
(2006) 12 MAD CK 0132

In the Madras High Court

Case No : C.P. No's. 171 to 173 of 2006

In Re: Knit Process P. Ltd.; In Re: Clothings P. Ltd.; In Re: RBR Garments P. Ltd.

Date of Decision : 01-12-2006

Acts Referred:

Companies Act, 1956 — Section 16, 231, 232, 233, 234

Citation : (2007) 138 CompCas 176 : (2008) 82 SCL 147

Hon'ble Judges : Chitra Venkataraman, J

Bench : Single Bench

Advocate : P.S. Suman, for the Appellant; T.S. Sivagnanam, for Regional Director, Ministry of Company Affairs and M. Jayakumar, Asst. O.L. for Official Liquidator, for the Respondent

Judgement

Chitra Venkataraman, J.—These company petitions are preferred under Sections 391 and 394 of the Companies Act, 1956, for sanctioning the scheme of amalgamation of the transferor companies with the transferee company with effect from March 31, 2006.

2. RBR Knit Process P. Ltd., the petitioner in C. P. No. 171 of 2006, is the transferor company 1. The main objects of the transferor company 1 as stated in the memorandum of association is narrated in paragraph 3 of the petition and the memorandum of association is marked as annexure A.

3. RBR Clothings P. Ltd., the petitioner in C. P. No. 172 of 2006 is the transferor company 2. The main objects of the transferor company 2 as stated in the memorandum of association is narrated in paragraph 3 of the petition and the memorandum of association is marked as annexure A.

4. RBR Garments P. Ltd., the petitioner in C. P. No. 173 of 2006, is the transferee company. The main objects of the transferee company as stated in the memorandum of association, is narrated in paragraph 3 of the petition and the memorandum of association is marked as annexure A.

5. In the meeting held on August 23, 2006, the board of directors of the

transferor company 1, the petitioner in C. P. No. 171 of 2006, considered and approved the scheme of amalgamation of the transferor companies, the petitioners in C. P. Nos. 171 and 172 of 2006, with the transferee company, the petitioner in C. P. No. 173 of 2006. Copy of the board resolution is marked at Serial No. 7. The scheme of amalgamation is marked as annexure C.

6. In the meeting held on May 18, 2006, the board of directors of the transferor company 2, the petitioner in C. P. No. 172 of 2006, considered and approved the scheme of amalgamation of the transferor companies 1 and 2, the petitioners in C. P. Nos. 171 and 172 of 2006, with the transferee company, the petitioner in C. P. No. 173 of 2006. Copy of the board resolution is marked at Serial No. 7. The scheme of amalgamation is marked as annexure C.

7. In the meeting held on May 18, 2006, the board of directors of the transferee company, the petitioner in C. P. No. 173 of 2006, considered and approved the scheme of amalgamation of the transferor companies 1 and 2, the petitioners in C. P. Nos. 171 and 172 of 2006, with the transferee company, the petitioner in C. P. No. 173 of 2006. Copy of the board resolution is marked at Serial No. 7. The scheme of amalgamation is marked as annexure C.

8. It is stated that, the transferor companies are wholly owned subsidiaries of the transferee company. The transferor company 1, the petitioner in C. P. No. 171 of 2006, is having its own factory doing job work for the transferee company. It is stated that the transferor companies and the transferee company are engaged in the similar line of business manufacturing all readymade garments. Considering the fact that both the transferor companies are wholly owned subsidiaries of the transferee company, the parties herein have decided to go for a scheme of amalgamation which would be for the benefit of the companies concerned. It is stated that considering the volume of business of the transferee company and the pressure on its capacity to execute, it is felt that the amalgamation would be beneficial in enhancing the operations of the transferee company. It is also felt that internal economies in administration would lead to better utilisation of infrastructure facilities and optimised productivity of the combined resources. The proposed amalgamation will enable the pooling of the financial, production, manufacture and distribution of resources of the companies to their best advantages. In view of such benefit, the parties herein have resolved to go for an amalgamation.

