
(1994) 06 KL CK 0016
In the High Court Of Kerala
Case No : M.F.A. No. 542 of 1984

Mathew Philip and Others

APPELLANT

Vs

Malayalam Plantations (India) Ltd. and Another

RESPONDENT

Date of Decision : 24-06-1994

Acts Referred:

Companies Act, 1956 — Section 394, 394(1), 450, 481

Citation : (1994) 81 CompCas 38 : (1994) 3 ILR (Ker) 557

Hon'ble Judges : V.V. Kamat, J;K.T. Thomas, J;K. Narayana Kurup, J

Bench : Full Bench

Advocate : K.M. Joseph, John Kosy and Raju Joseph, for the Appellant; C.M. Devan and J.B. Koshy, for the Respondent

Judgement

K.T. Thomas, J.—A Division Bench of this court, while hearing the appeal against an order passed by a learned single judge felt that the decision in Official Liquidator v. Madura Co. P. Ltd. [1975] KLT 562 requires reconsideration. Hence, the reference to the Full Bench. The case, in brief, is the following :

Two companies, Malayalam Plantations (India) Ltd. (for short "MPI") and Harrisons and Crossfield (India) Ltd. (hereinafter referred to as "H & C"), evolved a scheme of amalgamation with each other. They filed petitions in this court u/s 391 of the Companies Act, 1956, for a direction to convene separate meetings of the shareholders of the companies. This Court issued a direction and in the separate meetings held pursuant thereto resolutions were adopted by overwhelming majority of the shareholders favouring the amalgamation of the two companies. A joint petition has been filed by the two companies in this court seeking sanction for such amalgamation. The learned single judge considered the objections filed by the four shareholders of MPI. After overruling the objections, the learned single judge granted sanction for the amalgamation of H & C with MPI, as per the order impugned in this appeal.

2. The appeal was filed by two among the four shareholders who raised objections against the amalgamation. One of the points raised before the learned

single judge was that the High Court cannot sanction any arrangement for amalgamation without obtaining a report from the official liquidator to the effect that the affairs of H & C have not been conducted prejudicially to the interest of its members or to the public. As per the second proviso to Section 394 of the Companies Act such a report is indispensable for granting the sanction, according to the objectors. The learned single judge repelled the said contention for which he relied on the decision of the Division Bench of this court in *Official Liquidator v. Madura Co. P. Ltd.* [1975] KLT 562.

3. In this appeal, learned counsel for the appellants contended before the Division Bench that the view adopted in *Official Liquidator v. Madura Co. P. Ltd.* [1975] KLT 562 requires reconsideration. Learned counsel cited a number of decisions before the Division Bench in support of his contention. The Division Bench felt that "there is something to be said for the view taken in those decisions" and hence made the reference to the Full Bench.

4. After addressing elaborate arguments on the question referred to the Full Bench, learned counsel proceeded to argue on the further contention based on factual allegations to urge that even otherwise sanction for amalgamation ought not to have been granted. We noted from the trend of this argument that counsel may take a long time to complete his arguments regarding the other aspects involving the facts of the case. But we thought that this Full Bench need not spend time on such factual aspects and hence what we propose to do is to relegate this appeal to the Division Bench after deciding the question referred to the Full Bench.

5. We wish to point out yet another aspect also. The amalgamation has already become a reality pursuant to the order passed by the learned single judge on September 19, 1984 (see *Malayalam Plantations India Ltd. v. Harrisons and Crossfield (India) Ltd.* [1985] 2 Comp LJ 409 (Ker)). It is now a decade and there is no dispute that the company has been functioning prosperously. Of course, the appellants would say that H & C would have fared still better had there been no amalgamation.

