(2005) 10 AHC CK 0203

In the Allahabad High Court

**In Re: Surya Commercial Ltd.
In Re: Nidhi Commercial Enterprises Ltd.**

Date of Decision : 18-10-2005

Acts Referred:
Companies Act, 1956 — Section 391, 392(2), 394

Citation : (2007) 137 CompCas 325 : (2008) 87 SCL 169

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sunil Ambwani, J.

This confirmation petition has been filed by Surya Commercials Ltd., ("transferee company") and Nidhi Commercial Enterprises Ltd., ("transferor company") seeking sanction of the proposed scheme of amalgamation by which Nidhi Commercial Enterprises Ltd., the transferor company, is proposed to be amalgamated in Surya Commercials Ltd., the transferee company, in terms of the scheme of amalgamation, a copy of which has been annexed to the company petition as annexure 1.

2. By order dated March 24, 2005, in Company Application No. 4 of 2005, filed on February 2, 2005, both the companies were directed to convene separate meetings of their equity shareholders to consider the scheme of amalgamation, meetings of creditors were not required as the two companies had no creditors. Sri Vikash Chandra Tripathi, advocate was appointed as the chairman and Sri Rajiv Gupta, advocate, as alternate chairman for the said meetings. The notices of the meetings, besides despatch by post under certificate of posting, were also required to be published in Hindustan Times (English daily published from Lucknow), Economic Times (English daily published from New Delhi) and Dainik Jagaran (Hindi daily published from Kanpur Nagar). The notices were duly despatched and published.

3. Sri Vikash Chandra Tripathi, chairman for the above meetings, has filed his

two reports both dated May 21, 2005, about the result of each of the two meetings with his affidavit dates May 26, 2005, (filed on May 26, 2005). He has verified that the meetings were duly held at the time and place as directed by this Court vide order dated March 24, 2005. The meetings of the shareholders of the transferee company was attended in person or by proxy by 10 persons representing 100 per cent, of the shareholding and the meeting of the shareholders of the transferor company was also attended by 10 persons representing 100 per cent, of shareholdings. The shareholders present in the meetings considered and scheme of amalgamation was approved unanimously without any modification.

4. The present Company Petition No. 22 of 2005, filed on May 27, 2005, seeks sanction of the proposed scheme of amalgamation. This court, vide order dated August 8, 2005, fixed October 18, 2005, as the date for hearing of the petition and directed that the notices of the petition be published in the same three news papers in which notices convening the meetings were ordered to be published. Notices of the petition were also directed to be served on the official liquidator, U.P., Allahabad and Regional Director, Northern Region, Ministry of Company Affairs, Noida. The petitioner companies were also directed to file original documents pertaining to the meetings.

5. The director of the petitioner companies, has filed his affidavit dated September 8, 2005, (filed on September 13, 2005) confirming that the notices of the petition have been duly served on the official liquidator and the Regional Director and have been published on September 1,2005, in all the three news papers, namely, Dainik Jagaran, Hindustan Times and Economic Times. Copies of newspapers and acknowledgments of the official liquidator and the Regional Director have been filed with the said affidavit. Another affidavit has been filed by the director of the petitioner companies on September 13, 2005, annexing thereto the original documents pertaining to the meetings of the transferee and the transferor companies.

6. The official liquidator has filed his Report No. 148 of 2005, dated October 18, 2005. In paragraph 9 of the report, he has verified that the affairs of the transferor company have not been conducted in a manner prejudicial to the interest of its members or to public interest.

7. Sri U.C. Nahta, Regional Director, Northern Region, Ministry of Company Affairs, has filed his affidavit dated September 22, 2005, in paragraph 4 of the affidavit, he has stated that the authorised capital of the transferee company is not sufficient to allot shares to the members of the transferor company and hence it is submitted that the transferee company may be directed to increase its authorised capital. In paragraph 5.2 of the affidavit he has stated that the scheme of amalgamation provides that the authorised share capital of the transferee company shall automatically stand increased by addition of the authorised share capital of the transferor company without payment of fees to the Registrar of Companies. He has submitted that this could only be done after

following the procedure prescribed under the relevant provisions of the Companies Act, 1956, and payment of requisite fees to the Registrar of Companies and stamp duty to the State Government.

