

(1994) 04 DEL CK 0044
In the Delhi High Court
Case No : Civil Petition No. 91 of 1992
In Re: Mohan Exports India Ltd.

Date of Decision : 21-04-1994

Acts Referred:

Citation : (1994) 54 DLT 513 : (1994) 29 DRJ 312

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : B.B. Menon, B.R. Menon, Deepak Prakash and M.M. Sareen, for the Appellant;

Judgement

P.K. Bahri, J.

(1) This petition has been filed u/s 391 & 394 of the Indian Companies Act praying that the scheme of arrangement comprised in annexure A to the petition may be approved by this court so that the same becomes binding on all the shareholders and the creditors of the transferor and the transferee companies and necessary directions be also issued for implementation of the said scheme.

(2) On notice being issued u/s 394A of the Act to the Central Government, an opposition has been filed by the Regional Director, Northern Region, Department of Company Affairs. Before I deal with the petition, on merits I may

(3) One of the pleas raised is that a notice was required to be served on the Central Government in the proceedings initiated initially in C.A. 753/91 when "Judges Summons" had been taken out for holding the meetings of the creditors and the shareholders of the two companies and as no such notice was served at that stage the present petition, filed after the receipt of the reports of the Chairman concerned of the result of the said meetings, is not maintainable. In arguments counsel for the Central Government has not passed this plea and rightly so because if we peruse the provisions of the statute as well as the Company Court Rules it would become self-evident that notice is not required to be issued to the Central Government for taking out "Judges Summons". Section 391(1) does not contemplate issuance of any notice to the Central Government

before getting the scheme of arrangement or amalgamation approved in a meeting of the shareholders and the creditors. Rule 11 of the Company Court Rules, 1959, requires, inter alia, filing of a petition u/s 391(2) for seeking sanctioning of a compromise or arrangement. Under this rule the matters which have to be brought before the Company Judge contemplate filing of a petition. Rule 11(b), however, lays down that all other applications under the Act or under these Rules shall be made for a Judges Summons returnable to the Judge sitting in Court or in Chambers. So, it is evident that no notice was required to be served on the Central Government at the time the Judges Summons are taken out for holding meetings of the creditors and the shareholders.

(4) The Madras High Court in the case of *in re: W.A. Beard shell & Co.(P)Ltd. and Mettur Industries Ltd.*, (1968) 38 CompCas 197, has also laid down the same proposition of law that in an application to the court u/s 394 of the Companies Act for sanctioning of a compromise arrangement, notice to the Central Government need not be given at the initial stage before the court makes an order on an application u/s 39(1) calling for a meeting of the creditors or members of the company. I negate this particular legal objection.

(5) The second legal objection raised in the application is that a joint petition by the two companies i.e. transferor and the transferee companies is not competent and separate petitions should have been filed. Counsel for the Central Government has placed reliance on *In re :Electro Carbonium Pvt. Ltd. And Electric Materials Company Pvt.Ltd.*, (1979) 49 CompCas 825, wherein the Karnataka High Court had expressed the view that separate petitions by the transferor company and the transferee company must be filed. I have gone through the judgment and find that no reasons have been given as to why there should be separate petitions by the two such companies when the subject-matter for decision is the same as to whether a particular scheme of compromise or amalgamation or arrangement ought or ought not to be sanctioned by the Court. Neither, the Company Act nor the Company Court Rules prohibit filing of a joint petition by the two companies when the subject-matter is the same and common questions of fact and law would arise for decision.

(6) Under Order I Rule 1 of the CPC all persons may be joined in one suit as plaintiffs where any right to relief in respect of or arising out of the same act or transaction or series of act or transactions is alleged to exist, in such persons whether jointly, severally or in the alternative and if such persons brought separate suits any common question of law or fact would arise. I may mention that provisions of Order I Rule 1 of the CPC were not considered in the case of *Electro Carbonium Pvt.Ltd.* (supra). So, I hold that a joint petition is maintainable by the transferor and the transferee companies.

