

(2008) 04 CAL CK 0020

In the Calcutta High Court

Case No : C.P. No. 123 of 2007 and C.A. No. 156 of 2007

In Re: Tata Tea Ltd.; In Re: Amalgamated Plantations P. Ltd.

Date of Decision : 09-04-2008

Acts Referred:

Companies Act, 1956 — Section 293, 391(2), 394A
Income Tax Act, 1961 — Section 45, 47
Transfer of Property Act, 1882 — Section 6

Citation : (2008) 144 CompCas 236

Hon'ble Judges : Patherya, J

Bench : Single Bench

Advocate : L.K Chatterjee and Manasi Bhattacharya, S.B. Mookherjee, Ratnanko Banerjee, A. Agarwal and Manju Bhutoria, for the Appellant;

Judgement

Patherya, J.—This is an application for sanctioning a scheme of arrangement between Tata Tea Ltd. ("transferor company") and Amalgamated Plantation P. Ltd. ("transferee company") and their respective shareholders.

Petitioners' case:

2. The case of the applicants is that pursuant to advertisements the meeting of the shareholders was held. At the said meeting the scheme was approved by the requisite majority without any modification. The said will appear from the chairperson's report of the transferor and transferee companies.

3. Twenty-seven advertisements were published and from the explanatory statement it will appear that documents were open for inspection including the quarterly financial results as on June 30, 2006, September 30, 2006 and December 31, 2006, of the transferor company.

4. As the shareholders have approved the scheme of amalgamation without any modification and as held in A.W. Figgis and Co. P. Ltd. In Re: A.W. Figgis and Co. Pvt. Ltd.;, , the shareholders are the best judge of the fairness and reasonableness of a scheme, the scheme ought to be sanctioned.

5. Non-appearance of shareholders in spite of notice should be assumed as

supporting the scheme by giving its implied consent. For the said proposition reliance has been placed on *Bengal Tea Industries Ltd. v. UOI* [1989] 93 CWN 542 and *Maharashtra Apex Corporation Ltd., In re* [2005] 124 Comp Cas 637 (Karn).

6. After the approval by the majority shareholders and report filed by the chairpersons, advertisements were published, upon notice to the Central Government. The Central Government has filed its objection.

Central Government's case:

7. The first objection raised is that the purpose for giving notice to the Central Government is to represent the interest of the investing public. Section 45 of the Income Tax Act deals with capital gains. Exemptions from Section 45 has been provided in Section 47 of the Income Tax Act, 1961. A scheme of arrangement has not been exempted and therefore the proposed scheme of arrangement attracts capital gains. The scheme is a method to avoid payment of capital gains. The consideration for transfer of 24 tea estates of the transferor company is not being distributed to the shareholders nor is any share being given to them. In fact, the consideration is to pass from the transferee company to the transferor company and is to the deprivation of the shareholders.

8. There is every likelihood of the money being invested and in case of loss, money received will be lost. The transfer of the 24 tea estates is nothing but an outright sale to avoid payment of stamp duty. Sale can be effected u/s 293 of the Companies Act with the consent of the board of directors and therefore this method need not be adopted.

9. The second objection raised is that no provision for interest has been made in case of delay in payment. The shareholders will not benefit from payment made within a year from the effected date. There is also no provision in the scheme regarding utilization of Rs. 334 crores and there is every possibility of substantial reduction of the earnings of the transferor company.

10. The third objection is that the scheme has not been passed by a majority as four shareholders have voted against the scheme.

11. The fourth objection raised relates to approval of the scheme on the basis of balance-sheet as on March 31, 2006. The appointed date fixed is April 1, 2007. Therefore the assets, liabilities and value of the 24 tea estates were not known to the shareholders on April 5, 2007.

12. The fifth objection relates to no mention of North India Plantation Division in the balance-sheet of the transferor company.

13. The sixth objection is with regard to the scheme not specifying in clear terms the amount the transferor company is getting in respect of the 24 tea estates. The additional assets cannot be ascertained and therefore the scheme is vague, incomplete and uncertain and ought not to be sanctioned.

Petitioner-in-reply:

14. It has been submitted by counsel for the applicant that under the proviso to Section 391(2) of the Companies Act, 1956, the latest financial position along with the auditor's report must be submitted. In the event the same is not done the scheme cannot be sanctioned. Section 394A postulates notice to the Central Government.

15. Clause 10 of the scheme deals with consideration and Clause 10.3 deals with allotment of shares to the company and not to its shareholders upon payment of sums. It has been specifically stated that the current assets shall be transferred at book value and the specified assets are contingent in nature. These clauses have been approved by the shareholders. It has been specifically provided in Clause 10.5 of the scheme that upon the scheme becoming effective the transferee company will take steps to increase its authorised share capital for allotment of shares to the transferor company. Therefore, the objection raised is unfounded.

16. No allegation of fraud or any illegality in the scheme has been alleged by the shareholders. The said scheme has been approved at a meeting held by the chairpersons appointed by the court and transfer approved by shareholders as held in *A.W. Figgis and Co. P. Ltd. In Re: A.W. Figgis and Co. Pvt. Ltd.*;, , ought to be respected.

