

Renuka Datla Vs. Duphar Interfran Ltd.

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SooperKanoon Citation : sooperkanoon.com/358740

Court : Mumbai

Decided On : Apr-24-2001

Reported in : 2002(2)ALLMR387; [2004]121CompCas631(Bom)

Judge : B.N. Srikrishna and ;A.B. Naik, JJ.

Acts : [Companies Act, 1956](#) - Sections 391, 391(1), 392, 392(1), 393, 393(1) and 394; Indian Companies Act, 1913; Income-tax Act, 1961 - Sections 2(19AA)

Appeal No. : Appeal No. 19 of 2001, Company Petition No. 267 of 2000 and Company Application No. 57 of 2000

Appellant : Renuka Datla

Respondent : Duphar Interfran Ltd.

Advocate for Def. : Virendra Tulzapurkar, ;Virag Tulzapurkar and ;Sandeep Parekh, Advs.

Advocate for Pet/Ap. : F. Devitre and ;Shyam Mehta, Advs.;C.J. Joy, Adv. ;Venkatesh Dhond, Adv.

Disposition : Appeal dismissed

Judgement :

Srikrishna, J.

1. Admit. Notice made returnable forthwith. Dr. Tulzapurkar, the learned Counsel, waives service for the respondent. By consent. Appeal Called out and heard.

2. This Appeal is directed against the order of the learned Company Judge rejecting the application for opposing the Scheme of demerger put forward for sanction under Sections 391 to 394 of the [Companies Act, 1956](#) ('the Act').

3. The respondent in the Appeal is a company incorporated under the Indian Companies Act, 1913 having its registered office at Mumbai. The Appellant is a shareholder of the respondent-company.

4. The company known as Duphar Interfran Ltd. ('the Transferor') ('DIL') was incorporated on 1-5-1991. The company known as Duphar Pharma India Ltd. (The transferee) ('DPIL') was incorporated on 24-1-2000. A Scheme was formulated for demerger of the Pharmaceutical Division and transfer of DIL thereof to DPIL. The scheme envisaged the transfer of the Pharmaceutical business carried on by DIL together with all assets, liabilities to the transferee-company, i.e., 'DPIL', with effect from 1-4-2000. The scheme provides that, upon the scheme coming into effect, and in consideration of demerger and transfer of the Pharmaceutical Division in favour of DPIL, DPIL shall issue or allot to each member of DIL whose name appears on the register of members of DIL as on the Record Date, two equity shares of DPIL of the face value of Rs. 10 each credited as fully paid up for every one fully paid equity share of face value of Rs: 10 each held by such member in DIL. Clause 5.8 of the scheme is important and reads as under :--

'5.8 Post allotment of Equity Shares by DPIL in terms of Clause 5.1 above and in pursuance of this Scheme, the Foreign Collaborators shall transfer 9,80,000. Equity Shares of Duphar Interfran in favour of the Vasant Kumar Family or their nominees in lieu of the Vasant Kumar Family transferring 10,98,978 Equity Shares of DPIL and assigning two brands, namely, 'Vertin' and 'Colospa', presently owned by Dupen Laboratories Private Limited, a company wholly owned by the Vasant Kumar Family in favour of the Foreign Collaborators or its nominees by a separate deed of assignment. The above transfers will be subject to obtaining the necessary regulatory approvals.'

Clause 9.1 of the scheme provides that the scheme is conditional and subject to sanction from the High Court, approval of the Foreign Investment Promotion Board and/or Reserve Bank of India and any other sanction or approval of the appropriate authority required under law. The scheme declares that the basis on which shareholders of DIL were to receive allotment of shares from the transferee-company in consideration of the transfer had been duly worked out by individual experts Arthur Andersen & Associates and the suggested share ratio had been accepted by the board of directors of DIL and DPIL.

5. A meeting of the equity shareholders of DIL was called for the purpose of considering the demerger Scheme after due notice. Ninety eight (98) equity shareholders of DIL either personally or by proxy holding 19,41,585 equity shares attended the meeting. The resolution embodying the proposed scheme of demerger was put to vote by ballot and with the exception of two (2) equity shareholders holding 1,13,591 equity shares, who voted against the scheme of demerger and eight (8) equity shareholders holding 2,842 equity shares, whose votes were invalid, eighty eight (88) equity shareholders holding in the aggregate 18,22,310 equity shares voted overwhelmingly in favour of the scheme. The percentage of equity shareholders voting in favour of the scheme was 89.90 per cent in the number of equity shareholders and 93.89 per cent in the value of equity shares held. The scheme was also overwhelmingly approved by unsecured creditors.

