(2007) 08 P&H CK 0183

In the Punjab And Haryana At Chandigarh

In Re: Prakash Industries Ltd.

Date of Decision : 23-08-2007

Acts Referred:
Companies Act, 1956 — Section 101, 101(2)

Citation : (2008) 87 SCL 112

Hon'ble Judges : Satish Kumar Mittal, J

Bench : Single Bench

Judgement

Satish Kumar Mittal, J.—Prakash Industries Limited has filed this petition u/s 101 of the Companies Act, 1956 (hereinafter referred to as "the Act") for confirmation of the reduction of share capital due to utilization of its securities premium account for the purpose of meeting the deferred tax liability in terms of Accounting Standard-22, issued by the Institute of Chartered Accountants of India, as resolved by the special resolution passed by the extraordinary general meeting of the company held on 15-12-2006; and further for dispensing with the procedural requirement of Section 101(2) of the Act, as the proposed reduction of share capital does not involve either diminution of any liability in respect of unpaid capital or payment to any shareholder of any paid up capital, and the petitioner-company has no creditor or any class of them entitled to object it.

Initially, the petitioner-company was registered on 31-7-1980, under the provisions of the Act, as a company limited by shares in the name of Prakash Pipes and Industries Limited in the State of Haryana. Subsequently, the name of the petitioner-company was changed to Prakash Industries Limited and a fresh certification of incorporation was issued by the Registrar of Companies. The registered office of the petitioner-company is situated at 15 km stone, Delhi Road, Hissar. The main objects of the petitioner-company are manufacture of all kind of PVC pipes, picture tubes, worsted woollen yarn, steel products like sponge iron, billets, bloom, channel, structure, generation of power through any mode and mining of coal and iron ore, etc., and other objects as set out in the memorandum of association thereof. The memorandum and articles of association of the petitioner-company has been annexed with the petition as annexure P-2. The authorised share capital of the petitioner-company is Rs. 160

crores divided into 15 crores equity shares of Rs. 10 each and 10 lakhs preference shares of Rs. 100 each, of which 98313106%quity shares of Rs. 10 each and 8,00,000 preference shares of Rs. 100 each have been fully paid up or credited as fully paid up and 10910808 equity shares of Rs. 10 each have been paid up to the extent of Rs. 2.50 per share.

2. It is stated in the petition that Article 47 of the articles of association of the company provides that the company may, from time to time, by special resolution reduce its capital in any manner permitted by law. It is further stated that Articles 123(3) of the articles of association further provides that the securities premium account and capital redemption reserve fund may, for the purpose of the articles be applied for paying up of unissued shares to be issued to the members of the company as fully paid bonus shares and for various other purposes in accordance with the provisions of law for the time being in force.

3. The board of directors of the petitioner-company in its meeting held on 11-11-2006, resolved to reduce the share capital by utilizing the securities premium account of the petitioner-company for the purpose of meeting the "deferred tax liability" in terms of Accounting Standard-22, subject to approval of its shareholders and confirmation by this court. A copy of the resolution has been annexed as annexure P-3.

4. In the extraordinary general meeting of the company held on 15-12-2006, the following special resolution was passed:

Resolved that pursuant to Section 78, read with Section 100 and other applicable provisions, if any, of the Companies Act, 1956, and Article 123(3) of the articles of association of the company and subject to the confirmation by the Punjab and Haryana High Court at Chandigarh or National Company Law Tribunal or any other authority, if required, as the case may be, the company be and is hereby authorised to utilize the credit balance in the securities premium account of the company for the purpose of meeting the ''deferred tax liability'' in terms of Accounting Standard-22 issued by the Institute of Chartered Accountants of India, Le., ''accounting for taxes on income'' and for ''deferred revenue expenses'' and for ''capital issue expenses'' of the company.

Resolved further that the purpose of giving effect to the aforesaid resolution, the board of directors of the company (including any committee of the board for this purpose) be and is hereby authorized to take all such acts, deeds, matters and things as may be considered necessary.

