

(2014) 09 GUJ CK 0157

In the Gujarat High Court

Case No : C.P. No. 157 of 2014 in C.A. No. 83 of 2014, C.P. No. 158 of 2014 in C.A. No. 84 of 2014 and C.P. No. 159 of 2014 in C.A. No. 85 of 2014

In Re: Omkar Textile Mills P. Ltd.

Date of Decision : 25-09-2014

Acts Referred:

Companies Act, 1956 — Section 100, 101, 102, 103, 103

Citation : (2015) 126 CLA 280 : (2015) 189 CompCas 667

Hon'ble Judges : N.V. Anjaria, J.

Bench : Single Bench

Advocate : Tushar P. Hemani and Vaibhavi K. Parikh, for the Appellant; Devang Vyas, for the Respondent

Judgement

N.V. Anjaria, J.—The captioned are the petitions filed by three companies named M/s. Omkar Textile Mills P. Ltd., Aarnav Industries P. Ltd., and Raghav Creations P. Ltd., respectively for obtaining a sanction of this court to a scheme of arrangement in the nature of demerger and transfer of the demerged undertakings being Narol and Naroda Units of M/s. Omkar Textile Mills P. Ltd.—the demerged company, to Aarnav Industries P. Ltd., and Raghav Creations P. Ltd., respectively being the two respective resulting companies, and restructuring of capital of these companies, proposed under sections 391 and 394 read with sections 100 to 103 of the Companies Act, 1956. All the three petitions being necessarily interconnected, they were heard 2 together and are considered simultaneously by this common order.

2. M/s. Omkar Textile Mills P. Ltd., the petitioner in Company Petition No. 157 of 2014 and demerged company was incorporated on October 4, 1973, thereafter its name came to be changed to M/s. Omkar Textile Mills P. Ltd., and thereafter, converted into private limited company and the name M/s. Omkar Textile P. Ltd., is the current name under which its stands incorporated. The petitioner of Company Petition No. 158 of 2014, Aarnav Industry P. Ltd., was incorporated on November 20, 2012, in the name of Aarnav Texfab P. Ltd., subsequently as per certificate dated January 27, 2014, its name has been changed to the present one as per the certificate of incorporation. The petitioner of third petition was

incorporated on September 18, 2012.

Taking note of the objects of the petitioner-companies from their memorandum of association as annexed in the petitions, M/s. Omkar Textile has the objects of carrying business of manufacturing and processing of cloths and trading in textiles, spinning of cotton waste and for that purpose, establishing plant, etc. Aarnav Industry P. Ltd., second company has the main object of manufacturing, processing, washing, dying, bleaching, etc., cloths, fibrous substances, etc., Raghav Creations P. Ltd., the second resulting company is with the objects of carrying on in India or elsewhere the business of manufacturing, processing, dying, etc., all types of cloths, fabrics and such material. The details of the share capital of the de-merged company as well as two resulting companies are mentioned in the respective petitions. The registered offices of the companies are in the State of Gujarat at the addresses mentioned in the cause title.

3. Heard the learned advocate Ms. Vaibhavi Parikh for the petitioner-companies and the learned Assistant Solicitor General Mr. Devang Vyas who appeared for the Central Government upon notice served to the Regional Director.

4. It was pointed out from the record that by order dated March 28, 2014, passed in Company Application No. 83 of 2014, filed by M/s. Omkar Textile Mills P. Ltd. the demerged company, and being closely held private limited company, the meetings of the preferential shareholders and unsecured loan creditors were dispensed with in view of the written consent letters from all its shareholders and creditors, approving the proposed scheme, The court directed to convene separate meetings of the equity shareholders, secured creditors and unsecured trade creditors of the de-merged company. Pursuant to the directions, after the service of notices to the parties concerned as well as after giving public notice, the meetings of the equity shareholders and unsecured trade creditors were duly convened on May 8, 2014. As none of the secured creditors were present in the meeting convened on May 8, 2014, the same was adjourned to May 26, 2014. The notice for the said adjourned meeting was sent to all the secured creditors of the company through registered post acknowledgment due. Pursuant to said notice, the meeting of secured creditors was duly convened on May 26, 2014. The proposed scheme was approved unanimously at all the respective meetings of the equity shareholders, secured creditors and unsecured trade creditors, that is 100 per cent in number and 100 per cent in value by the shareholders and creditors present and voting at the respective meetings. The chairman's report for all these meetings is placed on record confirming the result of these meetings.