9. It is stated that the scheme of amalgamation contemplates that all properties, reserves, assets including the investment, registration, contracts, licences, permits and other communication facilities, benefits under various schemes of different taxation laws, liberties, easements, advantages and approval of whatsoever nature was vested in the transferee company with effect from the appointed date, viz., March 31, 2006, or such other date, this Court may fix. It is stated that such transfer would be without any further act or deed, pursuant to the provisions of Section 394 of the Companies Act. It is also stated that the transferee company shall have all contracts and other instruments of nature to

which the transferor companies are parties to the benefit of the transferee company. It is also felt that the transferee company shall enter into and execute deeds or writings or enter into tripartite arrangements, confirmations or novations to which the respective transferor companies will, if necessary be also added as a party to give formal effect to the clause, if so required or becomes necessary.

10. It is stated that upon the scheme coming into effect, the authorised share capital of the transferor companies shall stand combined with the authorised share capital of the transferee company. It is also stated that clause V of the memorandum of association of the transferee company shall, without any further act, instrument or deed, be and stand altered, modified and amended pursuant to Sections 94 and 394 and other applicable provisions of the Act by deleting the existing clause and replacing it by the following clause:

The authorised share capital of the company is Rs. 5,50,00,000 divided into 55,00,000 equity shares of Rs. 10 each with power to increase and reduce the capital of the company or to divide the shares in the capital for the time being into several classes and to attach thereto respectively such preferential, deferred, qualified or special rights, privileges or conditions as may be determined by or in accordance with the regulations of the company and to vary, modify or abrogate any such rights, privileges or conditions in such manner as may be for the time being provided by the regulation of the company and the legislative provisions for the time being in force.

11. It is also stated that Article 4 of the articles of association of the transferee company shall, without any further act, instrument or deed, be and stand altered, modified and amended by deleting the existing article and replacing it by the following:

The authorised share capital of the company is Rs. 5,50,00,000 divided into 55,00,000 equity shares of Rs. 10 each with power to increase and reduce the capital of the company or to divide the shares in the capital for the time being into several classes and to attach thereto respectively such preferential, deferred, qualified or special rights, privileges or conditions as may be determined by or in accordance with the regulations of the company and to vary, modify or abrogate, any such rights, privileges or conditions in such manner as may be for the time being provided by the regulation of the company and the legislative provisions for the time being in force.

12. The scheme also contemplates that the approval of the scheme by the shareholders of the company under Sections 391 and 394 of the Act shall be deemed to have the approval under Sections 16, 31 and other applicable provisions of the Act.

13. Since the transferor companies are wholly owned subsidiaries of the transferee company, the entire issued, subscribed and paid up equity capital of the transferor companies will stand automatically cancelled and there would be

no issue and allotment of shares by the transferee company to the shareholders of the transferor companies in pursuance of the scheme. On the date immediately preceding the effective date, all employees of the transferor companies in service shall become the employees of the transferee company without any break or interruption in service and on the same terms and conditions which the employees enjoyed in the transferor companies as on such date.

14. The scheme also contemplates the transferor companies shall stand dissolved without winding up. It is stated that the transferor company 1 is in sound financial position. The scheme does not affect the interest of the creditors of the company involved. It is further stated that none of the directors of the transferor companies or the transferee company have any material interest in the proposed scheme of amalgamation. No investigation are pending against any of these petitioner-companies.

15. The transferor company 1, the petitioner in C. P. No. 171 of 2006, has only one secured creditor, viz., State Bank of Travancore. The said bank by its letter dated July 21, 2006, stated no objection to the scheme being sanctioned. The copy of which is marked as annexure D.

16. The transferor company 2, the petitioner in C. P. No. 172 of 2006, has also only one secured creditor, viz., Canara Bank. The said bank by its letter dated August 24, 2006, stated no objection to the scheme being sanctioned. The copy of which is marked as annexure D.

17. As far as the transferee company is concerned, the petitioner in C. P. No. 173 of 2006, it has only one secured creditor, viz., State Bank of Travancore. The said bank by its letter dated June 28, 2006, indicated its no objection to the scheme being sanctioned. The copy of which is marked as annexure D.

