Mphasis Limited Vs. Nil

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SooperKanoon Citation : sooperkanoon.com/388313

Court : Karnataka

Decided On : Jun-19-2007

Reported in : [2008]141CompCas558(Kar); ILR2007KAR3375

Judge : N. Kumar, J.

Acts : Companies Act 1956 - Sections 94 to 97, 391 to 394 and 394(3)

Appeal No. : Company Petition No. 121 of 2007

Appellant : Mphasis Limited

Respondent : Nil

Advocate for Def. : Basavaraj Belavangala and ;Y. Hariprasad, Advs.

Advocate for Pet/Ap. : S.S. Nagananda, Sr. Adv. for ;Amarchand, ;Managaldas and ;Suresha A., Advs.;Shivaprabhu Hiremath, Adv.

Judgement :
ORDER

N. Kumar, J.

1. The petitioner has preferred this Petition under Section 394 of the Companies Act, 1956 for sanctioning of the scheme of amalgamation.

2. The petitioner company is incorporated under the provision of the Indian Companies Act, 1956, for short hereinafter referred to as the 'Act'. The Registered Office of the petitioner company is situate at Bangalore at No. 139/1, Hosur Main Road, Koramangala, Bangalore-560 095, Karnataka. The main object of the petitioner company as set in the Memorandum of Association is to manufacture either for its own use or for sale in India or for export outside India computer systems, computer peripherals and accessories, computer consumables like floppy disks/diskettes, hard disks, ribbons, etc., as set out in the Memorandum of Association. Annexure-B is the copy of the Memorandum and Articles of Association of the petitioner company. The authorized share capital of the company as on 18-8-2006 is 20 crores equity shares of Rs. 10/- each amount to Rs. 200 crores. The issued, subscribed and paid capital is 161,859,420 equity shares of Rs. 10/-each amounting to Rs. 1,618,594.200. The company has produced the true copy of the annual report for the financial year 2005-06 containing its balance sheet and audited financial statements as per Annexure-C. This company is hereinafter referred to as the 'transfer company'.

3. The transferor company-E.D.S. Electronic Data Systems (India) Private Limited was established with the object of carrying on business of providing services including management consulting, systems development, systems integration, systems management, process management and rendering management consultancy services of all kinds, etc., as clearly set out in the Memorandum of Association. A copy of the same is produced as Annexure-D. The share capital structure of the transferor company as on August 18, 2006 is 45,000,000 equity shares of Rs. 10/- each amounting to Rs. 45 Crores and the issued, subscribed and paid up capital is 3,52,83,252 of Rs. 10/- each amounting to Rs. 35,28,32,520/-. The financial statement of the transferor company for the year ended March 31, 2006 containing its balance sheet has been produced as per Annexure-E.

4. The transferor company and the transfer company are part of Electronic Data Systems Corporation, a listed company incorporated under the laws of Delaware. The said E.D.S. Group now desires to consolidate its interests in the information technology and business process outsourcing business in India in such a manner

as to generate revenue, cost and other operating synergies that will benefit the customers, employees and shareholders of both the petitioner company and the transferor company. In order to achieve this objective the transfer company proposed to enter into a scheme under Sections 391 to 394 of the Companies Act, 1956 to amalgamate the transferor company with itself. After the scheme is made effective the transferor company will dissolve without the process of winding up. The salient features of the scheme are all clearly set out in Annexure-A, copy of the scheme.

5. The Board of Directors of the transferor company and the transfer company have passed resolutions dated 20-7-2006 and 26-7-2006 approving the scheme. The transfer company has passed a resolution on October 30, 2006 extending the time for implementation of the scheme.

6. The share exchange ratio for the scheme was computed and recommended by Deloitte Haskin and Sells, Chartered Accoutants, Bangalore. The Board of Directors of both the companies have accepted the said valuation as it is fair and reasonable. Annexure-H is the valuation report.

