

(2003) 08 AP CK 0113
In the Andhra Pradesh High Court
Case No : CP No. 78 of 2003

In Re: Moschip Semiconductor Technology Limited

Date of Decision : 13-08-2003

Acts Referred:

Companies Act, 1956 — Section 2(7), 391(2), 394, 394(4)

Citation : (2003) 5 ALD 827 : (2004) 120 CompCas 108 : (2004) 50 SCL 405

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : C. Kodanda Ram, for the Appellant;

Judgement

T. Ch. Surya Rao, J.—The petitioner seeks sanction of the scheme of arrangement for amalgamation u/s 394 read with 391(2) of the Companies Act ("the Act" for brevity)

2. The petitioner is the transferee company. It was incorporated on 27.7.1999 as NetMos Technology India Private Limited and its name was changed to Moschip Semiconductor Technology Private Limited on 1.6.2000. Subsequently on 24.7.2000 the petitioner company was converted into a public limited company. Its registered office is situate at 8-2-685/1/1, Road No. 12, Banjara Hills, Hyderabad. The authorised capital of the company was Rs. 26 crores divided into 2.6 crores of equity shares of Rs. 10/- each. The issued, subscribed and paid up capital of the company is Rs. 23,22,17,700/- comprising of 2,32,21,770 fully paid up equity shares of Rs. 10/- each. Subsequently, by a resolution dated 28.4.2003 the authorised capital of the company was increased by Rs. 9 crores thereby raising up the capital to Rs. 35 crores. The company was incorporated with the main objects, to carry on the business in the area of information technology and software and to render consultancy training; to undertake turnkey software projects and operation research; to offer complete hardware and software solutions and technical services; to carry out researches, investigations and experimental work of every description in relation to the electrical, electronic and telecommunication industry; to undertake designing, development and programming of systems and application software either for its

own use or for sale in India or abroad; to carry on the business of internet and e-commerce and to offer web based solutions; to set up and run electronic data processing centers and to carry on the business of data processing, word processing, software development, programming consultancy, etc.; and to carry on the business of manufacturers, developers, buyers, sellers, importers, exporters, agents, job workers, assemblers and dealers of Metal Oxide semiconductor chips, chips of integrated circuit nature and all types of computer and communication systems. The petitioner after commencement of its business established its design centers at Road No. 12, Banjara Hills, Hyderabad; and Noida Special Economic Zone (NSEZ), U.P., India. The balance sheet as on 31.12.2002 of the petitioner company has been annexed to the petition.

3. The transferor company is the Veracity Technologies Inc, incorporated with its Principal Executive Office at 3335 Kifer Road, Santa Clara, CA 95051, USA. The company was incorporated with the object of providing silicon, software, and support for last-mile internet-connected security solutions and has been engaged in the said business. The authorised capital of the transferor company is 10,000,000 (ten millions) shares of common stock. The issued, subscribed and paid up capital is 6,177,778 (six millions one hundred seventy seven thousand and seven hundred seventy eight) shares of common stock. The balance sheet of the transferor company as on 31.12.2002 has been annexed to the petition.

4. The Board of Directors of the petitioner company in the meeting held on 20.3.2003 unanimously approved the scheme of arrangement for amalgamation of transferor company with the petitioner-transferee company.

5. The scheme of arrangement for amalgamation inter alia envisages the transfer of the assets of, all assets, investments, rights, titles and interests with effect from the appointed date; all debts, outstandings and receivables without any notice or other intimation to the debtors; all debts, liabilities, duties and obligations of every kind nature and description of the transferor company to the transferee company without any further act or deed and they stand transferred to and vested in the transferee company. After receipt of the sanction and approval of the scheme, the transferee company shall without any further act or deed issue and allot within 30 days from the effective date an aggregate of 6,177,778 equity shares of the face value at a premium of Rs. 21/- per share to the transferee company credited at as fully paid up and each such share being exchanged for every one share of common stock held by the members of the transferor company. All the staff, workmen and other employees in the service of the transferor company shall become the staff, workmen and employees of the transferee company with continuous service without any interruption and the transferee company shall stand substituted for the transferor company. The scheme is subject to the approval of the appropriate authorities.