6. The prayers made in the petition jointly filed by the two companies seeking sanction for amalgamation were for the reliefs (a) to (f) set out therein (the remaining reliefs are only residuary in nature). Principal among them were (a) for sanctioning the scheme of amalgamation ; (b) for transferring all the properties, rights and powers of H & C to MPI to be vested in MPI ; (c) for transferring all the liabilities and duties of H & C to MPI ; (d) for continuing all proceedings pending against H & C by or against MPI; (e) for transposition of the shares in the ratio specified. As the last relief, it is prayed in Clause (f) that a certified copy of the order may be delivered to the Registrar of Companies for registration purposes and on such certified copy so delivered, it be brought for dissolution of H & C.

7. It is true that the learned single judge granted all the above reliefs. Hence, the

contention is that as the scheme of amalgamation included dissolution of H & C, the same relief could not have been granted without a report from the official liquidator as contemplated in the second proviso to Section 594 of the Companies Act. It was also contended that "dissolution" of the transferor-company is inevitable in the implementation of any arrangement envisaged in Section 394 of the Companies Act and hence without complying with the formality contained in the second proviso to the Section no amalgamation could be ordered.

8. Section 394 of the Companies Act is extracted below :

"394. Provisions for facilitating reconstruction and amalgamation of companies.--

(1) Where an application is made to the court u/s 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court,--

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies ; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as the "transferee company");

the court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters :--

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person ;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company ;

(iv) the dissolution, without winding up, of any transferor company ;

(v) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement ; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out :

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being

wound up, with any other company or companies, shall be sanctioned by the court unless the court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest :

Provided further that no order for the dissolution of any transferor company under Clause (iv) shall be made by the court unless the official liquidator has, on scrutiny of the books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest."

9. We will assume that the application filed by H & C and MPI for sanctioning the scheme of amalgamation is one envisaged in Section 394 as neither side has contended differently on that aspect. Section 394 of the Companies Act makes it clear that the High Court while sanctioning the scheme is not obliged to include all the provisions enumerated in Clauses (i) to (vi) together in the order. The provision so included can be confined to the first clause alone or second clause alone or the fourth clause alone or a combination of two or more of those provisions. In other words, it is open to the High Court to sanction the scheme by providing for "the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company."

10. The first proviso says that the scheme of amalgamation pertaining to a company "which is being wound up" cannot be sanctioned without a report from the Company Law Board or the Registrar. The second proviso is with reference to Clause (iv), which relates to "dissolution, without winding up, of any transferor company". The Division Bench in *Official Liquidator v. Madura Co. P. Ltd.* [1975] KLT 562 held that the second proviso would apply only in a case where the first proviso applies as the second proviso is intended to function as an additional provision for safeguarding the interest of the persons concerned, over and above the safeguard incorporated in the first proviso. The Division Bench has laid emphasis on the word "further" in the second proviso to arrive at that conclusion.

11. We do not think that the word "further" is employed in the second proviso for denoting that an additional provision is made in a situation covered by the first proviso. It is not unusual in legislative drafting to use the word "further" in a second proviso added to the main section. The purpose is to indicate that it is yet another proviso. It may be an additional one or it could be entirely separate from the other. The word "further" need not necessarily mean that the proviso is intended to be in conformity with the preceding proviso.

12. Palaniswamy J. of the Madras High Court has observed thus in *Bush Products Ltd.*'s case [1973] 86 LW 243 :

"The word further has no special significance. It is the usual mode of drafting when two provisos are incorporated even though the two provisos may not be inter-connected. It is the usual draftsmanship to start the second proviso by the expression "provided further". If there is a third proviso, it is usual to start the

third proviso with the expression "provided also". The word further occurring in the second proviso is often used to indicate that it is the beginning of a new clause. It has almost the same meaning as the word "also".

13. A Division Bench of the Karnataka High Court has also taken the same view in *Regional Director, CLB v. Mysore Galvanising Co, Pvt. Ltd.* [1976] 46 Comp Cas 639 ; [1976] Tax LR 2001. In *In Re: Sumani Pvt. Ltd.*, it was held that it is not necessary that the second proviso would come into operation only when the first proviso operates. However, learned judge observed like this (at page 552) :

"It is no doubt true that a single scheme of amalgamation or reconstruction in a given case may involve both types of companies, namely, those under winding up and those which are not, one or more of the latter category coming in for dissolution. In such a situation both the provisos come into operation. On the other hand, there may be cases where, as in the instant case, no company which is under winding up may be involved. In such an event, the first proviso does not come into play at all and only the second proviso will be operative. This is not the same as saying that the second of the provisos would come into operation only when the first proviso operates, as contended for the respondent companies."