(7) The learned counsel for the Central Government has vehemently argued that keeping in view the facts and circumstances and the terms of the proposed scheme of arrangement it would-be self-evident that the scheme is not in public interest and has been so framed as to avoid payment of government revenue in

the shape of stamp duty, registration charges as real intent and purport of the scheme is to transfer very valuable Immovable assets of the transferor company to the transferee company.

(8) On the other hand, the learned counsel for the petitioner has contended that the scheme has been approved unanimously by the shareholders and the creditors of the two companies in separate meetings and two of the shareholders of the transferor company are still shareholders of the transferee company and the transferor company has various businesses and had achieved lot of economic progress and has become unwieldy and thus, the scheme proposes to transfer International Merchandising Division and Handicapped Division of the transferor company to the transferee company for better management of the affairs and in the interest of better business. He has argued that the members of the two companies and the creditors of the two companies as shrewed businessmen had thought it fit to separate the export business of the transferor company and vest it in this transferee company so that it could be managed efficiently and in a better way and thus, there is not public interest which is being violated by this bonafide and genuine scheme of arrangement. He has argued that the scheme provides for issuance of paid-up shares in favor of the members of the transferor company as a consideration for transfer of the Export Unit of the transferor company to the transferee company which would also transfer the assets of the said Export Division but would also transfer the liability of that Division to transferee company and the workers of the said Division of the transferor company shall become the workers of the transferee company on the same terms and conditions on which they are functioning with the transferor company.

(9) In order to appreciate the contentions raised before me, it is necessary first to briefly refer to the salient features of the two companies and the terms of the proposed scheme. The authorised capital of the petitioner .transferor company- M/s Mohan Exports India Ltd. is rupees one crore divided into ninety thousand equity shares of Rs. 100.00 each and 10,000 preferential shares of Rs. 100.00 each and the subscribed and paid-up capital is Rs. 41,40,000.00 of equity shares and this company is engaged in the business of buying, selling, importing, exporting, manufacturing and dealing in retail and wholesale in clothing and wearing apparel of every kind and to manufacture, purchase, sale, export and import of handicrafts of all types and it has four trading units, namely. Garments Division, Handicrafts Division, Engineering and General Products Division and International Merchandising Division and the turnover in this company in the past two years exceeds about Rs. 40 crores.

(10) The transferee company M/s Tarun Overseas Pvt. Ltd. has been recently incorporated and it has authorised capital of Rs.10,00,000.00 divided into one lakh equity share of Rs. 10.00 each and the paid-up capital is only Rs. 200.00 divided into 20 equity shares of Rs. 10.00 each and the sole purpose for which this company is incorporated is to take over the Export Division of the Transferor Company. There are only two shareholders of the transferee company, one of

them Inder Mohan Pun is also one of the shareholders of the transferor company, In para 2 of the scheme, it is mentioned that all the assets in Schedule 1 to this scheme shall stand transferred to the transferee company and so also the liabilities mentioned in Schedule II. It is also recorded therein that rights, privileges, powers, permits, licenses obtained, trademarks and import quotas and telephones and telexes shall also stand transferred to the transferee company.

(11) In the scheme there is no reference to transfer of any export business of the transferor company to the transferee company; rather in para 12 it is mentioned that all employees of the transferor company shall become the employees of the transferee company on the same terms and conditions on which they have been working with the transferor company. Here again it is not mentioned that how many employees are working with the transferor company and out of which how many employees are functioning in such export business international merchandise. In the scheme there is no reference to the four trading units of the transferor company. It is significant to mention that when the Judges Summons were taken vide C.A.753/91, schedules I & II were not even filed. It is only when this present petition was filed and opposition had been raised by the Central Government that Along with the rejoinder schedule I has been filed which is referred to in the scheme and schedule II which is also referred in this scheme has not been filed. Schedule I is very important which shows the assets of the transfer or company which are to be transferred to the transferee company under this scheme. The details of the same are as follows:

