
(2001) 04 BOM CK 0018

In the Bombay High Court

Case No : Company Petition No"s. 381 to 383 of 2000 and Company Application No"s. 741 to 743 of 1999

In Re: Mather and Platt (India) Ltd.

Date of Decision : 18-04-2001

Acts Referred:

Companies Act, 1956 — Section 391, 393, 394

Citation : (2001) 04 BOM CK 0018

Hon'ble Judges : D.V. Chandrachud, J

Bench : Single Bench

Advocate : C.J. Roy Pareira and R.P. Singh, Company Prosecutor, V.J. Paymaster, Virendra Tulzapurkar and S. Seksaria, for the Appellant;

Judgement

D.V. Chandrachud, J.—In this proceeding, sanction of the Court is sought in exercise of powers under Sections 391 and 394 of the Companies Act, 1956 ("the Act") to a scheme of arrangement by which two divisions namely (1) The Fire and Security Engineering Division and (2) The Fluid Engineering Division of Mather & Platt (India) Ltd. are sought to be transferred to and vested, in pursuance of a scheme of spin off in Veedip Financial Services P. Ltd. and Datum Trading P. Ltd. respectively. Company Petition No. 381 of 2000 has been instituted by the Transferor-Company while Company Petition Nos. 382 and 383 of 2000 are by the respective transferee-companies.

2. The transferor-company was incorporated on 6-8-1959 and was initially known as Mather Greaves P. Ltd. The name of that company came to be changed on 14-6-1979. The authorized capital of the transferor is Rs. 25 crores divided into 2,50,00,000 Equity Shares of Rs. 10 each. The issued, subscribed and paid-up share capital is Rs. 18,90,19,120 divided into 1,89,01,912 equity shares of Rs. 10 each fully paid-up. The transferor has been incorporated with the main objects inter alia of carrying on business as Machinists, makers of machinery, manufacturers or Pressed Bowls, mechanical engineers and iron founders.

3. The first transferee-company was incorporated on 2-7-1993. The authorised capital of the company is Rs. 5 lakhs divided into 50,000 equity shares of a face

value of Rs. 10 each. The issued, subscribed and paid-up share capital of the company is Rs. 200 divided into 20 equity shares of Rs. 10 each fully paid-up. The second transferee-company was incorporated on 17-10-1996 with an authorised capital of Rs. 1 lakh divided into 10,000 equity shares of Rs. 10 each. The issued, subscribed and paid-up share capital is Rs. 2000 divided into 200 equity shares of Rs. 10 each fully paid-up.

4. The transferor-company has two divisions : (1) The fire and security engineering division and (2) The fluid engineering division. By the proposed scheme of arrangement these two divisions are sought to be transferred to and vested in the two transferee-companies respectively with effect from the appointed date. The reasons on the basis of which the proposed scheme has been sought to be implemented, have been set out in Paragraph 17 of the company petition. In the company petition, it has been averred that the market for fire and security engineering products and for fluid engineering products has become highly competitive. The petitioner-company is at present a multi-product and multi-divisional company. In order to meet the requirements of the business, it is necessary for the company to adopt what is described as a "dynamic and forward looking growth strategy" in order to sustain its leadership position, in its fire and security engineering products and fluid engineering products. As a part of this strategy, the transferor seeks to create focused companies for fire and security engineering products and market related activities of the said products and also in respect of fluid engineering products and market related activities of the said products. This is sought to be achieved through a process of demerger of the said two divisions of the petitioner into two separate companies. The first and second transferee companies are under the same management. The transferee-companies have been identified for the purpose of entering into an arrangement with the petitioner where under the fire and security engineering division and the fluid engineering division of the petitioner would be transferred to the first and second transferee-companies. A copy of the proposed scheme has been annexed to the company petition. Insofar as is material, the scheme provides that the appointed date shall be 1-4-1999. Under Clause 3A of the Scheme with effect from the appointed date, the entire fire and security division of the transferor except for the portions specified in Sub-clauses (b) and (c) shall stand transferred to and vested in the first transferee-company. A similar provision has been made in Clause 13A in relation to the transfer of the fluid engineering division to the second transferee-company. The consideration for the transfer is provided under Clauses 11 and 21 of the Scheme. In consideration of the transfer of the fire and security division, every shareholder holding equity shares in the transferor-company on the effective date or on such other date as may be specified by the Board of Directors of the first transferee shall be entitled to be allotted equity shares in the first transferee in the ratio of nine equity shares of the first transferee-company for every fifty equity shares held in the transferor-company. Similarly in Clause 21 of the scheme, it has been provided that in consideration of the transfer of the fluid engineering division to the

