

(1982) 01 CAL CK 0021

In the Calcutta High Court

Case No : Company Petition No. 339 of 1981 with Company Application No. 204 of 1981

Karam Chand Thapar and Sons Ltd.

APPELLANT

Vs

Modern Agencies Ltd.

RESPONDENT

Date of Decision : 28-01-1982

Acts Referred:

Companies Act, 1956 — Section 391, 394
Monopolies and Restrictive Trade Practices Act, 1969 — Section 2

Citation : (1984) 55 CompCas 175

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

Bench : Single Bench

Advocate : R.C. Nag, R.K. Lala and R.N. Banerjee, for Company Law Board, for the Appellant;

Judgement

T.K. Basu, J.—In this application under Sections 391(2) and 394 of the Companies Act, 1956, the subject-matter is the sanction of a scheme of amalgamation of Karam Chand Thapar & Sons Ltd., the transferor-company, and Modern Agencies Ltd., the transferee-company. It may be mentioned that all the legal requirements regarding final sanction of the scheme have been duly completed.

2. At this stage, the Central Govt. has come forward with an affidavit affirmed by Chittaranjan Das on the 27th January, 1982. The only objection on behalf of the Central Government which will appear from paragraph 4 of the above affidavit is to the effect that the proposed scheme of amalgamation attracts the provisions of Section 23(2) of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as " the MRTP Act "). As such, it is contended that no order of amalgamation should be passed unless the scheme for amalgamation has been approved by the Central Govt. u/s 23(2) of the MRTP Act.

3. Mr. R. C. Nag, appearing on behalf of the petitioners, draws my attention, in the first place, to Section 2(v) of the Act which defines undertaking as follows:

"(v) "Undertaking" means an undertaking which is engaged in the production, supply, distribution or control of goods of any description or the provision of service of any kind."

4. My attention is also drawn to Section 2(r) of the Act, which contains an inclusive definition mentioning various kinds of service which are sought to be included within that definition.

5. My attention is next drawn to Section 23 of the MRTP Act. Sub-sections (1) and (2) thereof, which are material for our purpose, are set out hereinafter :

(1) Notwithstanding anything contained in any other law for the time being in force,--

(a) no scheme of merger or amalgamation of an undertaking to which this part applies with any other undertaking,

(b) no scheme of merger or amalgamation of two or more undertakings which would have the effect of bringing into existence an undertaking to which clause (a) or clause (b) of section 20 would apply, shall be sanctioned by any court or be recognised for any purpose or be given effect to unless the scheme for such merger or amalgamation has been approved by the Central Government under this Act.

(2) If any undertaking to which this part applies frames a scheme of merger or amalgamation with any other undertaking, or a scheme of merger or amalgamation is proposed between two or more undertakings, and, if as a result of such merger or amalgamation, an undertaking would come into existence to which clause (a) or clause (b) of section 20 would apply, it shall, before taking any action to give effect to the proposed scheme, make an application to the Central Government in the prescribed form with a copy of the scheme annexed thereto, for the approval of the scheme. "

6. Mr. Nag submitted that the language of Sub-section (1) of Section 23 of the MRTP Act clearly shows that it will come into play only when there is the question of amalgamation of an undertaking with any other undertaking. In other words, both the transferor-company and the transferee-company, according to this contention, must be an undertaking within the meaning of Section 2(v) of the MRTP Act.

7. Before I come to the authorities and the other contentions that were advanced on both sides it will be necessary to record that the transferor-company, according to paragraph 2(e) of the petition, commenced business shortly after incorporation and is an investment company having substantial investments in shares and securities. Reference may also be made in this connection to the report and accounts of the transferor-company for the period ended 30th June, 1980, which is annex. "C" to the petition at page 18 thereof. Page 11 of that report shows that during the year ended 30th June, 1980, the total income of the transferor-company from investments and interest amounted to Rs. 18,37,143

whereas the other income of the transferor-company was a paltry sum of Rs. 2 only during the same period.

8. On the strength of the above facts Mr. Nag submitted that an investment company like the transferor-company cannot be an undertaking within the meaning of Section 2(v) of the MRTP Act because it is not engaged in the production, supply, distribution or control of goods of any description nor is it providing service of any kind as illustrated in Section 2(r) of the MRTP Act.

