

(2004) 08 DEL CK 0087

In the Delhi High Court

Case No : CO. A (B) No. 9 of 2003 and CA No. 1140 of 2003

RFB Latex Limited

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 31-08-2004

Acts Referred:

Companies Act, 1956 — Section 397, 398

Citation : (2004) 115 DLT 484 : (2005) 63 SCL 539

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

Bench : Single Bench

Advocate : Anil Sharma, Sanjeev Saraswat and Nitin Gupta, for the Appellant;
D. Moitra, for the Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The appellant herein is the respondent before the Company Law Board. The respondent No. 2 herein, namely, 20th Century Finance Corporation Limited, is the petitioner before the Company Law Board who had filed CP No. 11/1998 under Sections 397/398 of the Companies Act, 1956 (for short "the Act") alleging oppression and mismanagement on the part of the appellant and others. While these proceedings were pending, the respondent No. 2 herein filed an application before the Company Law Board (hereinafter called as "the Board") for substitution of TCFC Finance Limited in place of 20th Century Finance Corporation Limited. On the other hand, the appellant herein filed another application for dismissal of the petition.

2. The reason which led to the filing of the substitution application was sanctioning of the scheme of amalgamation by the Bombay High Court between 20th Century Finance Corporation Limited (hereinafter referred to as "the transferor company") and TCFC Finance Limited (hereinafter referred to as "the transferee company") and all the assets and liabilities pertaining to investments were also transferred to the transferee company. The transferor company, as a result of the aforesaid amalgamation, ceased to exist. It was, in these

circumstances, application was filed for substitution of the transferee company in place of the transferor company along with copy of order of amalgamation dated 9th April, 1999, passed by the Bombay High Court in CP No. 28/1999. Although in view of the aforesaid facts, it was but natural for the Board to substitute the transferee company in place of the transferor company, however the appellant herein raised the contention that due to the, aforesaid amalgamation as a result of which the transferor company ceased to exist, the petition filed by the transferor company under Sections 397/398 of the Act did not survive and, Therefore, was bound to be dismissed as the transferee company had no allegation of oppression against the appellant company. It was also pleaded that as on the date of presentation of the petition before the Board the transferee company was not in existence and, Therefore, could not be allowed to continue the proceedings being not a shareholder of the respondent No. 2 at the time of presentation of the petition and the operative part of the discussion contained in the impugned order dated 4th August, 2003 is as follows:

"Para 15: I have heard the learned Counsel for both the parties and considered the pleadings and also the documents and records submitted by them. I find that the Hon"ble High Court of Bombay while approving the scheme has specifically mentioned that all legal proceedings pending by or against the petitioner company relating to Investments Division shall be continued by or against the transferee company. The judgment quoted by learned Counsel for the respondents of Hon"ble Supreme Court is not applicable in this case as there was no third party tenancy rights in that case. In the instant case there is no such third party rights/ agreement and shares are movable properties are freely transferable by virtue of amalgamation order passed by Hon"ble High Court of Bombay. I am also not convinced with the arguments of the learned Counsel for respondents that the transferee company namely TCFC Finance Ltd. has no complaint against the respondent company. Although, as such their assets and liabilities can be transferred but not the pending legal cases. It will be difficult to bifurcate the two and draw any line between the pending cases and assets and liabilities and shares of the company which has ceased to exist. The argument of the learned Counsel for the respondent Therefore, does not hold good. If this argument is accepted, there will be total chaotic state in transfer of assets and liabilities with various organizations and authorities. The very purpose of amalgamation order passed by the Hon"ble High Court would get defeated.

Para 16: The relevant question in this case to be seen is whether TCFC Finance Limited has become a member of the respondent company after amalgamation by virtue of the amalgamation order passed by Hon"ble High Court of Bombay. The answer is in affirmative and this fact was not denied by the respondents. As such the member company is entitled to move a petition under Sections 397/398 of the Companies Act, 1956 as they are holding not less than 10% shares by virtue of the provisions of Section 399 of the Companies Act, 1956. In the instant case TCFC has become a member of the respondent company and is also holding not less than 10% shares and as such is entitled to move a petition under

Sections 397/398 of the Companies Act, 1956.