5. In the petition, the following reasons for reduction of the share capital of the petitioner-company have been mentioned:

Company has taken various initiatives for improving its financial performance. In accordance with the provisions of Section 78 read with Section 100 of the Companies Act, 1956, the application/utilisation of securities premium account for the purpose of meeting the ''deferred tax liability'' in terms of Accounting

Standard-22, ''accounting for taxes of income'' issued by the Institute of Chartered Accountants of India and for writing off the ''deferred revenue expenses'' and ''capital issue expenses'', if any will be in the interest of the company and by setting-off the securities premium account against above will result in improvement in future profitability and consequent increase in earnings per share and return on capital employed. This should also help the company to show its operational efficiency better in future years.

It has been further stated that reduction of capital does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, and the petitioner-company has no creditor or any class of them entitled to object. In order to show this, the latest annual report of the petitioner-company for the year 2005-06 has been annexed. It is, thus, prayed that since the proposed over reduction of capital does not affect the interest of any creditor, therefore, the procedure required u/s 101(2) of the Act be dispensed with.

6. The form of the minute proposed to be registered u/s 103(1)(fo) of the Act is as follows:

Resolved that pursuant to Section 78, read with Section 100 and other applicable provisions, if any, of the Companies Act, 1956, and Article 123(3) of the articles of association of the company and subject to the confirmation by the Punjab and Haryana High Court at Chandigarh or National Company Law Tribunal or any other authority, if required, as the case may be, the company be and is hereby authorised to utilise the credit balance in the securities premium account of the company for the purpose of meeting the ''deferred tax liability'' in terms of Accounting Standard-22 issued by the Institute of Chartered Accountants of India, i.e., ''accounting for taxes on income'' and for ''deferred revenue expenses'' and for ''capital issue expenses'' of the company.

Resolved further that for the purpose of giving effect to the aforesaid resolution, the board of directors of the company (including any committee of the board for this purpose) be and is hereby authorized to take all such acts, deeds, matters and things as may be considered necessary.

Under the order of this court, notice of this petition was published in the daily Indian Express (English) and the daily Hari Bhoomi (Hindi) dated 23-7-2007, but neither any shareholder or creditor nor any other person has appeared to oppose the prayer made by the petitioner-company.

7. Shri Atul Gandhi, advocate, was appointed as amicus curiae to assist this court.

8. I have heard learned Counsel and have perused the petition as well as other documents annexed with it.

9. Section 100 of the Act provides for reduction of share capital by passing a special resolution. Such reduction can be made after the articles of association of the company so authorise to reduce its share capital. Section 101 provides that

such proposed reduction of share capital is to be confirmed by the company court, Sub-section (2) provides that where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the company court so directs, such proposed reduction is to be approved by the creditors of the company.

10. In this petition, the petitioner-company is seeking dispensation of complying with the mandatory requirement of Section 101(2) of the Act, as the proposed reduction of share capital, i.e., utilisation of securities premium account of the company for the purpose of meeting the "deferred tax liability" in terms of Accounting Standard-22, does not involve either diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, and the petitioner-company has no creditor or any class of them entitled to object the proposed reduction of share capital.

11. Learned Counsel for the petitioner-company submitted that where the reduction of the share capital is by way of set off of accumulated losses against the share premium account, there is no diminution of liability or payment to any shareholder of any paid-up capital, the interest of the creditors is also not likely to be affected and, therefore, it is not necessary for the company to comply with the procedure prescribed u/s 101(2) of the Act. It is only when the court finds that by the reduction of capital, the company seeks to affect the interest of the creditors that the court is empowered to issue directions to the company to follow the procedure under Sub-section (2) of Section 101, but if the proposed reduction does not result in diminution of liability in respect of unpaid share capital or payment to shareholders of any paid-up share capital, the company can be permitted to dispense with the mandatory requirement as provided u/s 101(2) of the Act, by virtue of the power conferred upon the company court under Sub-section (3) of Section 101.

