

(2008) 05 GUJ CK 0029
In the Gujarat High Court
Case No : Company Petition No. 54 of 2008

Mekaster Valves and Engineering Services Private Limited

Date of Decision : 06-05-2008

Acts Referred:

Companies Act, 1956 — Section 100, 149(2A), 17, 21, 259

Citation : (2009) 149 CompCas 593 : (2010) 98 SCL 8

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Swati Soparkar, for the Appellant; Harin P. Raval, Assistant Solicitor General, for the Respondent

Judgement

K.A. Puj, J.—The petitioner Company, namely, MEKASTER VALVES & ENGINEERING SERVICES PRIVATE LIMITED has filed this petition under Sections 391 to 394 of the Companies Act, 1956 for sanctioning the Scheme of Arrangement in the nature of amalgamation of MEKASTER ENGINEERING & EQUIPMENTS PRIVATE LIMITED (hereinafter referred to as the "Transferor Company") with the petitioner Company (hereinafter referred to as the "Transferee Company").

2. The petitioner Company is a Private Limited Company. It was started as joint venture Company with French collaboration. It is engaged in manufacturing of "Safety relief Valves". The products of the Company command good reputation and comply with the international standards of manufacturing. The Company has created a niche market for its products. The products find their application in all continuous process plants like Refineries, Petrochemicals, Chemical industries etc. The turnover of the Company has been growing consistently. During the financial year ended on 31.03.2007, the turnover of the Company has been more than Rs. 700 Lacs and net profit has been more than Rs. 50 Lacs. Thus, though the Company has some accumulated losses, it is making operative profits for the last about four years.

3. The Transferor Company, on the other hand, is also a Private Limited Company. The Company was originally promoted in 1986 with the Technical

knowhow from Gomaco International, USA for the manufacturing of Mechanised Concrete Lining Equipments called "Pavers". The Company entered into technical collaboration with Alimek A.B., Sweden for the manufacturing of "Rack and Pinion Hoist". Both the collaborations ended in 1997 and since then it has been managed by professionals. It is engaged in manufacturing of Pavers which are being used for Water Canals, Airports, Runways Concrete Roads etc. The other product is Rack and Pinion Hoist which is being used for vertical movement of Men and Materials at Thermal Power Stations, Doordarshan Towers, High Rise Buildings etc. The Company enjoys high goodwill for its products. The growing Indian economy and deployment in Capital Projects like Power, Infrastructure and Water Canals have given a good push to the Company's products. There has been consistent growth in Company's turnover as well as profitability. During the financial year ended on 31.03.2007, the turnover was nearly 28.58 Crores and net profit was more than Rs. 46 Lacs. It is a profit making and growth oriented Company.

4. The Board of Directors of both the Companies thought it fit to amalgamate the Transferor Company with the petitioner Transferee Company for achieving synergic advantages. The rationale, which led both the Board of Directors to decide to go for amalgamation, lies in several positive factors like synergies in operation, better synchronization in operations and resource utilization resulting in reduction in costs, larger product range etc. All these will culminate in overall improvement in profits, turnover and in shareholders worth. The amalgamation is considered to bring multiple benefits to the petitioner Company and to the Shareholders and Creditors of both the Companies and shall provide good opportunity for the growth and competitive edge over others. Accordingly, the Board of Directors of the petitioner Company resolved that subject to such approvals of the Equity Shareholders and subject to such sanctions and directions of the appropriate Courts as may be required in law, and subject to such consents and permissions of the Central Government and other authorities as may be necessary, the Scheme of Amalgamation was made between the Transferor Company and the Transferee Company on the broad basis referred to in the Scheme of Amalgamation which is produced at Exh. E to the petition.