second transferee-company, every shareholder holding equity shares is the transferor-company on the effective date or on such other date as may be fixed by the Board of Directors of the second transferee-company shall be entitled to be allotted equity shares in the second transferee-company in the ratio of three equity shares in the second transferee-company for every five equity shares in the transferor-company. A provision has been made in Clauses 8 and 18 of the Scheme for the transfer of the services of the workers of the transferor-company to the transferee-companies without interruption in service on the existing terms and conditions.

5. By an order dated 20-12-1999 passed at the stage of summons for directions, a meeting of the shareholders of the transferor-company was directed to be convened. The order of the Court also directed the issuance of an advertisement regarding the convening of the meeting. Notices were also directed to be issued to the shareholders of the petitioner of the meeting and of the place and time thereof together with a copy of the scheme and of the statement u/s 393 of the Act. The convening and holding of the meeting of the creditors was dispensed with in view of the undertaking given by the transferor-company to issue notices to all the creditors or a substantial majority thereof as may be directed by the Court. The meeting of the equity shareholders, thereafter took place on 2-2-2000. The report of the Chairman is annexed to these proceedings. The report of the Chairman records that by consent of the equity shareholders, notices convening the meeting, the explanatory statement u/s 393 and the Scheme of arrangement were taken as read. The proposed resolution was thereafter voted upon and a poll was taken. The ballots were thereafter counted and it was found that 79 equity shareholders holding 98,01,276 equity shares of Rs. 10 each representing the total value of Rs. 9,80,12,360 had voted in favour of the scheme of arrangement. Three equity shareholders holding 190462 equity shares of the value of Rs. 19,04,620 voted against the scheme of arrangement. Accordingly, it has been stated in the report annexed to the affidavit of the Chairman of the meeting, that the resolution was duly passed by shareholders present in person or by proxy representing 98.09 per cent in value of the members present at the meeting and voting in person or proxy. An affidavit dated 28-6-2000 has been filed in which it has been stated that the notice of the hearing of the present petition was duly published in the newspapers and that individual notices were dispatched to all the secured and unsecured creditors of the company. The requisite statutory formalities has been complied with.

6. An objection to the proposed scheme of arrangement was initially advanced in these proceedings by the Union representing the workmen. On the last date of hearing, the Court was, however, informed that the objection which has been filed by the union stands withdrawn.

7. In these proceedings before the Court, an objection has been raised to the scheme of arrangement by Mr. Vinod Jagmohandas Paymaster, an Advocate, who states that he holds 300 shares in the company. The objections which have been

raised before the Court may now be considered.

(i) The first objection which was sought to be raised was that a copy of the scheme of arrangement was not sent together with the notice of the meeting to the objector;

The learned counsel appearing on behalf of the company stated that the objection is factually incorrect and that in compliance with the order passed by this Court, a copy of the scheme of arrangement was enclosed with the copy of the notice which was sent to each shareholder. The learned counsel has stated that the petitioner undertakes to file an affidavit in this proceeding recording the aforesaid statement on or before 23-4-2001.

Insofar as the objection is concerned, it is stated that by the intervener before the Court that he received a copy of the notice on 10-1-2000. The meeting was scheduled to take place on 2-2-2000. On 1-2-2000, which was one day prior to the meeting, the objector submitted his objections to the proposed scheme of arrangement and at that belated stage, sought to make a grievance that a copy of the proposed scheme had not been served upon him with the notice covering the meeting. The grievance of the objector is lacking in bona fides. If he had not received a copy of the scheme of arrangement, he ought to have objected immediately upon the receipt of the notice of the meeting by making a grievance of the non-receipt of a copy of the scheme. This was evidently not done.