12. Shri Atul Gandhi, advocate, amicus curiae, submitted that the Accounting Standard-22, issued by the Institute of Chartered Accountants of India on deferred tax liability of listed companies has brought in a new concept called "deferred taxation". He submitted that under this concept, a company became liable to provide for deferred tax liability on the first day the company accounted for its income in accordance with the Accounting Standard-22, even when there was no certainty. Learned Counsel submitted that the deferred tax liability is a timing difference liability that is to be charged to the profit and loss account. Therefore, he submitted that this deferred tax liability should not be adjusted towards securities premium account.

13. After hearing learned Counsel for the petitioner-company and Shri Atul Gandhi, amicus curiae, I am of the opinion that the proposed reduction of share capital will not result in diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. Therefore, by the proposed reduction, the interests of the creditors or shareholders are not going

to be affected. Since the petitioner-company has no creditor or any class of them entitled to object and the proposed reduction of share capital (utilisation of securities premium account) is not likely to involve either diminution of any liability in respect of unpaid capital or the payment of any shareholder of any paid-up capital, the interests of the creditors of the company are also not going to be affected. Keeping in view these considerations, the petitioner-company is permitted to dispense with the requirement of Sub-section (2) of Section 101 of the Act.

14. Now the question arising for consideration is: Whether the "deferred s tax liability" can be adjusted towards the securities premium account and if it can be, then what is the procedure to reduce the share premium account?

15. Section 78(1) of the Act specifies that the provisions of the Act relating to reduction of share capital of the company shall, except as provided in that section, apply as if the securities premium account were the paid-up share capital of the company. Sub-section (2) of Section 78 of the Act provides that the securities premium account may be applied by the company for the following purposes:

(1) The paying up of fully paid bonus shares to be issued by the company to its members;

(2) The writing-off of preliminary expenses of the company;

(3) The writing-off of the expenses of, or underwriting commission paid or discount allowed on, any issue of shares or debentures of the company;

(4) The providing of a premium payable by the company on redemption of redeemable shares or redemption of debentures of the company;

(5) Purchase of its own shares or other specified securities in terms of Section 77A.

16. It is well-settled, as held by the Madras High Court in Parrys Confectionery Ltd., In re [2004] 122 Comp. Cas. 900 : 56 SCL 34 that where a company proposes to apply its securities premium account in the manner provided for in Sub-section (2), the provisions relating to reduction of capital would not be attracted and the company can do so without either being required to pass a special resolution u/s 100 or seek the confirmation of court u/s 101. Section 78(2) is, however, not exhaustive of the methods in which the securities premium account can be applied by the company. Where, however, a company proposes to apply its securities premium account in a manner other than that contemplated in Sub-section (2), then the provisions relating to reduction of share capital would have to be followed in respect of such application. Since in the instant case, the proposed reduction of share capital is not covering any of the grounds mentioned in Sub-section (2) of Section 78, therefore, the petitioner-company is required to follow the provisions relating to reduction of share capital provided under Sections 100 and 101 of the Act.

17. In this case, the articles of association authorise the petitioner-company to use/apply the fund of the securities premium account for the purpose of paying unissued shares to be issued to the members of the company as fully paid-up shares or for any other purpose in accordance with the provisions of law for the time being in force. The board of directors in its meeting held on 11-11-2006, has resolved to reduce the share capital by utilising the securities premium account of the petitioner-company for the purpose of meeting the "deferred tax liability" in terms of Accounting Standard-22, subject to approval of its shareholders and confirmation by this court. The company in its extraordinary general meeting held on 15-12-2006, passed the following special resolution:

Resolved that pursuant to Section 78, read with Section 100 and other applicable provisions, if any, of the Companies Act, 1956, and Article 123(3) of the articles of association of the company and subject to the confirmation by the Punjab and Haryana High Court at Chandigarh or National Company Law Tribunal or any other authority, if required, as the case may be, the company be and is hereby authorised to utilize the credit balance in the securities premium account of the company for the purpose of meeting the ''deferred tax liability'' in terms of Accounting Standard-22 issued by the Institute of Chartered Accountants of India, i.e., ''accounting for taxes on income'' and for ''deferred revenue expenses'' and for ''capital issue expenses'' of the company.

