

(2007) 01 AP CK 0028

In the Andhra Pradesh High Court

Case No : OSA No's. 24, 44 and 46 of 2005 and Com. P. No's. 144, 145 and 146 of 2003

In Re: Kemira Laboratories Limited

Date of Decision : 25-01-2007

Acts Referred:

Companies (Court) Rules, 1959 — Rule 24
Companies Act, 1956 — Section 391, 394, 394(3), 81(4), 94

Citation : (2007) 3 ALD 386 : (2007) 77 SCL 174

Hon'ble Judges : G. Chandraiah, J; Bilal Nazki, J

Bench : Division Bench

Advocate : V. Harish Kumar, V.S. Raju, Kanthi Narahari, Additional SC for Central Government and M. Anil Kumar, for Official Liquidator, for the Appellant;

Final Decision : Dismissed

Judgement

Bilal Nazki, J.—These three appeals raise same questions of law and fact and therefore, they are being disposed of by this common judgment. Facts are taken from O.S.A. No. 24 of 2005.

2. This appeal is filed by the appellants against the order passed by the Company Judge in C.P. No. 199 of 2003. The Company Petition was filed by the appellants under Sections 391 and 394 of the Companies Act, 1956 (for short "the Act"), seeking sanction of scheme of arrangement for amalgamation of the transferor Company M/s. Hetero Drugs Limited. The transferor Company was 100% subsidiary Company of the transferee Company. It was incorporated with the main objects of carrying on the business of research, design, manufacture, production and marketing of all kinds of organic and inorganic chemicals, pharmaceuticals and to carry on the business of stockists and commission agents. As per its Memorandum of Association, the authorized share capital of the transferor Company was rupees seven crores divided in to seventy thousand equity shares of rupees one thousand.

3. The transferee Company, which is a holding Company as per its Memorandum of Association, had almost objects similar to the transferor Company, but the

authorized capital was rupees ten crores divided into one crore equity shares of rupees ten. The Boards of Directors of the transferor and transferee Companies passed resolutions on 6-10-2003 and 7-8-2003 approving the scheme of arrangement for amalgamation of the transferor Company with the transferee Company. The said arrangement had been proposed for the benefit of members of both the Companies.

4. The Court admitted the Company Petition on 23-12-2003 and directed the publication in "Andhra Bhoomi" (Telugu) and "Business Standard" (English) of Hyderabad Editions, in terms of Rule 24 of the Companies (Court) Rules, 1959. Notice was also ordered to be given to Central Government and the Official Liquidator. The Official Liquidator and Central Government filed their replies. In the report filed by the Official Liquidator on 17-2-2004, it was stated that as perceived by the management of the transferor Company, the merger would result in better and efficient utilization of resources of both the Companies resulting in synergy of operation and reduction in costs. The Official Liquidator was also of the view after inspection of the records that the affairs of the transferor Company have not been conducted in the manner prejudicial to the interests of the members and to the public at large. However, in the affidavit filed by the Registrar of Companies on behalf of the Regional Director of the Department of Company Affairs, certain objections were raised. One of the objections raised was with regard to Clause 10 of the Scheme. Clause 10 of the scheme contemplated the clubbing of the authorised share capital of the transferor Company with the authorised share capital of the transferee Company. This was not acceptable to the Regional Director of the Department of Company Affairs on the ground that the transferee Company had to comply with the provisions of Sections 94 and 97 of the Act if it intends to increase its authorised share capital. It raised some other objections also, but the Company Court accepted the Scheme of Amalgamation for the merger of M/s. Kemira Laboratories Limited with M/s. Hetero Drugs Limited with a condition that Clause 10 of the Scheme of Amalgamation would not form part of the approved scheme. Therefore, the appeal has been filed by the Companies.

5. Clause 10 of the Scheme of Amalgamation lays down:

Clubbing of Authorised Share Capital: The liabilities of Transferor Company includes its Authorised Share Capital and it is proposed, through this scheme, to club the Authorised Share Capital of the Transferor Company with the Authorised Share Capital of the Transferee Company thereby reducing/ avoiding payment of registration fees for increasing the Authorised Capital of the merged Company, as a prudent commercial and economically viable business decision.

