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In Re: Va Tech Hydro India (P.) Ltd.

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Court : Madhya Pradesh

Decided On : May-07-2009

Reported in : [2009]94SCL317(MP)

Judge : Rajendra Menon, J.

Appellant : In Re: Va Tech Hydro India (P.) Ltd.

Judgement :
ORDER

Rajendra Menon, J.

1. This application has been filed under Section 391, read with Sections 392, 393 and 394 of the Companies Act (hereinafter referred to as the 'Act') read with Rules 9 and 79 of the Companies (Court) Rules, 1959 (hereinafter referred to as the 'Rules'). Prayer made in this application is to grant sanction to the proposed Scheme of Amalgamation and Arrangement from the effective date and with effect from the appointed day as notified and defined in the Scheme, as a going concern in accordance to the terms and conditions set forth in the Scheme.

The Scheme in question, approval of which is sought for is filed as Annexure P/1 and is available at Pages 39 to 74, of the petition.

2. Facts in brief, necessary for disposal of this petition, are that M/s. VA Tech Hydro India Private Limited is first petitioner and the transferee-company was

originally incorporated as CG Elin Power Systems Private Limited in the State of Madhya Pradesh with effect from 28-11-1996. Subsequently, name of the petitioner-company was changed to the present name, i.e.....M/s. VA Tech Hydro India Private Limited with effect from 26-6-2007 and after change of name a fresh certificate of incorporation was issued by the Registrar of Companies, Madhya Pradesh and Chhattisgarh. Shortly after its incorporation, it is stated that the first petitioner/transferee-company had commenced its business and at present it is carrying out the following business activities: 'manufacture, design, development, engineering, marketing, import and export, purchase, sale, lease, repair, consultancy, contracting, execution and project engineering, distribution, agency or otherwise deal in all kinds of products, plants, systems and services related to the generation, distribution and utilization of power and energy'.

It is pointed out that under clause 44 of the Memorandum of Association, a provision is made for the petitioner-company to amalgamate with any other company having objects altogether or in part similar to that of the petitioner-company or otherwise. Copies of Certificates of Incorporation of the first petitioner-company, issued by the Registrar of Companies, Madhya Pradesh and the fresh certificate indicating change of name are filed as Annexure P/3, available at pages 78 and 79 of the petition, and a copy of the Memorandum of Article of Association in force is Annexure P/4, at pages 80 to 101 of the petition.

3. It is further stated that the authorized Share Capital of the first petitioner/transferee-company as on 31-10-2008 is Rs. 200,000,000 divided into 20,000,000 Equity Shares of Rs. 10 each and the Issued, Subscribed and Paid-up Share Capital of the first petitioner/transferee-company as on 31-10-2008 is Rs. 185,000,000 divided in 18,500,000 Equity Shares of Rs. 10 each. As on 31-10-2008, the entire Issued, Subscribed and Paid-up Share Capital of the first petitioner/transferee-company, except one share is held by its parent company, viz., VA Tech Hydro Gmbh, Austria. The first petitioner/transferee-company has not issued any debentures or any other class of Shares (other than Equity Shares) as on date. The first petitioner/transferee-company has neither issued nor agreed to issue any debentures. It is further the case of the first petitioner-company that it has two Equity Shareholders and all the Shareholders have given their consent for

implementation of the Scheme without any modifications/amendments, by individual letters of consent.

List of Shareholders as on 31-10-2008, duly certified by M/s. Tarun Jaggi & Associates, Chartered Accountants along with individual letters of consent are annexed with the Company Petition as Annexure P/10 and are available at page Nos. 257 to 280 of the petition.

4. It is further stated that as on 31-10-2008, the first petitioner/transferee-company has the following creditors namely:

(i) Only one Secured Creditor representing Secured Credit of Rs. 32,29,725 (Rupees thirty two lakhs twenty nine thousand seven hundred and twenty five only).