By order dated March 28, 2014, passed in Company Application No. 84 of 2014, filed by Aarnav Industries P. Ltd., the first resulting company, the meeting of the equity shareholders of the company was dispensed with in view of the written consent letters from all its shareholders, approving the proposed scheme.

It was further pointed out from the record that that by order dated March 28, 2014, passed in Company Application No. 85 of 2014 filed by Raghav Creations P.

Ltd., the second resulting company, the meeting of the equity shareholders of the company was dispensed with by this court in view of the written consent letters from all its shareholders, approving the proposed scheme.

5. The present substantive petitions for the sanction of the scheme came to be filed by the demerged company and the resulting companies placing the scheme for consideration and sanction of this court.

Outlining the facts and aspects of the proposed scheme of demerger, the learned advocate for the petitioner-companies submitted that M/s. Omkar Textile Mills P. Ltd., the demerged company, is a closely held private limited company, which is a pioneer processing house of the group and it was first in Ahmedabad having processing facilities up to 108 width cloth, it was further mentioned. The company is having two processing houses situated at Naroda and Narol in Ahmedabad. Aarnav Industries P. Ltd., the first resulting company and Raghav Creations P. Ltd., the second resulting company, are newly incorporated companies, with the objects of manufacturing, processing and spinning of the textiles. Since they are newly incorporated companies, by way of their merger with the Narol and Naroda Units of the demerged company respectively, having similar objects, they will be able to focus on their core business in an efficient and effective manner, submitted the learned advocate Ms. Vaibhavi Parikh.

It was further submitted that all the companies in the scheme of arrangement belong to the same group of management. It has three separate units namely New Cloth Market, Narol and Naroda. The core activity of the New Cloth Market unit is trading of textiles. The Narol and Naroda units are mainly engaged into manufacturing and processing of cloths. It was stated that in order to achieve the desired growth, the company is aggressively pursuing a policy of expansion and diversification; it has proposed the present demerger of its Narol Unit into Aarnav Industries P. Ltd., and its Naroda Unit into Raghav Creations P. Ltd. Considering the growth opportunities in manufacturing and processing divisions, the management has considered it to be fit and timely to demerge their activities into separate entities, each of which can focus on these core business and strengthen respective competencies. The New Cloth Market Unit will be retained with the demerged company. It was next submitted that the demerger would facilitate adequate liquidity which in turn would help in repayment of its liabilities and provide additional working capital.

Different strategies are required to achieve such growth for all the three businesses due to differing cash flow and investment profiles together with the nature of risk and competition inherent in the different parts of the industry, explained the learned advocate for the petitioner-companies. According to the petitioners, the demerger would facilitate more transparent benchmarking of the companies with their peers in their respective industries; the demerger is a commercial requirement and would result in simplification of group structure and cost efficiency. Thus, it is perceived that the proposed demerger would work advantageous and beneficial in more than one way to the demerged company,

both the resulting companies as well as their shareholders and creditors.

Further, as a consequence of the above demerger, vide clause 16 of the scheme, the demerged company proposes to reduce its equity share capital as per the provisions of sections 100 to 103 of the Companies Act, 1956. However, this being consequential in nature is proposed as an integral part of the proposed scheme of arrangement.

The above petitions came to be admitted on June 27, 2014. The notice for the hearing of the petitions were advertised in the two newspapers Indian Express English dairy and Loksatta-Jansatta Gujarati daily, both Ahmedabad editions, on July 8, 2014 and the publication in the Government Gazette was dispensed with as directed in the said orders. The requisite affidavits as regards publication of notice in the newspaper were filed. Pursuant to the said publication in the newspapers, no objections were received either by the petitioners or their advocates.

