(2009) 04 GUJ CK 0023

In the Gujarat High Court

Case No : Company Petition No. 181 of 2008 in Company Application No. 343 of 2008 to Company Petition No. 186 of 2008 in Company Application No. 348 of 2008

In Re: Nirmay Properties P. Ltd.

Date of Decision : 27-04-2009

Acts Referred:
Companies Act, 1956 — Section 212, 3(1), 391, 394, 40
Income Tax Act, 1961 — Section 47

Citation : (2009) 150 CompCas 538 : (2010) 97 SCL 207

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Iqbal A. Shaikh, J.S. Yadav, S.N. Soparkar and Swati Soparkar, for the Appellant;

Judgement

K.A. Puj, J.—These are the petitions filed by the petitioner-companies for sanction of a scheme of arrangement in the nature of amalgamation of five transferor companies, viz., Nirmay Properties P. Ltd., Shreya Realities P. Ltd., Pulkit Developers P. Ltd., Ankita Builders P. Ltd., and Rishabh Infrastructure P. Ltd., with Sterling Addlife India Ltd., the transferee company u/s 391 read with Section 394 of the Companies Act, 1956. All the petitioner-companies belong to the same group of management and all the transferor companies are wholly owned subsidiaries of the transferee company.

2. It has been submitted that vide orders dated May 15, 2008, passed in Company Applications Nos. 343, 344, 345, 346 and 347 of 2008, meetings of the equity shareholders and unsecured creditors of the transferor companies were dispensed with in view of the written consent letters placed on record. There were no secured creditors of these companies. Whereas vide order passed on May 15, 2008, in Company Application No. 348 of 2008, meeting of the equity shareholders was directed to be convened. The scheme was unanimously approved by all the equity shareholders present and voting at the said meeting duly convened on June 19, 2008.

3. The petitions were admitted vide order dated July 4, 2008. The public notices for the same were duly advertised in the newspapers The Times of India (English daily) and Sandesh (Gujarati daily), both Ahmedabad edition, dated July 22, 2008 and the publication in the Government Gazette was dispensed with. The affidavits dated July 23, 2008, confirm the same. No one has come forward with any objections to the said petitions even after the publication. The same has been further confirmed by the additional affidavit dated April 22, 2009, annexed to the petition for the transferee company.

4. Notice of the petition of the transferor companies were served upon the official liquidator attached to this Court. Vide separate reports dated January 22, 2009, filed by the official liquidator for all the transferor companies, some observations are made by the chartered accountant appointed by the official liquidator. The same have been dealt with vide additional affidavits dated March 9, 2009, filed by the director and authorised signatory of the petitioner transferor companies.

5. The official liquidator in his report has stated that the auditors appointed for the purpose of scrutiny and investigation of the books of account and affairs of the company have submitted their report. The report of the auditors is a qualified report. They have concluded in their report that the affairs of the company have not been conducted in a manner prejudicial to the interest of the members or public interest subject to their observations contained in paragraphs 5, 8 and 16 of their report. It is further observed from paragraphs 5, 8 and 16 of the report of the chartered accountants that they have pointed out violation of the provisions of Section 3(1)(iii)(d), Sections 40 and 212 of the Companies Act, 1956, and Accounting Standards AS-4 and AS-18 and evasion of stamp duty and Income Tax apart from shortfall of cash of Rs. 57,125 and functioning of the company between the periods from May 12, 2007 to June 6, 2007, without a valid board of directors of the company. Therefore, the company was requested by the official liquidator vide letter dated November 27, 2008 to furnish his explanation and clarifications in respect of adverse observations of the chartered accountants. The company has replied vide letter dated December 4, 2008. The reply to each of the observations of the chartered accountant is as under:

1. Note to paragraph 5 on shareholding pattern:

The transferor companies had become subsidiary of the transferee company on May 10, 2007, i.e., after the balance-sheet date of March 31, 2007 and, therefore, the auditors of the company have not stated the shares held by the holding company, since as on the balance-sheet date there was no holding subsidiary relationship. The annual return was filed based on the annual general meeting date, on which the transferor companies had become subsidiary of the transferee company and therefore the correct shareholding pattern was incorporated in the annual return.

2. Paragraph 8 on books of account:

The management of the transferor companies was taken over by the present board during the financial year 2006-07. On taking over of the management, there was a cash shortfall of Rs. 57,125 and, therefore, the management decided to write it off the short fall in cash by passing the board resolution. Accordingly, such shortfall in cash was written off to profit and loss a/c., after obtaining the approval in the board meeting. Further, the auditor of the company have not qualified the report or the Registrar of Companies, Gujarat, has not taken any objection on filing of accounts.

3. Paragraph 16 on general remarks:

(a) Self explanatory.