5. This Court vide order dated 01.11.2007 directed the petitioner Company to convene a meeting of the Equity Shareholders of the Company for the purpose of considering and if thought fit approving with or without modifications in the said Scheme of Amalgamation and the said order directed Shri A. V. Krishnan, Vice Chairman of the petitioner Company and failing him Shri B. K. Singhal, Director of the Company be appointed as Chairman of the meeting and to report the result thereof to this Court. Vide order dated 24.12.2007, the date of the meeting was extended to 24.01.2008. The notice of the meeting was sent individually to all the Equity Shareholders of the Company as required by the order together with a copy of Scheme of Amalgamation and the Explanatory Statement required u/s 393 of the Act and a Form of Proxy. The notice of the meeting was also advertised as directed by the said order, in Indian Express -

English daily and Divya Bhaskar - Gujarati daily both Ahmedabad editions dated 29.12.2007. On 24.01.2008, the said meeting of the Equity Shareholders of the Company was duly convened in accordance with the said order and Shri A.V. Krishnan acted as the Chairman of the said meeting. Shri A.V. Krishnan has reported the result of the meeting to this Court and copy of the report along with the affidavit dated 10.02.2008 is placed on record of this petition.

6. The meeting of the Equity Shareholders of the Company was attended to by four members of the Company entitled together to Rs. 3,37,05,000/- being 3,37,050 Equity Shares of Rs. 100/- each. The Scheme of Amalgamation was taken as read with the permission of all the Equity Shareholders present at the meeting. The detailed discussion and deliberations were made on the proposed scheme. The poll was taken to ascertain the wishes of the Equity Shareholders and all the four members who attended the meeting, voted in favour of the proposed Scheme of Amalgamation and the Resolution approving the Scheme was carried unanimously i.e. 100% in number and 100% in value. Since the proposed Scheme of Amalgamation has been duly approved unanimously by the Equity Shareholders, the petitioner Company has moved this Court for seeking sanction to the Scheme of Amalgamation.

7. The petition was admitted on 20.02.2008 and after admission of the petition, the petition was duly advertised in the Newspapers, namely, Indian Express & Divya Bhaskar - both Vadodara Editions. Publication in Government Gazette was dispensed with. Affidavit dated 07.03.2008 has been filed confirming the said publications. No one has come forward with any objections to the said petition even after the publication.

8. Notice of petition was served upon the Central Government and affidavit is filed by Mr. R.K. Dalmia, Dy. Registrar of Companies along with the letter dated 19.03.2008 written by the Joint Director (Legal) to the Registrar of Companies. In the said affidavit, following points are brought to the notice of this Court:

1. The petitioner Companies may be directed to submit their latest financial statement before this Court at the time of hearing.

2. As per Clause 12.1 of the Scheme, Transferee Company may be directed to comply with provisions of Section 94/97 read with Schedule X of the Companies Act, 1956.

3. As per Clause 12.2 of the Scheme, Transferee Company may be directed to comply with the provisions of Section 17 of the Companies Act, 1956.

4. As per Clause 12.3 of the Scheme, Transferee Company may be directed to comply with the provisions of Section 21 of the Companies Act, 1956.

9. In response to this affidavit of the Deputy Registrar, Mr. Anshuman M. Shah, Vice President (Finance & Commerce) of the petitioner Company has filed an additional affidavit. It is stated therein that the first issue pertains to the latest financial statement of the petitioner Company to be furnished before this Court.

The petitioner Company has submitted the provisional balance-sheet of the Company as at 29.02.2008 as Annexure 1 to the additional affidavit. So far as the second, third & fourth issues are concerned, they pertain to the proposed amendments in the Memorandum and Articles of Association of the Transferee Company, in form of change in Capital Clause, change in objects Clause and change in Name Clause respectively vide Clause Nos. 12.1, 12.2 and 12.3 of the Scheme. The principle being the same for all the aforesaid sub-clauses, they are dealt with as a common issue by the petitioner. With regard to all these issues, it is submitted that the settled principle of Single Window Clearance is well recognized and accepted by various High Courts including this Court. Under this principle, it is held that when the Scheme envisages various incidental proposals as an integral part of the Scheme, the procedures prescribed under the Companies Act, need not be separately undertaken. In the present case, since the Capital Clause, Objects Clause and Name Clause of the Transferee Company are proposed to be amended as a part of the Scheme, it is submitted that separate procedure is not required to be followed.