18. The transferor company 1, the petitioner in C. P. No. 171 of 2006, obtained consent affidavits from the shareholders. Based on these affidavits, this Court by order dated August 30, 2006, in C. A. No. 1428 of 2006, dispensed with the convening of the meeting of the shareholders of the transferor company 1 for sanctioning the scheme of amalgamation. The consent affidavits are marked as annexure E.

19. The transferor company 2, the petitioner in C. P. No. 172 of 2006, obtained consent affidavits from the shareholders. Based on these affidavits, this Court by order dated August 30, 2006, in C. A. No. 1429 of 2006, dispensed with the convening of the meeting of the shareholders of the transferor company 2 for sanctioning the scheme of amalgamation. The consent affidavits are marked as annexure E.

20. The transferee company, the petitioner in C. P. No. 173 of 2006, obtained consent affidavits from the shareholders. Based on these affidavits, this Court by order dated August 30, 2006, in C. A. No. 1430 of 2006, dispensed with the

convening of the meeting of the shareholders of the transferee company for sanctioning the scheme of amalgamation. The consent affidavits are marked as annexure E.

21. Considering the fact that the scheme is a bona fide one and in the interest of everybody and would benefit the company and the shareholders of the transferee company, the petitioners prayed for sanctioning of the scheme.

22. On notice, the Regional Director, Ministry of Company Affairs has filed his report raising the following objections:

(i) The authorised capital of the company was a notional limit up to which the company can increase its paid up capital. Hence, two notional limits cannot be clubbed together. The authorised capital of the company is not a liability like other liabilities which are to be returned or refunded. Hence, they will not come within the purview of transfer of liabilities under the scheme of amalgamation, that after the amalgamation, the transferor companies would be dissolved and only the transferee company exists and if the transferee company increases its authorised capital, it has to comply with the provisions of Sections 94 and 97 of the Companies Act, 1956. In the context of the said objection, the Regional Director has submitted that the same may be taken note of while considering the petition. It is further stated that this Court had already allowed the merger of the authorised capital on similar case for amalgamation of M/s. Henkal Spic India Ltd., with M/s. Henkal India Ltd. The Registrar of Companies, Chennai, has filed an appeal against the said order dated July 28, 2005.

(ii) It is further stated that as seen from the balance-sheet of the transferor companies as at March 31, 2006, a sum of Rs. 1,95,00,000 is shown as application money pending allotment in the case of transferor company 1 and, Rs. 1,45,53,000 as application money in the case of transferor company 2. But nothing has been mentioned in the scheme as to how the said application money pending allotment will be treated in the books of the transferee company pursuant to the amalgamation. It is further stated that the said application money cannot be treated as application money in the books of the transferee company and should be shown only as unsecured loan in their books.

(iii) It is stated that there is no enabling provisions for amalgamation in the memorandum of association of the transferor company 2.

23. The Regional Director has stated in paragraph 10 of the report that clause 9 of the scheme protects the interest of all employees in service of the transferor companies and clause 10 of the scheme provides for dissolution of the transferor companies without winding up, upon amalgamation.

24. As regards the first objection on the clubbing of two notional limits, learned Counsel for the petitioners placed reliance on the decision of this Court reported in Cavin Plastics and Chemicals P. Ltd. In re [2006] 129 Comp Cas 915 (Mad). Under the circumstances, there are no merits in the objection raised to stand in

the way of grant of approval to the scheme.

25. In so far as the second objection is concerned, learned Counsel appearing for the petitioners pointed out that clause 2 of the scheme contemplates that all duties, liabilities and obligations of the transferor companies to be transferred or deemed to have been transferred to or vested in the transferee company pursuant to the provisions of Section 394 of the Act so as to become the assets or the liabilities of the transferee company. Considering the fact that the said amount has been shown in the balance-sheet at pages 20 and 24 respectively as regards the transferor companies 1 and 2, learned Counsel for the petitioners submitted that there is fair disclosure that the same would be treated as a part of its liability. Hence, it would be treated as a unsecured loan in the books of account of the transferee company. In the above circumstances, learned Counsel for the petitioners submits that there cannot be any objection to this.