(b) Self explanatory.

(c) The transferor companies had become a wholly owned subsidiary company of the transferee company on May 10, 2007, i.e., after the balance-sheet date. Since the accounts were finalised based on the balance-sheet date as on March 31, 2007, there was no need for any disclosure of holding subsidiary relationship in the audited accounts. Further, AS-4 requires to make a disclosure in respect of event which existed on the balance-sheet date and there is some material event taking place after the date of balance-sheet. There was no event which existed on the balance-sheet date as regards holding subsidiary relationship and therefore, there was no need to make any disclosure in accordance with AS-4. Further, the auditors of the company have not qualified on the issue or the Registrar of Companies, Gujarat, has not taken any objection on such issue.

(d) Section 212 of the Companies Act, 1956, requires to make disclosure in respect of the subsidiary companies as on the balance-sheet of the holding company. Since the transferor companies had become subsidiary companies after the balance-sheet date of the holding company, there was no requirement to make any disclosure in respect of subsidiary companies as per Section 212 of the Companies Act, 1956.

(e) No explanation is required, since it is a commercial transaction based on the management prudence.

(f) The purpose of the amalgamation is neither to avoid stamp duty or to avoid capital gain tax. The transferor companies were incorporated before number of years and that they were not incorporated only for amalgamation purpose. The transferee company will be required to pay stamp duty as per the Bombay Stamp Act on amalgamation. Therefore, the judgment relied upon by the chartered accountant is misplaced.

(g) The details of appointment and resignation of the directors during the year 2007-08 are as under:

--- Sr. Name of director Date of appointment Date of resignation --- 1. Mr. V.

Mohankrishnan 10-05-2007 15-02-2008
--- 2. Mr. S.K. Shah 10-05-2007
--- 3. Dr. Bharat Gadhavi 10-05-2007 15-02-2008
--- 4. Mr. G.G. Choudhary 15-02-2008

(h) The transferee company is not a listed Indian company. Further, as on the balance-sheet date there was no holding subsidiary relationship and therefore there was no requirement to make any disclosure as per AS-18. The necessary disclosure of the transaction was made in the audited accounts of the transferee company at Note No. 2. Regarding disclosure as per AS-4, please refer our reply at paragraph (c) above.

6. On the basis of the explanation furnished by the company, the official liquidator has observed that violation of provisions of the Companies Act and Accounting Standards and the adverse observations of the chartered accountant are not satisfactorily clarified/explained by the company, more particularly, the evasion of stamp duty in the context of judgment of this Court in the case of Wood Polymer Ltd. In re [1977] 47 Comp Cas 597, and the evasion of Income Tax of Rs. 2,23,84,000 causing substantial loss to the exchequer. The official liquidator has, therefore, stated that subject to the report of the chartered accountant, the affairs of the transferor companies have not been conducted in a manner prejudicial to the interest of its members or public interest.

7. Over and above the reply furnished by the company to the report of the official liquidator, an affidavit-in-reply is also filed before this Court to the report of the official liquidator wherein it is stated that the chartered accountant''s report is without any basis and the objections taken in the said report have already been dealt with by the transferor companies in their reply. It is further stated that the report of the chartered accountants appointed by the official liquidator is not within the scope and is without jurisdiction and, therefore, the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or public interest. It is further submitted that the said objections raised by the chartered accountants have already been dealt with and since all the requisite compliances are made by the transferor companies relevant to the scheme of amalgamation, the court should sanction the said scheme.

8. Mr. S.N. Soparkar, learned senior counsel appearing for the petitioner-companies in support of his submissions, while dealing with the objections raised by the official liquidator as well as the chartered accountant, has submitted that these issues have been raised earlier also in number of such petitions and the court has time and again considered these aspects of the matter. He relied on the decision of this Court in the case of Ratnamani Engineering Ltd. In re [2002] 4

Comp LJ 257, wherein after considering the objections raised by the chartered accountant and the explanation tendered by the transferor companies, the court has observed that (page 271) ""'the court has examined those aspects only from the limited angle as to whether the petitions were such that the scheme of amalgamation of the two transferor companies with the transferee company is required to be disapproved by giving a finding that the affairs of the transferor companies have been conducted in a manner prejudicial to its members or to public interest. The court has found that the objections are not such as to warrant disapproval of the scheme of amalgamation". The court has further observed that (page 272) "upon amalgamation, the transferee company will have not only the record of the transferor companies, but also the officers and employees conversant with the facts of both the transferor companies and, therefore, if any of the statutory authorities have any doubt on any of the affairs of either or both the transferor companies, even after amalgamation, the transferee company would be in a position to attend to all the queries which may be raised or inquiry which may be initiated by any such authority. Hence, any inquiry or investigation which may be pending or initiated against any of the transferor companies will not be prejudiced by amalgamation of the transferor companies with the transferee company".