6. The transferee company filed C.A. No. 304/2003 on 28.3.2003 u/s 391 of the Act. Notices have been directed to be issued to all the shareholders of the company and publication in the newspaper, namely, "Business Line" has been

ordered. The meeting of the shareholders was held on 28.4.2003. Out of total 93 shareholders that attended both in person and through proxies, 91 voted unanimously in favour of the scheme and two votes became invalid. The shareholders of the transferor company have given a written consent.

7. The transferee company has only trade creditors. The transferor company has no creditors at all. The scheme does not involve any compromise or composition with the creditors of the petitioner-transferee company or transferor company. The assets of the transferee company are sufficient enough to meet all the liabilities present and future.

8. After the admission of the petition, publication was ordered besides notices to the Central Government. Publication was duly effected in the newspapers "Business Line" and "Andhra Bhoomi". The Registrar of Company pursuant to the notice issued filed his report. Inter alia in his report, he mentioned that as per Section 1108(d) of Chapter 11 of California Corporations Code if the surviving corporation is a foreign corporation, the merger shall be effective as to any domestic disappearing corporation in the foreign jurisdiction upon filing in the state of California certain documents as prescribed therein. As per the said provision, the transferee company has to file the order of this Court duly certified by the Registrar of Companies in the capacity of Public Officer having official custody of the original. Upon filing of the said certified document, the transferor company gets dissolved and there is no need to order separately for dissolution of the transferor company and, therefore, the Registrar requested to pass appropriate orders. No objections whatsoever have been received from any comer pursuant to the general notice and the publication in English and vernacular languages, as aforesaid.

9. It is obvious from the report filed by the Registrar of Companies that the Central Government has no objection to the scheme. There is no need to dissolve the transferor company by means of any specific order inasmuch as filing of the certified copy of the order of this Court with the authorities of State of California has the effect of the transferor company getting dissolved automatically. The transferor company and the transferee company are in the same semiconductor business and will be using the same ASIC Service provider and will be using the common sales and distribution channels for selling their products. By amalgamation the transferee company is expected to become stronger in terms of technology and will be able to project a stronger brand and wider product offering to its potential customer base globally. Such amalgamation would ensure optimum utilization of financial and human resources. Sharing of overhead, common sourcing of production and higher sales volumes through common sales and distribution channels will lead to reduction of costs on one hand and higher sales volumes on the other hand. The arrangement will be conducive to better control of operation from India, which will automatically lead to better synergy.

10. Having regard to the above reasons set forth in the petition and having regard to the fact there have been no objections whatsoever from any comer

including the Central Government, it becomes necessary to accord the necessary sanction. But, then one glaring aspect need be noticed. The transferee company has been incorporated within the territorial limits of this Court. However, the transferor company is situate in a foreign country. The transferor company has not joined the transferee company in this petition seeking the necessary sanction from this Court. It is appropriate, therefore, here to consider Section 394 of the Act, the provision germane in the context. The said Section provides for sanctioning of the scheme when such a scheme has been proposed for the reconstruction of the company or companies or amalgamation of any two or more companies. The company Court while sanctioning the scheme may make necessary provisions as enjoined under Clauses (1) to (6) of Sub-section (1) thereof. Sub-section (4) thereof is the important provision. It reads as under:

"(4) In this section-

(a) "property" includes property, rights and powers of every description and "liabilities" includes duties of every description; and

(b) "transferee company" does not include any company other than a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act or not."

