

(2010) 08 MAD CK 0202
In the Madras High Court
Case No : C.P. No's. 85 and 86 of 2010

**In Re: Laurel Aromatics Private Limited and Contract Point Impex
(India) Private Limited**

Date of Decision : 05-08-2010

Acts Referred:

Companies Act, 1956 — Section 17, 231, 232, 233, 234

Citation : (2010) 08 MAD CK 0202

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : R. Rajesh and R. Vidya, ACGSC for Regional Director Ministry of Corporate Affairs and M. Jayakumar, Deputy Official Liquidator, for the Appellant;

Judgement

P. Jyothimani, J.—These company petitions are preferred under Sections 391 to 394 of the Companies Act, 1956 for sanctioning the scheme of amalgamation of the transferor company with the transferee company with effect from 1st April 2009.

2. M/s. Laurel Aromatics Private Limited, the petitioner in C.P. No. 85 of 2010 is the transferor company. The main objects of the transferor company, as stated in the Memorandum of Association, are narrated in paragraph (5) of the said petition and the Memorandum of Association is enclosed as Annexure (1) to the said petition.

3. M/s. Contract Point Impex (India) Private Limited, the petitioner in No. 86 of 2010 is the transferee company. The main objects of the transferee company, as stated in the Memorandum of Association, are narrated in paragraph (5) of the said petition and the Memorandum of Association is enclosed as Annexure (1) to the said petition.

4. In the meeting held on 12.2.2010, the Board of Directors of the transferor company, the petitioner in C.P. No. 85 of 2010, considered and approved the scheme of amalgamation of the transferor company with the transferee company, the petitioner in C.P. No. 86 of 2010. Copy of the Board resolution is enclosed as Annexure (4). The scheme of amalgamation is enclosed as Annexure

(5).

5. As regards the transferee company, in the meeting held on 12.2.2010, the Board of Directors of the petitioner in C.P. No. 86 of 2010, considered and approved the scheme of amalgamation of the transferee company with the transferor company, the petitioner in C.P. No. 85 of 2010. Copy of the Board Resolution is enclosed as Annexure (3). The scheme of amalgamation is enclosed as Annexure (4).

6. As far as the transferor company is concerned, as per the Auditor Certificate, the transferor Company has no secured creditors and the copy of the Auditor Certificate is enclosed as Annexure (8) . In so far as the transferee company, the petitioner in C.P. No. 86 of 2010 is concerned, there are two secured creditors as per Annexure (7) and they have given consent for the scheme of amalgamation as per Annexure (8).

7. The transferor company, the petitioner in C.P. No. 85 of 2010, obtained individual consent affidavits from the equity shareholders. Based on these affidavits, this Court, by order dated 30.3.2010 in C.A. No. 722 of 2010, dispensed with the convening and holding of the meeting of the equity shareholders of the transferor company for sanctioning the scheme of amalgamation.

8. As regards the transferee company, the petitioner in C.P. No. 86 of 2010, individual consent affidavits from equity shareholders have been obtained. Based on these affidavits, this Court, by order dated 30.3.2010 in C.A. No. 723 of 2010, dispensed with the convening and holding of the meeting of the equity shareholders of the transferee company for sanctioning the scheme of amalgamation.

9. The Official Liquidator has filed his report along with the report of the Chartered Accountant. The report of the chartered accountant states that the affairs of the transferor company have not been conducted in a manner prejudicial to the interest of its members or creditors 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. However, the Official Liquidator in the report has raised a pertinent objection which is to the effect that the Memorandum of Association of the transferee Company does not have a specific clause on amalgamation.

10. On a reference to the Memorandum of Association of the transferor company, it is clear that as per Clause 30, the transferor company is enabled to amalgamate with any company or companies having objects altogether or in part similar to those of the transferor company. However, it is true that in the Memorandum of Association of the transferee company, there is no corresponding clause enabling it to enter into amalgamation.

11. The issue as to whether the absence of such enabling clause to amalgamate

in the Memorandum of Association either of the transferor company or the transferee company is an impediment for this Court to approve the scheme of amalgamation came up for consideration in various Courts and the Courts have consistently taken the stand that inasmuch as the power of amalgamation or arrangement by way of scheme is statutorily available under the Companies Act, 1956, as provided under Sections 391 and 394, even in the absence of any enabling provision in the Memorandum of Association enabling the company to enter into amalgamation or arrangement, there is no impediment for the Court to approve such scheme.

