

(2011) 09 KAR CK 0032
In the Karnataka High Court
Case No : CP No"s. 50 to 52 of 2011

In Re: Solidcore Techsoft Systems India (P.) Ltd.

Date of Decision : 09-09-2011

Acts Referred:

Companies Act, 1956 — Section 391, 394

Citation : (2012) 108 CLA 367 : (2012) 171 CompCas 286

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : A. Murali, K.S. Mahadevan, N.V. Jayaraman and A.V. Vijay, for the Appellant;

Judgement

1. Heard Sri Arjun, learned advocate for the petitioner, Sri A V Vijay, learned counsel appearing for the Regional Director for Company Affairs, Sri K S Mahadevan for the official liquidator. These company petitions are filed under the provision of sections 391 to 394 of the Companies Act, 1956 ("the Act") for approval of the scheme of arrangement entered into between Reconnex India (P.) Ltd. ("transferor-company No. 1"), Solidcore Techsoft System India (P.) Ltd. ("transferor-company No. 2") and McAfee Software (India) P. Ltd. ("transferee-company").

2. The transferor-companies and transferee-company are engaged in the similar business as enumerated in the memorandum and articles of association appended to the petitions. Registered office of the said companies are located at the address mentioned in the cause title of these petitions within the jurisdiction of the Registrar of Companies ("RoC"), Karnataka. A perusal of the petition discloses that the authorised share capital and paid-up capital of the respective companies is as reflected therein. The Board of directors of the transferor- and transferee-companies have approved the scheme of amalgamation and have sought for approval of the same by this court. Insofar as the transferor-companies are concerned this court by order dated 25th February, 2011 passed in CA No. 233 of 2011 connected with CA No. 234 of 2011 and CA No. 235 of 2011 had dispensed with convening the meeting of equity shareholders and

unsecured creditors which orders are at annexure F of respective petitions. This court while dispensed with convening of the meetings has also observed in the orders dated 25th February, 2011 passed in CA No. 233 of 2011 connected with CA No. 234 of 2011 and CA No. 235 of 2011 that there is no secured creditor. It is also observed that trade creditors have given their approval of the proposed scheme.

3. Notice of this petition came to be issued on the Regional Director of company affairs and the official liquidator. The official liquidator has filed a report in OLR No. 349 of 2011 stating that the affairs of the transferor-companies are not conducted in any manner prejudicial to the interests of the shareholders or to the public. Hence, the said report is accepted. The Regional Director through the RoC has filed an affidavit with the following observation/queries/objections, which reads as under :

"(i) Clause 8 of the scheme provides for dissolution of the transferor-companies without winding up. However, the petitions pertaining to both the transferor-companies do not have a specific prayer for their dissolution.

(ii) The memorandum of association of the transferor-companies have the enabling provision for amalgamation. However, the memorandum of association of the transferee-company does not have a specific object providing for amalgamation. The transferee-company has to amend the objects suitably.

(iii) Since the paid-up capital of both the transferor-companies are held by their respective foreign holding companies, viz., Reconnex Corporation, USA and Solidcore Systems Inc., USA, the transferee-company is required to comply with applicable provisions of the Foreign Exchange Management Act, 1999 and the Foreign Exchange Management Regulations while issuing shares to the shareholders of the transferor-company as per scheme. The transferee-company has to file necessary undertaking/affidavit before the hon'ble High Court.

(iv) As the entire authorised capital of the transferee-company is already issued, subscribed and paid-up, the transferee-company has to invariably increase its authorised capital to the extent required to meet the requirements of issue of shares to the shareholders of the transferor-companies in terms of schemes as per the provisions of sections 94 and 97 of the Companies Act, 1956."

4. Pursuant to the affidavit of the RoC, the director of the transferor-companies have filed reply affidavit. The managing director of the transferee-company has also filed a reply affidavit. Insofar as the first observation-raised by the Regional Director about the scheme not providing for dissolution of the transferor-companies without winding up, it is stated that said prayer is made in petition and there being no other query, in this regard, the said observation is being kept in mind while considering the claim of the petitioner and the same is being answered in the succeeding paragraphs. Insofar as observation No. 2 which is to the effect that there is no enabling provision for amalgamation in the memorandum of association of the transferee-company it is stated in the reply

