

In Re: Parke-davis (India) Ltd.

In Re: Parke-davis (India) Ltd.

SooperKanoon Citation : sooperkanoon.com/369691

Court : Mumbai

Decided On : Feb-07-2003

Reported in : [2005]124CompCas531(Bom)

Judge : D.K. Deshmukh, J.

Acts : Companies Act - Sections 391 to 394

Appeal No. : Company Petition No. 894 of 2002

Appellant : In Re: Parke-davis (India) Ltd.

Advocate for Pet/Ap. : S.R. Kom, Official Liquidator ;N.H. Seervai and ;D.J. Khambatta, Advs., i/b., Prem Ranga, Adv.;D.A. Dube and ;Sureshkumar, Advs., i/b., T.C. Kaushik, Adv.;D.V. Lakhani, ;Janak Mathurdas, ;Arvind Vyas,

Judgement :

D.K. Deshmukh, J.

1. This petition has been filed under sections 391 to 394 of the Companies Act by the petitioners, i.e., Parke-Davis (India) Ltd., a company incorporated under the Companies Act. It has been filed for obtaining sanction of this court to the scheme of amalgamation of the petitioner-company, hereinafter referred to as the transferor company, with Pfizer Ltd., which also is a company incorporated under the Companies Act, hereinafter referred to as the transferee company, with effect

from the appointed date. It is stated in the petition that with effect from the appointed date, all the debts, liabilities, duties and obligations of the transferor company shall stand transferred to the transferee company. It is further stated that all legal and other proceedings by or against the transferor company pending on the appointed date shall be continued and be enforced by or against the transferee company. It is further stated that all the employees of the transferor company who are in service on the date immediately preceding the effective date shall become the employees of the transferee company and they will be treated to be in continuous service. The terms and conditions of the employment after transfer shall not in any case be less favourable than those applicable before the appointed date. It is further stated that on the scheme becoming effective, the transferee company shall allot four equity shares of Rs. 10 each to every equity shareholder of the transferor company for every nine equity shares of Rs. 10 each held by the shareholder in the transferor company. It is further stated that this share exchange ratio has been worked out by M/s. N. M. Raiji and Co. and M/s. S. B. Billimoria and Co. and this was accepted by the board of directors of the transferor company and the transferee company. It is further stated that by an order dated July 4, 2002, the transferor company was directed by this court to convene on August 21, 2002, a meeting of the equity shareholders for the purpose of considering and if thought fit approving the scheme. Shri R. A. Shah was appointed as chairman of the said meeting. It is stated that accordingly, the meeting was held on August 21, 2002, which was attended by 114 equity shareholders of the transferor company, representing 55,47,032 equity shares of Rs. 10 each. When the result approving the scheme was put to vote by poll, 53 equity shareholders holding in the aggregate of 55,43,479 equity shares of Rs. 10 each voted in favour of the scheme and 46 equity shareholders voted against the scheme, 15 votes cast were found to be invalid.

2 To this petition, the following persons claiming to be the shareholders of the transferor company have raised objection :

(1) Shri Hiren Vyas

(2) Shri Dinesh G. Lakhani

- (3) Smt. Meenakshi B. Bankheria
- (4) Shri Janak Mathuradas
- (5) Arvind J. Vyas
- (6) Shri Rosario B. Alva
- (7) Smt. Pushpa Vijaykumar Soni
- (8) Shri Yogesh Mathuradas
- (9) Shri Pramodchandra Hiralal Shah
- (10) Shri Vinodchandra Hiralal Shah
- (11) Shri Alloysius Peter Mascarrenhas
- (12) Shri Vishwanath P. Shringare
- (13) Shri Vijaykumar Soni
- (14) Shri Prafulchandra K. Parekh
- (15) Shri Bhupendra Chimanlal Shah
- (16) Shri Chandar Pritamdas Hira

3 At the hearing of the petition, I have heard learned counsel appearing for the petitioners. On behalf of the objectors, arguments were advanced by Shri Lakhani and by Shri Janak Mathuradas. The principal objections that were raised on behalf of the objectors are :

'(1) The swap ratio of four shares of the transferor company for every nine shares of the transferee company is unfair to the shareholders and is against the interest of the minority shareholders of the transferor company.

(2) The detailed valuation report of the chartered accountants was not made available to the objectors.