(ii) First Petitioner/Transferee-Company has sanctioned working capital limits from four banks namely: State Bank of India - Overseas Branch; ICICI Bank; IDBI Bank; and, Calyon Bank of Rs. 233,80,00,000 (Rupees two hundred thirty three crores and eighty lakhs only).

(iii) Has 181 (one hundred eighty one) Unsecured Creditors representing Unsecured Credit of Rs. 26,75,56,168 (Rupees twenty six crores seventy five lakhs fifty six thousand one hundred sixty eight only).

It is submitted that all the Creditors, namely, Secured, Unsecured and four banks [set out in Clause (it) above] have provided their consent to the Scheme being sanctioned by this Hon'ble Court without any modification/amendment.

Copies of the List of Secured Creditors as on 31-10-2008, duly certified by M/s. Tarun Jaggi & Associates, Chartered Accountants along with individual letters of consent are annexed with the Company Petition as Annexure P/11 and are available at page Nos. 281 to 289 of the petition; and, a List of Unsecured Creditors as on 31-10-2008 again duly certified by M/s. Tarun Jaggi & Associates, Chartered Accountants is annexed with the Company Petition as Annexure P/12 and are available at page Nos. 290 to 295 of the petition. Further copies of the List of Banks together with amount of guarantees issued as on 31-10-2008 again

certified by M/s. Tarun Jaggi & Associates, Chartered Accountants is annexed with the Company Petition as Annexure P/13 and are available at page Nos. 296 to 300 of the petition.

5. It is further stated that VA Tech Escher Wyss Flovel Private Limited, the second petitioner/transferor-company, was originally incorporated as Flovel Limited on 3-4-1976 at New Delhi, under the provisions of the Act. Subsequently, the name of the second petitioner/transferor-company was changed from Flovel India to Sulzer Flovel Hydro Limited with effect from 20-12-1995. Subsequently, the name of the Company was changed from Sulzer Flovel Hydro Limited to VA Tech Escher Wyss Flovel Limited with effect from 25-4-2000. Finally, the name of the Company was changed from VA Tech Escher Wyss Flovel Limited to VA Tech Escher Wyss Flovel Private Limited with effect from 7-11-2007. Thereafter, the second petitioner/transferor-company filed a petition under the provisions of the Act, before the Company Law Board for shifting its registered office from New Delhi to the State of Madhya Pradesh and, accordingly, the Company Law Board granted permission. The Order of the Company Law Board was registered with the Registrar of Companies, NCT of Delhi and Haryana vide its Certificate dated 11-9-2008. Shortly after incorporation, the second petitioner/transferor-company commenced its activities in accordance with its objects, as set out in its Memorandum of Association, namely, carrying out the business of Engineers, Consultants and Manufacturers of Engineering goods like hydraulic turbines, governors, hydraulic pumps, butterfly valves, spherical valves, annular sleeve valves, needle valves and associated operators. Clause 22 of the Memorandum of Association of the transferor-company enables the transferor-company to amalgamate with another company.

Copies of the certificates and order of the Company Law Board are filed as Annexure P/6 available from pages 139 to 142, and copies of the Memorandum of Association and Article of Association of the second petitioner/transferor-company is annexed as Annexure P/7 to the petition.

6. The authorised Share Capital of second petitioner/transferor-company as on 31-10-2008 is Rs. 150,000,000, divided into 15,000,000 Equity Shares of Rs. 10 each

and the Issued, Subscribed and the Paid-up Share Capital of the second petitioner/transferor-company as on 31-10-2008 is Rs. 21,205,640, divided into 2, 120,564 Equity shares of Rs. 10 each and the entire Issued, Subscribed and Paid-Up Share Capital of the second petitioner/transferor-company, is beneficially held by VA Tech Escher Wyss Gmbh, Germany. The second petitioner/transferor-company has not issued any debentures or any other class of Shares (other than Equity Shares), as on date. The second petitioner/transferor-company has neither issued nor agreed to issue any debentures.

7. It is further stated that as on 31-10-2008, the second petitioner/transferor-company has seven Equity Shareholders and all the Shareholders have given their consent to the implementation of the Scheme without any modifications/amendments by individual letters of consent.