6. In the aforesaid circumstances, the transferor-company filed Company Petition No. 267 of 2000 for approval of the Scheme of Demerger. Due notice was given to the Regional Director Company Law Administration who signified his no objection to the Scheme being sanctioned.

7. The scheme was opposed by the appellant who is a shareholder and certain other shareholders who are the appellants in the other companion Appeals. These shareholders intervened in the Company Petition and opposed the scheme as a fraud perpetrated on the transferor-company and its shareholders on the ground that the-scheme was designed to benefit a small group of shareholders, namely, Vasant Kumar and his family and the foreign collaborators group consisting of

Solvay BV. The learned Company Judge heard the objections and by different orders made on 29-11-2000, overruled the objections. Hence, the appeal.

8. The learned counsel for the appellant raised three contentions in support of the Appeal. The first contention is that, though the scheme has been overwhelmingly approved by the shareholders, there was no informed consent of the shareholders. This is so because the shareholders were never informed the manner in which the share exchange ratio was arrived at. Though the scheme states that the share transfer ratio was arrived at on the basis of the recommendations of Arthur Andersen & Associates, the Report of Arthur Andersen & Associates does not disclose any basis at all. Hence, the consent of the shareholders given to the scheme was not informed consent and, therefore, the scheme should not be allowed to go through.

9. In our judgment, there is no substance in this contention. Clause 5.1 of the scheme states that the ratio of the share allotment has been worked out by Arthur Andersen & Associates at two equity shares of DPIL of the face value of Rs. 10 as against each share of DIL held by the shareholder member. The Report dated 17-1-2000 made by Arthur Andersen & Associates which is on record indicates the manner in which they had carried out the work. In paragraph 2, Arthur Andersen & Associates indicate that they had (a) read the draft scheme of arrangement for the proposed demerger; (b) read the projected balance sheet and statement of profit and loss account for the year ending 31-3-2000 of the pharma business; (c) read the audited financial statements of DIL for the year ending 31-3-1999; (d) read the Memorandum of articles of association of DIL; and (e) held discussions with the management of DIL. Thereafter, they had taken into consideration the following :--

(a) Future equity servicing capacity of the new company.

(b) Avoiding fractional entitlement in hands of the shareholders.

(c) Satisfying the listing guidelines of major Stock Exchanges in India.

(d) The current equity share capital of DIL.

Based on the abovementioned procedures carried out by them, and the capital structure which was proposed, Arthur Andersen & Associates indicated in the report that a share exchange ratio of 1:2 for the demerged pharma business of DIL was appropriate, i.e., a shareholder of every one equity share of DIL of Rs. 10 each would receive two fully paid up equity shares of Rs. 10 each in the new company. They also indicated that the proposed equity share capital of Rs. 50,496,060 was less than the threshold equity share capital of Rs. 100,000,000 specified under the listing guidelines of the Bombay Stock Exchange. Therefore, they suggested that DIL can seek the approval of the Bombay High Court for lower threshold of equity capital, based on their understandings of certain precedents.

10. The report of Arthur Andersen & Associates has been vehemently criticized by the learned counsel for the appellant. He contends that this report of the so-called expert is nothing but a mere repetition of what the respondent-company wanted. He contends that the share transfer ratio has no meaning unless the capital structure of the transferee-company was itself recommended by the financial experts. In our view, the criticism is unjustified. In the first place, the procedures adopted by the financial experts indicate that they had a clear picture of the profit potential of the Pharma Division of the transferor-company projected right upto the end of the financial year. They also had the figures of performance of the transferor-company. Given the proposed capital structure - albeit that it was not proposed by the financial experts - and the financial figures, if the financial experts suggested the share transfer ratio of 1:2, and knowing these facts if the shareholders overwhelmingly approve the Scheme, it is by no means a situation of uninformed consent being given by the shareholders to the proposed Scheme. As the Supreme Court pointed out in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* [1996] 87 Comp. Cas. 792 'the shareholder is the best judge of the commercial validity of transaction and it is not for the Court to sit in appeal over the judgment'. We do not think that merely because the capital structure of the transferee-company was suggested by the transferor-company and not by Arthur Andersen & Associates, the scheme can be called as sham or bogus as contended. Given the facts and figures of the capital structure, the experts devised the financial ratio which cannot be described as frivolous, absurd or sham. There is justification for the contention of the respondent that this was not a situation where a share swap

ratio had to be worked out by the financial expert. If it was a situation of merger of two Companies, whose shares were already listed on the Stock Exchange and who had different profit potentials, then the equivalence of one share to another would have to be carefully worked out by reconciling several factors. A demerger by hiving off one division of a company into the company by itself, is a far simpler task than the former, though we may not agree with the contention of the respondent's counsel that in every case of a demerger, the share transfer ratio is wholly irrelevant, in the facts and circumstances of the case, we are not satisfied that the share transfer ratio worked out is so absurd or perverse that it would amount to uninformed consent on the part of the shareholders who overwhelmingly voted in favour of the scheme.

