

(2003) 06 BOM CK 0076

In the Bombay High Court

Case No : Company Petition No"s. 326 and 327 of 2003 and Company Application No"s. 73 and 74 of 2003

In Re: Mayfair Ltd.

Date of Decision : 26-06-2003

Acts Referred:

Companies Act, 1956 — Section 101(2), 391, 392, 393, 394

Citation : (2004) 2 BomCR 235 : (2004) 122 CompCas 748 : (2003) 4 CompLJ 102 : (2003) 4 MhLj 663 : (2003) 46 SCL 672

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : R.C. Master, for Regional Director, S.R. Kom, for Official Liquidator and J. Mitra and Delilah Fernandes, for Subhash Knitting Industries, Virag V. Tulzapurkar and Alpana Ghone, for the Appellant;

Judgement

D.G. Karnik, J.—Company Petition No. 326 of 2003 is filed by transferor-company while Company Petition No. 327 of 2003 is filed by the transferee-company. The transferor and transferee-companies have sought approval and sanction from this Court for the scheme of arrangement, of amalgamation of the transferor-company into the transferee-company. Under the scheme, all properties and assets of the transferor-company along with its liabilities are proposed to be taken over by transferee-company.

2. By two separate orders dated 7th February, 2003 in Company Application No. 73 of 2003 and Company Application No. 74/03 filed by transferor and transferee-companies, this court directed holding of the separate meetings of the equity shareholders of transferor as well as transferee-company. The court however, dispensed with the holding of the meetings of the creditors of both the transferor and transferee-companies for the reasons stated in the said orders. Accordingly, separate meetings of the equity shareholders of the transferor and transferee-companies were held on 21st March, 2003. The resolutions approving the scheme of amalgamation were passed in both the meetings with requisite statutory majority.

3. After having obtained the necessary approval in the meetings of the equity shareholders, the transferor and transferee-companies have filed these petitions for approval and sanction of the schemes by this court u/s 391/394 of the Companies Act, 1956. At the time of admission of the petition, the Court directed issuance of the notices to the Official Liquidator in case of the transferor-company and notices to the Regional Director, Department of Company Affairs in both the petitions. The Court also directed publication of notices in the newspapers and service of individual notices to the creditors of the transferor and transferee-companies. In both the petitions, transferor and transferee-companies have filed the necessary affidavits proving services of notices as ordered by the court. The Official Liquidator has submitted his report dated 11th June 2003 stating that the affairs of the transferor-company have not been conducted in a manner prejudicial to the interest of its members or to public interest. Shri Kom, Official Liquidator present in person states his "No objection" for sanctioning of the scheme. Shri "Chakradhara Paik has filed an affidavit dated 13th May, 2003 stating that he finds that the scheme is not prejudicial to the interest of the creditors and shareholders. The learned counsel for the Regional Director states that the Regional Director has no objection for sanctioning of the scheme.

4. At the hearing of the petition, no member of either of the companies has appeared to oppose the petition. However, M/s. Knitting Industries creditor of the transferor-company appeared and opposed the petition. The objecting creditor has filed an affidavit of its partner Shri Subhash Mehra, which is countered by the transferor-company.

5. According to the opposing creditor, it had supplied goods to the transferor-company under various purchase orders, copies of which are annexed as Annexures B1 to B16 to the affidavit of Shri Subhash Mehra. Copies of the delivery notes are also annexed to the said affidavit as Exhibit "C1" to "C27". Copies of delivery challans/gate passes and copies of invoices are also annexed as Exhibit D1 To D62 and Exhibit E1 to E67 respectively to the affidavit. A statement of account as in the books of the opposing creditor is also annexed as Exhibit "A1" and "A2" to the affidavit. According to the opposing creditor, a sum of Rs. 7,38,295.50 is due and payable to it. He therefore, opposes the scheme unless he is paid or sufficiently secured.

6. Mr. Tulzapurkar, the learned counsel for the petitioner submits that the petitioner has made payment for all the supplies received except for a sum of Rs. 51,154. According to Shri Tulzapurkar, the learned counsel, the transferor-company has a claim for damages for the loss suffered by it for the defective supplies against the objecting creditor far in excess of Rs. 51,154 and therefore, the said amount has not been paid. Mr. Tulzapurkar further submitted that in any event, the claim is not admitted and the transferor-company is not required to pay or secure the objecting creditor in respect of a disputed claim. The learned counsel drew a distinction between Sections 100 to 105 on the one hand and

Sections 391 to 395 of the Companies Act on the other hand. He submitted that the objecting creditors have a right to be heard before sanctioning of a reduction u/s 100/105 or sanctioning of a scheme of arrangement u/s 391/394 of the Companies Act. But the similarity ends there. Clause (c) of Sub-section (2) of Section 101 empowers the Court to require the Company proposing to reduce its capital either to pay debt or to sufficiently secure the objecting creditor.