12. A reference to the said Sections 391 and 394 of the Companies Act, 1956, which facilitate the reconstruction and amalgamation of the companies by order of Court, shows clearly that such transfer or amalgamation is a right conferred under law and the Memorandum of Association of every company also impliedly incorporates the terms of the Companies Act. Under such circumstances, I am of the considered view that even in the absence of any enabling provision under the Memorandum of Association enabling the company to formulate a scheme for the purpose of amalgamation, the Court can consider such scheme, provided such proposal or scheme is not detrimental to the interest of the transferor or transferee company. On the facts of the present case, as elicited above, the transferor company in fact is having such enabling provision under the Memorandum of Association, while the same is not available in Memorandum of Association of the transferee company.

13. A Division Bench of the Calcutta High Court in Hari Krishna Lohia Vs. Hoolungooree Tea Co. Ltd. and Another, , while considering a similar situation wherein the Memorandum of Association as framed u/s 17 of the Companies Act of the company does not possess a clause enabling a proposal for amalgamation, held that the statutory powers under Sections 391 to 396 of the Companies Act are sufficient for approval of such scheme. In fact, the Division Bench has also made a reference to the powers of the Liquidator u/s 494 of the Companies Act. The operative portion of the Division Bench judgment is as follows:

7. ...For the purpose of the present appeal it need be only said that if a company by virtue of its power in the Memorandum desires to amalgamate with another company without coming to a Court of law such amalgamation would be valid and there could be cases where a company desiring to amalgamate would have to come to a Court of law. The power to amalgamate may flow from the Memorandum or it may be acquired by resorting to the statute. Section 17 of the Companies Act indicates that a company which desires to amalgamate with another company will take necessary steps to come before a Court for alteration of its Memorandum in aid of such amalgamation. The statute confers a right on a company to alter its Memorandum in aid of amalgamation with another company. The provisions contained in Sections 391 to 396 and 494 illustrate some instances of statutory power of amalgamating a company with another company without any specific power in the Memorandum.

14. Subsequently, a Single Judge of the Calcutta High Court in *In Re: Marybong and Kyel Tea Estate Limited* [1977] 47 Comp Cas 802, while referring to the above said Division Bench judgment, has held that the absence of such clause in the Memorandum is not an impediment for sanctioning a scheme.

15. Subsequently, another learned Single Judge of the Calcutta High Court in the matter of: *E.I.T.A. India Limited and Ors.* AIR 1997 Cal 203, by following the Division Bench judgment, *supra*, has held as under:

13. The fact that the transferor and the transferee companies carry on dissimilar business is no ground why the Court should not sanction a Scheme of Amalgamation. In this connection reference may be made to the judgment and decision in the cases *In Re: P.M.P. Auto Industries Ltd.*; *In Re: Morarji Goculdas Spinning & Wvg. Co. Ltd.*, *In Re: S.S. Miranda Ltd.* reported in (1994) 80 Comp Cases 289. It was held in this decision that the power to amalgamate is a statutory power given to a company expressly under the provisions of Section 391 of the Companies Act and hence this objection cannot be sustained.

14. The contention of the Central Government that inasmuch as the Memorandum of Association of some of the petitioners do not contain express power to amalgamate with another, company, the petition is not maintainable and cannot be accepted. In this connection the judgment and decision of the Division Bench of this Court in the case of *Hari Krishna Lohia Vs. Hoolungooree Tea Co. Ltd.* and *Another*, may be taken note of. In the aforesaid decision the Division Bench held that the power to amalgamate is a statutory power and this power may be exercised notwithstanding the fact that the Memorandum of Association of a particular company may not contain express power to amalgamate with another company. Accordingly, the contention of the learned advocate of the Central Government on this point fails. The other contention of the learned advocate Mr. Kundu for the Central Government with reference to the Directors' Reports on the Balance-sheet and Profit & Loss Account of the transferor companies for the year ended March 31, 1994 that these companies are not profit making companies and they have not recommended any dividend to the shareholders. In the premises, inasmuch as these companies are not faring well the proposed scheme of amalgamation should not be sanctioned.

16. The Bombay High Court in *In Re: Aimco Pesticides Ltd.* [2001] 103 Comp Cas 463, by following the judgment of the learned Single Judge in *Marybong* case, *supra*, and after referring to a judgment of the Chancery Division in the case of *In Re: Oceanio Steam Navigation Co.* [1939] 9 Comp Cas 229 (Ch D), has held as follows:

Apart from the fact that it cannot be said that the memorandum of association of the petitioner-company does not provide for the company to arrive at an arrangement with another company, the company has a statutory power to arrive at such arrangement which the court is required to sanction. In so far as the judgment of the Chancery Division relied on by the learned Counsel for the

objector is concerned, in that case the court was considering not a scheme of amalgamation or arrangement, but the company was amalgamating its business as a going concern on its own undertaking and according to the court, if such a power is not in the memorandum of association of the company, it cannot enter into such an agreement. In my opinion, the law laid down by the Chancery Division in the above referred case is not applicable to the present case. It is further to be seen that this question has not been at all raised by the objector in the various affidavits that have been filed in this Court. Thus, I find no force in the objections raised on behalf of the objector. Therefore, the objection is rejected.

