

(1976) 05 DEL CK 0028

In the Delhi High Court

Case No : C.P. No. 115 of 1974 with C.A. No. 378 of 1974

In Re: Sharat Hardware Industries P. Ltd.

Date of Decision : 10-05-1976

Acts Referred:

Citation : (1978) 48 CompCas 23

Hon'ble Judges : D.K. Kapur, J

Bench : Single Bench

Advocate : R.C. Beri, Adv V.V. Shastri, for the official liquidator and H.S. Bhatia, Assistant Registrar of Companies in perso, for the Appellant;

Judgement

D.K. Kapur, J.—In this petition under Sections 391 and 394 of the Companies Act, 1956, moved by the petitioner-company concerning a proposed scheme of arrangement and amalgamation between the petitioner and M/s. Choudhari Metal Industries Private Ltd., I had passed an order on 19th April, 1976, sanctioning the compromise, but making allowance for some further orders to be passed u/s 394 when information had been obtain. The matter was processed in the Registry for drawing up a formal order in Form No. 41 and the question of drawing up a formal order in Form No. 42 was deferred. The report from the Registry was that there were certain defects in the scheme as sanctioned which had passed unnoticed and, furthermore, the transfer date was mentioned as 30th April, 1974, and it had not been indicated as to when the scheme would come into operation. Furthermore, it was pointed out that the petitioner-company was merging into M/s. Choudhari Metal Industries (P.) Ltd., which had its registered office in West Bengal. The effect of the order would have been that the company's assets would go to another company which was outside the jurisdiction of this court and, Therefore, further orders may be difficult to pass. Though I do not fully agree with the Registry's view, I saw the possibility of an eventual conflict and so I directed the matter to be re-listed before the court for passing an order which would finally dispose of the petition in every respect, i.e., I wanted to pass an order which would dispose of the petition both u/s 391 and Section 394 of the Companies Act, 1956. In order to pass this composite order, I have to give some of the grounds which have already been mentioned in the

judgment dated 19th April, 1976. In spite of the repetition involved, I think this is an appropriate case in which certain observations have to be made regarding the procedure to be adopted in cases of this type.

2. When the petition was originally moved before the court, notice was issued to the Central Government and the court also directed that a meeting of the shareholders of the transferee-company should be held at Calcutta. I have referred to the order dated 4th March, 1975, and subsequent orders concerning this matter. A resolution of M/s. Choudhari Metal Industries (P.) Ltd. was passed on 27th February, 1975, and an affidavit concerning the same has been filed. It is the affidavit of Shri Chandrakant U. Kamdar dated 26th March, 1975. It is stated therein that pursuant to the orders of this court passed on 19th December, 1974, a meeting of the shareholders of M/s. Choudhari Metal Industries (P.) Ltd. was called for 27th February, 1975, to consider the proposed scheme of arrangement and amalgamation between the petitioner-company and M/s. Choudhari Metal Industries (P.) Ltd. The resolution was passed by the meeting and reads as follows :

" Resolved that the scheme of arrangement and amalgamation under sections 391 and 394 of the Companies Act, 1956, placed before this meeting be and is hereby agreed to and approved.

Resolved further that the directors of the company be and are hereby authorised to do all such acts, deeds, matters and things as may be required for carrying on the said scheme of arrangement and amalgamation into effect, and to assent to such modifications and conditions, if any, imposed by the Delhi High Court while sanctioning the said scheme of arrangement or suggested by the amalgamating companies and approved by the court. "

3. This affidavit, Therefore, shows that the proposed scheme of arrangement and amalgamation between the two companies has obtained the approval of the transferee-company by reason of the resolution just reproduced having been passed by the shareholders of the company. This fact was not noticed in the order dated 19th April, 1976, and is reproduced now in order to examine the full legal effect of the proposed scheme of reconstruction and amalgamation.

4. I had noticed in the order dated 19th April, 1976, that a question had been urged before me whether the scheme had to be sanctioned by the transferee-company, M/s. Choudhari Metal Industries (P.) Ltd., as well as by the petitioner-company. No doubt, the proposed scheme has been passed by the requisite majority of the shareholders of the petitioner-company. In fact, it has been unanimously passed. The question which was raised was whether a similar requirement is necessary qua the shareholders of M/s. Choudhari Metal Industries (P.) Ltd., i.e., the transferee-company. I had noticed a decision of the Bombay High Court, *Bank of India Ltd. v. Ahmedabad Manufacturing & Calico Printing Co. Ltd.* [1972] 42 Comp Cas 211, where this question had been analysed. It had there been noticed that in certain cases it would be necessary