7. There is no such power in the Court u/s 391/394. According to him, the Court has no power to require the transferor or transferee-company to pay or secure the objecting creditor. He further submitted that in any event, the present scheme was not a scheme of arrangement with the creditors of either the companies as neither of the Companies was seeking any adjustment or arrangement with the creditors. The companies were going to pay all the creditors as per the initial contracts or terms of credit without claiming any diminution of liability or deferment of payment. The creditors were therefore, not affected at all and the liabilities, if any, of the transferor-company would be taken over by the transferee-company on the same terms and conditions and therefore, no creditor of the transferor-company would be affected in any manner whatsoever. He further submitted that a creditor who was not effected at all has no right to object to the scheme of arrangement by way of an amalgamation. I am unable to agree. An objecting creditor who has a debt due from the transferor-company would on the scheme being sanctioned be required to look not to the transferor-company for the repayment of his dues but would be required to look to the transferee-company for repayment. In a given case, the transferee-company may have negative assets or may not have sufficient liquidity to repay the creditor, as per the original terms agreed between him and the transferor-company. Besides, the creditor would be required to look for the repayment of his dues to the transferee-company, with whom he has no dealings in the past and with whom he had no privity of contract, in substitution of the transferor-company. Whether the creditor would be adversely affected by being required to deal with the transferee-company in substitution of a transferor-company is a matter of perception of the creditor. It cannot be therefore, be said that the creditor of a transferor-company would have no right to object to the scheme of arrangement. Such a creditor can certainly oppose the scheme for arrangement on all grounds available to him in law which would include an objection that the scheme is not just and fair to him or to the class of creditors to whom he belongs. The first argument of Tulzapurkar that in view of the absence of provision like Section 101(2)(c) empowering the court to direct the company to pay or secure the creditor before sanctioning of the scheme of arrangement contemplated under Sections 391 to 394 of the Companies Act, the Court has no power to direct the Company to secure the objecting creditor also cannot be accepted. If the said argument is accepted and the court comes to the conclusion that the scheme of arrangement is unfair and unjust to the objecting creditors or to the class of objecting creditors, because the interest of the objecting creditors are adversely affected then the only option left to the Court would be to reject

the scheme instead of accepting the scheme subject to a direction that the objecting creditors whose interest are adversely affected should either be paid or secured. If the court has a power to reject the scheme on the ground that it is unjust and unfair, it certainly has a power to sanction the scheme subject to such conditions as would remove the grounds of unjustness and unfairness.

8.1 hasten to all that I do not and should not be construed to have said that in every case, before sanctioning of the scheme u/s 391/394 the objecting creditor must either be paid off or be sufficiently secured. It must be remembered that the petition for a sanction of a scheme u/s 391 of the Companies Act is not a tool in the hands of the creditor to recover the debt or to coerce the company to pay, especially when the debt is not admitted. The objecting creditor must show to the court that the scheme is mala fide or fraudulent and is likely to adversely affect him or the creditors or the class of creditors to whom he belongs. This has been my view which I have already expressed in the case of *In Re: Zee Interactive Multimedia Ltd.*; *In Re: Siti Cable Network Ltd.*, . In order to get any relief, the objecting creditor must show :

- (i) that there is a debt due to him and the debt is either admitted by the Company or the Court prima facie comes to the conclusion that the debt is due.
- (ii) that the creditor would be adversely affected by sanctioning of the scheme.
- (iii) the scheme is unjust and unfair to the creditors on any class of creditors to whom the objecting creditor belongs.

9. In the present case, the debt except to the extent of Rs. 51,154 is not admitted. As against that debt, the transferor-company claims to have a claim for damages. No compromise or arrangement is proposed with the objecting creditor or any of the creditors as all the debt and liabilities of the transferor-company are being taken over by the transferee-company. It is not even the case of the objecting creditor that the transferee-company is not sound and would not be able to pay its debts after taking over the debts of the transferor-company. The balance sheet shows that the transferee company is stronger than the transferor company. The transferor-company is a subsidiary of a transferee-company. It is not shown how the proposed scheme is unjust and unfair to the objecting creditor or to the creditors either of the transferor or transferee-company. Both the companies have positive net worth. It is not shown even prima facie by the objecting creditor that he would be adversely affected by sanctioning of the scheme.

10. No other objection was raised by anybody. In the circumstances, the scheme or arrangement is sanctioned and Company Petition No. 326 of 2003 is allowed in terms of prayer Clauses (a) to (e) and Company Petition No. 327 is allowed in terms of prayer Clauses (a) to (d).

11. The transferor-company shall pay Rs. 2,500 to the Official Liquidator and Regional Director as costs. The transferee-company shall pay Rs. 2,500 to the

Regional Director as costs.