11. Dr. Tulzapurkar, the learned counsel for the respondent, also drew our attention to Section 2(19A4A) of the Income-tax Act, 1961 under which the expression 'demerger' has been defined. Though this is a special definition contained in the provisions of the Income-tax Act and is not of universal application, it gives an indication of the general concept of demerger which has been noticed and formally introduced into the Income-tax Act.

12. It is next contended by Mr. Devitre, the learned counsel for the appellant, that the meeting called of the shareholders lumped together different classes of shareholders whose interests were disparate. Hence, taking the consent of the prescribed majority of the shareholders of disparate interests, was no consent at all and was contrary to the provisions of Sections 391 and 394 of the Act. It is urged that the majority controlling shares of DIL were held by the promoter group known as Vasant Kumar and family and the foreign collaborator Solvay BV. As a result of inclusion of Clause 5.8 of the scheme, which provides for inter se exchange of shares between Vasant Kumar and family and Solvay BV, each of them would get majority control, respectively, in DIL and DPIL. It was contended that this was done with a view to evade payment of revenue by way of stamp duty. Further, in the guise of transferring property of DIL to the transferee-company, certain valuable brand names were being transferred as a part of the scheme, though they belonged to the transferor-company. The value of these brands is not disclosed, and the transfer is effected under the scheme, even though the

respondent-company is not the owner of the brands but only the marketing agent. Cost of the transfer to DIL is undisclosed and its shareholders get nothing in return. This contention appears to be without merit, both on facts and in law. In the first place, the material on record clearly shows that the two brand names 'Vertin' and 'Colospa' were not the properties of DIL. They were the properties of Vasant Kumar and family and the DIL were merely marketing agents. Secondly, the inter se transfer contemplated under Clause 5.8 is only after the scheme comes into force. This is made clear by the opening words of Clause 5.1 of the scheme which says, 'Upon the coming into effect of this scheme and in consideration of the demerger....' Again, Clause 5.8 starts by saying, 'Post allotment of Equity Shares by DPIL....'

13. The material on record clearly shows that the two brand names, at all material times, were not the property of DIL. Thus, if after the scheme comes into force, there is transfer of certain equity shares of DIL in favour of Vasant Kumar and family or their nominees, in lieu of the said family transferring certain equity shares of DPIL and assigning two brands 'Vertin' and 'Colospa' in favour of the foreign collaborators, we see nothing objectionable in the transaction. We do not see how the shareholders of the transferor-company could object to the transfer of the brand names which does not belong to the transferor-company. In any event, this explanation given by the respondent-company is acceptable in our judgment. Though strictly, this arrangement was not required to be mentioned in the scheme, the respondent states that it was disclosed in the scheme so as to avoid allegations of suppression of truth and mala fides. The approval of the scheme and its coming into force are not at all dependant on this Clause. This was an arrangement which was to come into force after the scheme was approved and post allotment of equity shares of DPIL. The contention, therefore, is misconceived and has no validity.

14. Paragraph 5 of the affidavit of Keshav Kashid, Chief Executive Officer of the respondent-company, filed in the proceedings indicates the reasons for including Clause 5.8 in the scheme, though it was not strictly relevant. This affidavit also indicates that the transferor-company had maintained separate books and records of the assets and liabilities of the Pharma and the Chemical Divisions and as such

it was possible to give the information which was called for by Arthur Andersen & Associates.

