

Sandvik Asia Ltd.

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Court : Mumbai

Decided On : Oct-16-2003

Reported in : 2004(4)BomCR287; [2004]121CompCas58(Bom);
[2004]50SCL413(Bom)

Judge : S. Radhakrishnan, J.

Acts : Companies Act, 1948 - Sections 77A, 100 to 104, 206, 391 and 394

Appeal No. : Company Petition No. 478 of 2003

Appellant : Sandvik Asia Ltd.

Advocate for Def. : Janak Dwarkadas, Adv., i/b., ;Ashok Purohit, Adv. for ;Bharat Kumar Padamsi, ;Madhusudan Madhavdas, ;Yogesh Mathuradas, ;Mathuradas Morarji and ;Janak Mathuradas, ;N. Engineer, Adv., i/b., ;A.H. Wala

Advocate for Pet/Ap. : Virag Tulzapurkar, Adv., i/b., ;Prem J. Ranga, Adv.

Disposition : Company petition dismissed

Judgement :

S. Radhakrishnan, J.

1. By this Petition, the Petitioner M/s. Sandvik Asia Limited is seeking sanction and confirmation by this Court with regard to the Special Resolution passed by the

Petitioner Company's shareholders at its Extra-Ordinary General Meeting held on 13th June, 2003 for reduction of its share capital.

2. It appears that the aforesaid M/s. Sandvik Asia Limited had proposed the resolution for reduction of paid-up equity share capital to the effect that the share capital be reduced by paying off/returning to the holders of equity shares other than the promoters (viz. Sandvik AB & Sandvik Finance BV), at the rate of Rs. 850/- per share, i.e. Rs. 100 by way of face value plus Rs. 750 by way of premium, per share, thereby extinguishing all such shares. It appears that the said Sandvik AB and Sandvik finance BV, held 95.54% of equity share capital in the said Company. In pursuance of the aforesaid proposal, the resolution was passed by the Company at its Extra Ordinary General Meeting (EOGM) held on 13th June, 2003, whereby the Company had approved the said reduction of share capital. At the said meeting, six members who were present, had strongly opposed and spoken against the said resolution. Their main objection has been that there has been discrimination between the members holding equity shares, in the sense one group being the promoters group viz. Sandvik AB and Sandvik Finance BV, are treated separately and the other equity shareholders who are holding 4.46% shares have no option but to leave the Company and accept the amount offered by the Company. To put in other words, the said shareholders of non-promoters group having 4.46% shares were not given any option but they were to leave even if they do not accept the offer of Rs. 850/- by a particular day. Then in any event, after a particular date they will have to leave the Company accepting the compensation of Rs. 850/- per share. The main grievance of the opposing shareholders has been that those minority shareholders who were desirous of continuing in the said Company and to be associated with the Company cannot do so, At the poll in the said meeting 99.95% of votes were in favour of the resolution and 0.05 votes were against the resolution.

3. Mr. Tulzapurkar, the learned Counsel for the Petitioner has pointed out that the minority shareholders had objected on four grounds i.e. (i) the said reduction of share capital was not within the preview of Section 100(1)(a) to (o) of the Companies Act, (ii) there was no need at all to reduce the share capital, (iii) there has been a patent discrimination between one class of shareholders to another

class of shareholders amongst the equity shareholders and (iv) the only way the Company could have reduced the share capital was by way of buying back under Section 77(A). Finally the contention of the Petitioner was that the compensation offered at Rs. 850/- per share was not a fair & adequate compensation.

4. Mr. Tulzapurkar, the learned Counsel for the Petitioner took me through the provisions of Section 100 and pointed out that the methodology provided under Section 100(1) (a) to (c) only indicate some of the methods by which it could be reduced and emphasised the wording 'reduce its share capital in any way' i.e. there is a wide general power to reduce the share capital. Mr. Tulzapurkar also contended that in the commercial wisdom the above proposal for reduction of share capital was accepted by a majority of shareholders, and therefore, this Court ought not to sit in judgment over the same. He has also emphasized that the aforesaid reduction of share capital was very much permissible in law and there is no bar to the same. He also brought to my notice that the SEBI had also approved the offer and found offer to be fair. He has contended that the offer was more than the book value and in fact there is no trading taking place, and in view thereof, there is no method to find out the real market value.

