Phlox Pharmaceuticals Ltd.

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Court : Gujarat

Decided On : Jul-28-2005

Reported in : [2008]114CompCas133(Guj); [2005]63SCL237(Guj)

Judge : K.A. Puj, J.

Acts : Companies Act, 1956 - Sections 15 to 19, 31, 32, 94, 97, 187(1), 391 to 394 and 611; Sick Industrial companies (Special Provisions) Act, 1985 - Sections 3(1)(O), 22, 26 and 32; Contract Act - Sections 28

Appeal No. : Company Petition No. 66 of 2005 in Company Application No. 80 of 2005 and Company Petition No. 67 of

Appellant : Phlox Pharmaceuticals Ltd.

Advocate for Def. : Jitendra Malkan, Adv. for Respondent No. 1

Advocate for Pet/Ap. : Swati Soparkar, Adv. for Petitioner No. 1

Judgement :

K.A. Puj, J.

1. These petitions are filed by two petitioner Companies for sanction of the Scheme of Amalgamation proposed to be made between Phlox Pharmaceuticals Limited (hereinafter referred to as 'transferor Company') with Sun Pharmaceutical Industries Limited (hereinafter referred to as 'transferee Company') under Section

391 read with 394 of the Companies Act, 1956.

2. The transferor Company was originally registered on 21.4.1995 under the Companies Act, 1956 as Public Limited Company under the name of Parekh Laboratories Limited in the office of the Asst. Registrar of Companies, Gujarat, Dadra & Nagar Haveli. The Company was issued the certificate for commencement of business on 26.6.1995 and subsequently the name of the Company was changed from Parekh Laboratories Limited to Phlox Pharmaceuticals Limited under fresh certificate of incorporation issued by the Asst. Registrar of companies, Gujarat, Dadra & Nagar Haveli on 11.12.1998. The transferor company is having its plant and office at Vadodara in the State of Gujarat and it is engaged in the business of manufacture and development of cephalosporins which are the most critical products used in surgical prophylaxis (preventive treatment) and unidentified infections that cause life threatening conditions and has adequate technology to produce its pharmaceutical products. The accumulated losses as on 30.9.2002 stood at Rs. 2518.81 lacs which has resulted in erosion of 100% net worth of the Company and has come within ambit of Section 3(1)(O) of the Sick Industrial companies (Special Provisions) Act, 1985 and during the year, the said Company has submitted a rehabilitation scheme for its revival with the Board for industrial and Financial Reconstruction (BIFR) and the same is pending before the BIFR.

3. The transferee Company is a listed public limited company having its primary base in the state of Gujarat. Its equity shares are listed at major stock exchanges in the country at National Stock Exchange & the Stock Exchange, Mumbai and the Foreign Currency Convertible Bonds (FCCB) amounting to US $350 Millions issued by the Company during November/December, 2004 are listed at the Singapore Exchange Limited. It is engaged in the business of manufacturing, marketing and trading of pharmaceutical products. The specialitiy areas of this Company are therapeutic segments like cardiology, psychiatry, neurology, gastroentrology, orthopedics, oncology, gynecology, anasthesiology, Ophthalmology, fertility management and pain management. The Company is a fast growing pharmaceutical company in the country. The turnover/income from operations increased from Rs. 31.38 crores in the year 1992-93 to Rs. 1042.17

crores for the year 2003-2004. The transferee Company is a profit making and dividend paying Company and it has allotted Bonus Equity shares on 8.6.2004 in the ratio of 1 Bonus Equity Shares for every one Equity Share held by those shareholders of transferee Company holding shares of the transferee company on 25.5.2004. As per the published unaudited financial results of transferee Company for the nine months ended 31.12.2004 (without taking into account the effect of merger of the transferor Company) transferee Company recorded net profit after tax of Rs. 2350.7 Millions on the total income of Rs. 9944.4 Millions.

4. The Board of Directors of both these companies thought it fit to amalgamate them mainly for synergy of manufacturing operations besides the benefits of economies of scale thereby increasing cost competitiveness for products of both the Companies. The petition gives details of advantages that would flow by virtue of the amalgamation/merger of transferor company with transferee company.

5. The proposed scheme was approved unanimously by the Equity Share holders and unsecured creditors of the transferor Company at the duly convened meeting. Canbank Venture Capital Fund Ltd., (CVCFL) by letter dated 1.4.2005 had asked to record their opposition for the Scheme of Amalgamation. The Chairman in his report has observed that neither CVCFL sent any proxy or letter of authorisation under Section 187(1)(a) of the Act nor any representative of CVCFL attended and cast vote at the meeting. Accordingly, in absence of any ballot from CVCFL, no cognizance of the same has been taken for purpose of counting votes for or against the resolution. The meeting of the Equity Shareholder and Preference Shareholder of the transferee Company was held on 4.4.2005. The Chairman in his report has observed that 91 Equity Shareholders holding 15,00,52,506 Equity Shares of Rs. 5 each have attended the meeting and voted in favour of the compromise or arrangement being adopted and put into the effect. The Chairman has further observed that 2 shareholders holding 3,00,598 of Rs. 5 each valued Rs. 15,02,990/- have attended the meeting and voted against the proposed compromise or arrangement being adopted and carried out into effect. The Chairman has further reported that 2 shareholders holding 496 Equity shares of Rs. 5 each valued Rs. 2480/- have attended the meeting but did not cast their vote either in favour or against the resolution and as such they were treated as invalid.