(3) Shri Lakhani had moved a resolution amending the swap ratio but that amendment was rejected by the chairman without putting it to vote.

(4) The chairman of the court convened meeting did not conduct the proceedings of the meeting properly. The chairman of the meeting is the chairman of the board of directors of the transferor company and is also an alternate director of the transferee company, he is a senior partner of M/s. Crawford Bayley and Co., solicitors, who are official solicitors of both the transferor and transferee companies. According to the objectors, Shri Shah has vested interest in the proposed scheme of amalgamation and therefore, his acting as chairman of the meeting was prejudicial to the interest of the members of the company.

(5) Shri Shah, the chairman of the court, convened meeting has not disclosed in his report made to this court that 18 persons had spoken against the resolution. He also did not record in the report that amendment to the resolution was moved and seconded. According to the objectors, this vitiates the report of the chairman of the court convened meeting submitted to this court.

(6) There are several discrepancies in the scrutineers' report. Several votes have been shown to be invalid without assigning any reason why they are termed as invalid.

(7) It is submitted that several persons have voted more than once in the meeting which according to the objectors, is impermissible under the law.

(8) Some objections are also filed to claim that they are workmen of the transferor company, whose services were terminated and who have filed proceedings before the Deputy Commissioner of Labour. According to them, this fact has been suppressed by the transferor company from this court. This objection has been raised by Shri G. Sudersan. Shri Shyam Sunder, Shri R. Kanaka Durga and several other persons.'

4. In so far as the first objection is concerned, on behalf of the petitioners, 4 it is contended that so far as the swap ratio is concerned, it is fixed on the basis of the expert opinion received by the board of directors of both the companies. Relying

on a judgment of the Supreme Court in the case of Hindustan Lever Employees' Union v. Hindustan Lever Ltd [1994] 4 Comp LJ 267 : [1995] 83 Comp Cas 30, it is submitted that the court, while considering the scheme of amalgamation, does not exercise appellate jurisdiction, it exercises jurisdiction founded on fairness. It is submitted that the court does not interfere with the swap ratio adopted by the company on the expert's advice unless the court finds that it is contrary to some law. The only enquiry that the court has to hold in this regard is to find out whether it is in accordance with law and that it was carried out by an independent body. It is submitted that it is not even the case of objectors that the chartered accountants on whose opinion, the swap ratio has been fixed were not independent persons. It is also not the case of the objectors that the swap ratio is contrary to any law. On behalf of the objectors, in so far as this objection is concerned, the submission is that the proposed ratio will result in substantial reduction of dividend income on long-term basis, it will result in substantial reduction in the book value of the shares.

5. So far as the parameters of the jurisdiction of the company court in this regard is concerned, in my opinion, the observations of the Supreme Court found in paragraph 3 of its judgment in the case of Hindustan Lever Employees' Union [1994] 4 Comp LJ 267: [1995] 83 Comp Cas 30 referred to above are relevant. The Supreme Court has observed thus (page 37) :

'But what was lost sight of is that the jurisdiction of the court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction. It exercises a jurisdiction founded on fairness. It is not required to interfere only because the figure arrived at by the valuer was not as good as it would have been if another method had been adopted. What is imperative is that such determination should not have been contrary to law and that it was not unfair for the shareholders of the company which was being merged. The court's obligation is to be satisfied that valuation was in accordance with law and it was carried out by an independent body.'

6. The Supreme Court in the same paragraph further observes (page 37) :

'But since admittedly more than 95 per cent. of the shareholders who are the best judge of their interest and are better conversant with market trends agreed to the valuation determined, it could not be interfered by courts as 'certainly it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The court is least equipped for such oversights. Nor, indeed, is it a function of the judges in our constitutional scheme. We do not think that the internal management, business activity or institutional operation of public bodies can be subjected to inspection by the court. To do so, is incompetent and improper and, therefore, out of bounds.'

7. It is clear from the above observations that if any objection is raised before the company court to the swap ratio of shares, the enquiry that the court has to make is whether it is contrary to any law, whether the valuation is carried out by an independent body and to find out whether it can be said that the ratio is unfair. The court has to see how the members who are the best judges of their own interest have voted on the resolution. So far as the present case is concerned, it is nobody's case that the swap ratio is contrary to any law. It is also nobody's case that the experts who submitted the valuation report were not independent so far as the question of fairness is concerned. It is clear from the material produced on record that 99.94 per cent. of the shareholders have voted in favour of the resolution and therefore, in my opinion, when 99.94 per cent. of the shareholders find that the swap ratio is not unfair, this court would not be justified in interfering with the same.