(ii) The next objection is that the scheme of arrangement is ultra vires because neither the memorandum nor the articles of association of the transferor provide for a scheme of arrangement such as in the present case. There is no substance in this contention since the memorandum of association of the transferor-company expressly provides in Clause (iii)(bb) the power to sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may deem fit:

(iii) Another objection sought to be raised is that there was no necessity for the scheme of arrangement under which two divisions of the transferor-company which is a 40 year old company are sought to be alienated and transferred to the two newly formed transferee-companies. In my view, having regard to the well-settled position in law, it would not be permissible for this court to go into the commercial wisdom of either the Board of directors or of the shareholders in proposing the scheme of arrangement. The reasons which motivated the transferor-company in proposing the scheme of arrangement have been adverted to in Paragraph 17 of the company petition. This is a matter which lies in the commercial wisdom of the general body of Shareholders and the Board of Directors of the company. In a matter involving the exercise of powers by the Court under Sections 391 and 394 it is now a well-settled principle of law that the Court will not enter into the commercial merits or demerits of the scheme before it. In *Miheer H, Mafatlal v. Mafatlal Industries Ltd.* [1996] 87 Comp. Cas. 792 the contours of the jurisdiction of the Court were formulated by the Supreme

Court as follows :

"(1) The sanctioning court has to see to it that all the requisite statutory procedures 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 subsection (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 of 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." (p. 819)

8. In the present case, the requisite statutory procedure has been duly followed before the scheme has been placed for the sanction of the court. The scheme is

backed by the requisite majority. The creditors have been duly given individual notices of the hearing of the petition. The members of the company have voted in favour of the scheme by an overwhelming majority. All the necessary material as required by law was placed before the shareholders u/s 393. The proposed scheme is not violative of any provision of law or public policy. There is absolutely no material on record to come to the conclusion that the members were not acting bona fide and in good faith or that they were attempting to coerce the minority in order to promote any interest adverse to the interest of the minority. The Scheme, in the present case cannot be regarded as one which a prudent businessman would not adopt. The scheme has the requisite support of an overwhelming majority of shareholders. The court must defer to the commercial wisdom of the shareholders.

(iv) On behalf of the objector, the exchange ratio which has been specified in Clauses 11 and 21 of the scheme was sought to be impugned. At the outset, before dealing with the grievances of the objector it will be necessary to state that a scheme of the kind involved in the present case must be distinguished from a scheme of amalgamation. In a scheme of amalgamation, the transferor-company seeks to be merged with the transferee-company as a result of which, the transferor-company as an amalgamating entity ceases to have any existence. In consideration of the scheme of amalgamation, shares are offered to the shareholders of the transferor-company in the transferee-company. The shares which are offered in the transferee-company are in lieu of the shares which the shareholders have held in the transferor-company. In a case such as the present involving a spin off, two divisions of the transferor-company are sought to be transferred to the two transferee-companies, respectively. As consideration for the transfer of the two divisions the shareholders of the transferor-companies are to be allotted certain shares in the two transferee-companies. In case of the first transferee-company, shares are to be allotted at the rate of 9 equity shares for every 50 equity shares held in the transferor-companies. In case of the second transferee-company, shares are to be allotted at the rate of 3 equity shares for every 5 equity shares held in the transferor-company. The membership of the shareholders, including the objector, in the transferor-company is not terminated and does not come to an end. The shareholders of the transferor-company continue to be shareholders of that company but as a result of the transfer of a portion of the assets of the transferor-company to the transferee-companies, certain shares of the transferee-companies are allotted in addition to their existing shareholding.

9. This distinction was noticed in a Judgment of a Division Bench of this Court consisting of my learned brothers Mr. Justice B.N. Srikrishna and Mr. Justice S. Radhakrishnan in *All India Blue Star Employees Federation v. Blue Star Ltd* [2000] 27 SCL 265 (Bom.). In the Judgment of the Division Bench delivered on 1-3-2000 this court made a reference to the said distinction in paragraphs 15 and 16 of the judgment. This Court held as follows :

" 15. It is next contended that there is no disclosure of the method by which the shares were valued and, therefore, there was no "informed consent" on the part of the shareholders when they approved the terms of the scheme in the meeting specially called for that purpose. In our view, this contention has no merit. It cannot be gainsaid that this was not a case where BSL was merging into another company, nor was this a situation where, as a result of merging, the shares of BSL were to become extinct. It was also not a situation where there was any compromise of merger with another company, whose shares were listed on the Stock Exchange and had certain market value. It was a unique situation in which ISD, which was part and parcel of BSL, was spun off into another company known as BSIL and the BSL shareholders were entitled to cash compensation for the consequent decrease in their capital by 25 per cent. Instead of cash compensation being handed over to the shareholders and the shareholders thereafter applying for shares of BSIL, the scheme propounded a package deal by which the cash payment due to the shareholders would be deemed to have been paid if one paid-up share of Rs. 10 of BSIL was issued against the cash compensation for education of 25 per cent in the value of 4 shares of BSL.

