(2014) 03 P&H CK 0037

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No. 25 of 2014 and C.P. No. 166 of 2013

In Re: Ludhiana Holdings Ltd.

Date of Decision : 28-03-2014

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

Citation : (2015) 124 CLA 88 : (2014) 186 CompCas 565

Hon'ble Judges : Rajiv Narain Raina, J

Bench : Single Bench

Advocate : Munisha Gandhi and Gourav Goel, Advocate for the Appellant; Manjit Singh, Assistant Official Liquidator, Advocate for the Respondent

Judgement

Rajiv Narain Raina, J.—The petitioner-companies, namely Ludhiana Holdings Ltd., (hereinafter referred to as the transferor company) and Oswal Woollen Mills Ltd. (hereinafter referred to as the transferee company) have filed this petition under sections 391 to 394 of the Companies Act, 1956, for sanctioning a scheme of amalgamation by virtue of which it is proposed to amalgamate the transferor company with the transferee company. Vide order dated December 4, 2013, passed in Company Petition No. 166 of 2013, the holding of meetings of the equity shareholders, secured and unsecured creditors of the transferor company were directed to be dispensed with in view of the consents received from the eight equity shareholders of the transferor company and in view of the fact that the transferor company does not have any creditors, secured or unsecured.

2. It had also been directed vide order dated December 4, 2013, passed in C.P. No. 166 of 2013, that meetings of the equity shareholders, secured creditors and unsecured creditors of the transferee company be convened to consider the scheme on January 18, 2014, at Oswal Woollen Mills Ltd., G.T. Road, Sherpur, Ludhiana. Shri Arjun Partap Atma Ram and Shri Aman Sharma, advocates had been appointed as chairman and co-chairman, respectively, for conducting the meetings of the equity shareholders and secured creditors of the transferee company. Shri Animesh Sharma and Shri Keshav Gupta, advocates, had been appointed as chairman and co-chairman, respectively, for conducting the meeting

of the unsecured creditors of the transferee company.

3. Accordingly meetings were held and the respective chairmen filed their reports which were taken on record on February 4, 2014. As per the reports the scheme was unanimously approved by 100 per cent of the shareholders, present and voting, and also 100 per cent by the secured creditors, present and voting. The scheme was approved by 100 per cent of the unsecured creditors, present and voting.

4. The first motion petition was allowed vide order dated February 4, 2014 and the petitioner-companies were granted liberty to file a second motion petition in accordance with law.

5. Upon filing of the present petition, notice was issued to the Regional Director, Ministry of Corporate Affairs, Noida and the official liquidator. It was also directed that a notice of the hearing of the petition be published in the newspapers, namely, The Business Standard (English) and Punjabi Tribune (Vernacular), both Ludhiana edition and in the Official Gazette of the State of Punjab.

6. Mr. B.N. Harish, Regional Director, Northern Region, Ministry of Corporate Affairs, Noida has filed an affidavit dated March 14, 2014. The observations/ objections raised by the Regional Director, paragraphs 3 to 5 of the affidavit, reads as follows:

"3. That the deponent craves leave to submit that as per clause 8 of Part-D of the scheme of amalgamation all the staff/employees of the transferor company shall become the employees of the transferee company without any break or interruption in their services upon sanctioning of the scheme of amalgamation by the hon''ble court.

4. That the deponent craves leave to submit that M/s. Ludhiana Holdings Ltd. (transferor company) is a non-banking finance companies (NBFC) and registered with the Reserve Bank of India. It is submitted that the petitioner transferor company may be asked to give an undertaking for all compliances from the Reserve Bank of India being concerned regulator, if deemed fit and proper by the hon''ble court.

5. That the deponent craves leave to submit that with reference to the Regional Directorate''s Letter No. 6/47/T-3/2014/11677, dated February 21, 2014, letter has been received from Dr. Rishi Kumar, Assistant Commissioner of Income-tax Ludhiana vide their No. CCIT/Ldh/JB/Misc. 279/2013-14/4850, dated March 10, 2014, stated that ''it is seen that along with the letter, copy of scheme being annexure P1 has been sent. It appears that the petitioner have filed many other documents before the hon''ble High Court. For the purpose of sending reports/ comments, it is necessary that all the documents are sent to this office so that requisite comments may be sent. Further, since the records of the companies need to be verified and examined, further time of at least two months may be given to send comments. The submission of the Income-tax Department may be

considered if deem fit and proper by the hon''ble court."

7. The official liquidator has also filed his report dated March 21, 2014 and along with the report of the chartered accountant appointed for scrutinising the books of account and papers of the transferor company. The official liquidator has in paragraph 5 of his report stated as under:

"5. That in view of the report of the chartered accountant, the official liquidator most respectfully submits that the amalgamation is not prejudicial to the interest of its members or to public interest."

