
(2011) 12 CAL CK 0067
In the Calcutta High Court
Case No : CP No. 500 of 2011

In Re : Noble Enclave and Towers Private Limited and Others

Date of Decision : 20-12-2011

Acts Referred:

Companies Act, 1956 — Section 13(1), 149(2), 149(2)A, 17, 17(6)

Citation : (2012) 108 CLA 61 : (2012) 174 CompCas 109 : (2012) 2 CompLJ 120

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : S.N. Mookerjee and Mr Debangshu Basak, for the Appellant; Saswati Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Sanjib Banerjee, J.—The nature of the objections raised by the Central Government to the sanction of the proposed scheme of amalgamation has inspired the court to revisit a matter that apparently stands concluded by virtue of a judgment of a Division Bench of this court.

2. The Central Government says that two of the clauses of the proposed scheme of amalgamation, Clauses 4.2 and 4.3 of Part III, should not be approved even if the scheme is otherwise sanctioned. The two relevant clauses provide as follows:

4.2 The resolutions, including resolutions passed u/s 293(1)(d) of the Act, if any, of the Transferor Companies, which are valid and subsisting on the Effective Date, shall, mutatis mutandis, continue to be valid and subsisting and be considered as resolutions of the Transferee Company and if any such resolutions have upper monetary or other limits being imposed under the provisions of the Act, or any other applicable provisions, then the said limits shall be added and shall constitute the aggregate of the said limits in the Transferee Company."

"4.3 With effect from the Effective Date, without following any further procedure as laid in Section 149(2A) and other applicable provisions of the Act, the Transferee Company shall be deemed to be authorised to commence such business as laid down in the Objects Clauses of the Memorandum of Association

of the Transferor Companies.

3. The petitioners suggest that since special resolutions at shareholders' meetings of all the three companies have been passed to approve the proposed scheme, there should be no impediment to either of the aforesaid clauses being retained in the scheme notwithstanding the Central Government's objection. It is necessary to dwell at some length on either clause to visualise what has happened and what the petitioner seeks to obtain. Clause 4.2 envisages the carrying over of approvals accorded by the general bodies of the shareholders of the three companies to the respective boards of directors for the effective merger of the resolutions in the post-merger entity that the transferee company is to become. In practice, there may not be much difficulty but in principle, it is a most absurd notion of merger that was bound to follow upon the court's acceptance of the merger of other things notional. A public company, or a private company which is a subsidiary of a public company, cannot undertake certain transactions through its board of directors unless such matters have the sanction of the general body of the shareholders of the concerned company. That is the mandate of the Section 293 of the Companies Act. In practice, general approvals are accorded by the shareholders (say, the limit to which the company may borrow) and the board functions within the ambit of such general approvals in respect of the matters covered thereby. These petitioners, buoyed no doubt by the recent acceptance by courts of the merger of authorised capitals of companies in course of a scheme of amalgamation, seek to carry the proposition to the dizzy heights of absurdity. The implication of the approval of Clause 4.2 would be that if the first transferor company has an outstanding resolution u/s 293(1)(d) for borrowing money, the amount approved for borrowing by its shareholders will be added to the amount approved by the shareholders of the second transferor company and both these limits would get added on to the limit sanctioned by the shareholders of the transferee company. It is inconceivable that such a clause can be accepted in principle, even though in practice it may not be of much relevance.

4. The petitioners suggest that since the shareholders of all three companies have unequivocally approved the proposed scheme, including Clause 4.2 of Part III thereof, the court should not look any further. Such argument is unacceptable. Section 293 of the Act requires the shareholders of a public company, or a private limited company if it is a subsidiary of a public company, to apply their minds to certain matters and the transactions pertaining to such matters by the boards of directors of the concerned company are subject to the sanction (generally, previous sanction) of its shareholders. It is true that the shareholders of the two transferors companies in this case will become shareholders of the transferee company on the sanction of this scheme of amalgamation. But as of date, or, more precisely, as on the dates on which the statutory meetings u/s 391 of the Act in respect of these three companies were convened and held, the shareholders of either transferor company were not shareholders of the transferee company. It is true that the shareholders of the transferee company

also unanimously accepted Clause 4.2 of Part III of the proposed scheme, whether or not they were specifically made aware of the individual limits u/s 293(1)(d) of the Act relating to the two transferor companies that have been approved by the shareholders of the two transferor companies. The expression "shareholders of the company" in Section 293(1) of the Act has to be restricted to the shareholders of the concerned company and not extended to prospective shareholders thereof. There is also a matter of the share exchange ratio which may not be of any relevance in the present context but is of some significance in appreciating the logic. The approval of Clause 4.2 would amount to prospective shareholders of the transferee company being permitted to approve a matter pertaining to the transferee company prior to the shareholders of the transferor companies becoming shareholders of the transferee company.