8. So far as the second objection is concerned, on behalf of the petitioners, it is contended that the objectors and the shareholders were supplied with a copy of the report of the chartered accountants, which was received by the company. That was the only report received by the company and nothing was kept back or concealed from the members. On behalf of the objectors in this regard nothing was pointed out to me which would indicate that any report that was received by the company was not supplied to the objectors. In my opinion, therefore, the statement made on oath on behalf of the petitioners has to be accepted.

9. So far as the third objection is concerned, on behalf of the company, it is contended that it being a special meeting of the company called pursuant to the court's order to consider the resolution about approval or rejection of the scheme of amalgamation, any proposal for any amendment in that resolution could not have been moved in that meeting, That meeting could have either approved the resolution or rejected it. It is further submitted that Shri Lakhani who suggested the amendment was allowed to speak, others were also allowed to speak at the meeting and after discussing the entire proposal, by an overwhelming majority the resolution was approved. It is pointed out that in the case of Hindustan Ciba Geigy Ltd., In re [1997] 14 SCL 115, a similar situation has been considered by this court. The said judgment is reported in SEBI and Corporate Laws Reports, volume 14, page 115 and in that case also, an amendment proposed to the resolution was ruled out of order. This objection was raised before the court and the court rejected the objection and sanctioned the scheme. The petitioners also rely on a judgment of the Division Bench of this court in Appeal No. 787 of 1997 in Company Petition No. 92 of 1997, Dinesh Lakhani v. Hindustan Ciba Geigy Ltd., decided on August 27, 1997, and submit that in identical case, an identical objection has been rejected by the learned single judge of this court and the Division Bench. On behalf of the objectors, relying on a judgment of a learned single judge of this court in the case of T.H. Vakil v. Bombay Presidency Radio Club Ltd. [1946] 16 Comp Cas 8: AIR 1945 Bom 475, it is submitted that the chairman could not have ruled out the amendment and the chairman was under a duty to put the amendment to vote, Now, a perusal of the judgment of the learned single judge in the case of Hindustan Ciba Geigy Ltd., In re [1997] 14 SCL 115 (Bom) shows that in that case also, the court was considering a petition for sanction of scheme of arrangement, in the court convened meeting and amendment was proposed to the resolution. That amendment was ruled as out of order by the chairman. When the resolution was put to vote it was passed by the overwhelming majority. In the petition, an objection on that ground was raised and the learned single judge of this court rejected that objection. An appeal was preferred against that judgment of the learned single judge and the Division Bench approved the decision of the learned single judge and held that because the chairman ruled the amendment as out of order, the resolution passed in that

meeting approving the scheme does not become invalid. The decision of the Division Bench is binding on me, it is in almost identical facts and therefore, the objection raised in this regard cannot be accepted.

10. So far as the fourth and fifth objections are concerned, the impropriety in so far as the conduct of the chairman of the meeting is concerned, according to the objectors is--(1) not putting amendment to vote and (2) not disclosing in the report submitted to this court that an amendment was moved which was ruled out of order. I have already held that the rejection of the amendment and not putting of the amendment to vote do not vitiate the resolution approving the scheme. Non-disclosure of the fact in the report of the chairman, in my opinion, is also not significant. No other conduct which can be termed as improper has been attributed to the chairman and therefore, in my opinion, there is no substance in this objection.