10. It is further stated that it has been specifically provided in Sub-clause 12.4 of the Scheme that the shareholders of the Transferee Company, while approving the Scheme as a whole, have also resolved and accorded the relevant consents as required respectively under Sections 17 21 31 94 97 and 81(a) of the Companies Act, 1956 or any other provisions of the Act and shall not be required to pass separate resolution as required under the Act. It is further submitted that considering the stipulation in the Scheme itself, the Resolution approving the Scheme as a whole amounts to approval under all the aforesaid clauses. The certified copy of the order of this Court sanctioning the Scheme, as a matter of course, shall be filed with the Registrar of Companies which shall confirm sanction of all the clauses of the sanctioned Scheme. It is further submitted that this is to be treated as an intimation to the Registrar of Companies and it has to take note of all the changes proposed and sanctioned under the Scheme. In view of this explanation given on various observations made by the Regional Director, it is submitted that the Scheme deserves to be sanctioned and the prayers made in the petition are required to be granted.

11. Mr. Harin P. Raval, learned Assistant Solicitor General in support of his submission that the principle of Single Window Clearance cannot be pressed into service as the Companies Act, 1956 and the Rules framed thereunder cannot permit either the Transferor or Transferee Company to give go-bye to the relevant statutory provisions and the compliance required for giving effect to the provisions contained under other relevant statutes. He has extensively referred to certain passages from the decisions of this Court in the case of *In re Maneckchowk and Ahmedabad Manufacturing Company Limited* (1970) 40 Comp Cas 819 and decision of Bombay High Court in the case of *PMP Auto Industries Limited.*, *In re* (1994) 80 Comp Cas 289 and decision of Andhra Pradesh High Court in the case of *Novopan India Limited*, *In re*. (1997) 88 Comp Cas 596 and strongly urged that for the purpose of reduction of share capital, change of

name, change of registered office or increase in the authorised share capital of the Transferee Company, the provisions contained in the Companies Act are required to be followed and necessary applications to this effect are to be moved before the appropriate authorities. Simply because a Scheme of Amalgamation or arrangement is proposed between the Transferor Company or Transferee Company and between their members and/or Creditors, it cannot be accepted that all other formalities are also complied with.

12. As against the aforesaid submissions of Mr. Raval, Mrs. Swati Soparkar, learned advocate appearing for the petitioner Company has submitted that the legal position is well settled by now and even the judgments referred to and relied upon by Mr. Raval also support the case of the petitioner. Over and above this, there are several other judgments of different High Courts as well as of this Court which have consistently taken the view and approved the principle of Single Window Clearance.

13. In the case of Vasant Investment Corporation Limited v. Official Liquidator, Colaba Land and Mill Co. Ltd. (1981) 51 Comp Cas 20, the Bombay High Court has held that the Court is given wide powers u/s 391 of the Companies Act, 1956, to frame a Scheme for the revival of a Company. Section 391 is a complete Code under which the Court can sanction a Scheme containing all the alterations required in the structure of the Company for the purpose of carrying out the Scheme, except reduction of share capital which requires a special procedure. In considering a Scheme u/s 391, the Court must attach importance to the wishes of the members. In addition, it should be satisfied (1) that the statutory provisions are complied with, (ii) that the class affected by the Scheme has been properly represented, and (iii) that the arrangement is such that a man of business would reasonably approve.

14. In the case of PMP Auto Industries Limited, In re. (1994) 80 Comp Cas 289, three Companies PMP, SSM and MG, formulated a Scheme of Amalgamation under which PMP was to merge in SSM and, thereafter, SSM was to merge in MG. In petitions filed by the Companies u/s 391 of the Companies Act, 1956 for sanction of the Court to the Scheme, the Company Law Board, upon being served with notice u/s 394A of the Act, objected that the Transferee Company MG was not permitted by the objects clause of its Memorandum of Association to carry on the business carried on by the other two Companies, and that the Scheme necessitated an amendment to the Memorandum of Association of MG, that this could be done only by procedure laid down in Section 17 of the Act and with confirmation by the Company Law Board; that the Court could not direct alteration of the memorandum thereby usurping the powers of the Company Law Board, an independent quasi-judicial authority. While allowing the petitions, the Bombay High Court held that Section 391 of the Companies Act, 1956 invests the Court with powers to approve or sanction a Scheme of Amalgamation / arrangement which is for the benefit of the Company. In doing so, if there are any other things which, for effectuation, require a special procedure to be

