(2008) 04 CAL CK 0092

In the Calcutta High Court

Case No : C.P. No. 210 of 2007 and C.A. No. 310 of 2007

In Re: Joonktollee Enterprises Ltd. and Others

Date of Decision : 09-04-2008

Acts Referred:
Companies Act, 1956 — Section 293, 391, 391(1), 391(2), 392

Citation : (2008) 145 CompCas 159 : (2008) 4 CompLJ 95

Hon'ble Judges : Patherya, J

Bench : Single Bench

Advocate : Manju Bhutoria, Shipra Mazumdar, for the Appellant;

Final Decision : Allowed

Judgement

Patherya, J.—This is an application for sanctioning the scheme of amalgamation between petitioners Nos. 1 to 4 and petitioner No. 8 and the scheme of arrangement between petitioner No. 8 and petitioners Nos. 5, 6 and 7.

Petitioners'' case:

2. Pursuant to order passed the chairpersons were appointed to conduct the meeting of the shareholders of petitioners Nos. 1 to 4 and 8. Advertisements were issued in the respective dailies intimating all shareholders the dates of the meetings. Meetings of the shareholders of both petitioners Nos. 1 to 4 and 8 were held under the chairmanship of the chairpersons appointed by this hon''ble court. Meetings of the petitioners Nos. 5, 6 and 7 were dispensed with pursuant to the order passed. The schemes were put to vote and were passed unanimously without any modification. This will appear from the report of the chairperson filed in respect of the petitioner companies. Thereafter, once again advertisements were issued in the dailies with notice to the Central Government. It is after the second round of advertisements that an affidavit has been filed by the Central Government and objections have been raised.

Case of the Central Government:

3. The Central Government has raised several objections which are as follows:

As per clause 10(a) of Part-Ill, Part-IV and Part-V of the Scheme, Estates A, B and C of petitioner No. 8 is to vest in petitioners Nos. 5, 6 and 7. Such vesting is in an out right sale without allotting shares to the shareholders and therefore is likely to result in loss of revenue.

The second objection raised is with regard to non-furnishing of details of the properties, its book value or market value in the scheme.

The third objection relates to the valuation report prepared which recommends allotment of shares at a high premium.

The fourth objection relates to avoidance of payment of stamp duty upon transfer of properties to petitioners Nos. 5, 6 and 7. The shares of the subsidiary companies can be sold by the board of directors at any price and without the approval of the shareholders. The transfer of properties under the scheme is to avoid payment of stamp duty and for no other reason.

The fifth objection raised is with regard to the appointed date of the scheme of amalgamation and scheme of demerger being subsequent to the balance-sheet relied upon. Therefore, the details of assets and liabilities of the petitioners as on the appointed dates were not known to the shareholders.

The sixth objection raised is regarding the method of valuation and the percentage of the holding company being increased beyond the permissible limits.

The seventh objection raised is with regard to the insufficiency of the authorised share capital of the transferee company for allotment of shares.

The eighth objection raised is with regard to the increase of share capital without payment of fees to the Registrar and adjustments which should be made as per the accounting standards prescribed by the Institute of Chartered Accountants of India, New Delhi.

Therefore, for all the said reasons the scheme of amalgamation and the scheme of arrangement ought not to be sanctioned.

Petitioner''s reply:

4. Counsel for the petitioner submits that all requirements of Section 391(1) and Section 391(2) have been complied with. Advertisements have been published regarding the holding of meetings and the sanctioning of scheme. Meetings have been held under chairpersons appointed by court in the case of petitioners Nos. 1 to 4 and 8. The scheme of amalgamation and the scheme of arrangement have been approved by the majority shareholders as will appear from the chairperson''s report. From consent letters given by the shareholders of petitioners Nos. 5, 6 and 7 approval is also evidenced. No shareholder has challenged the said scheme of arrangement. There is no allegation of violation of any statutory provision. There is compliance of Sections 391, 392 and 394 of the Companies Act, 1956. Each of the objections raised has been considered in earlier decisions and negatived.

5. In respect of objection No. 1 it has been submitted that there is no embargo on shares being issued directly by petitioners Nos. 5, 6 and 7 to petitioner No. 8. This does not amount to sale and at the highest will not entitle the companies to avail of the benefits under the Income Tax Act. The issuance of share is not in violation of any provision of law and therefore is not a case of out right sale. This has been decided in the unreported decision in C.A. 259 of 2007 In Re: Celica Developers P. Ltd. (No. 1) and Others, and In Re: Celica Developers P. Ltd. (No. 2); In Re: Microfirm Software P. Ltd.; In Re: Glacier Farms P. Ltd.,

6. Avoidance of capital gains is not material as these are commercial matters and are best left to the wisdom of the shareholders who are astute businessmen, and can be no reason for non-sanctioning the scheme of arrangement. It is a matter of revenue and will attract the provisions of the Income Tax Act. For the said proposition reliance is placed on In Re: A.W. Figgis and Co. Pvt. Ltd.;, and Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.,

7. As regards the second objection details of Estates A, B and C have been set out in paragraph 9 of the said scheme. It has been specifically stated that the assets and liabilities shall be taken as per the book value. The explanatory statement has specifically informed all the shareholders that the valuation report was open for inspection along with other documents. Therefore, no complaint can be made with regard to the valuation report or non-furnishing of details of properties, their market value or book value.