5. Mr. Tulzapurkar, the learned Counsel for the Petitioner, while dealing with the objection that the only method by which the shares could be reduced by way of resorting to Section 77(A) of the Companies Act alone was not accepted by this Court and in that behalf he relied upon the judgment of this Court in Securities and Exchange Board of India (SEBI) v. Sterlite Industries (India) Ltd. 2003 113 Comp Cases 273, wherein, the Division Bench of this Court had specifically formulated the certain points (questions) for consideration, and the point No. (ii) whereof, reads as under :-

'Whether the Company Court has power to grant reorganisation scheme under Section 391 read with Sections 100 to 104 empowering the Company to buy back the shares from the shareholders or whether Section 77A is the only mode to buy back the shares? '.

The Division Bench after discussing the law exhaustively in the case referred to above, came to the conclusion as under :--

'There is no reason as to why a cancellation of shares and the consequent reduction of capital cannot be covered by Section 391 read with Section 100 merely because a shareholder is given an option to cancel or to retain his shares. In view of the forgoing discussions, the objections of the Appellants based on Section 77A must be rejected.'

6. Mr. Tulzapurkar therefore contended that the objection that buying back in case of reduction of share capital can only by resorting to Section 77A, is not a correct proposition in law. Mr. Tulzapurkar has strongly relied upon an old English Court judgment in the case of *British And American Trustee And Finance Corporation v. Couper* - (1891-4) All England Law Reports Reprint 667, wherein, Lord Macnaghten has observed

'If there is nothing unfair or inequitable in the transaction, I cannot see that there is any objection to allowing a Company limited by shares to extinguish some of its shares without dealing in the same manner with all other shares of the same class. There may be no inequality in the treatment of a class of shareholders, although they are not all paid in the same coin, or in coin of the same denomination.'

7. Therefore, the submission of Mr. Tulzapurkar, the learned Counsel for the Petitioner is that as far as equity shareholders are concerned, the Company has the right to reduce the number of shares, when the entire class of paid up equity shareholders in its majority decides to reduce certain number of shares. Finally, Mr. Tulzapurkar, the learned Counsel for the Petitioner referred to the judgment of Madras High Court in the case of *re Panruti Industrial Company (Private) Ltd.* - AIR 1960 Madras 537 wherein, the Court has referred to the very same judgment of the English Court (referred to above) and has observed that the Court's power to sanction any reduction is to determine whether such a reduction is fair and equitable.

8. Under the aforesaid facts and circumstances, Mr. Tulzapurkar, the learned Counsel for the Petitioner has contended that in view of the substantial and overwhelming majority of the equity shareholders voting in favour of the said reduction and also that the aforesaid 4.46% of shareholders are being offered a fair compensation fixed at Rs. 850/- per share, and the said decision also has

been taken in exercise of commercial wisdom of large majority of shareholders, this Court should not interfere with the same, and hence should approve the said reduction.

9. On the other hand, Mr. Dwarkadas, the learned Senior Counsel appearing on behalf of the shareholders who are opposing the aforesaid reduction of share capital, has contended that his main objection is that the aforesaid reduction of share capital is not fair and equitable. Mr. Dwarkadas in fact emphasised that the resolution which was proposed and approved at the EOGM on 13th June, 2003 does not give any option to the minority shareholders. To put it in other words, the minority shareholders were told that they will be paid Rs. 850/- per share, and upto a particular date, the said offer was kept open, and in the event if they do not accept the said offer their shares will be compulsorily purchased at Rs. 850/- per share after a particular date, in any event. In fact, he emphasised that the resolution clearly contemplates two classes of shareholders amongst the paid-up equity shareholders, in the sense, one group known as promoters group and the others being the non-promoters group, and what is sought to be done by the aforesaid resolution is to completely extinguish the shares held by the non-promoters group and to force them out of the Company.