17. That was also the view of the Delhi High Court in *In Re: Highland Electro Appliances Private Limited*, wherein by referring to the above said judgments, it was held as follows:

7. In *Hari Krishna Lohia v. Hoolungooree Tea Co. Ltd. and Anr.* (1970) 40 Comp Cas 458, a Division Bench of the High Court of Calcutta held that "the power to amalgamate one company with another may flow from the memorandum of 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. If a company by virtue of its power in the memorandum desires to amalgamate with another company without coming to a court of law, such amalgamation would be valid". A Single Judge of the Calcutta High Court has adopted this view in *United Bank of India Limited. v. United India Credit and Development Co. Limited* (1977) 47 Comp Cas 689 and in *Marybong & Kyel Tea Estates Ltd.* (1977) 47 Comp Cas 802. The Learned Judge had based his conclusion on the principle that by invoking Sections 391 and 393 of the Companies Act, the statutory powers exercised by the Company Judge had been invoked, and that consequently 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. This view has also found favor with the High Court of Bombay in *Aimco Pesticides Ltd.*, (2001) 103 Comp Cas 463. I am in respectful agreement with the views expressed by both the High Courts. It appears to me to be uncontrovertable 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 object on raised by the Regional Director is overruled.

18. For the reasons aforesaid, the objection raised by the Official Liquidator regarding the absence of amalgamation clause in the Memorandum of Association of the transferee company stands overruled.

19. In terms of the compliance of the provisions of the Companies Act, notice

was ordered to the Regional Director. On notice, the Regional Director, Ministry of Corporate Affairs has filed his report stating that the scheme protects the interest of all employees of the transferor company and also provides for dissolution of the transferor company upon amalgamation. However, the Regional Director has raised two objections. The first objection raised is that the transferee company is not having power to amalgamate with other companies. The said objection has been answered above in negative. The second objection which has been raised is that the transferee company is required to file Form No. V along with the registration fees for the increase of its share capital on its amalgamation.

20. As regards the second objection raised by the Regional Director, as rightly submitted by the learned Counsel for the petitioners, in the light of the decision of this Court in *In Re: Cavin Plastics and Chemicals Private Limited* [2006] 129 Comp Cas 915 (Mad) the objection is no longer *res integra* and hence, the objection of the Regional Director does not survive for consideration.

21. In fact, a Division Bench of this Court in *The Regional Director, Ministry of Company Affairs and The Registrar of Companies Vs. Cavin Plastics and Chemicals (P) Ltd.*, , while affirming the view of the Single Judge in *Cavin Plastics and Chemicals Private Limited*, *In RE*, *supra*, has held as follows:

In the case of *In Re: Hotline Hol Celdings Pvt. Ltd.*; *In Re: Fusebase India Pvt. Ltd.*; *In Re: Hotline International Pvt. Ltd.*; *In Re: Netillennium Technologies Pvt. Ltd.*; *In Re: Protek Components (India) Ltd.*; *In Re: Fusebase Eltoro Pvt. Ltd.*, , the Delhi High Court followed the decision of the Andhra Pradesh High Court in *In Re: Saboo Leasing (P) Ltd.* [2003] 117 Comp. Cas 728, while considering an objection of the Regional Director to the effect that the authorized share capital of the merged company was being increased as a result of the scheme of amalgamation and this could only be carried out after following the procedure prescribed by the relevant provisions of the Companies Act and held that in the case of such merger no such payment of fee to the Registrar of Companies or stamp duty to the State Government shall be payable.

22. Moreover, a perusal of the scheme shows that it contains no objectionable feature detrimental to the interest of the employees of the transferor company 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, 1956. All the statutory provisions are complied with.

23. Consequently, there shall be an order approving the scheme of amalgamation of the transferor company - Laurel Aromatics Private Limited with the transferee company - Contract Point Impex (India) Private Limited, as provided in Annexures (5) and (4) in the respective company petitions, with effect from 1.4.2009, as the procedure laid down under Sections 391 and 394 of the Companies Act is duly complied with. These petitions are allowed. Taking

note of the report by the Chartered Accountant as enclosed by the Official Liquidator, in terms of the order passed by this Court, the transferor company shall stand dissolved without winding up.

The learned Additional Central Government Standing Counsel is entitled to a fee of Rs. 2500/- from the transferee company.