11. From a bare perusal of the said provision, it is obvious that the transferee company shall invariably be a company within the meaning of the Act. However, the transferor company includes any body corporate - whether such body corporate is a company within the meaning of the Act or not. The expression "body corporate" has been defined u/s 2(7) of the Act and it reads as under:

"2(7) "body corporate" or "corporation" includes a company incorporated outside India but does not include-

(a) a corporation sole;

(b) a co-operative society registered under any law relating to cooperative societies; and

(c) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf;"

12. Therefore, a body corporate includes a foreign company also. A combined reading of Sections 394(4) and 2(7) of the Act shows that the transferor company can be a foreign company but the transferee company shall invariably be a company within the meaning of the Act. Having regard to this clear legal position, there can be no legal bar for entering into a scheme in between an Indian company and a foreign company. But such a scheme shall be subject to the laws of both the countries. Equally, there is no legal bar for sanction of the said scheme by this Court when the transferee company is an Indian company and the transferor company is either an Indian company or a body corporate

including a foreign company.

13. As can be seen from the report of the Registrar of Companies, the laws prevailing at the place where the transferor company is situate provide for the amalgamation of the said company with any foreign company and once the certified copy of the order of the Court sanctioning the scheme of amalgamation at the place where the transferee company is situate, is filed that automatically dissolves the transferor company.

14. Sri C. Kodanda Ram, learned Counsel appearing for the petitioner-transferee company, seeks to place reliance upon Section 1108 of the California Corporations Code. Clauses (a), (b) and (d) thereof read as under:

"1108.(a) The merger of any number of domestic corporations with any number of foreign corporations may be effected if the foreign corporations are authorised by the laws under which they are formed to effect the merger. The surviving corporation may be any one of the constituent corporations and shall continue to exist under the laws of the state or place of its incorporation.

(b) If the surviving corporation is a domestic corporation, the merger proceedings with respect to that corporation and any domestic disappearing corporation shall conform to the provisions of this chapter governing the merger of domestic corporations, but if the surviving corporation is a foreign corporation, then, subject to the requirements of subdivision (d) and of Section 407 and Chapters 12 (commencing with Section 1200) and 13 (commencing with Section 1300)(with respect to any domestic constituent corporations), the merger proceedings may be in accordance with the laws of the state or place of incorporation of the surviving corporation.

(c).....

(d) If the surviving corporation is a foreign corporation, the merger shall become effective in accordance with the law of the jurisdiction in which it is organized, but, except as provided in subdivision (e), the merger shall be effective as to any domestic disappearing corporation as of the time of effectiveness in the foreign jurisdiction upon the filing in this state as required by this subdivision...

15. A perusal of the above provision, particularly Clause (d), shows that the laws prevailing at the place at which the transferor company is situate provides for the merger of the domestic corporation with any foreign corporation and the disappearance of the domestic corporation in the surviving corporation even if it is a foreign corporation and the merger becomes effective the moment certified copy of the order passed by the Court having territorial jurisdiction over the foreign corporation is filed within six months from the effective date.

16. It is further obvious that a surviving company may be a domestic company or a foreign company unlike in the case of Indian laws. Sub-section (4) of Section 394 of the company specifically says that the transferee company shall be a company as defined under the Act and the transferor company can be a

body corporate, which includes a foreign company. In these days of globalization, a liberal view is expected to be taken enabling such scheme of arrangement for amalgamation between a domestic company and a foreign company and there is every need, in my considered view, for suitable modification of the law in that direction.

17. Turning to the instant case, inasmuch as the transferee company is a company incorporated in accordance with the provisions of the Act with its registered office within the territorial jurisdiction of this Court and the transferor company, on the other hand, is a foreign company which comes within the definition of "body corporate" as can be seen from Section 2(7) of the Act and under Sub-section (4) of Section 394 of the Act the transferor company can be a body corporate, there can be a valid scheme of arrangement for amalgamation in between them. Therefore, there is no legal bar for according the necessary sanction.

18. For the, foregoing reasons, the petition is ordered. This order shall be drafted in Form No. 42 with such modifications as are required according to the facts of this case. A certified copy of this order shall be filed with the Registrar of Companies within thirty days from the date of receipt of the same.