for the transferee-company to get the proposed compromise or scheme sanctioned by the court before it would become binding on both companies. I also noticed that the transferor-company (the petitioner) was a wholly-owned subsidiary company of the transferee-company and, Therefore, it was not necessary for the transferee-company to approve the scheme. The reason I reached this conclusion was that Section 391 of the Act deals with two special cases : (a) when there is a compromise or arrangement between a company and its creditors or any class of them and (b) where the compromise or arrangement is between a company and its members or any class of members. Considered from the point of view of the petitioner-company there is a scheme affecting the members of the company because as a result of the scheme, the transferor-company will cease to exist and will be fully merged in the transferee-company. When the scheme comes into operation, the shareholders of the petitioner-company will cease to have any shares in the petitioner-company. Therefore, there is a compromise between the petitioner-company and its shareholders. Considered from the point of view of the transferee-company, there is no such proposal. The assets and liabilities of the petitioner-company will be appropriated under the scheme by the transferee company, the shareholding and other rights of the members of the transferee-company will be unaffected, because no new shares are being issued and there is not going to be any change in the capital structure of the transferee-company. These are facts which are ascertainable on an analysis of the scheme. Therefore, the scheme or arrangement considered from the point of view of the transferee-company is not a scheme or arrangement coming within the field of operation of Section 391 and does not seem to require the approval of creditors or a subsequent sanction by the court. Now, two other cases have been brought to my notice in which the question whether the transferee-company is also required to approve the scheme, has been considered. Those two cases are *In re Carron Tea Co. Ltd.* [1966] 2 Com LJ 278 decided by the Calcutta High Court and *In re Union Services Private Ltd.* [1973] 43 CompCas 319 decided by the Madras High Court; although both these cases are somewhat different on facts, the decision in both cases was that the scheme does require the approval of the transferee-company u/s 391 of the Act. In both cases there was some change affecting the members or creditors of the transferee-company. That position is not true in the present case. The point that requires analysis is whether, in law, the present scheme requires the approval of the transferee-company, because if it does, it would be pointless approving the scheme which could not be carried into effect qua the transferee-company.

5. For this purpose, it is necessary to keep in view the essential features of a scheme or arrangement. In essence, a scheme is a contract between two or more parties. It requires the necessary approval in accordance with Section 391 of the Act, if it is a scheme covered by that provision, otherwise any other contract entered into by a company does not require such approval. The essential features of the present scheme under consideration are that two companies are merging with each other. Therefore, it is a contract between

companies. Such a contract does not require the approval of the court. But, as one of these companies will merge into the other and will thereafter have to be dissolved u/s 394 of the Companies Act, 1956, considered from the point of view of that company which is to cease to exist, the scheme or arrangement between the two companies is also a scheme or arrangement between the transferor-company and its shareholders and creditors, etc. That is why the scheme requires to be placed for consideration in the manner required by Section 391. It also requires the sanction of the court. Seen from the point of view of the transferee-company, the agreement is essentially a contract which does not affect the creditors or members of the transferee-company in any manner. Therefore, the scheme does not require to be sanctioned from the point of view of the transferee-company u/s 391 of the Act. However, if the scheme had some flaws whereby the rights of the transferee-company were affected, it would require the approval of those persons at a meeting or meetings held in accordance with Section 391 and would also require the sanction of the court having jurisdiction which in this case would be the Calcutta High Court.

6. In the analysis, I have considered also one possible case which might arise which is, let us assume that the scheme is approved by the members of the transferor-company but, later, the transferee-company refuses to give effect to the scheme. That is the position also analysed in the case of Union Services Private Ltd. [1973] 43 Comp Cas 319 referred to earlier and decided by the Madras High Court. Obviously, if the transferee-company refuses to give effect to the scheme, the purpose and object of the scheme would be demolished. Now, is there any material before me to suggest that M/s. Choudhari Metal Industries (P.) Ltd. has approved the scheme or has agreed to be bound by the scheme ? For this purpose, there are two pieces of evidence before me. Firstly, the holding company qua the petitioner-company is M/s. Choudhari Metal Industries (P.) Ltd. and I am told that it is holding 100 per cent, of the shares of the petitioner-company. As the present scheme has been approved by the members of the petitioner-company, it follows that M/s. Choudhari Metal Industries (P.) Ltd. has approved of the scheme fully by participating at the meeting of the members of the petitioner-company. In fact, without the approval of the transferee-company, the scheme could not have been passed by the members of the petitioner-company. Secondly, the scheme could not have been put forward as a proposal unless there was an arrangement between the petitioner-company and M/s. Choudhari Metal Industries (P.) Ltd. Thirdly, I now have the resolution passed by the members of M/s. Choudhari Metal Industries (P.) Ltd. before me. This resolution was passed as a result of a general meeting of that company held under the orders or directions of this court. The resolution and the affidavit accompanying it show that almost all the shareholders of the transferee-company attended the meeting. Thus, the members of the transferee-company have also approved the scheme. Therefore, there is nothing at all to show that the transferee-company is not intending to be bound by the scheme. In fact, as the transferee-company is the holding company and also owns all the shares of

the transferor-company, it would follow that the transferee-company has not only approved the scheme but has actively brought about the arrangement and certainly wants to enforce the scheme. For these reasons, I think that in the present case, there can be no doubt that the scheme is not going to be thrown overboard . and there is no such intention. The contract is, Therefore, binding on the transferee-company. All it requires now is the approval of the court. As soon as the scheme is sanctioned, it becomes effective.