7. The transfer company filed an application before this Court in C.A. No. 984/2006 seeking permission from this Court for convening the meeting of equity share holders to seek their approval to their scheme. By an order dated 13-20-2006 this Court directed that meeting of the equity shareholders of the petitioner company be held on 13-11-2006 to consider and if thought fit, approve, with or without modifications, the scheme. The meeting of the secured creditors and unsecured creditors was dispensed with. As directed by this Court, on Monday 13-11 -2006 the meeting of the equity shareholders of the petitioner company was duly held at 9.30 am at The Taj West End Hotel, Bangalore. Mr. Jaithirfh Rao acted as Chairman of the said meeting. The said meeting of the equity shareholders was attended either in person or by proxy by 88 equity shareholders of the petitioner company. The Chairman put the resolution to vote. 66 equity share holders holding 11,66,99,560 equity shares representing 71.97% of the equity shares of the company and 99,999146% of the equity shares present and voting, voted in favour of the scheme. 6 equity share holders holding 157 equity

shares, representing 0.0001 % of the equity shares of the company and 0.000135% of the equity shares present and voting, voted against the scheme. Poll papers of 2 equity shareholders, holding 840 equity shares, representing 0.00052% of the equity shares of the company and 0.00072% of the equity shares present and voting were declared invalid. The Chairman declared that the scheme was approved by requisite majority in number as well as in holdings at the meeting of the equity share holders and has reported the result of the meeting to this Court. Annexure-K is the Chairman's report.

8. The transferor company which is having its registered office at Bombay has also filed similar petition before the High Court of Bombay. By an order dated 2-2-2007 in Company Petition No. 663/2006 connected with Company Application No. 937/2006 the Court has approved the scheme of amalgamation with the transfer company subject to the order to be passed by this Court in this Petition.

9. After entertaining this Petiton, notice was ordered to the Registrar of Companies. The petitioner was directed to take out advertisement in Hindu and Vijaya Karnataka. Accordingly, the petitioner has taken out the publication in the aforesaid two newspapers. In pursuance of the notice, the Registrar of Companies has entered appearance and filed his report/statement of objections. In pursuance of the public notice one of the equity share holder has entered appearance and has filed his statement of objections.

10. The main objection of the Registrar of Companies is that, on account of the amalgamation, the transferor company will be dissolved and only the transfer company exists and on account of the scheme of amalgamation the authorized capital of the transfer company gets increased. Therefore, the transfer company has to comply with the provisions of Sections 94 and 97 of the Companies Act, 1956 by filing relevant returns with the Registrar of Companies with registration fee/filing fee. The Companies Act does not specifically exempt the transferee company on account of the scheme of amalgamation from payment of registration fee for increase of its authorized capital pursuant to the scheme of amalgamation. If such a course is permitted it will be against the provisions of the Companies Act. It involves substantial loss to the revenue and the State Government.

11. The grievance of the share holder who is opposing this petition is that, the company has not furnished the information and suppressed the same to the share holders. He objects to the valuation made by the petitioner as well as the exchange ratio of shares. Therefore, he has sought for rejection of the Petiton.

12. I have heard the Learned Counsel for the parties.

13. The first objection of the Registrar of Companies is that, the petitioner has to first comply with he mandatory requirement of Sections 94 and 97 before approaching this Court for amalgamation. In fact the said objection raised by the Registrar of companies was considered by the Andhra Pradesh High Court in the case of Saboo Lesing (P) Limited In Re. (2004)52 SCL 681 (AP) where in was held as under:

10. The present scheme of arrangement or amalgamation if it is sanctioned by this Court, the certified copy of the order of this Court is required to be filed before the Registrar within 30 days from the date of the order under Sub-section (3) of Section 394 of the Companies Act, for the purpose of its registration. The object behind such intimation, which is required under law either under Section 95 or under Section 97 or under Section 394(3) of the Companies Act, appears to be one and the same. Again the default in not filing certified copy of the order of this Court before the Registrar within 30 days entails penal consequences. Well, when the certified copy of the order sanctioning the scheme by this Court is required to be filed before the registrar for the purpose of its registration, there is no reason as to why it shall not be treated as notice to the Registrar as envisaged under Section 95 to 97 of the Companies Act. Inasmuch as, as discussed hereinabove, the object being the same, the necessary changes that are required to be made in the concerned Registered by the Registrar of companies can be effected after receiving the certified copy of the order of this Court sanctioning the scheme. The sanction of the scheme by this Court has its own effect. It is not a mere act of the parties individually and volitionally. The scheme upon being sanctioned by this Court, it becomes operational by virtue of the orders passed by this Court. In other words, by operation of law, such changes would come into effect. Therefore, it has statutory genesis and statutory character, but not mere individual acts of the

companies. In that view of the matter, no separate notice informing the Registrar under Section 95 or 97 of the Companies Act need be given, unlike the other cases which do not require the sanctions of the Court, in my considered view, inasmuch as the scheme is required to be sanctioned by this Court and such sanction is required to be registred with the Registrar of Companies by filing the certified copy of the order of this Court.