5. Clause 4.2 of Part III of the proposed scheme is not approved.

6. Clause 4.3 of Part III of the scheme allows the transferee company to carry on the business of either transferor company even if the relevant business is not reflected in the objects clause of the memorandum of association of the transferee company. In effect, the transferee company seeks to amend the objects clause of its memorandum of association and take advantage of the single-window clearance that is available at the time of obtaining sanction of a scheme under Chapter V of Part VI of the Companies Act. The Central Government's objection is that the provisions of Section 17 and 18 of the Act need to be complied with in course of the memorandum of association of a company being amended and the provisions require other formalities to be adhered to that may not have been done by the transferee company in course of the present proceedings. The Central Government appears to have missed the wood for the trees in carrying the objection and restricting it to only Section 17 and 18 of the Act.

7. Clause 4.3 of Part III of the scheme dispenses with the requirements of, inter alia, Section 149(2)(a) of the Act. Such aspect of the matter appears to have been lost on the Central Government. In the usual course, a company formed after 1965 cannot commence any business relating to matters covered by Section 13(1)(d)(ii) of the Act without the concerned company having passed a special resolution approving the commencement of such business and the company filing a declaration through a director or its secretary with the Registrar of Companies. It is a mandatory provision since the contravention thereof visits every person responsible for the breach with a fine of Rs.5000/- per day, in addition to any other liability that may be consequential there to.

8. Section 17 of the Act requires an application to be made to the Company Law Board for the alteration of the memorandum of association of any company. It is not to suggest that since an application for alternation of memorandum has to be carried to the Company Law Board, the court while approving a scheme under Chapter V of Part VI of the Act will not have the authority to allow the same. However, the court has to be mindful of the interests of all persons connected

and required to be protected by the statute. Section 17(6) of the Act requires the rights and interests of members of the company, of classes of members of the company and of the creditors of the company to be kept in mind in exercising the authority to permit the alteration of the memorandum of association of a company. In the present case, no meeting of the creditors of the transferee company was sought to be convened for the purpose of approving the scheme. It is accepted in this court that where a scheme of amalgamation does not involve creditors' rights being expressly jeopardized, the approval of the creditors of the concerned companies need not be obtained; the requisite approval of the shareholders of the concerned companies would suffice. The petitioners here have not indicated the nature of the creditors of the transferee company or the extent of the transferee company's indebtedness for the court to make any meaningful assessment as to whether the creditors' views ought to have been obtained before allowing the transferee company to undertake other business ventures.

9. Section 189 of the Act makes a distinction between an ordinary resolution and a special resolution. A resolution proposed to be moved at a general meeting of a company is regarded as a special resolution when the three conditions specified in Section 189(2) of the Act are complied with: the intention to propose the resolution as special resolution is specified in the notice calling the meeting; due notice in accordance with the provisions of the Act is given of such general meeting; and, the votes cast in favour of the resolution are not less than three times the number of votes cast against by members voting in person or by proxy. Both Section 17 of the Act and Section 149(2A) of the Act require special resolutions being passed. One of the mandates of Section 189 is that specific notice for the relevant purpose has to be indicated in the notice for the general meeting where the special resolution is proposed to be passed. It is possible that in course of the statutory meeting relating to a scheme, the approval whereof requires the approval of a majority in number representing three-fourths of the value of the votes of the concerned persons, other special resolutions may also be passed. But if the specific attention of the shareholders is not drawn to a relevant matter that requires approval by way of a special resolution, that such matter has been incidentally approved by the shareholders in course of accepting the proposed scheme, may not meet the requirement of the statute.

10. Again, it is on a matter of principle that Clause 4.3 of Part III of this scheme cannot be accepted, even though in the present case the consideration may not be relevant. Section 189 of the Act mandates that the attention of the noticee is specifically drawn to a matter that requires to be approved by a special resolution. Now, it is not necessary that every noticee attends every meeting that he is entitled to and for which he receives notice. This is particularly true of listed companies with scattered shareholding where a small shareholder may choose not to attend the meeting upon being satisfied that he would not be prejudiced thereby. The transferee company in the present case is also listed company but it appears to be one of the more closely-held listed companies that

are associated, for some obscure reason, with a telephone directory.

11. The command of Section 189 is that not only must the requisite number of shareholders approve a matter for it to be regarded as a special resolution, the attention of the shareholders must also have been specifically invited to the matter. Section 189(2) of the Act contains three conditions and none of them can ordinarily be dispensed with. It is also not unknown in this country for those in management of the company taking a blanket approval from the shareholders in respect of matters that the shareholders may not be aware of as being included in their approval. That is not to suggest that the shareholders of the transferee company in this case were kept in the dark in respect of the matter pertaining to the alteration of the objects clause of the transferee company and the commencement of the business covered by Section 13(1)(d)(ii) of the Act. But again, there is nothing to demonstrate either that the shareholders present and voting at the transferee company's statutory meeting were specifically made aware of such matter, other than by the incorporation of the clause in the proposed scheme.