11. So far as the sixth and seventh objections are concerned, according to the objectors, in terms of the provisions of sub-section (2) of section 391, apart from majority in number representing 3/4ths in value majority in members voting in favour of the resolution is necessary, it is necessary that majority of the members present and voting either in person or by proxy should also vote in favour of the resolution, then only a resolution can be said to have been passed. According to the objectors, in the meeting, 114 members were present in person/proxy, 53 of these members/proxies voted in favour of the resolution, 46 members/proxies voted against the resolution, 15 votes cast were found to be invalid. According to the objectors, for all the 15 votes which have been declared invalid, the reason has not been disclosed for holding them invalid. But in so far as the shareholder Illa Chandulal Jhaveri is concerned, the vote is declared invalid but in the scrutineers' report, no reason is given. It was also pointed out that some persons have voted more than once. According to the objectors, this is also invalid. The petitioners therefore have filed a detailed affidavit of Shri V. N. Deodhar, scrutineer. In so far as the objection that certain shareholders as per the scrutineers' report have voted more than once is concerned, it is pointed out that when shares are held jointly either with any one or more joint names being different or the order of the joint names differing, the same are given different folio

numbers and are treated as different numbers and therefore, all such joint holders have been treated as separate and distinct members for the purpose of computing the number of members present and voting at the meeting. The scrutineers have admitted that while doing so, mistake in one case has occurred inasmuch as at serial Nos. 20 and 110, though two persons hold shares in separate folios, they are joint holders, however on scrutiny it was found that they are the same and therefore, there is a mistake committed in relation to one vote. It is explained that in each case, the scrutineers have given reason for invalidating a vote. In so far as the vote of Smt. Illa Chandulal Jhaveri is concerned, that vote was held to be invalid as remarks were written on the ballot paper. After going through the detailed affidavit and the documents produced with that affidavit, I find that mistake in relation to one vote has been admitted by the petitioners. Therefore, the number of members voting in favour of the resolution has to be reduced by one. I also find that the scrutineers have committed an error in holding the vote of Smt. Illa C. Jhaveri as invalid because in the present voting, there is no concept of secrecy of votes and therefore, merely because something is written on the ballot paper, the vote could not have been invalidated. The said Smt. Illa C. Jhaveri has voted against the resolution, therefore, the number of members voting against the resolution would go up from 46 to 47 and the number of members voting in favour of the resolution will come down from 53 to 52. So far as the aspect of double voting is concerned, in my opinion, as the votes are taken folio wise and as proxies are allowed, such double voting can take place and it is in accordance with law. For example, if one share folio is held by A, B and C and the other folio is held by A, D and E and by both the folio holders, A is authorised to vote, then A will vote twice but in one case, he will vote in his own right as a member and in other case, he may be entitled also to vote in his own right as a joint shareholder, but he can also vote because a proxy is given in his favour. According to the Act, a proxy can be given even to a non-member, therefore the two other joint holders could give proxy in favour of one of them and because that member votes twice, in my opinion, it cannot be said that it is against the law. The petitioners have placed on record for information as to what way the voters, whose votes have been declared invalid, have voted. A perusal of that document shows that out of 15 voters whose votes have been declared invalid, six have voted in favour of the resolution and

nine have voted against the resolution. If all these votes are taken to be valid, then also there would be majority in favour of the resolution. In my opinion, therefore, this objection also does not have any substance and has to be rejected.

12. Now, so far as the objections filed by the workers are concerned, they are no longer in the employment as per their own objections and their matters are pending either in court or before the Commissioner of Labour. There is a clear averment made in the petition that all pending litigations of the transferor company would be contested by the transferee company after amalgamation and all liabilities that may be incurred by the transferee company would be taken over by the transferee company. A statement has also been made at the Bar on behalf of the petitioners that in case ultimately any order is passed in favour of these workers by the competent court, it will be the transferee company who would be bound by that order and at no point of time, a defence that because of the amalgamation the transferee company is not liable would be taken. In this view of the matter therefore, in my opinion, the interest of workers who have lodged objections have been taken care of and they are not likely to be prejudiced in their pending litigations because of the amalgamation. Taking an overall view of the matter therefore, the objections that have been raised to the scheme have no substance and therefore, they are disposed of.

13. The Regional Director has filed an affidavit stating that workers whose names are mentioned above, have written to him about the pendency of their matters before the Commissioner of Labour. Learned counsel appearing for Regional Director as also the Official Liquidator, High Court have no objection to the amalgamation scheme being sanctioned. Petition is allowed in terms of prayer Clauses (a) to (m).

14. Parties to act on the copy of this order duly authenticated by the company registrar/personal secretary as true copy.

15. Certified copy expedited.

16. Shri Lakhani, an intervenor requests for grant of stay of this order.

17. Considering, the nature of objection raised, in my opinion, it will not be appropriate to grant any stay. Request is, therefore, rejected.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com