8. In response to the objections raised by the Regional Director, Northern Region, Ministry of Corporate Affairs, Shri Sat Paul Nijhawan, the authorised signatory of the transferor company, filed an affidavit dated March 25, 2014, stating as under:

"3. That with reference to the observations made by the learned Regional Director in paragraph 4 of his affidavit, regarding giving an undertaking by the transferor company for complying with all compliances required by the Reserve Bank of India, the deponent on behalf of the transferor company submits as under:

(a) The transferor company is a non deposit taking non-banking finance company (NBFC) and does not accept any funds from the public. The transferor company does not have any creditors and the same has already been placed on record of the first motion petition (C.P. No. 166 of 2013) vide annexures P13 and P14 thereto, and has also been recorded as such by this hon''ble court while passing order dated December 4, 2013.

(b) That the transferor company had vide its letter dated October 21, 2013, intimated the Reserve Bank of India (RBI) regarding the proposed amalgamation, and had sought its consent. Vide letter dated November 6, 2013, issued by the RBI, certain information had been sought from the company, which was duly complied with by the transferor company vide its letter dated December 2, 2013.

(c) That thereafter the RBI had vide letter dated December 13, 2013, asked the transferor company to supply the following:

(i) Notice of hearing of amalgamation published in the newspapers.

(ii) Order of sanction of the scheme passed by the hon''ble High Court.

(iii) Form 21 filed with the Registrar of Companies.

(iv) Duly audited combined balance-sheet of the transferor company and transferee company post the sanction of the amalgamation.

(d) That the letter was duly replied by the transferor company on December 20, 2013, wherein it was submitted that the publication in the newspapers had been carried out and the copies were enclosed, and that as far as the remaining queries were concerned, those could only be complied with after the approval and sanction of the proposed amalgamation.

(e) That on demand of the RBI, the transferor company had already surrendered the original Certificate of Registration and it has been orally informed by the RBI officials that the name of the company will be struck off from the list of registered NBFC, after compliance of the remaining queries. It is submitted that all documents as had been asked for by the RBI have already been submitted, and the remaining documents will be submitted post the approval of the Scheme by this hon''ble court. Moreover, the transferor company is a non-deposit taking NBFC. Hence there has been compliance by the transferor company. Copies of the entire correspondence between the transferor company and the RBI are annexed herewith as annexure A.

(f) That the deponent further undertakes that all compliances as may be required by the RBI, referred to hereinabove, shall be duly complied with by the transferor company.

4. That with reference to the observations made by the learned Regional Director in paragraph 5 of his affidavit, regarding the seeking of further time for examination of records of the transferor company, by the Income-tax Department, the deponent on behalf of the transferor company submits as under:

(a) That the transferor company has filed all requisite returns and papers as are statutorily required with the Income-tax Department every year.

(b) That there is no outstanding tax demand against the transferor company as on date. This has been duly certified by the chartered accountant appointed by the official liquidator.

(c) That clause 4.2 of the scheme reads as follows:

''All assets and liabilities along with debts, obligations and duties of the transferor company as on the appointed date, whether or not included in the books of the transferor company, shall be deemed to be and shall become the assets, liabilities, debts, obligations and duties of the transferee company and all assets and properties which are acquired by the transferor company on or after the appointed date but prior to the effective date shall be deemed to be and shall become the assets and properties of the transferee company and shall under the provisions of sections 391 to 394 and all other applicable provisions if any of the Act, without any further act, instrument or deed, be and stand transferred to and vested in and be deemed to have been transferred to and vested in the transferee company upon coming into effect of this scheme pursuant to the provisions of the Act''

(d) In view of the said clause 4.2 of the scheme it is incumbent upon the transferee company to take over and be responsible for any liability of the transferor company, whether reflected in its books or not. Thus in the event of any demand raised by the Income-tax Department, the deponent undertakes that the transferee company shall duly discharge the same, in accordance with law.

5. That in view of the fact that both the observations made by the learned Regional Director pertain to events which may occur subsequent to the sanction of the scheme, by this hon''ble court, the undertaking given hereinbefore by the deponent for duly complying with the same would be deemed sufficient for the purposes of compliances thereof."

9. During the course of hearing, the official liquidator has placed on record a copy of an e-mail dated March 28, 2014, sent by the office of the Regional Director, Northern Region, Ministry of Corporate Affairs, Noida which contains a letter dated March 26, 2014, written by the Commissioner of Income-tax-III, Ludhiana. The following observations have been made by the Commissioner, Income-tax in the letter:

"There does not appear to be any competitiveness with M/s. Ludhiana Holdings Ltd., as the paid-up capital is only Rs. 5 lakhs whereas the paid-up share capital of M/s. Oswal Woollen Mills Ltd., is Rs. 16.18 crores. In paragraph B of the scheme the business of M/s. Ludhiana Holdings Ltd. (transferor company) and M/ s. Oswal Woollen Mills Ltd. (transferee company) has been mentioned. The business of both companies is quite distinct and different. On that score also there does not appear to be any competitiveness...