12. For long, matters pertaining to schemes under Chapter V of Part VI of the Act have gone almost by default in this court. Tenancies stood transferred pursuant to sanctions of schemes till the Supreme Court dictum on the point stopped such illegal transactions. Till a few years ago schemes were contrived and sanction of this court obtained merely to deprive the state of the stamp duty payable as in case of a conveyance. Again, a Supreme Court decision has now put paid to such enterprise. Far too often the question that has been asked in this court in proceedings for sanctioning schemes under Chapter V of Part VI of the Act has been the inappropriate "why not?" and not the more reasonable "why?"

13. The judgments in *General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs.*, and *Hindustan Lever and Another Vs. State of Maharashtra and Another*, instruct, in principle, that a third party cannot be affected by the private arrangement of two or more companies or its shareholders involved in a scheme. If the state as the recipient of stamp-duty in case of a conveyance, is not to be robbed of the revenue merely because the transfer of an immovable property is pursuant to a scheme sanctioned by court, it should follow from the principle enunciated by the Supreme Court that a private arrangement between two or more companies and their shareholders cannot entitle the transferee company to a waiver of the fees payable under Schedule X to the Companies Act. The court has no express authority under the statute to waive any fee payable under Schedule X to the Act. Nothing in Chapter V of Part VI of the Act empowers a court to deprive the state of its rightful due, whether or not the fee is regulatory or compensatory or otherwise.

14. It is in such context that the third objection to the sanction of this scheme arises, not by reason of the point being made by the Central Government but upon it occurring to court. It must be said at the outset that it is not open to the company judge of this court to question such matter in view of the Division

Bench judgment reported at 144 Comp Cas 311 (Areva T and D India Ltd v. Union of India) which expressly overruled the view of the company judge in the judgment reported at 138 Comp Cas 834 (Areva T and D India Ltd). But, with all humility and utmost respect, a doubt still lingers, probably fuelled and inspired by the larger principle in the Supreme Court dictum that in case of the transfer of an immovable property pursuant to a scheme sanctioned by a court the stamp duty for the transfer would still be payable. Nothing much need be made of the principle recognised in the Single Bench judgment of Areva T and D India Ltd that the authorised capitals of companies which are notional in nature cannot be merged upon the sanction of a scheme of amalgamation. In fact, the Single Bench judgment conceded such point in recognising that instead of seeing the merger of authorised capitals as the merger two notional things it may also be regarded as the shareholders of the transferee company agreeing to increase the authorised capital of the transferee company such that the approved authorised capital of the transferee company would be the sum of the authorised capitals of the companies involved in the scheme of amalgamation. To such extent and subject to Section 189(2) of the Act, it can be accepted; based on the principle of a single-window clearance involved in a scheme. But again, with respect, it does not follow that just because a scheme of amalgamation has received the imprimatur of court, the transferee company is absolved of its obligation to pay due fees for the increase in its authorised capital upon the sanction becoming effective. If the transfer of an immovable property pursuant to a sanctioned scheme cannot entitle the transferee to a waiver of the stamp duty therefore, the increase in the authorised capital of a transferee company following the sanction of a scheme of amalgamation should also not result in the waiver the additional fees under Schedule X to the Act by virtue of the order of sanction. It is true that the transferor companies involved in schemes of amalgamation would have paid the fees based on their authorised capitals. But that would have been specifically for the transferor companies, just as the registration fees paid by them at the time of their incorporation. If the registration fee deposited by a company at the time of its incorporation is lost to it upon it being merged with another, there is no scope for treating the fees paid for its notional capital on a separate footing. The fees in either case would be specific and personal to the company itself.

15. The petitioners here have referred to judgments rendered on the point subsequent to Areva T and D India Ltd reported at 141 Comp Cas 475 (Regional Director v. Cavin Plastics and Chemicals P. Ltd) and 153 Comp Cas 45 (Regional Director v. Mphasis Ltd.) where the merger of authorised capitals and the waiver of the fees therefore have been accepted. But in neither judgment the rationale for the waiver of the requisite fee on the increased authorised share capitals is evident.

16. In view of the binding effect of the Division Bench judgment in Areva T and D India Ltd the company Judge of this court is bound to accept that both the merger of authorised capitals of the companies concerned in a scheme of amalgamation and the waiver of the consequential fees under Schedule X to the

Act are permissible. Accordingly, the clause or clauses pertaining to the merger of authorised capitals in the scheme that is the subject-matter of the present proceedings cannot be touched. However, Clauses 4.2 and 4.3 of the proposed scheme cannot be approved and are required to be deleted. Subject to the above there will be an order in terms of prayers (a) to (j) of the petition.

17. In the event the petitioners supply legible computerised printouts in appropriate form of the scheme and the schedule of assets, the department will, upon due verification, append such computerised printouts to the certified copy of this order without insisting on hand-written copies thereof.

18. CP No. 500 of 2011 is allowed as above. The petitioners will pay assessed that 1500 GM to the Central Government.

19. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.