16. Mr. Narula, the learned counsel for the appellant, criticized the compromise on the ground that the issuance of shares by BSIL was not done by a proper valuation of the shares of BSL by any known method of valuation. In our view, this was wholly irrelevant and unnecessary. Whatever, the value of the shares of BSL in the market, the terms of the scheme proceed on the footing of valuation of the assets as at book value to determine the extent to which the capital of BSL stands reduced. It was also not a situation where shares of BSL were being swapped for the shares of BSIL. Instead of BSIL handing over cash payment to the shareholders of BSL for proportionate reduction in their share value, and the shareholders thereafter making payment to BSIL for subscribing to the shares of BSIL, the scheme makes a composite arrangement by which shares of BSIL are allotted to the shareholders of BSL in the ratio as aforesaid. We see nothing unconscionable in the bargain which has been approved by an overwhelming majority who held about 99.98 per cent of the shareholding and by the Financial Institutions who held about 9 per cent of the stake. The argument does not sound well from the mouth of the appellants who hardly hold 0.00 per cent of the stock and whose dues to the tune of 54 lakhs have been fully secured by the bank guarantee." (p. 272)

10. In the case which was decided by the Division Bench of this Court also, shares of the transferee-company were sought to be allotted to the shareholders of the transferor-company, a Division of which was spun off to transferee-company. The Division Bench made a reference to the fact that in such a case. Instead of cash compensation being handed over to the shareholders of the transferor-company, a scheme by which shares will be allotted to the shareholders of the transferor-company in the transferee-company was propounded. In the present case, it was vaguely sought to be submitted that the exchange ratio on the basis of which the shares are sought to be allotted in the

transferee-companies is not proper. In this regard reference must be made to the fact that the determination of the exchange ratio was carried out by a reputed firm of Chartered Accountants, Bansil Mehta & Co. The report of the firm of Chartered Accountants dated 27-10-1999 was placed before the Court. Part 4 and Part 5 of the report specify the considerations which have been taken into account by the Chartered Accountants before the share exchange ratio was arrived at. In the report, the Chartered Accountants have observed as follows :

"For the purpose of arriving at a fair exchange ratio, we have examined, considered and placed reliance on various details, data, documents, accounts, statements furnished and explanations and information given to us and have proceeded to find out the exchange ratio on a consideration of the following factors :

(i) The assets and liabilities identified as pertaining to or in relation to FSD and FED of MPIL, are to be transferred to VSPL and DTPL respectively at book values as appearing in the books of MPIL as on the Appointed Date, pursuant to the scheme of Arrangement between MPIL and VSPL and DTPL.

(ii) Audited Balance Sheet of MPIL as at March 31,1999 showing details of assets and liabilities of FSD and FED, to be transferred to VSPL and DTPL respectively.

(iii) Pursuant to the transfer of FSD and FED, the equity share capital of MPIL amounting to Rs. 18,90,19,12C shall be reduced and organized to become Rs. 75,60,000 comprising 7,56,000 equity shares of Rs. 10 each.

(iv) The value of Net Assets of FSD FED of MPIL based on the book value of the assets and liabilities, identified for being transferred to VSPL and DTPL, work out to Rs. 546.83 lacs, and Rs. 1240.71 lacs respectively (as per Annexure "A").

(v) We have noted that under Clause 30 of the Scheme, the excess of the net value of the relative undertaking over the paid-up value of shares to be allotted pursuant to the Scheme is to be credited by the Transferee to General Reserve Account.

(vi) Finally, regard is had to the fact that all the shareholders of MPIL will become the shareholders of each of the Transferee-Companies in the same proportion in which they hold shares (on the record date) in MPIL as also that the capital of both VSPL and DTPL is minimal, so that the question or aspect of adjusting the equities between two or more disparate groups of shareholders (which is ordinarily at the root of fixing such ratio of allotment) is not relevant in this case.

