

(1980) 07 CAL CK 0031

In the Calcutta High Court

Case No : Company Application No. 119 of 1979 in Company Petition No. 668 of 1979

In Re: Reliance Jute and Industries Ltd.

Date of Decision : 23-07-1980

Acts Referred:

Companies Act, 1956 — Section 372, 372(4), 391, 391(2), 394
Income Tax Act, 1961 — Section 72A
Monopolies and Restrictive Trade Practices Act, 1969 — Section 26

Citation : (1983) 53 CompCas 591

Hon'ble Judges : T.K. Basu, J

Bench : Single Bench

Advocate : S.B. Mookerjee, for the Appellant;

Final Decision : Allowed

Judgement

T.K. Basu, J.—This is an application by the Reliance Jute and Industries Ltd., u/s 391(2) read with Section 394 of the Companies Act, 1956 (hereinafter referred to as "the Act"), for the sanctioning of a scheme of amalgamation. The petitioner which is the transferee-company was incorporated on 25th October, 1960. It is a very solvent and prosperous concern according to the affidavit of Jyoti Prasad Mukherjee, which has been filed on behalf of the CLB which is opposing this application. The transferee-company has built up huge reserves and as on 31st March, 1979, its net worth is Rs. 226.61 lakhs as against a paid-up capital of Rs. 126.72 lakhs.

2. Keshari Steels and Industries Ltd., the transferor-company, was incorporated on 12th August, 1971. Its original name was Rolta Industries Private Ltd., which has been subsequently changed to the name mentioned above. It carries on business at Dewas in Madhya Pradesh. It is admittedly a wholly owned subsidiary of the transferee-company. The transferor-company is admittedly quite sick and has a large accumulated loss.

3. The reasons for the proposed scheme of amalgamation are stated in para. 13 of the petition as follows :

" (1) The transferor-company is a sick unit and is lacking in finance. The amalgamation will end the financial crisis and give stability to the transferor-company.

(2) The transferor-company is a wholly owned subsidiary of the transferee-company as mentioned above and has a common management. The proposed amalgamation will reduce and minimise the overhead expenses and lead to efficient management.

(3) Apart from the usual advantages and economics of the amalgamation, the transferee-company will be able to diversify its business activity."

4. Under the order of this court dated 10th July, 1979, directions were given for holding separate meetings of the equity and preference shareholders of the transferee-company and respective chairmen were appointed in respect of those meetings. From their reports, it appears that the scheme of amalgamation has been unanimously approved of both by the equity and the preference shareholders.

5. As I have said, the CLB through an affidavit filed by its Regional Director, Eastern Region, is opposing this application on three grounds. The first ground is that because the transferor-company is admittedly a sick unit and not financially viable its amalgamation with an admittedly solvent and prosperous company should not be allowed by this court.

6. Mr. S. B. Mookerjee, who appeared on behalf of the petitioner, had two answers to this objection of the CLB. First, he submitted that it is the policy of the Govt. of India to encourage the amalgamation of sick units with prosperous and financially viable units. He submitted that such an amalgamation has certain obvious advantages particularly with regard to the Income Tax dues of the amalgamated company. I must say, however, that apart from a statement in the affidavit-in-reply filed on behalf of the petitioner, there is no other material before me in support of this submission with regard to the government policy.

7. The second answer of Mr. Mookerjee, however, is much more substantial. Mr. Mookerjee drew my attention to the scheme of amalgamation which is annex. A to the petition and Clause 5 whereof is as follows :

" The scheme is conditional upon and subject to necessary declaration being made by the Central Government to the effect that the conditions laid down in section 72A of the Income Tax Act, 1961, are satisfied."

8. He next drew my attention to Section 72A of the I.T. Act, 1961, which provides as follows:

" 72A. Provisions relating to carry forward and set-off of accumulated loss and unabsorbed depreciation allowance in certain cases of amalgamation, --(1) Where there has been an amalgamation of a company owning an industrial undertaking or a ship with another company and the Central Government, on the

recommendation of the specified authority, is satisfied that the following conditions are fulfilled, namely :--

(a) the amalgamating company was not, immediately before such amalgamation, financially viable by reason of its liabilities, losses and other relevant factors;

(b) the amalgamation was in the public interest; and

(c) such other conditions as the Central Government may, by notification in the Official Gazette, specify, to ensure that the benefit under this section is restricted to amalgamations which would facilitate the rehabilitation" or revival of the business of the amalgamating company,

then, the Central Government may make a declaration to that effect, and, thereupon, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and the other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.

(2) Notwithstanding anything contained in Sub-section (1), the accumulated loss shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless the following conditions are fulfilled, namely :--

(i) during the previous year relevant to the assessment year for which such set off or allowance is claimed, the business of the amalgamating company is carried on by the amalgamated company without any modification or reorganisation or with such modification or reorganisation as may be approved by the Central Government to enable the amalgamated company to carry on such business more economically or more efficiently;

(ii) the amalgamated company furnishes, along with its return of income for the said assessment year, a certificate from the specified authority to the effect that adequate steps have been taken by that company for the rehabilitation or revival of the business of the amalgamating company.

Explanation.--In this section,--

(a) " accumulated loss" means so much of the loss of the amalgamating company under the head " Profits and gains of business or profession" (not being a loss sustained in a speculation business) which the amalgamating company would have been entitled to carry forward and set off under the provisions of section 72 if the amalgamation had not been effected ;

(b) " specified authority" means such authority as the Central Government may, by notification in the Official Gazette, specify for the purposes of this section ;

(c) " unabsorbed depreciation " means so much of the allowance for depreciation of the amalgamating company which remains to be allowed and which would have been allowed to the amalgamating company under the provisions of this Act if the amalgamation had not been effected."