Para 17: In the light of the above, I allow the application of the petitioner for substitution of TCFC Finance Limited in place of 20th Century Finance Corporation Ltd. The petitioner is directed to file amended memo of parties. In view of above discussions, CA No. 242/99 stands disposed of. CA No. 244/99 which was of similar nature also stands disposed of. There is no order as to cost."

3. The aforesaid conclusion and decision to substitute the transferee company in place of the transferor company, arrived at by the Board, is perfectly valid. The effect of amalgamation of one company into other is so obvious that it hardly needs any elaboration. When two companies amalgamate and merge into one, the transferor company loses its entity and ceases to have its existence. However, their respective rights or liabilities are to be determined under the scheme of amalgamation. This principle is clarified by the Apex Court in the case of *Saraswati Industrial Syndicate Ltd. v. CIT*, Haryana, Himachal Pradesh, New Delhi. In the scheme of amalgamation between the two companies before us, as sanctioned by the Bombay High Court, in para 3(a), it was categorically provided that:

"All the privileges and benefits of all contracts, agreements and all other rights.....be transferred to and/or deemed to be transferred to and vested in TCFC so as to become the properties of TCFC Finance. Para 5 of the scheme itself provides for substitution of TCFC in place of 20th Century Finance. Paras 8(a) and 9 further inter alia reads that "...all contract deeds and other instruments of whatsoever nature relating to the investment division of 20th Century....may be enforced as fully and effectually as if instead of 20th Century, TCFC Finance had at all material times been a party thereto". Para 9 of the scheme further inter alia provides "the transfer of all assets and liabilities of 20th Century of its Investment Division of TCFC in continuation of all contracts and proceedings by TCFC Finance under Clauses 8 and 5 hereof shall not affect any contracts or proceedings already concluded by 20th Century in TCFC Finance accepts and adopts all acts, deeds, matters and things done and/or accepted by 20th Century as having been done or executed on behalf of TCFC Finance."

Further the Bombay High Court has specifically stated under the scheme of amalgamation inter alia that"... all legal proceedings pending by or against the petitioner company relating to its Investment Division shall be continued by or against the transferee company".

4. The transferee company thus stepped into the shoes of the transferor company and acquired the right to proceed with any such proceedings pending in any Court of law and to enforce the right which could be enforced by the transferor company.

5. The matter may be looked into from another angle. The allegations of oppression and mismanagement are to be seen as on the date when the petition is filed and maintainability is also to be decided on that basis. This is clear

position in law as held in the case of Shri Jagdish Chand Mehra and Ors. v. The New India Embroidery Mills, (1946) Pvt. Ltd. Chheharta, District Amritsar and Ors. wherein the Court observed:

"The maintainability of a petition under Sections 397, 398 and 402 of the Companies Act, or in the alternative u/s 433 for the winding up of the company, has to be decided on the basis of the facts as they are at the time of its presentation, and any events-subsequent thereto cannot affect its maintainability. The validity of the petition must be judged on the facts as they are at the time of its presentation; a petition, which is valid when presented, cannot cease to be maintainable by reason of events subsequent to the presentation thereof. Neither the right of the applicant to proceed with the application nor the jurisdiction of Court to dispose of it on its own merits can be affected by events happening subsequent to the presentation of the petition."

6. Thus when the transferee company stepped into the shoes of the transferor company as a result of the said amalgamation it does not have to state the alleged oppression against it on the date of such merged but the maintainability of the petition is to be seen when it was presented and thus the transferee company can rely upon same very allegation which the transferor company had made while presenting the petition.

7. There may be another justification in support of the view taken by the Board in the impugned order. Even when the transferor company, on its amalgamation with the transferee company ceased to exist, the position of such defunct company is not exactly that of a dead person and the substitution is to be allowed (Refer State of U.P. and Another Vs. Jaya Shree Textile and Industries Ltd. and Another,). Otherwise it will lead to anomalies and nullify the very effect of the amalgamation of the rights guaranteed to the transferee company as a result thereof.

8. It may be significant to note, as noted in the impugned order and not denied by the appellant herein, in CP No. 113/1999 filed before this Court this Court has allowed the substitution of M/s. Centurian Bank in place of transferor company and interestingly this application was not opposed by the appellant herein who is also party to the said proceedings.

9. I, Therefore, do not find any merit in this appeal which is dismissed accordingly. The application also stands disposed of.

10. There shall be no order as to costs.