9. In support of this contention Mr. Nag drew my attention to a decision of the Bombay High Court in the case of M.G. Investment and Industrial Co. Ltd. v. New Shorrock Spinning and Mfg. Co. Ltd, [1972] 42 Comp Cas 145. In that case, M. G. Investment and Industrial Co. Ltd. applied under s. 391 and 394 of the Companies Act, 1956, for sanctioning of a scheme of amalgamation of the petitioner company with the respondent. New Shorrock Spinning and Manufacturing Co. Ltd. Notice of the petition was given to the Central Govt. as required by Section 394A of the Companies Act. In that case it was contended for the petitioner company that it was not an undertaking, because, after 1st January, 1966, it was not engaged in the production, supply, distribution or control of goods of any description or in the provision of any service of any description which was made available to potential users within the meaning of Sub-clauses (v) and (r) of Section 2 of the MRTP Act and, therefore, its amalgamation did not require the approval of the Central Govt. u/s 23 of the Act. It was held that from the name of the petitioner company and its object clauses, it would appear that the petitioner company was a company whose business was to consist of investing its funds in the shares and securities of other companies for the purpose of capital appreciation, income, preservation or safety of capital or for combination of such purposes. An investment company sells its own shares to the public and then reinvests the proceeds in a portfolio of securities which it manages on a continuous and full-time basis. An investment company normally invests for yield or for appreciation. An investment company does not render any service for remuneration to any potential user or even to its shareholder. The service rendered by the board of directors or by the managerial staff is to the company which is a distinct person in law. It is benefiting the share-holders by its specialised knowledge of management and business acumen. That is not a service to the shareholders. There is no direct service rendered to them, much less for remuneration. Therefore, an investment company which invests its share capital in the business of making profit by investment in other companies by earning capital appreciation or dividends is not engaged in providing any service to potential users or its shareholders for remuneration or otherwise. The petitioner-company was not engaged in the provision of " service " of any kind within the meaning of Section 2(r) of the Act. Part A of Chap. III did not apply to it and its amalgamation with the respondent company did not require the approval of the Central Government.

10. My attention was also drawn to the case of Union of India and Another Vs.

Tata Engineering and Locomotive Co. Ltd., . In that case, a question arose whether the Central Bank of India after nationalisation remained an undertaking within the meaning of the MRTTP Act. It was held that it was not an undertaking within the meaning of that Act.

11. Lastly, Mr. Nag drew my attention to a decision of the Supreme Court in the case of Carew and Company Ltd. Vs. Union of India (UOI), . In that decision it was, inter alia, held that an entity which is not engaged in actual production of goods or supply of services is of no economic significance and has to be excluded from the purview of the Act.

12. Mr. Nag submitted that the facts of the present case were identical with the facts in the case of M. G. Investment and Industrial Company's case [1972] 42 Comp Cas 145 and submitted that the decision of Nain J. in the above case should be held to be on all fours with the facts of the present case. I accept this contention of Mr. Nag.

13. Mr. R.K. Lala, appearing on behalf of the Central Government, contended before me that Section 23 of the MRTTP Act was attracted in the present case. This is because the transferor-company, according to Mr. Lala, is undertaking within the meaning of Section 2(v) of the MRTTP Act. According to his contention, an undertaking which is engaged in the "control of goods " comes within that definition. According to Mr. Lala the transferor company is engaged in purchase and sale of shares on a fairly large scale. This amounts to " control of goods " within the meaning of Section 2(v) of the MRTTP Act. In support of this contention Mr. Lala drew my attention to Section 2(7) of the Sale of Goods Act, 1930, which defines "goods " as follows:

" "goods " means every kind of movable property other than actionable claims and money ; and includes stock and shares..... "

14. So it was argued that control of stocks and shares would mean control of goods within the meaning of Section 2(v) of the MRTTP Act.

15. Faced with the question as to control of the shares of which company Mr. Lala initially drew my attention to the Reports and Accounts of the transferor-company up to 30th June, 1980, which is annexure "C" to the petition and which has been referred to hereinabove. At p. 18 of the Report, there is a Schedule G which contains a list of various companies of which the transferor-company is a shareholder. That list contains a statement of the number of shares of the various companies listed therein which are held by the transferor-company and the amount which represents the shares. When it was pointed out that if by control of stocks and shares is meant the control of the companies whose stocks and shares are held by the transferor-company then the materials contained in Schedule G at p. 18 of the report were totally insufficient for that purpose. This is because unless the total shareholding of the various companies which are listed at p. 18 of the report are before the court it is not possible to come to a conclusion as to what is the percentage of the shareholdings of the transferor

company in the various companies listed therein. Realising this difficulty Mr. Lala submitted that any kind of control irrespective of the percentage in a company whose shares are held by the transferor-company would be sufficient to attract the operation of the MRTP Act.