9. According to Mr. Mookerjee the intrinsic evidence of Sub-clause (1)(a) of Section 72A clearly shows that it contemplates the amalgamation of companies which are financially not viable with other companies.

10. In my view, this contention of Mr. Mookerjee is sound and should be accepted. The provisions of Section 72A of the I.T. Act, 1961, referred to. by Mr. Mookerjee clearly contemplate the amalgamation or merger of a financially unsound company with another company. This objection of the CLB is, therefore, held to be without any foundation and is rejected.

11. The second objection of the CLB is that Section 372(4) of the Act is being contravened in the facts of the present case. This is because, according to para. 6 of the affidavit of Mukherjee, the purchase by the holding company of the shares of the transferor-company is far in excess of 10% of the subscribed capital of the transferor-company. Consequently, since the purchase is not sanctioned by a resolution of the transferee-company in a general meeting and has not been approved by the Central Govt., Section 372(4) of the Act has been violated,

12. In repelling this contention, Mr. Mookerjee drew my attention to the statements contained in para. 9 of the affidavit-in-reply of Suparshva Mull Borar affirmed on 8th July, 1980. Briefly put, the modus operandi of the acquisition of the shares of the transferor-company by the transferee-company is this. Initially, several subsidiaries of the transferee-company purchased 10% shares each of the transferor-company. Thereafter, the transferee-company purchased these shares from its subsidiaries. In the process, the transferor-company became a wholly owned subsidiary of the transferee-company. In the circumstances, according to Mr. Mookerjee, there was no contravention of Section 372(4) of the Act.

13. My attention was also drawn by Mr. Mookerjee to Section 372(14) of the Act which, in so far as is material for our purpose, provides as follows :

" (14) This section shall not apply-- ...

(d) to investment by a holding company in its subsidiary."

14. On the basis of the above provision, Mr. Mookerjee submitted that since the transferor-company is admittedly a wholly owned subsidiary of the transferee-company, Section 372 of the Act has no manner of application.

15. In my view, both the contentions of Mr. Mookerjee are sound. I hold that even assuming that Section 372 applies there has been no contravention of Sub-section (4) thereof in the facts and circumstances of the present case. I further

hold that Section 372 has no manner of application to the facts of the present case.

16. The last objection of the CLB is, as will appear from paras. 7 and 8 of the affidavit of Mookherjee, that the transferee-company is liable to registration u/s 26 of the MRTP Act, 1969. As such, in view of the provisions of Section 23 thereof the court, is precluded from sanctioning this amalgamation.

17. In reply to this contention Mr. Mookerjee drew my attention to a letter dated 22nd September, 1978, from the joint directors of the Ministry of Law, Justice and Company Affairs of the Govt. of India, addressed to the transferee-company alleging that the company is liable to apply u/s 26 of the MRTP Act and threatening with penal consequences for non-compliance with the above section; Mr. Mookerjee strongly commented on the facts that although certain replies were sent by the transferee-company to the requisition made by the aforesaid joint-directors, that fact has been completely suppressed in the affidavit of Mookerjee. He drew my attention to the correspondence annexed to the affidavit-in-reply wherefrom it appears that on 20th November, 1979, a similar letter was written by the joint directors wherein certain particulars with regard to the inter-connected undertakings were given and it was alleged that the total value of the assets of the inter-connected undertakings together with the undertaking of the transferee-company amounted to more than Rs. 20crores and as such attracted the operation of the MRTP Act. To this a reply was given by the transferee-company on 20th November, 1979, stating, inter alia, that Mr. P. K. Kanoria and his family and B. K. Kanoria and his family do not form one group. It was further stated that P. K. Kanoria and his family, who admittedly control the transferee-company together with its inter-connected companies, has total assets of only Rs. 11,60,83,000 and as such the provisions of the MRTP Act are not attracted to the transferee-company. It appears that on 17th January, 1980, a further letter was addressed by the joint directors to the transferee-company asking for certain particulars which have been duly furnished by two letters dated the 30th January, 1980, and 6th February, 1980, respectively, annexed to the affidavit-in-reply. Thereafter, there is complete silence from the end of the joint director.

18. On the basis of the above, Mr. Mookerjee submitted that quite apart from the fact that, in the facts and circumstances of this case, the transferee-company does not come within the mischief of the MRTP Act, from the conduct of the Union Govt. I should come to the conclusion that they are deemed to have been satisfied that the transferee-company does not come within the operation of the MRTP Act. He drew my pointed attention to the fact that although as early as 22nd September, 1978, the Union Govt. has threatened the transferee-company with the penal consequences of non-compliance with the provisions of Section 26 of the MRTP Act, no action of any kind whatsoever has been taken by the government against the transferee-company up till now. He further pointed out that for the last six months there is complete silence on the part of the Union Govt.

19. In my view, this contention of Mr. Mookerjee also should be accepted. Having regard to the correspondence mentioned above and in the facts of the present case, I hold that the Central Govt. must be presumed to have been satisfied that the transferee-company does not attract the operation of the MRTP Act. This objection of the CLB also fails and is rejected.

20. Before I conclude this judgment, I must say that I find it rather baffling to understand as to why the CLB should spend good taxpayer's money in opposing an application for the sanction of a scheme of amalgamation on mere frivolous grounds when both the equity and preference shareholders of the holding company have unanimously approved the scheme of amalgamation of a wholly owned subsidiary.

21. In the result, this application succeeds and is allowed. There will be an order in terms of prayer (a) of the petition sanctioning the scheme with effect from the 1st April, 1979. There will be orders in terms of prayers(b), (c), (d), (e), (f) and (g) of the petition.

22. There will be no order as to costs.

23. The stay of operation of the order is prayed for and is refused.