A copy of the List of Shareholders as on 31-10-2008 duly certified by M/s. Tarun Jaggi & Associates, Chartered Accountants along with individual letters of consent are annexed with the Company Petition as Annexure P/14 and are available at page Nos. 301 to 357, of the petition.

8. According to the averments made in this petition, which is found to be correct, as on 31-10-2008, the second petitioner/transferor-company has the following creditors namely:

(i) Five Secured Creditors representing Secured Credit of Rs. 3,06,60,727 (Rupees three crore six lakhs sixty thousand seven hundred twenty seven only).

(ii) Second petitioner/transferor-company has sanctioned working capital limit from four banks namely: State Bank of India - Overseas Branch; ICICI Bank; IDBI Bank; and, Calyon Bank, of Rs. 299,80,00,000 (Rupees two hundred ninety nine crores and eighty lakhs only)

(iii) Second petitioner/transferor-company has three hundred and seven (307) Unsecured Creditors representing Unsecured Credit of Rs. 652,900,901 (Rupees sixty five crores twenty nine lakhs nine hundred and one only).

It is submitted that all the Creditors, namely, Secured, Unsecured Creditors and the Four Banks [mentioned in Clause (ii) above] have given their letters of consent for implementation of the Scheme without any modifications/amendments.

A copy of the List of Secured Creditors as at 31-10-2008 duly certified by M/s. Tarun Jaggi & Associates, Chartered Accountants along with letters of consent are annexed with the Company Petition as Annexure P/15 and are available at pages 358 to 363, of the petition. Copy of List of the Unsecured Creditors as at 31-10-2008 duly certified by M/s. Tarun Jaggi & Associates, Chartered Accountants are annexed as Annexure P/16 and are available at pages 369 to 391, of the petition. Copy of the List of the Banks along with the amount of working Capital Limits as on 31-10-2008, duly certified by M/s. Tarun Jaggi & Associates, Chartered Accountants are annexed as Annexure P-17, and are available at pages 373 to 376, to the petition.

9. It is the case of the petitioner that it is desirable and expedient to amalgamate with the transfer on occurrence of the effective date and with effect from the appointed date, i.e., 1-1-2009. The entire business and undertaking of the second petitioner/transferor-company with the first petitioner/transferee-company as a going concern on the terms and conditions, which are contained in the Scheme so as to become assets, liabilities and undertakings of the transferee-company in accordance to the terms and conditions stipulated in the Scheme.

10. It is the case of the petitioner that the Board of Directors of Petitioner-Companies by Resolutions passed at their respective Meetings have unanimously approved the Scheme and copies of the said Resolutions are annexed as Annexure P/2 to the Company Petition (available at pages 75 to 77). None of the Directors of the Petitioner-Companies have any material interest in the said Scheme. The aggregate assets of the petitioner/transferee-company after the coming into force of the Scheme, is expected to be more than sufficient to meet all the liabilities of the petitioner/transferor-company and the said Scheme will not adversely affect the rights of any of the creditors of the petitioner-companies in any manner whatsoever, and due provisions have been made for payment of all liabilities as and when the same fall due in ordinary course of business. The

exchange ratios of the shares of the petitioner/transferor-company for shares of the petitioner/transferee-company have been fixed on a fair and reasonable basis based on the structure of the Scheme as proposed and based on the Report submitted by independent valuers, viz., M/s. Tarun Jaggi & Associates.

Copies of the Valuation Report is annexed as Annexure P/9, available at pages 239 to 256.

11. This petition has been filed by the petitioner seeking orders for dispensing with the meeting of the shareholders of secured creditors and for convening and holding a meeting of its unsecured creditors.