14. Section 94 of the Act deals with the power of limited company to alter its share capital. If so authorised by its articles, alter the conditions of its memorandum by providing for increase of its share capital in any of the modes set out in this Section. However, the said power shall be exercised by the company in General Meeting. It need not be confirmed by the Court. Section 95 provides that if the share capital is increased, the company shall within 30 days after doing so, give notice thereof to Registrar specifying such increase in the share capital, to enable him to record the same and made any alterations in the company's memorandum or articles or both. Therefore, it is clear that the increase in the share capital has to be authorised in the articles of the company and the said power is to be exercised in General Meeting and thereafter it has to be brought to the notice of the Registrar within 30 days after doing so, to enable him to make necessary entry in the records. These provisions ipso facto do not apply to a case of increase of share capital of a company on account of amalgamation. 'Sections 391 to 394 which deals with amalgamation, reconstruction of companies do not provide for compliance of Sections 94 to 97 in the event of an increase in the share capital on account of amalgamation. The increase of share capital in the case of amalgamation comes into effect only after the Court passes an order according sanction to the scheme of amalgamation. When such a scheme of amalgamation is approved in the General Meeting of the share holders, there is substantial compliance for Section 94.' A certified copy of the order of the Court is to be filed before the Registrar within 30 days from the said order, which would operate as a notice contemplated under Sub-section (1) of Section 95 and 97 of the Act. Thus, in the scheme of the Act, the provisions of Sections 94 to 97 are also complied with. There is no infraction of the said provision.

15. The second objection raised was that without paying the requisite fee/stamp duty on the enhanced share capital, enhancement of share capital cannot be permitted. This question also has been considered by various High Courts.

16. In the case of Jaypee Cement Limited (2004) 122 Company Case 854 it was held that, upon the merger authorised share capital of JP1 shall stand combined with the authorised share capital of JPC. According to the Regional Director, this amounts to increase of the authorised capital of JPC, which cannot be done without paying the requisite fee/stamp duty to the Government. In reply to this objection, it was submitted on behalf of JPC that the fee/stamp duty is nominal and has a maximum limit which the JPC is prepared to pay. But, it was submitted that the requisite fee has already been paid on the authorised capital of JPI and merely because of its merger with JPC, there is no reason why the same fee should be paid again by JPC on the same authorised capital. Accepting the said contention it was held that, the submission has force and no good reason has been shown why the two merged companies should be required to pay duty again on the same authorised capital on which duty has already been paid by the JPI. Regarding the increase of authorised share capital by merger of the authorised capitals of the two companies, an order can be passed under Section 391 of the Companies Act itself.

17. Again the Bombay High Court in the case of Vasant Investment Cop Oration Limited v. Official Liquidator (1981) 51 Company Cases 20 has held that, the whole purpose of Section 391 is to reconstitute the company without the company being required to make a number of applications under the Companies Act for various alterations which may be required in its memorandum and articles of association for functioning as a reconstituted company under the scheme. In fact a similar view was taken by the Bombay High Court in the case of PMP Auto Industries Limited (1994) 80 Company Cases 289. After relying on the aforesaid judgment the Allahabad High Court in the case of Surya Commercials Limited (2007) 137 Company Cases 325 (All) held that, since the combined authorised capital does not exceed the authorised capital of the two companies, no further fees or stamp duty is required to be paid. The authorised share capital of the transferee company would be sufficient to allot shares to the members of the

transferor company upon addition of authorised capital of the transferor company as provided in the scheme. The said judgment has been followed by the High Court of Andhra Pradesh in several judgments.