16. I am unable to accept the contention of Mr. Lala in the form in which it was addressed. This is because even assuming that the control of stocks and shares would amount to control of goods within the meaning of Section 2(v) of the MRTP Act, such control would have to be interpreted in the context of the preamble of the MRTP Act, which is as follows:

" An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto."

17. It would be clear from the mere perusal of the preamble that if control of stocks and shares be held to be comprised within the expression " control of goods" in Section 2(v) of the MRTP Act, such control must obviously be for the purpose of concentration of economic power. It would necessarily follow that such control by an undertaking must empower that undertaking to control the fate of the company whose stocks and shares are being held by the undertaking. In other words, the undertaking must be in a position to influence the policy matters and other administration of the company of which it is holding the stocks and shares.

18. In my view, there is absolutely no material before me in the present case to come to a conclusion whether even assuming that the expression "control of goods " in Section 2(v) of the MRTP Act includes control of stocks and shares where the transferor company can be held to be an undertaking.

19. It, therefore, follows that on the material before me it is not, in my opinion, possible to come to a conclusion one way or the other about the validity of Mr. Lala's submissions on this point. This question, therefore, must necessarily be kept open in the facts of the present case. Having regard to the fact that some other points have been advanced, I would briefly record them before I pass my order.

20. Mr. Nag drew my attention on this point to the preamble of the Sale of Goods Act which is as follows :

" Whereas it is expedient to define and amend the law relating to the sale of goods;....."

21. According to Mr. Nag, the definition of goods in Section 2(7) of the Sale of Goods Act, 1930, should be confined to cases of sale of goods according to the preamble of that Act and should not be extended to the MRTP Act which has a totally different preamble which I have set out earlier. It was further pointed out by Mr. Nag that the MRTP Act itself contains a definition of goods in Section 2(e)

thereof and provides as follows :

"" goods " includes goods produced in India, and, in relation to any goods supplied, distributed or controlled in India, also includes goods imported into India."

22. According to Mr. Nag control of stocks and shares could not possibly be control of goods within the meaning of Section 2(v) of the MRTTP Act having regard to the inclusive definition of goods which is to be found in Section 2 thereof.

23. Mr. Lala also drew my attention to the dictionary meaning of " control" which is to be found at p. 169 of Mitra's Legal and Commercial Dictionary, second edition, I am totally unable to see how the dictionary meaning of the word " control" is of any assistance to Mr. Lala in the present case. Reference is also made to s. 82 of the Companies Act, 1956, by Mr. Lala which provides that shares or other interests of any members in a company shall be movable property transferable in the manner provided by the articles of the company. I similarly do not see how this section is of any assistance to Mr. Lala in his present contention.

24. Finally Mr. Nag raised a very interesting and, in his view, a clinching question on this aspect. He drew my attention to a Study Report of the Sachar Committee on Companies and MRTTP Acts which has been published on behalf of the Centre for Legal Studies. At p. 292 of the publication while dealing with the definition of goods in the MRTTP Act under article 19.2 thereof, the following and, in my view, a rather illuminating passage appears:

" The existing definition of goods does not cover the cases of investment companies dealing in stocks and shares and other activities like mining or processing, e.g., fish and animal products, which are not covered under the definition of goods in the Sale of Goods Act. Many investment companies maintain that they are not " undertakings " within the meaning of the Act as the existing definition of goods would not include dealings in stocks and shares. In order to put matters beyond doubt, we would, therefore, recommend that the definition of goods should be revised as follows so as to harmonize it with the definition contained in the Sale of Goods Act."

25. Then follows the particular definition of the word " goods " in the MRTTP Act.

26. As I have said earlier, on the material available to me in the present case it is utterly impossible to come to a final conclusion about the correctness or otherwise of Mr. Lala's contention. I would, therefore, for the purpose of the present case leave this question open having recorded the rival contentions.

27. In the result, this application succeeds. There will be an order in terms of prayers (a), (b), (c), (d), (e), (f), (g) and (h). Let the schedule of assets be allowed to be filed.

28. Stay of operation of this order is asked for and is refused.

29. All parties including the official liquidator to act on a signed copy of the minutes on the usual undertaking.