affidavit that under similar circumstances this court in the case of Sun Micro Systems India (P.) Ltd. in CP No. 27 of 2008 and CP No. 28 of 2008 by order dated 9th January, 2009, has held such observation would not be a relevant factor for not sanctioning the scheme. Even otherwise the power of this court under sections 391 to 394 is not circumscribed by a clause in the articles of association and this court has got inherent powers to sanction the scheme of amalgamation with the transferor-companies if it is in consonance with the statutory provisions of the Act. This court while considering similar contentions in CP Nos. 27 and 28 of 2008 has relied upon the judgment of the hon''ble Apex Court in the case of Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax, wherein it is held that section 17 of the Act is an aid to companies which seek amalgamation and has further held that Legislature in its wisdom has provided for such wide range for powers to be exercised by this court in the matters of amalgamation conducive to the interest of the shareholders. In that view of the matter the query raised by the Regional Director through the RoC cannot be sustained.

5. Insofar as query No. 3 with regard to a direction to be issued to the transferee-company to file necessary undertaking/affidavit to comply with the applicable provisions of the FEMA and the FEM Regulations, affidavit has been filed by the managing director of the transferee-company dated on 15th July, 2011, and it is stated as under :

"Regarding observation No. 3 of the Regional Director, the transferee-company is carrying on business permitted under the automatic route of the FEM Regulations and hereby undertakes to make the necessary reporting in compliance with the applicable provisions of the FEMA and the FEM Regulations while issuing shares to the shareholders of the transferor-companies."

6. Regarding observation No. 3 the managing director of the transferee-company has stated that it is carrying on business permitted under automatic route of the FEM Regulations and it also undertakes to make necessary reporting in compliance with the applicable provisions of the FEMA and the FEM Regulations while issuing shares to the shareholders of the transferor-companies. In view of the said undertaking given by the managing director of the transferee-company the observation made by the RoC stands complied" with.

7. The RoC has observed as No. 4 that the authorised capital of the transferee-company is already issued, subscribed and paid-up capital and increasing its authorised capital to the extent required to meet the requirements of issue of shares to the shareholders of the transferor-companies in terms of the scheme as per provision of sections 94 and 97 of the Act, has to be invariably done. On perusal of the scheme, it would reflect at that clause 10 would provide for consolidation of authorised capital of the transferor-companies with the authorised capital of the transferee-company. Thus, the authorised capital post-consolidation would be sufficient to issue shares to the shareholders of the transferor-companies. Even, otherwise the affidavit of the managing director of

the transferee-company dated 15th July, 2011, filed would indicate that undertaking has been given to report its compliance with applicable provision of the Act. It reads as under :

"Regarding observation No. 4 of the Regional Director that transferee-company needs to increase its authorised capital to meet the requirements of issue of shares to the shareholders of transferor-companies in terms of the scheme. It is submitted that clause 10 of the scheme provides for consolidation of authorised capital of the transferor-companies with the authorised capital of transferee-company. Accordingly, the authorised capital post-consolidation will be sufficient to issue shares to the shareholders of the transferor-companies. Further, the transferee-company undertakes to make the necessary reporting in compliance with applicable provisions of the Companies Act, 1956."

8. Thus, query No. 4 of the Regional Director raised through the RoC also stands complied with.

9. From the material on record it is clear that the scheme of arrangement being fair and reasonable and all statutory provisions have been complied with and it is not adverse to public policy, and pursuant to the order passed by this court, public notice has been taken out by the petitioners in the newspapers and none have appeared to oppose the scheme of amalgamation, the same is required to be approved. The official liquidator has also filed a report stating that the transferor-companies have not conducted their business prejudicial to the interest of its shareholders or public at large.

10. Since, all the statutory requirements and compliance have been fulfilled and affidavit of undertaking has been filed by the authorised signatories of the transferor-companies and managing director of the transferee-company. I am of the considered view that the scheme of amalgamation as proposed requires to be sanctioned/approved since commercial wisdom exercise by the Board of directors of the transferor- and transferee-companies being in the post-interest of its shareholders, this court would not be in a position to sit in appeal over the commercial wisdom exercised, as such this scheme required sanction. In view of the discussion made hereinabove, the following order is passed :

ORDER

(i) Company Petition Nos. 51, 52 and 50 of 2011 are hereby allowed and scheme of amalgamation is hereby approved/sanctioned.

(ii) The company petitioner/transferor-company Nos. 1 and 2 is ordered to be dissolved without there being any specific order for winding up being passed.

(iii) The petitioner-companies shall file the certified copy of this order within 30 days from the date of receipt of a certified copy of this order.