V. Exchange Ratio

(i) We have considered the serviceability of capital in view of the expected profitability of the undertakings to arrive at the reasonable level of share capital in VSPL and DTPL."

11. In my view, it will not be sufficient for the objector to plead across the Bar that the share exchange ratio was not appropriate or proper. The objector has

failed to disclose as to how the share exchange ratio is not proper similarly, the objector does not point out to the court any alternative valuation on the basis of which he can submit that the share exchange ratio was not correct or proper. A similar submission came to be made before the Supreme Court in *Miheer H. Mafatlal's case* (supra) and the Supreme Court in its Judgment repelled that contention holding thus :

"The appellant who was propounding this theory of correct exchange ratio had nothing to offer in support of his contention both before the learned single Judge as well as before the High Court....

It has also to be kept in view that which exchange ratio is better is in the realm of commercial decision of well informed equity shareholders. It is not for the court to sit in appeal over this value judgment of equity shareholders who are supposed to be men of the word and reasonable persons who know their own benefit and interest underlying any proposed scheme. With open eyes they have okayed this ratio and the entire scheme."

12. The Supreme Court approved the judgment of Maugham, J. in *Hoare & Co. [1933] All ER 105* wherein it was laid down that where a statutory majority had accepted the offer, the onus must rest on the applicants to satisfy the court that the price offered is unfair. The Supreme Court also approved the following observations of the Madras High Court in *Kamla Sugar Mills Ltd., In re [1984] 55 Comp. Cas. 308* :

"... 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 recognized 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." (p. 309).

13. These observations were held by the Supreme Court to be reflective of the correct legal position. In this case a reference was made to a leading firm of Chartered Accountants. The objector has been fair in stating that he does not make any allegation or submission whatsoever of improper conduct or otherwise against the said firm of Chartered Accountants and rightly so. That being the position, and in the absence of any alternative valuation being pointed out to the court, I am of the view that the contention of the objector is liable to be rejected. The valuation has been accepted by an overwhelming body of shareholders. In the scheme of arrangement it has also been provided in Clause 23 that the share capital of the transferor-company amounting to Rs. 18,90,19,120 shall be reduced to Rs. 75,60,000 by reducing the amount of the paid-up shares from Rs. 10 to Rs. 0.40 (ps. 40) per share and by transferring the balance of Rs.

18,14,59,120 to the reconstruction reserve account which will be utilised for absorbing the book values of the assets and liabilities of the F.S. Division and F.E. Division transferred thereunder to transferee-company No. 1 and transferee-company No. 2 respectively. Consequently, it has been provided that twenty five of such reduced equity shares shall be consolidated so as to constitute one equity share of Rs. 10 each, to that upon such consolidation the issued, subscribed and paid-up equity share capital shall consist of 7,56,000 equity shares of Rs. 10 each. The objector sought to submit that since his existing shareholding in the transferor-company, will stand reduced with effect from the appointed date, the allotment of shares in the two transferee-companies may be made to him on the basis of this reduced shareholding. There is no merit in this contention. In my view, the provisions of Clauses 11 and 21 of the scheme can not be so interpreted. The allotment of shares in the transferee-companies must take place on the basis of the existing shareholding of the members of the transferor-companies immediately prior to the appointed date. The allotment of shares in the transferee-companies must be made on the basis of the shareholding prior to the reduction which is to take place on the basis of Clause 23 of the scheme. The learned counsel appearing on behalf of the petitioner has also stated before the court that the allotment of shares of the transferee-companies, shall take place on the basis of shareholding immediately prior to the appointed date. There is, hence, no substance in the objection.

14. In the circumstances, I am of the view that the objections which have been raised on the part of the objector must fail. The objections lack in bona fides. The objector who holds 300 shares cannot be heard to question the commercial wisdom of the large body of shareholders which has approved the scheme. Company Petition No. 381 of 2000 is accordingly made absolute in terms of prayer Clauses (a) to (i).

Company Petition Nos. 382 of 2000 and 383 of 2000 are made absolute in terms of prayer Clauses (a) to (d).

The costs of the regional director are quantified at Rs. 1,500.