10. Mr. Dwarkadas, the learned Counsel has therefore contended that the aforesaid proposal had virtually no option at all, and he emphasised that in any event this is a matter wherein the Petitioner Company ought to have proceeded by way of a scheme under Sections 391 & 394 of the companies Act read with Section 100 of the Companies Act. The Petitioner company could not have proceeded only under Section 100 as in the instant case whereas the same ought to have proceeded under Section 100 read with Section 391 of the Companies Act. Mr. Dwarkadas, the learned Counsel has referred and relied upon the very same judgment in the case of Securities And Exchange Board of India v. Sterlite Industries (India) Limited, wherein the proposal was by way of a scheme under Section 391 read with Section 100, In that context, the Division Bench has observed that if there were to be a regular scheme under Section 391 read with Section 100, the same was permissible and that it was not necessary that buy back can only be by way of Section 77A. Mr. Dwarkadas has pointed out that if

there were to be a scheme, in the voting pattern, the Petitioner Company will have to establish that they had the requisite majority not only in value but also in number. Therefore, by not following the proposal of a scheme under Section 391 the petitioner Company has skillfully avoided the aforesaid protection of requisite majority by way of number also. In that behalf, Mr. Dwarkadas has referred to a well known judgment of the Madras High Court in the case of Coimbatore Cotton Mills Ltd. and Lakshmi Mills Co. Ltd.- 1980 (Vol.50) Company Cases 623 wherein the Madras High Court has clearly held that in case of a scheme under Section 391 of the Companies Act, the Court should be satisfied that the resolutions are passed by a statutory majority in value and in number, thus, there is a two-fold protection.

11. Mr. Dwarkadas, the learned Counsel for the aforesaid shareholders who are opposing, has also relied upon a very same English Judgment referred to and relied upon by Mr. Tulzapurkar viz. British And American Trustee And Finance Corporation v. Couper wherein, he referred to the observations of Lord Herschell, L.C. wherein, Lord Herschell has referred to the earlier english judgment in the case of Re Denver Hotel Co.- (1893) 1 Ch.495, wherein the Court has held as under :

'If the transaction really was a purchase by the Company of its own shares from one shareholder only, we are of opinion that the Court could not sanction it.'

There is also a further observation by Lord Herschell, L.C. as under :

'There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinised by the Court, and that no such scheme ought to be confirmed, unless the Court be satisfied that it will not work unjustly or inequitably.'

Similarly, Lord Macnaghten has categorically observed in the facts of that case as under :-

'It is not suggested by the one shareholder, who stands alone in opposing the application, that the majority are acting oppressively, or that the arrangement is

unfair or inequitable in the ordinary sense of those words. His real objection rather seems to be that he prefers the American system of doing business, and that he has more confidence in the American committee than in the London board.'

12. In these circumstances, Mr. Dwarkadas, the learned Counsel has contended that the aforesaid English Judgment makes it abundantly clear that even a Single minority shareholder has a right to oppose, and as pointed out in the said case the opposition was not on the ground that his shares have been purchased and his rights have been extinguished. The opposition of the said shareholder in that case was that he preferred the American way of conducting business and not the British way of conducting business, as such the Court did not interfere. It was not a case of extinguishing the right to hold a share.

13. Mr. Dwarkadas has pointed out that in the instant case, obviously there is no option given to the minority shareholders and the only option is to sell and there is no other option and if that be so, it is totally unfair and this Court ought not to approve the same. Mr. Dwarkadas has referred to another English Judgment in the case of Westburn Sugar Refineries Ltd. - (1951) 1 All England Law Reports 881, wherein the Court has emphasised that the Court has to safeguard the interest of the shareholders who may be in a minority.

14. Mr. Dwarkadas, the learned Counsel has also referred to another judgment of M.P. High Court in the case of Indian National Press (Indore) Ltd (1989) 66 Comp Cases 387, wherein it is observed as under :-

'The Company has the right to determine the extent, the mode and incidence of the reduction of its capital. But the court, before it proceeds to confirm the reduction of capital, must see that the interests of the minority and that of the creditors are adequately protected and there is no unfairness to it, even though it is a domestic matter of the company. The power of confirming or refusing to confirm the special resolution of a company to reduce its capital is conferred on the court in order to enable it to protect the interest of person who dissented or even of persons who did not appear, except on the argument and hearing of the Petitioner.'

15. Mr. Dwarkadas, the learned Counsel has also referred to another English Judgment in the case of Robert Stephen Holdings Ltd. - (1968) 1 The Weekly Law Reports 522, wherein the Court has observed that in the cases where one part of a class of equity shareholders has been treated differently from another part of the same class, it was desirable to proceed by way of a scheme of arrangement under Section 206 of the Companies Act, 1948 since it provided a better protection for the interests of the minority shareholders. Mr. Dwarkadas has emphasised that in the instant case, the Petitioner Company had chosen not to go into such a scheme as contemplated under Section 391 and had opted for an easier way under Section 100 which has resulted in the gross injustice to the minority shareholders. Mr. Dwarkadas, has referred to a well known judgment of the Supreme Court in the case *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* - : AIR 1997 SC506 , wherein the Supreme Court has quoted with approval from Palmer's Treatise Company Law 24th Edition, as under :-