15. The contention, namely, that disparate interests were lumped together for seeking approval of the resolution and, therefore, the approval of the resolution is invalid, is sought to be buttressed by relying on the judgment of the Supreme Court in *Miheer H. Mafatlal's case* (supra). In our view, *Miheer H. Mafatlal's case* (supra) affords no support to the appellant. It was pointed out by the Supreme Court in *Miheer H. Mafatlal's case* (supra) that the articles of association of company there contemplated only two classes of shareholders, namely, equity and preference shareholders. There was no sub-division or separate class of equity shareholders either defined by the Act or articles of association. The appellant before the Supreme Court was undoubtedly an equity shareholder and, therefore, he would fall within the same class of equity shareholders whose meeting was convened by the orders of the Company Court. It was argued before the Supreme Court that, because of a particular family arrangement, on which the appellant relied, the appellant therein was a special class of minority equity shareholder who had separate rights against the directors of company, and had special interest against the directors of the company because of the pending litigation between him and one of the directors. While dismissing the contention, the Supreme Court observed that even though the Companies Act or the articles of association did not provide for such a class within the class of equity shareholders, in a given contingency it may be contended by a group of shareholders that because of their separate and conflicting interests, vis-a-vis other equity shareholders with whom they formed a wider class, a separate meeting of such separately interested shareholders should have been convened. The Supreme Court, however, rejected the contention on the facts before it by observing, '.....if it were his case that the scheme of compromise and arrangement as offered to him and his group was in any way different from the scheme of compromise and arrangement offered to other equity shareholders who also belonged to the same class in the wider sense of the term....', some justification could have been found for the objection. Again, the Supreme Court says,.....' On the express language of Section 391(1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or

class of them has to be convened. This clearly pre-supposes that if the scheme of arrangement or compromise is offered to the members as a class and no separate scheme is offered to any sub-class of members which has a separate interest and a separate scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive....Consequently, when one and the same scheme is offered to the entire class of equity shareholders for their consideration and when the commercial interest of the appellant so far as the scheme is concerned is in common with other equity shareholders he would have a common cause with them either to accept or to reject the scheme from commercial point of view.....' For these reasons, a similar argument that a separate meeting of a sub-class of the appellant ought to have been called, was rejected. Finally, the Supreme Court observed 'it, is, therefore, obvious that unless a separate and different type of scheme of compromise is offered to a subclass of a class of creditors or shareholders, otherwise equally circumscribed by the class, no separate meeting of such sub-class of the main class of members or creditors is required to be convened....'

16. In the present case also, neither the Act nor the articles of association recognise anything other than equity shareholders as a class. The only contention urged is that the appellant and similarly placed, objectors to the scheme were minority shareholders and as a result of the post scheme transfer of equity shares, the controlling interest in the company would shift. In our judgment, this is hardly a consideration on the basis of which the scheme could be struck down as bad. The same Scheme is offered to all shareholders. The share ratio is to be uniformly applied to all the shareholders of the transferor-company. In any event, merely because a scheme is propounded for consideration of the Court under Section 391, the Court is not bound to sanction it as propounded. The court has the jurisdiction and the duty to sanction the Scheme subject to such modifications as the court may desire to make. The order of the learned Company Judge shows that, at the hearing, the learned counsel for the respondent-company, agreed that Clauses 5.8, 5.9 and 9.7 of the scheme of arrangement may be deleted from the scheme. This was accepted by the learned Company Judge as deletion of the said clauses did not in any way alter, affect or prejudice the scheme of the arrangement so as to require reconsideration of, the scheme of demerger or approval of the

shareholders. It is contended by the learned counsel for the appellant that this was not permissible at all. Irrespective of what was conceded before the Company Judge, if the scheme approved is not something identical to what was approved by the shareholders, the whole-thing must be sent back for the approval of the shareholders once again. In our view, this contention is unsound. When a scheme is put before the Company Court for approval, the Company Court may approve it wholly, or with or without modification, or reject the same. If the modification consists merely of deletion of certain clauses which do not affect the rest of the scheme, and if the scheme together with these clauses has already been approved by an overwhelming majority of the shareholders, we do not see why such a scheme minus the deleted clauses should once again be resubmitted for approval of the shareholders. Section 392 gives wide power to the Company Court to make addition to the scheme or omission therefrom solely for the purpose of making it workable. In fact, in *S.K. Gupta v. K.P. Jain* AIR 1979 SC 734, the Supreme Court went so far to say that, strictly speaking, omission of the original sponsor and substituting another one would not change the basic fabric of the Scheme. The Supreme Court in *S.K. Gupta's case* (supra), quoted with approval the observations of the Gujarat High Court in *Mansukhlal v. M. V. Shah* [1976] 46 Comp. Cas. 279, as under :

'15. In this context the observations of the Gujarat High Court, extracted hereunder, in *Mansukhlal v. M.V. Shah* [1976] 46 Comp. Cas. 279 can be referred to with advantage as it precisely lays bare the ambit and width of Court's power under Section 392 :