followed, except reduction of capital, then the Court has power to sanction them while sanctioning the Scheme itself. It would not be necessary for the Company to resort to other provisions of the Companies Act or to follow other procedures prescribed for bringing about changes requisite for effectively implementing the Scheme which is sanctioned by the Court. Not only is Section 391 a complete Code, but it is intended to be in the nature of a "single window clearance" system to ensure that the parties are not put to avoidable, unnecessary and cumbersome procedure of making repeated applications in the Court for various other alterations or changes which might be needed effectively to implement the sanctioned Scheme whose overall fairness and feasibility has been judged by the Court u/s 394 of the Act. The Court further held that with the introduction of Section 394A of the Act, it is necessary, before sanctioning any amalgamation, to issue notice to the Company Law Board of every application u/s 391 or 394 to and to take into consideration the representation, if any, made to it by the Company Law Board before passing any order under either section. There is no reason why the Company Law Board cannot raise all its objections at this stage. It would then be possible for the Court to appreciate the objections, if any, and adjudicate thereupon. If the Court is satisfied that the objection based on the alteration of the Memorandum has no substance, the Court itself can decide it then and there and sanction the Scheme even if it means a consequential amendment of the memorandum of association. There is no reason for driving the Company to the procedure u/s 17 of the Act because the Company Law Board is unable, unwilling or incapable of formulating its objections in reply to the notice u/s 394A. This would reduce the notice u/s 394A to an empty formality.

15. In the case of *I.C.I.C.I. Bank Limited, In re* (2002) 112 Comp Cas 291, this Court has held that since the Scheme itself provided for amendment to the Articles of Association of the petitioner Company as regards number of Directors and the Scheme had been approved by an overwhelming majority of Equity Shareholders, there was no justification for requiring the Company to follow the procedure all over again for increasing the number of directors. However, Section 259 of the Act required the sanction of the Central Government for increasing the number of directors above 21. The Central Government had already been served and had responded to the notice through Registrar of Companies. Neither the Central Government nor its counsel had contended that the approval would not be given. Even otherwise, there was no reason for the Central Government not to accord approval for the increase in the number of directors, when its capital was being substantially extended and three transferor Companies were merging into one.

16. In the case of *Search Chem Industries Limited, In re* (2006) 129 Comp Cas 471 (Guj), the petitioner Companies were public limited Companies. Petitions were filed for sanction of a Scheme of arrangement in the nature of demerger and transfer of manufacturing division of the Transferor Company to the Transferee Company u/s 391 read with Section 394 of the Companies Act, 1956. The Central Government raised three objections with regard to clauses of the

Scheme pertaining to the change in the name of the companies, change in the objects clause of the transferee Company and the pending prosecution against the demerged Company. While dealing with all these objections, this Court has held that the proceedings under Sections 391 to 394 give a "single window clearance" and there was no reason to insist on a separate formality to be followed for change in the name or the objects clause of the memorandum of association of the resulting Company. However, the petitioner Companies were to file necessary forms as prescribed under law in the office of the Registrar of Companies to place on record the changes. The Court further held that in view of the fact that the demerged Company would continue to subsist the pending proceedings would continue in accordance with law. The Court, therefore, sanctioned the Scheme and held that the proposed arrangement would be in the interest of the Company, Members and Creditors.

17. In the case of *In Re: Hotline Hol Celdings Pvt. Ltd.; In Re: Fusebase India Pvt. Ltd.; In Re: Hotline International Pvt. Ltd.; In Re: Netillennium Technologies Pvt. Ltd.; In Re: Protek Components (India) Ltd.; In Re: Fusebase Eltoro Pvt. Ltd.*, sanction of the Court to a scheme of amalgamation was sought by the transferor Companies along with all the requisite documents. Upon notice to the Registrar of Companies and the Official Liquidator, the latter stated that the transferee Company should be instructed to increase the authorised capital from its present level to such an amount which was sufficient for allotment of shares to the shareholders of the transferee Company and that this should be done upon payment of Registrar's fees and stamp duty. The scheme of amalgamation stated that the unissued portion of the share capital of the transferor Companies would become the share capital of the transferee Company. While dealing with this objection of the Registrar of Companies, the Delhi High Court has held that in case of merger where it was provided that the share capital of the transferor Companies became the authorized capital of the transferee Company, no fee to the Registrar of Companies or stamp duty to the State Government was payable. Sanction was granted and consequent on the amalgamation the transferor Companies would stand dissolved without the process of being wound up.