7. For the purpose of deciding this petition notices were issued to the Central Government and also to the Income Tax authorities. There was some objection from the Income Tax authorities which has been withdrawn. The Central Government also had no particular objection to the amalgamation. A citation was ordered and published in accordance with the order in the newspapers and journals as directed. No creditor has appeared to oppose the petition. There is in fact no opposition to the petition at all. I, Therefore, find no reason to withhold the sanction of the court. However, there are certain features of the scheme, which require that the court should alter the terms of the scheme to some slight extent. This has been necessitated by the fact that the scheme includes a number of paragraphs which were placed before the members with a view to making allowance for any changes that might be made either at the meeting or by the court. There are also some paragraphs concerned with giving some specific directions by the court. As the result of this petition will be that the petitioner-company will cease to exist in view of the order that I will presently be passing, it will not be possible to give specific directions and there will be no further modification, etc., as mentioned in the scheme. Therefore, to make allowance for some of the terms of the scheme having become redundant, I am making some alteration. Paragraphs 11, 13, 14 and 15 of the scheme will be omitted altogether and paragraph No. 12 will be renumbered as paragraph No. 11. In paragraphs Nos. 2, 9 and 10, the date of transfer is mentioned as 30th June, 1974. As the scheme is being approved in 1976, I must note that the scheme cannot be effective from an earlier date. It is conceivable that the scheme might be effective from some earlier date in some circumstances, but I think it is difficult to make it effective from a date almost two years earlier than this order. To avoid any possible misunderstanding I propose that the scheme should become effective, as far as preparation of balance-sheet, etc., is concerned, from 30th June, 1975, However, in passing the requisite orders u/s 394, it will have to be noticed that the transfer of property to be effected cannot be ante-dated and will only take effect in the manner stated in Form No. 42, which is the form covering formal orders to be passed u/s 394. Therefore, it is to be noted that the effective date mentioned in paragraphs Nos. 2, 9 and 10 of the scheme is changed to 30th June, 1975, but will only be for the purpose of accountancy and actual transfer of property. Thus, the scheme is sanctioned with the modification just set out.

8. I now proceed to deal with the question as to what directions have to be passed u/s 394 of the Companies Act, 1956. Firstly, I may mention that the

official liquidator has examined the accounts of the petitioner-company and has submitted a report stating that the transferor-company has not commenced business and hence no public interest is involved. He also stated that all the directors of the petitioner-company were also members of the transferee-company and the petitioner-company is a totally owned subsidiary company. Therefore, I have to conclude that the affairs of the petitioner-company are not being conducted in a manner prejudicial to the interest of its members or public at large and hence there is no impediment to the dissolution of the petitioner-company because the second proviso to Section 394(1) has been complied with. The result would be that the whole and every part of the undertaking, property and liabilities of the transferor-company will be transferred to the transferee-company; any legal proceedings which may be pending by or against the transferor-company may now be continued by the transferee-company and the transferor-company will be dissolved without winding up. There is no requirement to make any further incidental, consequential or supplementary orders except to indicate the property which is to be included in the formal order in Form No. 42.

9. The learned counsel for the petitioner has specified the property of the transferor-company which is now to be transferred. It consists of a factory plot at Faridabad, a factory building with staff quarters in the same town and various stock, stores and machinery, etc., at Delhi and Faridabad at the office and works of the transferor-company. Furthermore, there is cash in hand with bank and other movables, security deposits, etc. All this property will now be transferred to the transferee-company as a result of the approval of the scheme.

10. A formal order in Form No. 41 will be drawn up concerning the sanction of the scheme, the scheme being the one which has been set out above as the modified scheme and there will also be a formal order in Form No. 42 suitably modified to cover the present case which will set out in the scheme the property indicated by the learned counsel. The learned counsel for the petitioner has pointed out that, as the order is being passed now at one and the same time, it will be possible to amalgamate the contents of Form No. 41 and Form No. 42 and one formal order may be drawn up combining Forms Nos. 41 and 42. If this is possible, the Registry may draw up one formal order. It is to be noted that there has been a change in the law concerning the time in which the certified copy has to be filed with the Registrar of Companies. The formal order will, Therefore, specify that the time is 30 days from the date of the order and not 14 days as stated in the form. Further, paragraph No. 5 of Form No. 42 will have to be amended because the Registrar of Companies, Delhi, will have to send the documents relating to the transferor-company to the Registrar of Companies, West Bengal, so that the files of the two companies may be consolidated.