1. Land Rs. 1,85,263/OOP 2. Building Rs.5,29,154/OOP 3. Furniture & Fixture Rs. 16,276/1OP 4. Plant & Machinery Rs. 10,261.00P 5. Land at Badshahpur Rs. 1,44,420/OOP (Distt. Gurgaon) 6. Flats at Nehru Place Rs.10,09,303/OOP Hotels (2050 Sq. Ft.) 7. Sundry Debtors Rs. 1,77,979/48P (As per Annexure attached)
Total: Rs. 20,69,656/58P

(12) Abate glance at the said schedule shows that very valuable Immovable assets of the transferor company are sought to be transferred to the transferee company. It must be kept in view that the value shown of these Immovable assets is not the real market value but is only the book value. So, these assets of the transferor company in real terms would be of much high value than shown in this Schedule 1.

(13) The learned counsel for the petitioner has argued that it is a bonafide and genuine scheme of arrangement and as the same has been duly approved by the members and the creditors of the two companies, so this court should sanction this scheme as the scheme only contemplates taking over of one business unit of one company by the other company and the transfer of Immovable assets of the transferor company is only incidental and he has relied upon In re: Ucal Fuel Systems Ltd. & Another, (1992) 73 CompCas 63, a judgment of the Madras High Court. In this judgment, it was laid down that Section 394A of the Companies Act makes it obligatory on the court to give notice to the Central Government of

every application made to it u/s 391 or Section 394 and take into consideration the representation made by the Government before passing any order on the proposed scheme of amalgamation. The Central Government to study the proposal and raise objection thereto as it thinks fit in the light of the facts and information available with it and also place in the court the facts which may not have been disclosed by those who appear before the court so that the interests of the investing public at large may be fully taken into account by the court before passing the order. In the said case, the Central Government has raised objections to the proposed scheme of amalgamation on one of the grounds, inter alia, that Industries Development and Regulation Board should be made a party as the scheme is in violation of the provisions of the Industries Development and Regulation Act. The Court held that it is not necessary to make any other party in the scheme of the provisions of the Companies Act and the Company Court Rules. I do not understand how anything said in this judgment is of any help in deciding the present matter.

(14) He has then referred to a Division Bench judgment of the Calcutta High Court in the case of *New Central Jute Mills Co. Ltd. Vs. Rivers Steam Navigation Co. Ltd. and Others*, . It has been held in this judgment that Section 6(e) of the Transfer of Property Act which provides that a mere right to sue cannot be transferred, is not applicable when a scheme is sanctioned under the provisions of Sections 391 & 394 of the Companies Act. There is no dispute about the proposition of law that in case the proposed scheme is bonafide and genuine and is not against public interest then mere fact that certain Immovable properties or right to recover debts etc. are transferred to the transferee company would not mean that they are in violation of any provisions of the Transfer of Property Act.

(15) Lastly, the learned counsel for the petitioner has placed reliance on a case decided by the Calcutta High Court in *In re: W. Figgis & Co. Pvt. Ltd.*, (1980) 50 CompCas 95. In the said case the facts were that the transferor company was carrying on mainly two businesses, one of tea broking and auctioneering and the other of property business. The transferee company was incorporated with a view to carry on the property business and a scheme of arrangement was proposed by which the total property business of the transferor company was sought to be transferred to the transferee company Along with the Immovable assets of the transferor company pertaining to the property business of the transferor company. The objection raised on behalf of the Company Law Board was that the scheme is not bonafide and has been propounded solely for the purpose of avoiding the capital gains tax, stamp duty, court fee and thus, is not in public interest. The court, after considering the various cases on the subject and keeping in view the peculiar facts of the particular case, found that it was a genuine transfer of a portion of the business of the transferor company in favor of the transferee company and incidentally the Immovable assets of the transferor company pertaining to the said property business are sought to be transferred to the transferee company and it was held that the same does not amount to any violation of any law and it was in the wisdom of the shareholders

of the company who are businessmen to take the decision in the matter and the court should not unnecessarily interfere with such decision.

(16) Reference was made to certain judgments of the Supreme Court which laid down that the lawful ways of avoiding the tax liability could always be adopted by the parties concerned. It is only the evasion of tax which would bring about the interference of the court.