8. With regard to objection No. 3 the valuation report has not been challenged by any shareholder and the same cannot be challenged by the Central Government. For the said proposition reliance has been placed on In Re: Maknam Investments Ltd. and Others,

9. In respect of objection No. 4 petitioners Nos. 5, 6 and 7 are subsidiary companies of the petitioner No. 8 and transfer of any division will not attract stamp duty. For the said proposition reliance has been placed on Madhu Intra Limited and Another, VAI Automation Private Limited and Another and Stuti Developers Private Limited and Others Vs. Registrar of Companies and Others, Section 394 of the Companies Act read with Rule 84 contemplates filing an order to be made, in Form-42. Such Form-42 transfers the liabilities and duties without further act or deed. This therefore does not postulate payment of stamp duty. Section 293 has no application as without the consent of the holding company or the subsidiary at a general meeting, the assets of a company cannot be sold or disposed of.

10. In respect of the fifth objection the application for confirmation was filed in June, 2007 and the balance-sheet for 2007 was audited and filed subsequently. Therefore, placing the balance-sheet for the year ended March 31, 2006, is justified specially when the same along with the valuation report was open for inspection.

11. In respect of objection No. 6 there is no challenge to the valuation report or

the method of valuation. Upon sanctioning of the said scheme, application will be filed under clause 40A of the listing agreement for appropriate directions from SEBI.

12. As regards objection No. 7 the petitioners are agreeable to increase the authorised share capital of the transferee company to enable allotment of shares.

13. The eighth objection is not sustainable in view of the decision in APOT No. 542 of 2007 (Areya T and D India Ltd. v. Union of India [2008] 144 Comp Cas 311 (Cal)) which has held that the authorised share capital can be increased without payment of fees to the Registrar. The petitioner is agreeable to maintain its books of account as per the accounting standards prescribed by the Institute of Chartered Accountants of India, New Delhi.

Conclusion:

14. In view of the decision reported in In Re: A.W. Figgis and Co. Pvt. Ltd.;, Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., and the unreported decision in C. A. No. 259 of 2007-since reported as In Re: Celica Developers P. Ltd. (No. 1) and Others, and Celica Developers P. Ltd., In re (No. 2). The issuance of shares directly to the company will not amount to outright sale and at the most will attract the provisions of the Income Tax Act. Therefore the first objection is not sustainable.

15. The second objection can also not been sustained as details of Estates A, B and C, the properties, book value and market value have been specified in the scheme. Particulars of the said will also appear from the valuation report which was open for inspection and no shareholder has complained against the valuation report or the details furnished.

16. The third objection cannot be sustained as the valuation report has been prepared by a chartered accountant whose credentials have not been challenged. The valuation report has also not been challenged by any of the shareholder and there is no allegation against the chartered accountant and/or the valuation made. The court is to ensure that there is no malice or unreasonableness and the same does not appear in the instant case.

17. In view of the decision reported in Madhu Intra Limited and Another, VAI Automation Private Limited and Another and Stuti Developers Private Limited and Others Vs. Registrar of Companies and Others, which construed transfers by Amalgamation/arrangement beyond the purview of the Transfer of Property Act, the fourth objection cannot be sustained.

18. The application for confirmation was filed in June, 2007 and the audited balance-sheet for 2007 was approved in September, 2007. Therefore, the audited balance-sheet for March 31, 2006, was the only audited balance-sheet available and the same was also open for inspection, therefore, it cannot be said that the details of assets and liabilities were not known to the shareholders. The fifth objection accordingly is rejected.

19. As the valuation report has not been challenged nor has the method of valuation been challenged, the sixth objection is not sustainable. Upon sanctioning of the scheme the applicants are directed to file appropriate application under clause 40A of the listing agreement in case of increase beyond the permissible limit.

20. With regard to the seventh objection the applicants are ready and willing to increase the authorised share capital of the transferee company.

21. In view of the unreported decision in APOT No. 542 of 2007 (Areya T and D India Ltd. v. Union of India [2008] 144 Comp Cas 311 (Cal)) the eighth objection is rejected.

22. The petitioner is also agreeable to maintain its books of account as per the accounting standard prescribed by the Institute of Chartered Accountants of India, New Delhi.

In view of the aforesaid objections being rejected and the applicants being ready and willing to increase the authorised share capital of the transferee company and maintaining its books of accounts as per the accounting standard, there will be an order in terms of prayers (a) to (u) of the petition.

23. In the event, the petitioners supply a computerized print out of the scheme and the schedule of assets in acceptable form to the Department, the Department is directed to append such computerized print out upon verification to the certified copy of the order without insisting on a handwritten copy.

24. Objections filed by the Central Government are kept on record. The applicants are directed to pay cost assessed at 100 G. Ms, to the Central Government. With the aforesaid direction C. P. No. 210 of 2007 is disposed of.

Later:

25. Urgent xerox certified copy of this judgment be made available to the parties, if applied for, upon compliance of all the requisite formalities.