The framers of the company law in India have conferred statutory powers on the High Court to make such modifications in the compromise or arrangement as the Court may consider necessary for the proper working of the compromise and arrangement. The power of the widest amplitude has been conferred on the court under Section 392(1)(b) and the width and the magnitude of the power can be gauged from the language employed in Section 392(1)(a) which confers a sort of a supervisory role on the court during the period the scheme of compromise or arrangement is being implemented. Reading Clauses (a) and (b) of Sub-section (1) of Section 392, it appears that Parliament did not want the court to be fungous

officio as soon as the scheme of compromise and arrangement is sanctioned by it. The Court has a continuing supervision over the implementation of compromise and arrangement. Unenvisaged, unanticipated, unforeseen or even unimaginable hitches, obstruction and impediments may arise in the course of implementation of a scheme of compromise and arrangement and if on every such occasion, sponsors have to go back to the parties concerned for seeking their approval for a modification and then seek the approval of the court, it would be a long-drawn out, protracted, time-consuming process with no guarantee of result and the whole scheme of compromise and arrangement may be mutilated in the process. Parliament has, therefore, thought it fit to trust the wisdom of the Court rather than go back to the interested parties. If the parties have several times to decide the modification with the democratic process, the good part of an election machinery apart, the dirt may step in, the conflicting interests may be bought and sold, and, in the process, the whole-scheme of compromise and arrangement may be jettisoned. In order, therefore, to guard against this eventuality and situation, which is clearly envisageable. Parliament has conferred power on the court, not only to make modifications even at the time of sanctioning the scheme, but at any time thereafter during the period the scheme is being implemented: Conceding that before the Court sanctions the scheme, it partakes the character of an emerging contract between the company and the creditors and members; once the court approves it, it becomes a statutorily enforceable contract even on dissidents, with power in, the court to modify, amend or to correct or revise the contract the outer periphery or the limit on the power being that, after testing it on the anvil of probabilities, surrounding circumstances and the prevalent state of affairs, it can be done for the proper working of the compromise and arrangement, and subject to this limit on the Court's power, the power seems to be absolute and of the widest amplitude and it would be unwise to curtail it by process of interpretation.' (p. 740).

Thereafter, the Supreme Court observed as under :

'16. If the Court can suo motu act, it is immaterial as to who drew the attention of the Court to a situation which necessitated Court's intervention. Where the power is conferred on the court to take action on its own motion the information

emanating from whatever source which calls for Court's attention can as well be obtained from any person without questioning his credentials, moving an application drawing attention of the Court to a situation where it must act. Undoubtedly, the Court may decline to act at the instance of a busybody but if the action proposed to be taken is justified, valid, legal or called for, the capacity or credentials of the person who brought the situation calling for court's intervention is hardly relevant nor would it invalidate the resultant action only on that ground,...'(p. 740)

17. To same effect are the observations of the Gujarat High Court in *Tungabhadra Industries Ltd. v. National Dairy Board* 1983 Tax L.R. 2527 delineating the amplitude of the power of the Company Court under Section 392.

18. We are, therefore, of the view that there is no substance in the second contention also.

19. The Supreme Court has laid down *Miheer H. Mafatlal* (supra) the broad parameters of the jurisdiction of the Company Court in dealing with application under Section 394 in the following words :

'In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged :

(1) The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

(2) That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by Section 391(2).

(3) That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

(4) That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391(1).

(5) That all the requisite material contemplated by the proviso to Sub-section (2) of Section 391 of the Act is placed before the court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

(6) That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

(7) That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

(8) That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking commercial decision beneficial to the class represented by them for whom the scheme is meant.

(9) Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the court there could be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a scheme of compromise and

arrangement are not exhaustive but only broadly illustrative of the contours of the court's jurisdiction.' (p. 818)

20. Applying these parameters to the case before us, we are not satisfied that the order of the learned Company Judge over-ruling the objections and refusing to permit intervention was in any way unjustified. The objections raised were without substance and did not affect the merits of the demerger scheme propounded by the respondent-company.

21. A grievance is made by the learned counsel for the respondent-company that frivolous objections were raised mala fide in order to coerce the Vasant Kumar and family to yield to their demands in certain litigations pending in different Courts in Hyderabad between the different members of the said family. In our view, it is unnecessary to go into this aspect of the matter.

22. Considering the scheme as a whole, we are satisfied that the objections raised thereto have no substance and the learned Company Judge has rightly over-ruled them.

23. In the result. Appeal fails and is hereby dismissed. No order as to costs.