Resolved further that the purpose of giving effect to the aforesaid resolution, the board of directors of the company (including any Committee of the Board for this purpose) be and is hereby authorized to take all such acts, deeds, matters and things as may be considered necessary.

18. Counsel for the petitioner-company contends that many High Courts have confirmed the reduction of share capital on account of utilization of securities premium account of the company for meeting the deferred tax liability in terms of Accounting Standard-22, issued by the Institute of Chartered Accountants of India. In this regard, learned Counsel referred to the decision of the Calcutta High Court rendered in C.A. No. 95 of 2007 connected with Company Petition No. 43 of 2007, in the matter of Adhunik Metaliks Ltd. He also referred to a decision of the Delhi High Court rendered in Company Petition No. 165 of 2003, in the matter of E. Medilife, Co. Ltd., where the secured (share) premium account was permitted to be utilised for the purpose of reducing the share capital against debit balance in the unaudited (provisional) profit and loss account of the company. Learned Counsel also referred to the decision of the Andhra Pradesh High Court in Hyderabad Industries Ltd. In re (No.2) [2005] 123 Comp. Cas. 458 : [2004] 55 SCL 1 where the reduction of share capital by adjustment of the share premium against the permanent loss in value of investment made by the company in another company was confirmed.

While confirming the resolution of the company for reduction of the share capital, the company court is required to see that the proper procedure prescribed under Sections 100 and 101 of the Act has been followed and that the proposed reduction of share capital is neither causing any prejudice to the shareholders or the creditors of the company nor is against the public interest.

19. In the instant case, the articles of association authorised the company to use/apply the fund of the security premium account for the purpose of paying unissued shares to be issued to the members of the company as fully paid-up shares or for any other purpose in accordance with the provisions of law for the time being in force. The company has also passed a special resolution in accordance with the articles of association.

20. In spite of the notice published under the orders of this court, neither any shareholder nor any creditor or any person from the public has come forward to oppose the proposed reduction of share capital. Nothing has been brought to the notice of the court that the special resolution affects the interests of the shareholders or the creditors. In the petition, it has been stated that the proposed reduction of share capital will be in the interest of the company and by setting off the securities premium account against the deferred tax liability will result in improvement in future profitability and consequent increase in earnings per share and return on capital employed. This should also help the company to show its operational efficiency better in future years. It has also been stated that the proposed reduction of share capital does not result either in the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital.

21. So far as the contention of Shri Atul Gandhi, amicus curiae, is concerned, he has fairly submitted that recently the Calcutta High Court, while upholding the Accounting Standard-22, has observed that the deferred tax liability is not a notional tax liability, but a real liability. In the matter of Adhunik Metaliks Ltd. (supra), the Calcutta High Court has confirmed the reduction of share capital on account of utilisation of securities premium account of the company for meeting the deferred tax liability in terms of Accounting Standard-22, issued by the Institute of Chartered Accountants of India. The Delhi High Court in Company Petition No. 165 of 2003, in the matter of E. Medilife Co. Ltd. (supra), has also permitted to utilise the share premium account for the purpose of reduction of share capital against the unaudited profit and loss account of the company. The Andhra Pradesh High Court in Hyderabad Industries Ltd. In re (No. 2)''s case (supra) has also confirmed the reduction of share capital by adjustment of share premium account against the permanent loss in value of investment in shares of other company. Thus, I do not find any legal impediment to the proposed reduction of share capital. Hence, this petition deserves to be allowed.

22. Therefore, the reduction of share capital of the petitioner-company, as resolved in the special resolution of the extraordinary general meeting of the company held on 15-12-2006, is confirmed and the form of minute u/s 103(1)(6) of the Act as set out in para 13 of the petition is approved.

The petitioner-company shall deliver to the Registrar of Companies a certified copy of this order including minute as approved within a period of four weeks from the date of obtaining the certified copy.

23. The notice of registration of this order and of the minute as approved by the court shall be published in the daily "The Tribune "(English) and the daily "Dainik Bhaskar" (Hindi) within 2 weeks of the receipt of certified copy of registration from the Registrar of Companies.

24. The petition stands disposed of in the above terms.