18. Thus, the law on the point is well settled. Upon the merger of the transferor company with the transferee company under a scheme of amalgamation, the share capital of the transferor company is combined with the share capital of the transferee company. This amounts to increase of the authorised share capital of the transferee copany. The said combined authorised share capital of the transferee company is sufficient to allot shares to the members of the transferor company. The transferor and transferee company have already paid requisite fee/stamp duty on the authorised share capital of the respective companies. Therefore, in reality there is no increase in the share capital of the transferee company so as to attract payment of any additional fee/stamp duty. There is no obligation or reason for the two amalgamated companies to pay duty again on the same authorised capital on which they have already paid the duty.

19. The objection of the sole share holder who is opposing the scheme is that he was not given three years balance sheet. In fact he did not attend the meeting at all. In reply to his notice he was informed by the company to come to the registered office of the company and have a look at all the documents which he wanted, which he failed to do. Under those circumstances when there is no statutory obligation on the part of the company to make available the balance sheet and accounts for a period of three years, when admittedly they have supplied the latest balance sheet with all annexures, the conduct of the objector is not fair therefore, the majority decision taken by the equity share holders is just and fair and it would legitimately bind even a dissenting member of the class including the objector before this Court.

20. As per the proposed scheme the transferee company shall allot 5 (five) fully paid up equity shares of Rs. 10/- each that of the transferee company to every 4 (four) fully paid up equity shares of Rs. 10/- each of the transferor company. The same is based on the recommendation by Deloitee Haskin and Sells, Chartered Accountants, Bangalore. The Board of Directors of both the companies have

accepted the said valuation as fair and reasonable. Once the exchange ratio of the shares of the transferee company to be allotted to the shareholders of the transferor company has been worked out by a recognised firm of chartered accountants who are experts in the field of valuation and if no mistake can be pointed out in the said valuation, it is not for the Court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of the two companies or to say that the shareholders in their collective wisdom should not have accepted the said exchange ratio on the ground that it will be detrimental to their interest. It is not open to this Court to sit as a Court of appeal and decide sitting in judgment over the commercial wisdom of the share holders.

21. From the aforesaid facts set out above and the material on record it is clear that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated under Section 391 have been held. All necessary material intended by Section 393 is placed before the voters in the meeting as contemplated under Section 391(1), to enable the voters to arrive at an informed decision for approving the scheme in question. The scheme is backed up by the requisite majoirty votes as required under Sub-section (2) of Section 391. The two secured creditors of the company have given their consent for the amalgamation in writing. Similarly, all the requisite material contemplated by the provisio to Sub-section (2) of Section 391 is placed before the Court by the petitioner seeking sanction for such a scheme. The terms of the scheme of amalgamation indicate that with effect from the appointed day all debts, liabilities, duties and obligations of the transferor companies and any accretions and additions or deletions thereto after the appointed date shall without any further act or instrument or deed stand transferred and vested in or be deemed to be transferred to and vested in the transferee company so as to become as and from that date, the debts, liabilities, duties and obligations of the transferee company. Upon the scheme being sanctioned and becoming finally effective the transferee company shall allot 5 (five) fully paid up equity shares of Rs. 10/- each of the petitioner for every (4) four fully paid up equity shares of Rs. 10/- each of the transferor company. Thus, the interest of the share holders is fully taken care of. All the employees of the transferor company wherever applicable in service on the

effective date shall become the employees of the transferee company on such date without any break or interruption in service and on the terms and conditions not less favourable than those subsisting with reference to the concerned transferor company. In fact no employee of the transferor company has appeared before this Court to oppose the scheme of amalgamation. Thus, the interest of the employees of the transferor company is also taken duly care of. The scheme do not contravene any law. The affairs of the transferee company is not conducted in a manner detrimental to the interests of the share holders and creditors of the company. Under these circumstances, a case for according sanction for the scheme of amalgamation proposed by the petitioner is hereby made out. Hence, I pass the following order:

(1) The scheme of amalgamation Annexure-A proposed by the petitioner company is hereby sanctioned and it will be binding on the petitioner company, its share holders and creditors.

(2) The petitioner shall file the certified copy of the order with the Registrar of Companies within thirty days from the date of receipt of a copy of this order.

(3) Office is directed to draw up decree in Form No. 42.

(4) No costs.