Even otherwise, prima facie, there does not appear to be a case so as to use leverage combined assets and capital in a better way as M/s. Ludhiana Holdings Ltd., does not appear to have sufficient capital or combined assets so as to give a fillip to M/s. Oswal Woolen Mills Ltd."

10. Learned counsel appearing for the petitioner-companies submits that economies of scale shall be achieved by merger of resources of two companies at one place and in any case it would be an opportunity for shareholders of the transferor company to share the larger operations of the transferee company. Needless to say that the large scale business would obviously be more beneficial from all angles to all concerned persons, be it members, creditors or employees, than being run on a small scale. Moreover the transferor company has got limited business operations, i.e., investment and earning interest income whereas the transferee company is a multi-unit industrial profit making company. Therefore the benefits of the amalgamated business would be automatically available after the merger to the shareholders of transferor company. Learned counsel, Mrs. Munisha Gandhi, contended that even though the transferor company may be having a small capital base but it also has other assets which would definitely be used in a more fruitful manner once they merged with the transferee company which is having a greater capital base and greater resources. She further submits that the companies are part of the same group of companies and economies of scale would be achieved by merging the two entities.

11. The next observation made by the Income-tax Department is that "in paragraph 4.2 (paragraph D) of the scheme of amalgamation it has been pointed out that all assets and liabilities along with debt/obligations and duties of the

transferor company, whether or not included in the books of the transferor company shall be deemed to be and shall become the assets, liabilities, etc. It appears that there may be some assets, which may not have been included in the books of the transferor company. In this fashion, the Income-tax Department may have to take action on what assets have not been included in the books of transferor company". Thus the Department appears to be of the view that there may be assets which have not been included in the books of the transferor company and action is required on those assets.

12. Mrs. Munisha Gandhi, counsel for the petitioner-companies, submits that the observation made by the Income-tax Department is vague and ambiguous. Learned counsel submits that the comment is entirely based upon surmises, conjectures and a result of purely prejudiced imagination and does not deserve any credence. She submits that the current balance-sheet and assets submitted to this hon''ble court and the scheme clearly prescribes the entire assets of the transferor company which stands transferred to the transferee company. Moreover, the phrase "whether reflected in the books of account or not" in normal business parlance refers to the swapping of new assets with the existing assets or the future income during the course of ongoing business transactions of a running company. The financials of the scheme are drawn up on a certain date. However, the companies continue functioning and carrying out their day to day business, and in the course of the same, some assets such as payments received and made, stocks, raw material, etc., may be acquired and/or sold subsequent to the date on which the scheme is drawn up. This can, in no manner, be considered as being actionable as is being perceived by the Income-tax Department. It is also submitted that in view of the undertaking given by the authorised signatory of the transferee company that in the event of any demand raised by the Income-tax Department, the transferee company shall duly discharge the same, in accordance with law; the observation of the Income-tax Department is irrelevant and meaningless.

13. The third observation made by the Income-tax Department is that the share exchange ratio does not appear to be in best interest of the shareholders, creditors, employees, customers of the transferee company.

14. Mrs. Munisha Gandhi submits that valuation of the assets and liabilities of the companies is done by an independent expert to ensure the fairness of the transaction. It has to be kept in view that before formulating the proposed scheme of amalgamation, expert opinion was obtained by the petitioner-companies from a firm of chartered accountants, who having considered all the relevant aspects, suggested the aforesaid exchange ratio keeping in view the valuation of shares of respective companies. The shareholders of both the companies have approved the scheme, which necessarily includes the share exchange ratio. It is not in the purview of the Income-tax Department to sit in judgment over the share exchange ratio or on the other modalities and procedures contemplated in the scheme. The shareholders are the sole authority

to decide regarding the exchange ratio of merger and once the shareholders have approved and accepted the same it would not lie with the Income-tax Department to sit in judgment on the wisdom and decision of the shareholders. She further submits that the official liquidator has in paragraph 5 of his report submitted that the amalgamation is not prejudicial to the interest of its members or to public interest. Thus the objection/observation made by the Income-tax Department is unsustainable and irrelevant.