9. Mr. Soparkar further relied on the decision of this Court in the case of Gujarat Ambuja Cotspin Ltd. In re [1999] 2 Comp LJ 504 : [2001] 104 Comp Cas 397, wherein while dealing with the objections raised against the scheme, this Court has clarified that the order of sanctioning the scheme will not come in the way of the appropriate Revenue authorities in looking into the objections which have been raised by the objector and taking appropriate actions in accordance with law for which the transferee company shall always remain accountable.

10. Mr. Soparkar has further relied on the decision of this Court in the case of Arvind Mills Ltd. In re [2002] 111 Comp Cas 118, wherein while dealing with the objections raised in respect of the past transactions of the transferor company, this Court has observed that the sanction of the scheme is subject to the criminal prosecution for the alleged acts of misfeasance and/or malfeasance (past transactions) for which criminal complaint has been pending before the criminal court, and the issue of past transactions is kept open to be adjudicated in the appropriate proceedings, civil as well as criminal, by the appropriate court and the scheme deserves to be sanctioned subject to and without prejudice to the liability, if any, in the civil and criminal proceedings in respect of the past transactions.

11. Mr. Soparkar has further relied on the decision of this Court in the case of Core Health Care Ltd. In re [2007] 138 Comp Cas 204, wherein this Court has observed that the scheme can always be sanctioned subject to and without prejudice to the liability, if any, in the civil and criminal proceedings in respect of the past transactions. Mr. Soparkar has, therefore, submitted that there is no substance in any of the objections raised by the chartered accountant and it

would not affect the sanction of the scheme. He has, therefore, submitted that the scheme as prayed for by the transferor companies for their amalgamation with the transferee company should be sanctioned by the court.

12. Notice of the petitions have been served upon the Central Government and Shri Iqbal A. Shaikh, standing counsel appears for the Central Government. An affidavit dated October 17, 2008, has been filed by Mr. R. K. Dalmia, Deputy Registrar of Companies along with the letter dated October 16, 2008, whereby the only observation pertains to the latest financial reports of the petitioner-companies. The said issue is dealt with by the additional affidavit dated April 22, 2009, filed by the general manager (finance), of the transferee company, whereby the provisional balance-sheets of all the transferor companies as on February 28, 2009 and that of the transferee company as at March 31, 2009, have been placed on record.

13. Having heard Shri S. N. Soparkar, learned senior advocate appearing with Mrs. Swati Soparkar, learned advocate for the petitioner-companies and Shri Iqbal Shaikh, learned Central Government counsel and Shri J. S. Yadav, learned advocate appearing for the official liquidator and having perused the report of the chartered accountant, the report of the official liquidator as well as the affidavit of the Deputy Registrar of Companies, the court is of the view that the objections raised by the official liquidator have been properly explained by the petitioner transferor companies in their reply to the notice issued by the official liquidator as well as in the affidavit filed before this Court. The issues raised by the chartered accountant have come up before this Court earlier and they have been duly considered by the court. Despite these objections, the court has granted its sanction to the scheme subject to certain reservations. Here in the present case also, while considering the objections raised by the chartered accountant, the court is of the view that these objections would not affect the scheme and on the basis of these objections, it is not possible for this Court to come to the conclusion that the affairs of the company have been conducted in a manner prejudicial to the interest of the shareholders or to the public interest. Certain irregularities which are pointed out by the chartered accountant have been taken care of by the transferee company. There is no substance with regard to avoidance of the stamp duty nor there is any evidence in the objection that the whole scheme was proposed by the petitioners only with a view to avoid the capital gain tax. As a matter of fact, these are the transactions between the holding and subsidiary companies and Section 47 of the Income Tax Act, 1961, specifically grants exemption to such transactions. In any view of the matter, simply because the court has granted its sanction to such scheme, it would not absolve the petitioner-companies from any liability that may arise in future on violation of any statutory provisions or the scheme would not affect the pending proceedings either before the civil or criminal courts and the liability that may be inflicted upon the petitioners or their directors, would not be affected simply by virtue of the scheme of amalgamation. In any case, this Court is of the view that the prayers made by the petitioner-companies in those petitions deserve to be

granted and hence, prayers in terms of paragraph 15 (a) of the respective petitions of the transferor companies and paragraph 20(a) in case of the transferee company are hereby granted, subject to the observations made hereinabove.

14. The petitions are disposed of accordingly. So far as the costs to be paid to the Central Government standing counsel is concerned, the same are quantified at Rs. 3,500 per petition. The same may be paid to the learned advocate Shri Iqbal Shaikh.