14. We do not think that the entire observations can be accepted as correct though we are in agreement with his conclusion that the two provisos may operate in two different situations and may apply to two different companies.

15. Learned counsel for the appellants invited our attention to the decision of a Division Bench of the Calcutta High Court in *Company Law Board v. R. K. Investments Ltd.* [1978] Tax LR 1885. The Bench has made the following observations (at page 1890) :

"The provisos are separate and independent and each proviso makes suitable provision for the purpose for which the same is introduced ... It is not necessary that for the purpose of amalgamation the transferor company must necessarily be one which is being wound up. A company which is a going concern may choose for various reasons to amalgamate itself with another company."

16. Of course, the learned judges envisaged the situation that even in such a case an order for dissolution without winding up of the company may be made. It is apposite to point out that two other judges of the Calcutta High Court did not share the said view. *Salil K. Roy Chowdhury J. in Marybong and Kyel Tea Estate Ltd., In re* [1977] 47 Comp Cas 802 took the view that (at pages 812, 813) : "Section 394(1)(iv) includes all types of companies and a general provision empowering the court to dissolve any company without winding up and the second proviso to Section 394(1)(iv) seems to be intended to apply only in cases where there is commencement of winding up either by presentation of a winding up petition or any resolution of voluntary winding up of a company has been passed. That is the case only where an official liquidator has been appointed or could be appointed by the court, otherwise there would be inconsistency and absurdity of the court appointing an official liquidator in the case of a going

concern where no winding up petition has been presented or resolution for voluntary winding up has been passed." The above reasoning of the learned judge appears to us to be sturdy and quite appropriate in the context in which the second proviso is placed. It is pertinent to point out that the learned judge reaffirmed the same view in the case of R. K. Investments Ltd. [1978] Tax LR 1885. The same view was adopted by Ramendra Mohan Dutta J. of the same High Court in Indian Tack and Oil Co. Ltd., In re.

17. We are of the opinion that the view adopted by the Division Bench of this court in Madura Co. P. Ltd.'s case [1975] KLT 562 that the second proviso to Section 394(1) applies to the situation in which the first proviso applies is not always so, since there can be a situation when the second proviso would have application in a totally different situation.

18. That apart, we have to consider whether the second proviso in Section 394(1) is intended to apply in all cases of amalgamation or arrangement. As the second proviso itself is very clear it applies to a case where "dissolution without winding up" takes place. Does "dissolution" take place in all cases of amalgamation? "Amalgamation" is not defined in the Companies Act. Nevertheless it is a word the implication of which can be comprehended without much strain. It means mixing up or uniting together. The resultant position of amalgamation is not annihilation although the identity of the amalgamated unit would stand integrated with another. It is the organic unification of two entities or undertakings or the fusion of one with the other. In Halsbury's Laws of England, volume 7, paragraph 1539 of the 4th edition, "amalgamation" is described as "a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company or by the transfer of one or more undertakings to an existing company. Strictly "amalgamation" does not, it seems, cover the mere acquisition by a company of the share capital of other companies which remain in existence and continue their undertakings, but the context in which the term is used may show that it is intended to include such an acquisition. The question whether a winding up is for the purposes of reconstruction or amalgamation depends upon the whole of the circumstances of the winding up."

19. In General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., , the Supreme Court has held that after amalgamation of two companies the transferor company ceased to have separate identity and the amalgamated company acquires a new status. This was considered in Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income Tax, and the Supreme Court further observed that "in amalgamation two or more companies are fused into one by merger or by taking over by another . . . The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which

is to carry on the blended undertakings."

