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United Spirits Limited Vs. Nil

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Court : Karnataka

Decided On : Feb-19-2015

Judge : Ravi Malimath

Appeal No. : Company Petition No. 170 of 2014

Appellant : United Spirits Limited

Respondent : Nil

Judgement :

(Prayer: This Company petition is filed under Sections 391 to 394 of the Companies Act, 1956 praying to sanction the Scheme of Arrangement (Annexure-A) so as to be binding on petitioner company and its equity shareholders and secured and unsecured creditors; etc.,)

1. This petition is filed seeking for sanction of the scheme of arrangement vide Annexure-A to the petition. The petitioner is the transferor company which was incorporated on 31st March, 1999 under the name and style McDowell Spirits Limited. The name of the Company was subsequently changed as McDowell and Company Ltd. vide Fresh Certificate of Incorporation dated 12th April, 2001 and to the present name vide Fresh Certificate of Incorporation dated 17th October, 2006. The main objects of the petitioner Company is to manufacture alcohol, rectified spirit, potable and industrial alcohol, to manufacture brew, distill blend, compound, prepare, process, render potable or marketable all sorts of liquors, wines spirits

and beers, to carry on all or any of the business of malt factors, general and wine spirits merchants, either as exporters or importers and distilleries, commission agents etc. The particulars of the issued subscribed and paid up share capital of the petitioner Company as on 31st March, 2013 as follows;

Particulars	Rupees
Authorised Share Capital	
395,000,000 Equity Shares of Rs.10/- each	3950,000,000/-
159,200,000 Preference shares of Rs.10/- each	1592,000,000/-
Issued, Subscribed and paid-up	
Total	5542,000,000/-

Particulars	Rupees
Issued, Subscribed and Paid up Share Capital	
130,794,968 Equity Shares of Rs.10/- each fully paid up	1307,949,680/-
	1307,949,680/-

Subsequent to 1st April, 2013, the issued, subscribed and paid-up share capital of the Petitioner Company has changed and the share capital as on 1st November, 2013 of the Petitioner Company is as under:

Particulars	Rupees
Authorised Share Capital	
395,000,000 Equity Shares of Rs.10/- each	3950,000,000/-
159,200,000 Preference shares of Rs.10/- each	1592,000,000/-

Issued, Subscribed and paid-up	
Total	5542,000,000/-

Particulars	Rupees
Issued, Subscribed and Paid up Share Capital	
145,327,743 Equity Shares of Rs.10/- each fully paid up	1453,277,430/-
	1453,277,430/-

In the meeting of the Board of Directors of the Company held on November, 8th 2013, the scheme of arrangement in terms of Annexure-F to the petition was approved. The Bombay Stock Exchange, has given no objection for approving the scheme on 24th March, 2014 vide Annexure-H. The National Stock Exchange and the Bangalore Stock Exchange have given their no objection on 25th March, 2014 and 12th December, 2013, respectively vide Annexure-J and K. The Securities and Exchange Board of India gave its consent on 21st March, 2013 vide Annexure-P to the petition. The Competition Commission of India has approved the scheme by its order dated 26.12.2013 vide Annexure-Q.

2. The transferee Company has its registered office at No.9, Old No.5, Chinnaiah Street, T. Nagar, Chennai-600 017. The Company was incorporated on September 6, 1990 with the Registrar of Companies. The name of the Company was changed to Enrica Enterprises on 18-11-2017. The registered office was shifted from Andhra Pradesh to Tamil Nadu by a special Resolution dated 28-2-2007 which was confirmed by the Company Law Board by its order dated 27-7-2007. The authorized, issued, subscribed and paid up capital of the Company is as follows:-

Particulars	Rupees
Authorised Share Capital	

Rs.1,50,000/- Equity Shares of Rs.10/- each	15,00,000/-
Total	
Issued, Subscribed and paid-up	
Rs.1,50,000/- Equity Shares of Rs.10/- each fully paid up	15,00,000/-
Total	15,00,000/-

3. The main objects of the Company is to manufacture all kinds of beverages, oil seeds to carry on business of bottlers, canners etc. The Transferee Company had filed Company petition No.2/2014 before the High Court of Madras. By the order dated 31.7.2014 the scheme was sanctioned.