'What constitutes a class :

The Court does not itself consider at this point what classes of creditors or members should be made parties to the scheme. This is for the Company to decide, in accordance with what the scheme purports to achieve. The application for an order for meetings is a preliminary step, the applicant taking the risk that the classes which are fixed by the Judge, unusually on the applicant's request are sufficient, for the ultimate purpose of the Section, the risk being that if in the result, and we emphasise the words 'in the result' they reveal inadequacies, the scheme will not be approved. If e.g. rights of ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or which are to be treated differently under the Scheme, such groups must be treated as separate class for the purpose of the scheme. Moreover, when the company has decided what classes are necessary parties to the scheme, it may happen that one class will consist of a small number of persons who will all be willing to be bound by the scheme. In that case it is not the practice to hold a meeting of that class, but to make the class a party to the scheme and to obtain the consent of all

its members to be bound. It is however, necessary for at least one class meeting to be held in order to give the Court jurisdiction under the Section.'

After quoting the above, the Supreme Court has held that it is therefore obvious that unless a separate and different type of Scheme of Compromise is offered to a sub-class 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. In the instant case the promoter-group was not forced to go out, hence two separate meetings ought to have been held.

16. Mr. Dwarkadas, the learned Counsel has also pointed out that the value of the shares of this Company have been fairly high when the same has been regularly trading at the stock exchange. He pointed out that in December 1992 the value was Rs. 6850/- per share and in December, 1993 it was 1650/- per share and in December 1994 it was 3050/- per share. In any event, Mr. Dwarkadas, the learned Counsel has contended that in the instant case, the minority shareholders have been given no option whatsoever, in the sense, they have been forced to leave the Company by group of majority of 95.54% shareholders who belong to the promoters group. Therefore, he submitted that if the Petitioner Company had a proper scheme under Section 391 of the Companies Act, possibly the minority shareholders could have had a fair opportunity of opposing the same. In any event, his submission is that the aforesaid reduction of share capital is highly inequitable, unfair, unjust and this Court ought not to approve & sanction the same.

17. After having heard both the learned Counsel for the parties at length, the basic issue in the instant case is that amongst the paid-up equity shareholders themselves, there are two distinct groups in the sense one belonging to the promoters group and the other of non-promoters group. If that be so, the meeting ought to have been convened separately for the non-promoters group otherwise the meeting would be rather absurd and would result in injustice. Over & above, in the instant case, the minority shareholders of 4.46% were not given any option under the proposal. By a particular date if they do not accept the offer of Rs. 850/- per share, in any event, they will have to leave the Company and they will be paid

Rs. 850/- per share. In fact, as rightly pointed out by Mr. Dwarkadas referring to the aforesaid judgment of the English Court in *Re Denver Hotel Co.* (1893) 1 ch.495, even a single minority shareholder is entitled to oppose, and if the Court finds the scheme to be unjust, the Court should not confirm the said reduction of share capital. Even with regard to the judgment of High Court in the case of *SEBI v. Sterlite* (referred to above) wherein it was a scheme under Section 391 read with Section 100 of the Companies Act, in that context the Court held that there was no necessity to buy back only under Section 77A of the Companies Act. In fact, Mr. Dwarkadas did not contend that it is the only way of buy back under Section 77A. His contention is that there ought to have been a scheme under Section 391 of the Companies Act and not only by way of Section 100 whereby the statutory protection offered to minority shareholders is denied. His emphasis is that the proposal had no option and in any event the proposal was highly inequitable, unjust, unfair, in the sense that the minority shareholders will have to leave the Company. Therefore, the promoters group could virtually bulldoze the minority shareholders and purchase their shares at the price dictated by them, which Mr. Dwarkadas contended, is totally unfair and unjust.

18. It may be noted here that even in the case before the Division Bench in *Sterlite* case, an option was given to the shareholders to purchase or to continue, whereas that was not so in the instant case.

19. Under these circumstances, I am fully in agreement with the submissions made by Mr. Dwarkadas for the above reasons. Hence, the Company Petition stands dismissed with costs.

20. Parties to act on an ordinary copy of this order duly authenticated by the Personal Secretary or the Company Registrar.