26. As regards the third objection that there is no enabling provisions for amalgamation in the memorandum of association of the transferor company 2, learned Counsel for the petitioners placed reliance on the decision reported in *Highland Electro Appliances P. Ltd., In re* [2003] 2 Comp LJ 16 (Delhi), particularly, to paragraph 7 of the judgment, wherein the Delhi High Court referring to the decision of the Calcutta High Court reported in *Hari Krishna Lohia v. Hoolungooree Tea Co. Ltd.* [1970] 40 Comp Cas 458, held that (headnote):

The power to amalgamate one company with another may flow from the memorandum or it may be acquired by resorting to the statute which confers a right on a company to alter its memorandum in aid of amalgamation with another company.

27. The Delhi High Court also referred to a decision reported in *United Bank of India Ltd. Vs. United India Credit and Development Company Ltd.*, , by holding that by invoking Sections 391 and 393 of the Companies Act, there are no fetters on the exercise of such powers regardless of whether the power to amalgamate with another company is contained in the memorandum of the concerned company, the company can still go for an amalgamation. The Bombay High Court also taken a similar view in a decision reported in *Aimco Pesticides Ltd. In re* [2001] 103 Comp Cas 463. Considering the scope of powers under Sections 391 and 394 of the Companies Act, the Delhi High Court held that:

... the powers of the court under Sections 391 to 394 are not circumscribed by or predicated on the applicant-company possessing powers under its objects clause to amalgamate with any other company. As has been observed by the Division Bench of the Calcutta High Court, if such a power is in fact contained in the memorandum of the respective companies, those companies need not seek the imprimatur and approval of the company judge and may initiate and effect the amalgamation de hors the company judge. In these circumstances, the objection raised by the Regional Director is overruled.

28. I am in entire agreement with the view expressed by the Delhi High Court in

the decision reported in Highland Electro Appliances P. Ltd. In re [2003] 2 Comp LJ 16. In the wake of such enunciation of the law, I do not find any ground for sustaining the objection taken by the Regional Director.

29. A perusal of the scheme shows that it protects the interest of the employees of the transferor companies and thus, the interest of the employees are taken care of. The scheme provides for dissolution of the transferor companies without winding up. There is no objectionable feature in the scheme of amalgamation which is detrimental either to the employees of the transferor companies or of the transferee company. The said scheme is not violative of any statutory provisions. The scheme is fair, just, sound and is not against any public policy or public interest. No proceedings are pending under Sections 231 to 237 of the Companies Act. All the statutory provisions have been complied with.

30. Consequently, there shall be an order approving to the scheme of amalgamation of the transferor companies, the petitioners in C. P. Nos. 171 and 172 of 2006, with the transferee company, the petitioner in C. P. No. 173 of 2006, as provided in annexure C, with effect from March 31, 2006, as the procedure laid down under Sections 391 and 394 of the Companies Act are duly complied with. The petitions are allowed.

31. It may be seen that this Court by order dated September 25, 2006, directed the official liquidator to file a report to scrutinise the accounts of the transferor companies, the petitioners in C. P. Nos. 171 and 172 of 2006, and submit a report on the affairs of the transferor companies in terms of the second proviso to Section 394(1) of the Companies Act, 1956. The official liquidator has filed his reports along with chartered accountant's report.

32. On a perusal of the report summarising the reports of the chartered accountant, it is seen that the affairs of the transferor companies have not been conducted in a manner prejudicial to the interest of its members or to public interest and they do not come across any act of misfeasance by the directors attracting the provisions of Sections 542 and 543 of the Companies Act, 1956. It is further stated that the records maintained in the office of the Registrar of Companies were also caused to be inspected by the said chartered accountant. In the absence of any inference that the affairs of the transferor companies were being conducted in a manner prejudicial to the interest of its members or public interest, and in the absence of any comments that the affairs of the transferor companies conducted in a manner prejudicial to its members, the official liquidator has filed his reports before this Court for orders.

33. Taking note of the report by the chartered accountant as enclosed by the official liquidator, in terms of the order passed by this Court, both the transferor companies shall stand dissolved without winding up. The fees of the chartered accountant shall be payable at Rs. 10,000 each through the official liquidator by the petitioner in C. P. Nos. 171 and 172 of 2006.

34. The learned senior Central Government standing counsel is entitled to a fee

of Rs. 2,500 from each company.