4. This Honble Court by its order dated 29.4.2014 in Company Application No.770/2014 directed the Petitioner Company to convene a separate meeting of the equity shareholders, secured and unsecured creditors. Thereafter the meeting of the shareholders was held on 16.6.2014 at 2.30 p.m., the meeting of the secured creditors on 16.6.2014 at 12.00 noon and the meeting of the unsecured creditors on 16.6.2014 at 4.15 p.m. The Chairman submitted his report on 18.6.2014 vide Annexure-T to the petition. This petition was filed on 19.7.2014. By the order dated 7.8.2014 advertisement was taken out in The Hindu and Kannada Prabha. Notices were issued to the Regional Director and the official liquidator.

5. The Registrar of Companies has filed an affidavit on 9th December, 2014. Various objections have been raised therein. It is stated that in terms of the notice dated 28-8-2014 issued to the Income-Tax Department no objections were received. That the designated Stock Exchange namely, the Bombay Stock Exchange has accorded no objection to the draft scheme vide letter dated 2nd January, 2014. The Company was also listed before the National Stock Exchange and the Bangalore Stock Exchange who have both accorded no objection by the letter dated 25th March, 2014 and 12th December, 2013 respectively. That no objection was furnished by SEBI. Approval was also furnished by the Competition Commission of India.

6. In addition thereof, the Regional Director, has objected as follows:-

That the petitioner Company has stated that the petitioner before this Court is not for de-merger. It is only a hive-off by way of a slump sale. The preamble to the scheme provides that the petitioner Company being the transferor Company provides for sale of the Poonamallee unit located at Chennai, Tamilnadu. Therefore in terms of the Clause Nos.5, 6 and 7 of the scheme it is a sale of an undertaking from the transferor Company to the transferee Company at fair value (market price). The scheme does not have any clause for an exchange ratio for allotting shares to the shareholders of the petitioner Company by the transferee Company. The sale of an undertaking is covered under Section 293(1)(a) of the Companies Act, 1956 up-to 11-9-2013 and with effect from 12-9-2013 under Section 180(1)(a) and sub-Section (4) of the Companies Act, 2013, which speaks of the restrictions of the powers of the Board. Therefore, in terms of Section 180 of the Companies Act, 2013 the approval of the Board of Directors is required. In case a sale of an undertaking required the approval of the Honble High Court, then such a condition would exist in Section 180. However, Section 180 does not provide for any approval by the High Court. Therefore, the present scheme does not require the approval of the High Court under Section 180. It should be dealt within the domain of the Board of Directors in accordance with law who would have to take the responsibility of such a transaction.

7. In response, the petitioner Company has filed their counter to the same. They contend that Section 391 to 394 is a complete code by itself. It speaks of the various powers of the Company Court to grant approval or otherwise of the scheme. The provisions of Section 293 of the Companies Act, 1956 or Section 180 of the Companies Act, 2013 would not arise for consideration. That so far as the appointed date is concerned, the same has been approved as 1-4-2013 in the meeting of the shareholder, secured creditors etc. The filing of the balance sheet for the subsequent year is a requirement of law. The same has also been clarified by the directions issued by the Company Law Board. Therefore, only because the appointed date is over, would not mean that the appointed date would have to be shifted up-to the date of receiving sanction. Hence, he pleads that the objections be overruled and the scheme be approved.

8. Thereafter, the Regional Director has once again filed a second affidavit dated 27-1-2015. The Regional Director reiterates by placing reliance on the preamble to the scheme, that the scheme provides for transfer of the entire business of the petitioner Company by way of a slump sale. Slump sale is defined under the Income Tax Act. Neither slump sale nor de-merger has been defined under Section 390 to 394 of the Companies Act. Since there is no express provision in Section 180 of the Companies Act, requiring approval of the Honble High Court, such a sale does not require the approval of this Court. Since the approval is not required under Section 180 of the Act the same should not be granted by this Court. The petitioner should appropriately invoke the provisions of Section 180 of the Act. With regard to the appointed date, it is contended that if the appointed date is not shifted from 1-4-2013 to 1-4-2014 the same would amount to a violation of Section 211 of the Companies Act.

9. The transferee Company had filed a petition seeking approval of the scheme before the High Court of Madras for sanctioning of the scheme. By the order dated 31-7-2014 in Company Petition No. 2/2014 the same was allowed. The scheme was approved subject to approval being granted in the petition to be filed by the transferor Company before the High Court of Karnataka. Under these circumstances, it was contended that since the very scheme has already been approved by the High Court of Madras without any objections of the Regional Director none of the objections of the Regional Director could be considered herein. Iam of the considered view that only because the Regional Director at Madras has not raised objections, it is inappropriate to hold that the objections of the Regional Director herein should be overruled. The objection of the Regional Director requires to be considered.