20. But the position in "dissolution" need not be identical as in amalgamation. The word "dissolution" as used in the Companies Act has a perceptible connotation. Section 481 of the Companies Act contains what is "dissolution of company". It reads thus :

"481. Dissolution of company.--(1) When the affairs of a company have been completely wound up or when the court is of the opinion that the liquidator cannot proceed with the winding up of a company for want of funds and assets or for any other reason whatsoever and it is just and reasonable in the circumstances of the case that an order of dissolution of the company should be made, the court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly."

21. Three contingencies are provided therein for dissolution of a company. (1) When the affairs of a company have been completely wound up ;

(2) when the court is of the opinion that liquidator cannot proceed with the winding up of a company for want of funds and assets; (3) when the court is of the opinion that liquidator cannot proceed with the winding up for any other reason whatsoever. In all such contingencies the court can order dissolution of the company if the court is of the further opinion that it is just and reasonable in the circumstances of the case. The effect of such order is that "the company shall be dissolved".

22. An argument was addressed before us that the words "or for any other reason whatsoever" in Section 481 of the Companies Act have been incorporated therein to cover even a totally different situation which could as well be a situation unconnected with any winding up step. The rule *ejusdem generis* has necessarily to be imported for construction of those words, in the context, as the general clause follows specific and particular situations. "According to well-established rule in the construction of statutes general terms following particular ones apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the Legislature." (Vide Cockburn C. J. in *R. v. Cleworth* [1864] 4 B & S 927 as quoted by Maxwell On the Interpretation of Statutes). This rule of construction has gained acceptance in India as the Supreme Court has adopted it time and again. The aforesaid observations of Cockburn C. J. have been quoted with approval in *Narayan Bhondeo Pimputkar and Another Vs. Laxman Purshottam Pimputkar and Others*, .

23. It was contended that the rule of *ejusdem generis* can be departed from in this case as the Legislature has employed the word "whatsoever" after the words "any reason". We are not impressed by the said argument. If the Legislature intended that dissolution can be ordered for "any reason whatsoever" when the court is of the opinion that it is just and reasonable the Legislature need not have separately set out the first two situations in the provision because the words "or for any other reason whatsoever" are apparently wide enough to cover any

situation. But we have no reason to think that Parliament would have intended to permit dissolution in any situation without any nexus with the core of the eventualities enumerated in the two preceding categories.

24. Section 559 of the Companies Act empowers the court to declare the dissolution void on an application filed either by the liquidator or any other person interested in the company. Section 450 of the Act says that at any time after the presentation of a winding up petition and before the making of a winding up order, the court may appoint the official liquidator to be liquidator provisionally. When we read Sections 450 and 481 of the Companies Act we come across the situations when dissolution can be ordered after winding up as well as before winding up. In a case where dissolution is ordered before winding up either the liquidator or the shareholders may succeed in averting the complete winding up of the company and at the same time the company could be dissolved as per some arrangement. The first proviso to Section 394 envisages a situation where even without dissolution an amalgamation is made possible.

25. The survey of the above provisions indicates that the legal process of dissolution can take place after commencement of the steps for winding up. Dissolution without winding up only means dissolution without completely winding up the company. Thus what is envisaged in Clause (iv) of Section 394 as "dissolution without winding up" need not be the consequence of amalgamation of two companies.

26. In this case, the petitioners (of the joint application) have not made out any case for dissolution of the transferor company despite an incautious relief of dissolution being prayed for, inter alia, a catena of reliefs. We don't find any scope for ordering dissolution of the transferor company on the facts of the case and we are of the view that the amalgamation envisaged in the scheme can be sanctioned even without ordering the dissolution. So, the order of the learned single judge can be confirmed, if sanction has to be granted for amalgamation, without granting the relief for dissolution included in prayer (f) of the petition.

27. With the aforesaid findings, we send the case back to the Division Bench for disposal of the appeal after deciding the other issues relating to the facts of the case, if raised.