(17) It depends on the facts of each case to decide whether a particular scheme is a bonafide one and is not in violation of any public interest. In the aforesaid case, in view of the facts appearing in the case, it was quite clear that transferor company was dealing with two kinds of businesses and one kind of business was completely being transferred to the transferee company and incidentally an Immovable property pertaining to that particular property business was also sought to be transferred to the transferee company. So, in that situation the court held that it was a bonafide scheme and mere fact that certain taxes would stand avoided would not mean that the scheme was against any public interest.

(18) The learned counsel the Central Government, however, has referred to certain observations of the Supreme Court in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer, . It was laid down by the Supreme Court that:

"THE proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. "

(19) Almost a similar question arose for decision before Gujarat High Court In re: Wood Polymer Ltd. and In re: Bengal Hotels Pvt. Ltd .(1977) 47 CompCas 597. In the said case the proposed scheme of amalgamation contemplated dissolution of the transferor company without winding-up and transfer of assets which included building to the transferee company although all formalities have been completed in this case i.e. that the scheme was duly approved by the shareholders and creditors, still it was held by the court that not with standing that the formalities had been complied with, sanction to the scheme ought to be refused. The court would not, by approving such a scheme of amalgamation, be a party to an arrangement for avoiding payment of capital gains tax. After considering the various provisions of the scheme the court held that the only purpose discernible behind the proposed amalgamation is defeating tax by creating a paper company and transferring assets to such company, it would distinctly appear that the provision for such a scheme was being utilised for the avowed object of defeating tax. It was held that it is true that if the parties so arranged their affairs that it may amount to avoidance of tax liability and not evasion of tax, the law only frowns upon tax evasion and not on tax avoidance but such a benefit cannot be permitted to be enjoyed when it could not be done without the aid of the court. It was further emphasized that the court is charged

with a duty before it finally permits dissolution of the transferor company by dissolving it without winding-up, to ascertain whether the same is not against public interest. The expression "public interest" must take its colour and content from the contest in which it is used. It was held that the context in which public interest is used, enables the court to find out why the transferor company came into existence, for what purpose it was set up, who were its promoters, who were controlling it, what object was sought to be achieved through creation of transferor company and why it was being dissolved by merging it with another company. It was held that if the only purpose appears to be to acquire certain capital assets through the intermediary of the transferor company created for that very purpose to meet the requirement of law, and in the process to defeat tax liability which would otherwise arise, it could not be said that the affairs of the transferor company sought to be amalgamated, created for the sole purpose of facilitating transfer of capital assets through its medium, have not been carried on in manner prejudicial to the public interest. The public interest looms large in this background and the machinery of judicial process is sought to be utilised for defeating public interest and the court would not lend its assistance to defeat the public interest and, Therefore, the court would not sanction such a scheme.

(20) Similarly Inre:W.A.Beard shell & Co.Pvt. Ltd, (1968) 38 CompCas 197, the Madras High Court also held that amalgamation means within the scope of the decision of the body of shareholders. Such a decision if made by the body unanimously ought not to be lightly interfered with by the court but this does not necessarily mean that the consideration of public interest which always figures as a halo ought to be totally ignored.

(21) Keeping in view the facts of the present case, it is quite evident that the main and real purport of this scheme of arrangement is to transfer very valuable, Immovable assets of the transferor company to the transferee company which is just a paper company. If such a scheme is approved, it would not be in public interest because by this device the Immovable assets are sought to be transferred without payment of government dues. As already mentioned above, it is only in the petition that it was averred that a particular export division of the transferor company is sought to be transferred to the transferee company for better management but no facts have been given as to what that particular export unit of the transferor company comprised of, whether the Immovable assets sought to be transferred were being used for the said export unit of the transferor company and how many workers were functioning in the so-called export unit of the transferor company, If we go through the scheme of Schedule I the real purpose and the intent of the scheme is to only transfer the valuable Immovable properties of the transferor company to the transferee company. Such a scheme, in my view; is not in public interest.

(22) Upholding the objection of the Central Government, I decline to sanction the scheme and dismiss this petition leaving the parties to bear their own costs.