Notice of the petitions were served upon the Central Government through the Regional Director. An affidavit dated September 2, 2014, is filed by one Shri Shambhu Kumar Agrawal, the Regional Director, Ministry of Corporate Affairs, North-Western Region. The Regional Director made several observations with regard to the scheme. The same pertain to : (a) the allotment of new equity shares and consideration proposed to be paid to the demerged company and not its shareholders; (b) compliance of Accounting Standard-14 for the accounting entries; (c) the absence of details of assets and liabilities of the demerged undertakings proposed to be transferred to the resulting companies; (d) "the appointed date" as proposed under the scheme; and (e) compliance with the relevant provisions of the new Companies Act, 2013, with respect to "change of name" as provided in the scheme.

The demerged company and the second resulting company, as also the first resulting company filed additional affidavit dated September 22, 2014, through their directors.

6. Proceeding to consider the observations and comments of the Regional Director and the response to them by the petitioner-companies in their aforesaid additional affidavit dated September 22, 2014.

It is observed by the Regional Director that the scheme proposes to allot and issue new equity shares and cash consideration to the demerged company only and not to the equity shareholders of the demerged company. It was submitted that in the scheme of arrangement, in so far as the first resulting company namely Aarnav Industries P. Ltd. (AIPL) is concerned, it is to acquire Narol Unit from the demerged company?M/s. Omkar Textile Mills P. Ltd. (QTMPL) on a "slump sale" basis. Resultantly, when the first resulting company-AIPL is acquiring Narol Unit from the demerged company-OTMPL on a "slump sale" basis in a scheme of arrangement, the consideration has to flow from the said resulting company to the demerged company and not to the shareholders of the

demerged company. The intrinsic value of the shares in the hands of the shareholders of the demerged company, in either case, would remain the same. The derivation with respect to the same has been explained by the chartered accountants in the valuation report which is already produced before the Regional Director. Furthermore, the proposed scheme of arrangement has been unanimously approved by the shareholders and creditors of the demerged company. Thus, the observation made by the Regional Director on the score stand explained and clarified and taken care of. No further directions are required to be made in this regard.

The second observation of the Regional Director pertains to compliance of the Accounting Standard-14 by the resulting companies. In respect of this, it was submitted that the accounting treatment proposed in the scheme is not contradictory to the accounting principles and is permissible in law. In this regard, it was submitted that the prevalent Accounting Standards are not applicable to the scheme of demerger. Even under the Accounting Standard AS-14 applicable to the scheme of amalgamation, which reads as under:

"23. Treatment of reserves specified in a scheme of amalgamation.?The scheme of amalgamation sanctioned under the provisions of the Companies Act, 1956, or any other statute may prescribe the treatment to be given to the reserves of the transferor company after its amalgamation. Where the treatment is so prescribed, the same is followed.

In some cases, the scheme of amalgamation sanctioned under a statute may prescribe a different treatment to be given to the reserves of the transferor company after amalgamation as compared to the requirements of this statement that would have been followed had not treatment been prescribed by the scheme.

In such cases, the following disclosures are made in the first financial statements following amalgamation:

(A) A description of the accounting treatment given to the reserves and the reasons for following the treatment different from that prescribed in this Standard.

(B) Deviations in the accounting treatment given to the reserves as prescribed by the scheme of amalgamation sanctioned under the statute as compared to the requirements of this standard that would have been followed had no treatment been prescribed by the scheme.

(C) The financial effect, if any, arising due to such deviation."

From the above, it is clear that a company is entitled to prescribe under the scheme itself, a specific treatment to be given its reserves. Further, section 211(3B) of the Companies Act, 1956, also provides that if the practice adopted for such accounting entry, varies from the said Standard, necessary disclosure should be made in the financial statements. The said issue is already settled by several decisions of various High Courts, including the Gujarat High Court. The

petitioner-companies have undertaken that in case of deviation from the aforesaid Accounting Standard or practice, the resulting companies would make necessary disclosures in its first financial statement after the scheme is made effective, and also that the petitioner-companies would comply with the necessary accounting principles. Hence, the observations made by the Regional Director pertaining to Accounting Standard-14 is clarified and answered.