The provisions of Section 293 of the Companies Act, 1956 and Section 180 of the Companies Act, 2013 Act are almost similar. Hence, it is submitted by the learned counsel for the ROC that the contentions being advanced by her are with reference to Section 293 of the 1956 Act as well as Section 180 of the 2013 Act. That even though reference is made to Section 180 of the 2013 Act, the same should be considered as contentions with reference to both the Sections.

10. Heard learned counsels.

11. The sum and substance of the objections of the Regional Director are as follows:

(a) that the scheme of arrangement does not come under the provisions of Sections 391 to 394 of the Act but under Section 180 of the Companies Act, 2013 and hence the approval of this Court is not required.

(b) that the scheme as propounded is nothing but a slump sale. Hence, it cannot be considered as a scheme of amalgamation requiring the approval of the Court under Section 391 to 304 of the Act.

(c) that the appointed date should be shifted from 1-4-2013 to 1-4-2014.

Each of these objections are considered herein as follows:-

a) It is undisputed that Sections 391 to 394 is a complete code. It contains various powers of the Company Court in dealing with the scheme of amalgamation or reconstruction that is proposed before it. It deals with each and every aspect that the Company Court should consider before approving the scheme of amalgamation. Therefore to hold that Section 180 is applicable, only because the same involves the sale of the Company, in my considered view would be incorrect. Such a submission cannot be accepted. Section 180 deals with the powers of the Board of Directors to sell, lease or otherwise dispose off the whole or substantially the whole of the undertaking that would necessarily involve the sale of the undertaking also. Such a sale of the undertaking or such a lease or otherwise or disposal of the whole or substantially the whole of the Company is very well defined under the provisions of Sections 391 to 394 of the Act. When it is held that Sections 391 to 394 is a code by itself necessarily it would have precedence over the other provisions of the Act. It is not the case where the provisions of Section 180 of the Act are not being complied with and the scheme is sought to be sanctioned otherwise than in accordance with law. What is sought for is necessarily the sanction of the Company court in terms of Sections 391 to 394 of the Act. Therefore, it cannot be said that the non-compliance of Section 180 would

run contrary to the provisions of Sections 391 to 394. In view of the judicial pronouncements of the High Courts as well as the Supreme Court reiterating the fact that Sections 391 to 394 is a code, thereby other provisions of the Statute not forming part and parcel of the code, necessarily the provisions of these Sections would have precedence over the other provisions of the Act.

The very issue came for consideration in the case of PMP Auto Industries Ltd., In re and S.S. Mirinda Ltd., In re (1994) 80 Comp Cas 289 (Bom), wherein it was held that once a scheme of arrangement falls within the ambit of sections 391 to 394, the same could be sanctioned even if it involves doing acts for which the procedure is specified under other sections of the Companies Act. The said judgment was followed by the subsequent judgment of the Delhi High Court reported in (2004) 121 Company Cases 861 in the case of 1. HCL Infosystems Ltd., In re (C.P.No.140 of 2003), 2. HCL Infinet Ltd., In re (C.P.No.141 of 2003) 3. HCL Technologies Ltd., In re (C.P.No.142/2003). Following the earlier judgment it was held that the provisions under section 293(1)(a) of the Act are not applicable and section 391 to 394 of the Act alone requires to be applied. The aforesaid judgment would indicate that notwithstanding section 293, the same would not be applicable in view of the fact that sections 391 to 394 being a complete code in itself, the same would have to be followed. In PMP Auto Industries Ltd., [1994] 80 Comp Case 289 (Bom) it was held at page 152 as follows;

Thus the position of law appears to be clear. Section 391 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 powers 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 the changes requisite for effectively implementing the scheme which is sanctioned by the court. Not only is section 391 a complete code as held by the courts, but in my view, 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 to 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 under section 394 of the Act.

Therefore, it cannot be said that the scheme as propounded by the petitioner is a scheme that does not fall under Sections 391 to 394 but exclusively under the provisions of Section 180 of the Act. Hence, Iam of the considered view that the contentions regarding the applicability of Section 180 cannot be accepted. In the facts and circumstances of this case the provisions of Section 293 of the 1956 Act or Section 180 of the 2013 Act would not be applicable to the case herein. Sections 391 to 394 alone would be applicable herein.