17. It is the company's assets which are being transferred and the shareholders have no right in the assets of the company as long it is a going concern. A single window clearance is permitted as held in *Maneckchowk and Ahmedabad Manufacturing Co. Ltd In Re: Maneckchowk and Ahmedabad Manufacturing Co. Ltd.*, and *PMP Auto Industries Ltd. In Re: Pmp Auto Industries Ltd.*, . Four Stock Exchanges have given their approval and the same is to the knowledge of the Central Government.

18. The appointed date can always be agreed as held in *Raghubir Dayal v. Bank of Upper India Ltd.* AIR 1919 PC 9, but will take effect only when the scheme is sanctioned. There is no investigation proceedings pending and this scheme is not one for amalgamation but is a scheme of arrangement which can also be called a scheme for reconstruction and therefore the provisions of Section 47 of the Income Tax Act will not apply nor will any stamp duty be payable in such scheme of arrangement. For the said proposition reliance has been placed on *Madhu Intra Ltd. v. Registrar of Companies* [2006] 130 Comp Cas 510 (Cal).

Conclusion:

19. With regard to the first objection it has been submitted that avoidance of capital gains can be no reason for not sanctioning a scheme which is otherwise lawful or valid as held in *A.W. Figgis and Co. P. Ltd. In Re: A.W. Figgis and Co. Pvt. Ltd.*;, and the unreported decision in *C.P. No. 288 of 2007--* since reported as *SREI Infrastructure Finance Ltd. In Re: SREI Infrastructure Finance Ltd.* and

Another, . Clause 10 of the scheme deals with consideration and Clause 10.3 deals with allotment of shares to the transferee company upon payment of sums. This has been approved by the requisite majority of the shareholders. No allegation of fraud or illegality in the scheme has been made by the shareholders and therefore the objection be rejected. The question of payment of stamp duty cannot arise in view of the decision in Madhu Intra Limited and Another, VAI Automation Private Limited and Another and Stuti Developers Private Limited and Others Vs. Registrar of Companies and Others, . The shareholders have no right in the assets of the company as long as it is a going concern and a single window clearance is permitted as held in Maneckchowk and Ahmedabad Manufacturing Co. Ltd. In Re: Maneckchowk and Ahmedabad Manufacturing Co. Ltd., and PMP Auto Industries Ltd. In Re: Pmp Auto Industries Ltd., . For the said reasons the first objection be rejected. Section 6(e) of the Transfer of Property Act, 1882, is not applicable in transfer by court, therefore payment of stamp duty is not attracted.

20. With regard to the second objection Clause 10.3 of the scheme of arrangement postulates payment to the transferor company within such time as may be mutually agreed but not less than a year. The parties have been given the right to mutually agree to the date of payment. The consideration price has been fixed and has been approved by the majority shareholders of the transferor and transferee company. There is no allegation of fraud or unreasonableness and the shareholders are astute businessman accomplished in the commercial field and it must be presumed that the terms of the scheme have been approved only if it benefits the companies and its shareholders. There is no allegation of the scheme being unfair or unreasonable. The current assets shall be transferred at book value and the specified assets are contingent in nature. The clause relating to the aforesaid has also been approved by the shareholders. Therefore, this objection also be rejected.

21. As regards the third objection no shareholder has filed any objection to the scheme and it is only at the meeting that four shareholders have voted against the scheme. Therefore, the third objection be rejected. The scheme cannot be faulted on a mere apprehension or speculation as to what might happen in future. The present is certain. No objection has been filed to the scheme after advertisements.

22. The fourth objection is not pressed, as the quarterly financial results were open for inspection as will be borne out from the explanatory statement. The values of the assets have also been set out in the supplementary affidavit.

23. The fifth objection cannot be sustained as North India Plantation Division was an undertaking of the transferor company and has been shown as an asset of the transferor company in its balance-sheet.

24. The sixth objection cannot be sustained in view of Clause 10.3 of the scheme wherein the consideration has been mentioned and it is only if considered

necessary for effective functioning of the transferee company that additional assets may be transferred. Such transfer is also subject to terms and conditions agreed. This is contingent in nature and for the same, provisions have been made and agreed by the shareholders. This can only be fixed on the happening of the event and not prior thereto. Therefore, this objection can also not be sustained and is accordingly rejected.

25. There can be no dispute regarding the effective date as the same becomes binding from the date subject to sanction by the court, as held in *Raghubir Dayal v. Bank of Upper India Ltd.* AIR 1919 PC 9. The shareholders also approved the effective date.

26. The scheme has been approved by the majority shareholders and as no allegation of fraud, unreasonableness, unfairness or illegality has been made the scheme cannot be termed as vague, incomplete or uncertain. No investigation proceeding is pending and the scheme is one for arrangement and/or reconstruction.

27. As the objections have been rejected, there will be an order in terms of prayers (a) to (g) of the petition.

28. In the event, the petitioners supply a computerized print out of the scheme and the schedule of assets in acceptable form to the Department, the Department is directed to append such computerized print out upon verification to the certified copy of the order without insisting on a handwritten copy.

29. Objection filed by the Central Government is kept on record. The applicants are directed to pay cost assessed at 100 GMs, to the Central Government. With the aforesaid direction C.P. No. 123 of 2007 is disposed of.

Later:

Urgent xerox certified copy of this judgment be made available to the parties, if applied for, upon compliance of all requisite formalities.