Regional Director's third observation is about absence of details of assets and liabilities of the demerged undertakings proposed to be transferred to the respective resulting companies. For this, it was stated by the learned advocate for the petitioner-companies that the unit wise balance-sheet as on May 31, 2013, which reflects the details of the assets and liabilities which are proposed to be transferred to the respective resulting companies are already placed on record.

It is next observed by the Regional Director that the petitioners have provided the latest audited balance-sheets as on March 31, 2013 and no justification is provided in the scheme to keep the appointed date as June 1, 2013 and not April 1, 2013. In this regard, it is rightly submitted by the learned advocate for the companies that there is no legal bar on the selection of the appointed date. It is the prerogative of the board of directors of the petitioner-companies to select the appointed date for the scheme. The same is required to be approved by the shareholders of the respective petitioner-companies. Both these requisites have been complied with, in the present proceedings.

It was further submitted that the interregnum period between April 1, 2013, and June 1, 2013, not being substantial there are no material changes in the financial position of the petitioner-companies. All these companies are private limited companies belonging to the same group of management and the shares are largely held by the same family groups. Considering the said fact, interests of any of the shareholders are not likely to be affected. It is purely an administrative exigency due to which such date is chosen by the management and approved by the shareholders. The comments and observations by the Regional Director regarding the choice of appointed date is thus not sustainable.

The fifth observation relates to compliance of the relevant provisions of the Companies Act, 2013 and rules thereto with respect to the change of name of the petitioner-companies. The petitioner-companies have undertaken to comply with the relevant provisions of the Companies Act, 2013 and rules thereto for change of name of the petitioner-companies upon scheme coming into force, it was stated by the learned advocate for the petitioners.

It was submitted on behalf of the petitioner-companies that the Regional Director in its affidavit at paragraph 2(h) no objection has been received from the Income-tax Department. The petitioner-companies have undertaken to comply with the Income-tax Act, 1961 and the Income-tax Rules, 1962. The petitioners shall abide by the undertaking.

7. The Regional Director in its affidavit has observed that as per the said report/

no complaint and/or representation has been received against the petitioner-companies including any complaint/representation in respect of the proposed scheme of arrangement.

8. Considering all the facts and circumstances and taking into account all the contentions raised in the affidavits and reply affidavits and the submissions during the course of hearing, the observations made by the Regional Director, Ministry of Corporate Affairs do not survive. The present scheme of arrangement deserves to be sanctioned and it is hereby accorded sanction.

9. The reduction of issued, subscribed and paid-up share capital of the demerged company as envisaged under clause 16 of the scheme is hereby granted. Prayers in terms of paragraph 25(a) and 25(b) as well as the minutes as under section 103 in terms of paragraph 22 of Company Petition No. 157 of 2014 for the demerged company, prayers made in paragraph 15(a) of Company Petition No. 158 of 2014, for the first resulting company and prayers made in paragraph 15(a) of Company Petition No. 159 of 2014 for the second resulting company are hereby granted.

10. So far as the cost to be paid to the learned Assistant Solicitor General of India is concerned, I quantify the same at Rs. 7,500 per petition. The same may be paid to Mr. Devang Vyas, Assistant Solicitor General of India appearing for the Central Government.

11. The petitioner-companies are further directed to lodge a copy of this Order and the scheme duly authenticated by the Registrar, High Court of Gujarat, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty, if any, on the same within 60 days from the date of the order.

12. The petitioner-companies are directed shall file a copy of this order along with a copy of the scheme with the concerned Registrar of Companies. Electronically, along with E-Ford 21 in addition to physical copy as per relevant provisions of the Act. Filing and issuance of drawn up order is hereby dispensed with. All concerned authorities to act on a copy of this order along with the scheme duly authenticated by the Registrar, High Court of Gujarat. The Registrar, High Court of Gujarat shall issue the authenticated copy of this order along with scheme.