18. In the case of *Bazley Finvest Limited*, decided by this Court in Company Petition No. 41 to 43 of 2005 on 14.07.2005, this Court has held that the objections raised by the Registrar of Companies did not survive and the amalgamation would be in the interest of the Companies and their members and Creditors.

19. In *In Re: Liqui Box India P. Ltd. and Another*, a Scheme of amalgamation was proposed of the petitioner Companies to facilitate effective management and unified control of operations and the Board of Directors of both companies passed resolutions to that effect. Upon approval of the Scheme of Amalgamation, the Companies filed a petition wherein they were directed to hold meeting of the Unsecured Creditors of the transferee Company. On publication of notice, the Regional Director objected that the Scheme could not be sanctioned unless the

memorandum of association of the transferee Company was amended by a special resolution as required by the Act. The Transferor Company contended that the objects clause in the memorandum of association of the transferee Company could not be altered on the ground of amalgamation and that the alteration of the memorandum of association of the transferee Company had to be simultaneous and conterminus with the Scheme of amalgamation upon sanction by the Court. While considering this objection of the Central Government, the Court held that the procedure for alteration of the memorandum need not be followed in an amalgamation and the Court granted its sanction to the scheme of amalgamation.

20. In the case of Telecom India Private Limited, In re decided on 11.04.2007, while dealing with several objections raised by the Regional Director, the Bombay High Court held that the objection of the Regional Director that the name of the Transferee Company is to be changed and, therefore, a separate compliance with Section 21 in respect of the filing of necessary forms with the Registrar of Companies is mandatory, will not survive in view of the law laid down in Vasant Investment and PMP Auto Industries. The furnishing of a notice to the Registrar of the scheme as sanctioned will in any case constitute substantial compliance with the provisions of Section 21. The objection in respect of the filing of the necessary forms with the Registrar of Companies under Sections 96/97 of the Companies Act, 1956 is answered on the basis of the same principle. In so far as the payment of stamp duty is concerned, it has been already stated before the Court that the provisions of the Bombay Stamp Act mandating the payment of stamp duty are being duly complied with. No separate payment of fees to the Registrar of Companies is warranted. The authorized share capital of the transferee is but an amalgam of the authorized capital of the transferor and the transferee upon which requisite fees have already been paid. There is, therefore, no occasion for the payment of a separate set of fees. After considering all these objections, the Bombay High Court has held that all the requisite statutory compliance have been duly fulfilled. There was no other objection to the Scheme save and except for the two objections of the Regional Director, which have been dealt with, the Scheme was not prejudicial to the shareholders, creditors or the members of the public. The Court, therefore, held that there is no reason why the scheme should not be sanctioned. The Court accordingly sanctioned the scheme as proposed.

21. Having gone through the petition and the annexures attached therewith and having considered the above referred authorities, the Court is satisfied that since all these changes are proposed to be effected as an integral part of the scheme, the approval granted by the shareholders at the meeting to the scheme as a whole amounts to approval to all such incidental proposals and no separate procedure is required to be followed as envisaged by Sections 17 31 94 97 81(1A) 100 and 149(2A) respectively. It goes without saying that when this Court sanctions the scheme, the scheme is sanctioned as a whole with all its clauses and proposals. The certified copy of the order sanctioning the scheme by

this Court, when filed with the Registrar of Companies, shall be treated as intimation to the Registrar of Companies and it shall take note of all the changes proposed and sanctioned by the Court. In view of the same, no separate compliances of aforesaid provisions of the Companies Act, 1956 are, therefore, necessary. The Court is further satisfied that the amalgamation would be in the interest of the Companies and their members and Creditors and hence, prayer in terms of para 24 (a) is hereby granted.

22. The petition is disposed of accordingly. So far as the cost to be paid to the learned Assistant Solicitor General of India is concerned, the same is quantified Rs. 3,500/-. The same may be paid directly to the learned advocate Shri Harin P. Raval.