8. Sri R.P. Agarwal, learned Counsel for the petitioners submits that the authorised share capital of the transferee company would be sufficient to allot shares to the members of the transferor company since the scheme provides for automatic increase in the authorised share capital of the transferee company by addition of authorised capital of the transferor company.

As regards the other objection made by the Regional Director in paragraph 5.2 of his affidavit, Sri R.P. Agarwal has pointed out that identical objection was taken by the Regional Director in Company Petition No. 17 of 2005 in In Re: Juggilal Kamlapat Holding Ltd., J.K. Investment Ltd. and Kanpur Investments Ltd., He placed a copy of the order dated August 22, 2005, passed by this Court in the said petition by which the objection of the Regional Director was overruled relying on an earlier judgment of this Court in Jaypee Cement Ltd., In re [2004] 122 Comp Cas 854. In which it was held as follows (page 239 of 132 Comp Cas):

The second objection of the Central Government is with regard to another condition mentioned in paragraph 4.03 (ii) of the scheme which provides that upon the merger authorised share capital of JPI shall stand combined with the authorised share capital of JPC. According to the Regional Director, this amounts to increase of the authorised capital of JPC, which cannot be done without paying the requisite fee/stamp duty to the Government. In reply to this objection, it was submitted on behalf of JPC that the fee/stamp duty is nominal and has a maximum limit which the JPC is prepared to pay. But, it was submitted that the requisite fee has already been paid on the authorised capital of JPI and merely because of its merger with JPC, there is no reason why the same fee should be paid again by JPC on the same authorised capital.

The submission has force and no good reason has been shown why the two merged companies should be required to pay duty again on the same authorised capital on which duty has already been paid by the JPI. Regarding the increase of authorised share capital by merger of the authorised capitals of the two companies, an order can be passed u/s 391 of the Companies Act itself. This has been laid down by the Bombay High Court in the case of Vasant Investment Corporation Ltd. Vs. Official Liquidator, Colaba Land and Mill Co. Ltd., (at page 35). The relevant part of the judgment is reproduced below:

The whole purpose of Section 391 is to reconstitute the company without the company being required to make a number of applications under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme (vide In Re: Maneckchowk and Ahmedabad Manufacturing Co. Ltd.,). The company is, therefore, not required to make a separate application under the Companies Act for alteration of its memorandum of association to show the new share capital.

Such an alteration can be sanctioned under the scheme itself.

A similar view has been taken by the Bombay High Court in the case of PMP Auto Industries Ltd., In re [1994] 80 Comp Cas 289 (at pages 295, 296) and by the Gujarat High Court in the case of Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re [1970] 40 Comp Cas 819 (Guj)(at page 854).

Therefore, both the objections of the Regional Director, Northern Region, Department of Company Affairs, Kanpur, are overruled.

10. In view of the above legal position, objections of the Regional Director are not tenable and it is held that since the combined authorised capital does not exceed the authorised capital of the two companies, no further fees or stamp duty is required to be paid. The authorised share capital of the transferee company would be sufficient to allot shares to the members of the transferor company upon addition of authorised capital of the transferor company as provided in the scheme.

11. No other objection is taken by any person to the scheme of amalgamation.

12. This Court is satisfied that the required statutory requirements have been duly complied with and the proposed scheme of amalgamation deserves to be sanctioned.

13. The transferor and transferee company have disclosed all material facts relating to the companies. No investigation proceedings are pending against the companies under sections 235, 351 and the like. All the conditions of amalgamation stipulated under sections 392(2) and 394 of the Companies Act, 1956, read with Rules 67 and 69 of the Companies (Court) Rules, 1959, have been complied with.

14. The company petition is accordingly allowed. The scheme of amalgamation is confirmed and will come into effect from the appointed day given in the scheme. The transferor company shall stand dissolved without any order of winding up to be made by the court.

15. The office shall issue formal order in the prescribed form within one month and that the said order shall be filed by the transferor company with the Registrar of Companies within the statutory period prescribed under the Companies Act.