b) The further objection of the Regional Director is that it is not a scheme of amalgamation or reconstruction but a case of a complete sale. The preamble of the scheme itself narrates that it is a slump sale. The scheme being a slump sale the provisions of Section 391 to 394 would not be applicable. The learned counsel appearing for the petitioner submits that even assuming that the contention of the Regional Director is that it is not a sale or amalgamation or reconstruction but a slump sale, not only this Court but various High Courts have held that even in a case of a slump sale, the provisions of Sections 391 to 394 stand attracted requiring the approval of the Company Court. In support of his case he relies on the Judgment of the Honble High Court of Gujarat in the case of HEALTH PRODUCTS LTD., vs. UNKNOWN reported in 2005(62) SCL 393(Gujarat). The unreported Judgment of this Court dated 16-6-2008 passed in Company Petition No.45/2008 connected with 146/2008 and 147/2010. The unreported Judgment of High Court of Bombay dated 24th January, 2014 in Company Petition No.696/2013. The Judgment of High Court of Gujarat in Company case No.146/2010 and 147/2010 dated 14-3-2011 in the case of NIRMA LIMITED. I have considered each one of the Judgments. Since this is the consistent view that is taken by the majority of the High Courts, I do not find any ground to take a different view. Therefore, Iam of the considered view that the same would stand attracted by Sections 391 to 394 of the Act requiring the approval of the Court.

c) The further objection is with regard to the appointed date. What is proposed is 1-4-2013. It is on the basis of the accounts as on that date that the scheme has been finalized. What is objected is that subsequent to 1-4-2013 the balance sheet has been prepared for the year ended 31-3-2014. Hence the appointed date should be shifted.

The petitioners counsel relies on the Circular No.12 dated 21st February, 1977 issued by the Department of Company Affairs which reads as follows:-

241/Sec 210: Annual Accounts-General-Drawing up of final accounts in respect of companies which are under process of amalgamation-Whether obligatory.

A question has been raised whether a company which is in the presence of being amalgamated with another company is required to draw up its final accounts as required under Sections 210 and 211. This matter ahs been examined in the Department and it has been decided that till the amalgamation order is made by the court and the amalgamation scheme is in facts sanctioned, the transferor-company is required to continue complying with the various provisions of the Act including those relating to preparation, presentation, circulation and filing of accounts as and when they become due for compliance. The failure to do this will, among others, mean the denial to the shareholders and the public knowledge about the financial position of the company because the amalgamation petition for some reason or the other may not be decided for quite some time.

The Circular narrates that the objections raised by the Regional Director for filing of the accounts for the subsequent year being mandatory in terms of Section 211 does not imply that the appointed date requires to be shifted to the date on which the scheme is approved. Under these circumstances, in view of the clarification by the Department of Company Affairs, the said objection cannot be sustained.

12. The objections of the Regional Director having been answered, I find no impediment in sanctioning the scheme. The terms of the proposed scheme would be beneficial to the transferor as well as the transferee Company. That in terms of the proposed scheme the same would be beneficial to the petitioner as well Enrica with respect to the shareholders and the creditors. That the scheme would be in

the interest of the creditors of the petitioners company and shareholders. All employees of the petitioners company would be deemed to be employees of Enrica, on the same terms and conditions. The shareholders, secured creditors and unsecured creditors of the petitioner company have approved the scheme by requisite majority. That the proposed scheme will be beneficial to the Petitioner Company as well as Enrica. That the transferor company has already filed a petition before the High Court of Madras wherein by the order dated 31.7.2014 in Company Petition No.2/2014, the scheme was sanctioned. It cannot be said that the affairs of the petitioners company were conducted in a manner that is prejudicial to the interest of the public.

That the Bombay Stock Exchange, the National Stock Exchange and the Bangalore Stock Exchange, have already given their no objections to the scheme. The SEBI have also given their consent. The Competition Commission of India has approved the scheme. The scheme proposes the hive off the transferred undertaking of the petitioner company into Enrica, the Transferee Company, by way of a slump sale on a going concern basis. The same would be in the interest of the creditors of the Petitioner Company and its shareholders. In pursuance whereof a sum of Rs.125,07,00,000/- (Rupees One Hundred and Twenty five Crores and Seven lakhs only) shall be paid by Enrica to the Petitioner Company as consideration, with a sum of Rs.100,00,00,000/- (Rupees one hundred crores) being payable on the effective date or on such other date as may be mutually agreed date and the balance within 45 days of the effective date or such other date as mutually agreed date.

Under these circumstances Iam of the considered view that the scheme requires to be sanctioned. Hence, the petition is allowed. The scheme in terms of Annexure-F is sanctioned. The Registry to draw the decree accordingly.

The copy of this order shall be sent to the Registrar of Companies by the petitioner within 30 days from the date of receipt of copy of this order.

Ordered accordingly.

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