6. Coming to other two appeals, i.e. O.S.A. Nos.44 and 46 of 2005, almost a similar provision existed in the scheme for amalgamation and the learned Company Judge, in C.P. Nos. 68 and 69 of 2004, has approved the scheme without deleting the Clause similar to Clause 10 in C.P. No. 199 of 2003. This is Clause 8(f)(iv), which reads as under?

The Transferor Company and the Transferee Company have separate legal entities. On amalgamation, the Transferor Company will be dissolved without winding up and thereafter only the Transferee Company exists. At this stage if the Transferee Company increases its authorized capital, it has to comply with the provisions of Sections 94 and 97 of the Act by filing relevant returns with the Registrar of Companies with filing fees and the Registration fee.

7. Now, the question is whether an amalgamation require that the transferee Company, under Sections 94 - 97 of the Act, should increase its authorized share capital ?

8. In accordance with Section 94 of the Act, there is a power with the Limited Company to alter its share capital. u/s 94-A of the Act, the share capital stands increased where an order is made u/s 81(4) and u/s 95 of the Act, it is obligatory to give a notice to Registrar of consolidation of share capital in cases of conversion of shares into stock, and u/s 97 of the Act, notice of increase of share capital or of members has to be given to the Registrar.

9. The contention of the learned Counsel for appellants in O.S.A. No. 24 of 2005 is that Section 394 of the Act is an independent section and it cannot be controlled by Section 97. It is further contended that since an amalgamation u/s 394(3) of the Act has been sanctioned by the Court, certified copy of the order of the Court has to be filed before the Registrar of Companies within thirty days of the order for the purpose of registration. Therefore, a notice u/s 97 of the Act would not be necessary, which is only necessary in the event of increase in the share capital of the transferee Company. It is submitted that on merger, the assets of the transferor Company get transferred and merged into the transferee Company, as such, no notice is required under the Act. This contention had been accepted by the learned Company Judge in C.P. Nos.68 and 69 of 2004, whereas it was not accepted in C.P. No. 199 of 2003.

10. The learned Counsel for appellants has relied on a judgment of a learned Single Judge of this Court in C.P. Nos. 149 and 150 of 2001, dated 4th January 2002. Same objections were taken again in another judgment of learned Single Judge in C.P. Nos.98 and 99 of 2002 and also a judgment reported in In Re: R.K.S. Motors Private Ltd., .It is again a judgment of a learned Single Judge of this Court. Now, all the Judges who have decided that no notice is necessary u/s 97 of the Act, have relied on a judgment of the Delhi High Court reported in Telesound India Ltd., In RE. (1983) 53 CompCas 926 On merger, the two Companies cease to exist i.e., to say that neither the transferee Company remains nor the transferor Company remains, but a third Company comes into existence on the basis of the scheme sanctioned by the Court. In such a situation, it is hard to accept that there would be an increase in the share capital of one of the Companies. The same question was before Delhi High Court. In this case, the Delhi High Court held?

Amalgamation of a company with another or an amalgamation of two companies

to form a third is brought about by two parallel schemes of arrangements entered into between one company and its members and the other company and its members and the two separate arrangements bind all the members of the companies and the companies when sanctioned by the Court. Amalgamation is, therefore, an absorption of one company into another or merger of both to form a third, which is not a mere act of the two companies or their members but is brought about by virtue of a statutory instrument and to that extent has statutory genesis and character, and to that extent it is distinguishable from a mere bilateral arrangement to merger or join in a common endeavour, an undertaking or enterprise.

11. In view of the Law laid down by this Court and also the judgment of the Delhi High Court in Telesound India's case (supra), to which I am in respectful agreement, the order passed in C.P. No. 199 of 2003 to the effect that Clause 10 of the Scheme of Amalgamation would not be part of the approved scheme, is set aside and O.S.A. No. 24 of 2005 is allowed to that extent.

12. O.S.A. Nos. 44 and 46 of 2005 are dismissed.

C.P. Nos.144, 145 and 146 of 2003

13. In view of the orders in O.S.A. Nos. 24, 44 and 46 of 2005, these Company Petitions are referred back to the learned Single Judge.