12. This Court vide order dated 19-2-2009 dispensed with convening and holding of the meeting of the shareholders and secured creditors of the companies in question and directed convening and holding of a meeting of the unsecured creditors of the companies on 28-3-2009, at 10.00 AM and 11.30 AM respectively at the Registered Office of the Companies at Bhopal. Further directions were issued in the said order passed by this Court with regard to dispatch of notice, publication of public notice, appointment of Chairperson and Alternate Chairperson for the Meeting. It is stated that the petitioner-company has complied with the aforesaid order, had dispatched individual notices to the unsecured creditors indicating them about convening of the meeting, the notice was further published in the newspaper as directed by this Court. Copies of affidavit of service and other documents have been filed in this regard.

13. It is further seen from the records that in accordance to the directives issued by this Court on 19-2-2009, the meeting of the unsecured creditors of the first petitioner/transferee-company and second petitioner/transferor-company was held on 28-3-2009, at 10:00 AM and 11:30 AM respectively at the registered office of petitioner-companies at Bhopal. The unsecured creditors of the first petitioner/transferee-company and the second petitioner/transferor-company unanimously approved the Scheme, without any modification/amendment. The Chairperson appointed by this Court for the meeting of the first petitioner/transferee-company and second petitioner/transferor-company have filed their report as Annexure A/2 and A/3 respectively.

14. I.A. No. 4036/2009 is filed subsequent to the meetings held and on consideration of the aforesaid I.A., this Court vide order dated 2-4-2009 directed for issuing notice of the petition to the Regional Director, Department of Company Affairs, Western Region, Mumbai and the Official Liquidator of this Court and also ordered for publication of the notice in Hindustan Times - English edition and Dainik Bhaskar and Raj Express - Hindi Edition. Affidavit of the competent officer with regard to publication in the newspaper as ordered on 2-4-2009 has been filed and the Regional Director, Western Region has also submitted his affidavit along with Report through Shri Mohan Sausarkar, Standing Counsel for the Government of India. In his report, the Regional Director has indicated that since the transferor and transferee-company are owned by Andtriz Group (which is a Foreign Company), Reserve Bank of India may be notified regarding the sanction of the Scheme within 30 days from the date of pronouncement of the order, sanctioning the Scheme, by this Court. The Regional Director in his Report has indicated that the Scheme is not prejudicial to the interests of shareholders and public.

15. The Official Liquidator has also submitted his report, wherein he has stated that the affairs of the second petitioner/transferor-company are not conducted in a manner prejudicial to the interests of shareholders and public and that the Scheme is not prejudicial to the interests of shareholders and public.

16. Having considered the entire material available on record, including the report and affidavits filed, it is seen that no objection is raised by the Regional Director with regard to affairs of the petitioner's company. It is also seen from the records that no proceedings are pending under Sections 235 - 251 of the Act either against the Companies and no individual has objected to sanction of this Scheme in spite of notice issued by wide publication in three newspapers. That being so, it seems that there is no impediment or objection in the matter of approving the Scheme. On due consideration of the reports and other material available on record, this Court is of the view that the Scheme cannot be termed as unfair or unjust, warranting any interference.

17. Accordingly, this Company Petition has to be and is allowed. The Scheme in question filed as Annexure P/1 entered between M/s. VA Tech Escher Wyss

Flovel Private Limited, second petitioner (Transferor-Company) and M/s. VA Tech Hydro India Private Limited, first petitioner (Transferee-Company) is, accordingly, sanctioned. The Scheme shall come into operation with effect from the appointed day, i.e., 1-1-2009, as defined in this Scheme as a going concern in accordance to the terms and conditions already set forth in the Scheme subject to completion of necessary formalities.

18. This order be filed with the concerned Registrar of Companies, Madhya Pradesh and Chhattisgarh within a period of 30 days from the date of receipt of the certified copy. On filing of the certified copy of the said order, the Scheme shall be deemed to have come into force with effect from 1-1-2009, and the same shall be binding on all concerned and the second petitioner and the transferor-company be wound up without any order for winding up.

19. Any person interested shall have liberty to file appropriate application before this Court in this matter for any direction that may be necessary.

20. Ordered accordingly. The Company Petition is finally decided and disposed of in the aforesaid terms.

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