinion, the observations from the judgment of this Court in the case of Piramal Spg. & Wvg. Mills Ltd. are relevant.

The valuation of shares is a technical matter which requires considerable skill and expertise. There are bound to be differences of opinion as to what the correct value of the shares of any given company is, simply because it is possible to value the shares in a manner different from the one which has been adopted in a given case, it cannot be said that the valuation which has been agreed upon is unfair. What is important in the present case is that all the shareholders of both the companies have unanimously accepted the valuation which has been arrived at by the auditors of the transferor and transferee companies, under these circumstances, the application cannot be rejected on the ground that the valuation of shares is unfair to the shareholders of the transferor-company. In fact, one of the shareholders have complained of any such unfairness.

In this connection Mr. Cooper, who appears for the transferor-company, has drawn my attention to the case *In re Grierson, Oldham & Adams Ltd.* [1967] 37 C. C. 357. The learned judge in that case has pointed out that the question of valuation is obviously one about which opinions may differ. It is possible in cases like this to criticise figures, offers and balance-sheets and argue about matters of fairness and unfairness. Unless the person who challenges the valuation satisfies the court that the valuation arrived at is grossly unfair, the court will not disturb the scheme of amalgamation which has been approved by the shareholders of the two companies.

14. In the present case, it is clear that the valuers appointed by the companies together have given their detailed report and have adopted various methods for arriving at the fair exchange ratio. The RBI which is an independent body even, without the knowledge of the petitioner company and Bank, called for the report and it is clear from the contents of the affidavit quoted above that the report submitted to the RBI is also on the similar lines to the report submitted by the valuers appointed by the two companies. Considering the jurisdiction of this court in considering the question of sanction to amalgamation scheme, in my

opinion, unless and until the objectors who are challenging the valuation, produce material before the Court that the valuation arrived at is grossly unfair, the Court will not be justified in withholding its sanction, In the present case no such attempt was made by the objector.

15. In this view of the matter, therefore, in my opinion, the objections have no substance. One cannot lose sight of the fact that the overwhelming majority of the shareholders of the petitioner company have voted in favour of the scheme and considering the rule of corporate majority, in my opinion, withholding of the sanction will not be in the interest of justice. The objections are, therefore, disposed of.

16. Perused the petition as well as the scheme of amalgamation and Exhibits annexed to the Petition, Regional Director has no objection to prayer of amalgamation being granted. The official liquidator, on the basis of the report of the Chartered Accountant has submitted his report wherein he has opined that the affairs of the petitioner company have not been conducted in a manner prejudicial to the interest of its members or public.

Hence, the petition is made absolute in terms of prayer Clauses (a) to (g).

Costs of Rs. 1500 each to the Regional Director as well as to the official liquidator to be paid by the petitioner within four weeks from today.

At this stage, a request is made on behalf of the objectors for stay of the order. I do not find any justification for granting any stay. Request is, therefore, rejected.