15. Learned counsel has referred to the decision of the Madras High Court in In Re: Kamala Sugar Mills Ltd.;, , dealing with an objection regarding the exchange ratio adopted in the scheme of compromise and arrangement. The court observed as under (headnote):

"Once the exchange ratio of the shares of the transferee company to be allotted to the shareholders of the transferor company has been worked out by a recognised firm of chartered accountants who are experts in the field of valuation and if no mistake can be pointed out in the said valuation, it is not for the court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of the two companies or to say that the shareholders in their collective wisdom should not have accepted the said exchange ratio on the ground that it will be detrimental to their interest."

These observations were accepted and reiterated as being the correct legal position on this aspect by the hon''ble Supreme Court of India in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., .

16. Mrs. Gandhi submits that the objections in the guise of comments as made by Income-tax Department are frivolous and without any basis. The given scheme has been approved by the overwhelming majority (100 per cent) of the shareholders and creditors of the two companies and thus deserves to be sanctioned.

17. In support of her contentions learned counsel for the petitioner-companies relied upon the following decisions:

"(a) Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., :

"It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the court. The court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parries. The court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently, the company court''s jurisdiction to that extent is peripheral and supervisory and not appellate. The court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire...

In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the company court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

(1) The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by section 391(1)(a) have been held.

(2) That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by section 391(2).

(3) That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

(4) That all necessary material indicated by section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by section 391(1).

(5) That all the requisite material contemplated by the proviso to sub-section (2) of section 391 of the Act is placed before the court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same.

(6) That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

(7) That the company court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

(8) That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

(9) Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the court there could be a better scheme for the

company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."

(b) In Re: Maknam Investments Ltd. and Others, : In Re: Maknam Investments Ltd. and Others, :

"It is a matter for the shareholders to consider commercially whether such merger is beneficial or not. The court is really not concerned with the commercial decision of the shareholders until and unless the court feels that the proposed merger is manifestly unfair or is being proposed unfairly and/or to defraud the other shareholders. Whether the merged companies will be ultimately benefited or will be able to economies in the matter of expenses is a matter for the shareholders to consider." (c) In Re: Vijran Hotels and Estates P. Ltd., , the hon''ble Madras High Court has held that objections by authorities like the Regional Director in opposing the exchange ratio which is accepted the shareholders cannot be sustained and it has reiterated the position that the court will not sit on judgment on the exchange ratio. Similar is the view taken by our own High Court in the case of Max Estates Limited and Another Vs. Malsi Estates Limited, and by the hon''ble apex court in G.L. Sultania and Another Vs. The Securities and Exchange Board of India and Others, .

18. Having gone through the scheme of amalgamation and taking into consideration the views of the Regional Director and the official liquidator, the resolutions passed by the board of directors, the consents given by the shareholders of the transferor company, and the unanimous approval of the scheme by the shareholders, secured creditors and unsecured creditors of the transferee company and the submissions made by learned counsel for the petitioner-companies, I find no reason to decline the prayer for approval/sanction of the scheme of amalgamation to amalgamate and merge the transferor company, M/s. Ludhiana Holdings Ltd., with the transferee company, M/s. Oswal Woollen Mills Ltd. The objections/observations made by the Income-tax Department are overruled. It is however made clear that in the eventuality of the Income-tax Department raising any demand regarding statutory dues payable to the Department the same shall be discharged by the transferee company in accordance with law, as undertaken by it. The petitioner-companies are directed to file the documents namely the order of sanction of the scheme passed by this High Court, i.e., Form 21 filed with the Registrar of Companies and a duly audited combined balance-sheet of the transferor company and transferee company, post the sanction of the amalgamation before the Reserve Bank of India as per the undertaking dated March 25, 2014, given by the authorised signatory of the transferor company. In view of clause 4.2 of the scheme, whereby all liabilities of the transferor company are being transferred to the transferee company, and the undertaking given by the authorised signatory of the transferor company, the observation pertaining to the Income-tax

Department is suitably covered. Hence the scheme of amalgamation is hereby sanctioned subject to the petitioner-companies honouring in letter and spirit the undertakings dated March 25, 2014, filed regarding the observations of the Regional Director, Northern Region, Ministry of Corporate Affairs, Noida. The petition is consequently allowed as prayed for.

19. The transferee company shall issue the shares to the members of the transferor company in terms of paragraph 13 of Part D and shall also cancel the existing shares of the transferee company as per paragraph 14 of Part D of the scheme.

20. The scheme shall be binding on the petitioner-companies, their respective shareholders, creditors and all concerned.

21. A certified copy of this order shall be filed with the Registrar of Companies within 30 days, in Form No. 41, from the receipt of certified copy of the same.

22. A public notice shall also be published in the newspapers, namely: The Business Standard (English) and the Punjabi Tribune (Punjabi), both Ludhiana edition. Similarly, a notice be also published in the Official Gazette of the State of Punjab.

23. Any person interested shall be at liberty to approach this court in the above matter for any directions that may be necessary. The petition is disposed of accordingly.