The resolution was, therefore, passed by the requisite majority. With regard to the meeting of Preference Shareholders, the Chairman has observed that barring the members who abstained from voting, the meeting of Preference Shareholders was unanimously of the opinion that the Scheme of Amalgamation should be approved.

6. After the petitions were admitted, the same were duly advertised in the newspapers, namely, Indian Express-English Daily and Jansatta-Loksatta Gujarati Daily, both of Vadodara Edition. Publication of advertisement in Government Gazette was dispensed with, as directed in the order dated 15.4.2005. No one has come forward with any objections to the said petitions even after the publication.

7. Notice of the petition of the petitioner transferor Company was served upon the O.L attached to this Court. Vide report dated 28.6.2005 filed by the O.L it is observed that affairs of the transferor Company have not been conducted in the manner prejudicial to the interest of the members or to the public interest. The only objection which was raised by the O.L was that the account from 1.10.2003 to 27.2.2004 for 5 months are provisional statement of accounts and unaudited. Smt. Swati Soparkar, the learned advocate appearing for the petitioner Companies submitted that the latest audited Balance Sheet of the transferor Company was drawn as on 30.9.2003. Since, the appointed date in the present Scheme is 1.3.2004, it was thought prudent by the management as well as the Chartered Accountant to prepare any Provisional Balance Sheet for the broken period of 5 months and consider that for the purpose of working of the exchange ratio. The merged accounts of the transferor Company, duly audited shall reflect the accounts after considering the effect of amalgamation.

8. Notice of the petition has been served upon the Central Government through the Regional Director and Mr. J.M. Malkan, learned Asst. Solicitor General appeared for the Central Government. Mr. Malkan has informed the Court and put on record the letter from the Registrar of Companies, Gujarat, dated 30.6.2005 alongwith the letter dated 27.6.2005 indicating that the Central Government has made certain observations :-

9. The first observation which was made by the Regional Director is that as per Para (7) of the Scheme, in consideration of the transferor, the transferee company

shall issue at part and allot to every equity shareholders of the transferor company equity shares in the ratio 1 equity shares of Rs. 5 each for every 790 equity shares of Rs. 10 each or for every 7900 equity shares of Rs. 10 each partly paid up at Re.1 each. Whereas, as per S.H. Bathija & Associates, Chartered Accountant report's the exchange ratio fixed as 1580 equity shares and 15800 equity shares as against 790 and 7900 shares. The above recommended ratio is on the basis of valuation done as on 1.3.2004. The reasons for the change in the ratio as above has been explained in the scheme/petition. While meeting with this observation Smt. Swati Soparkar learned advocate appearing for the petitioner has submitted that the report of Chartered Accountant for the valuation of shares is based upon the issued and subscribed capital of transferee Company as on 31.3.2004. It has been pointed out vide para-4 of the Company Petition No. 67/2005 that the Company has issued bonus share in the ratio of 1:1 after that date. The resultantly, the Equity Share capital of transferee company has doubled and consequently, the value of the share has reduced to half. In order to give effect of this, the transferee company is required to issue 2 shares as against 1580 Equity Shares of transferor Company. The same is put up as one share of transferee Company against 790 Equity Shares of transferor Company. She has, therefore, submitted that the change in the exchange ratio as compared to the valuation Certificate is in proportion of change in the value of shares as on date of application and the same is not to the detriment of shareholders of either of the petitioner Companies. She has further submitted that the Company has obtained supplimentary Certificate from the same Chartered Accountant confirming the change.

10. The second objection raised by the Regional Director is that the transferor Company has not paid fees on Form No. 5 under Section 97 of the Companies Act, 1956 for increase in the authorised capital from Rs. 110 crores to 130 crores on 28.8.2002 alongwith interest thereon under Section 611/97 of the companies Act, 1956. It is seen that the authorised capital was increased by a resolution dated 28.8.2002 to implement the scheme approved by BIFR under SICA. While meeting with this objection, Smt. Swati Soparkar has submitted that same is pertaining to the registration fees not paid for the previous increase in authorised capital of the transferee Company. She has submitted that the first part of the

issue is not relevant for the present proceeding as the same pertains to the amalgamation as approved by the BIFR. Even otherwise, this issue has been dealt with by this Court in Company Petition Nos.41 to 43 of 2005 and the view was taken by the Court that the registration fees are not required to be paid on the increased unauthorised capital of the Company.

11. The second part of the objection raised by the Regional Director is that the current authorised capital is Rs. 130 crores as per present scheme. The transferee Company again wants to increase its authorised capital to Rs. 176.60 crores as per para (11) of the scheme which provides for amendment to the capital clause of Memorandum of Association and Articles of Association to reflect proposed increased Authorised Capital of Rs. 176.60 crores thereby an increase of Rs. 46.60 Crores (including Rs. 60 lacs as per earlier scheme) for which the Company is required to file Form No. 5 with the Registration fee in addition to payment of stamp duty and also to comply with provisions of Section 16/31/94/97 of the Act. In reply to this objection Smt. Soparkar has submitted that various High Courts have taken the view that transferee Company is not required to pay any Registration fee as the same is authorised capital, as directed pursuant to the Clause 11 of the Scheme. Even otherwise, this issue was also dealt with at length by this Court in Company Petition Nos.41 to 43 of 2005 wherein the same transferee company is there and the Court has taken the view that neither the stamp duty is required to be paid nor registration charges are required to be paid on the increased authorised capital of the transferee Company.

12. The third objection raised by the Regional Director is that the transferee Company is a sick company before BIFR and a scheme of rehabilitation/amalgamation is also pending before BIFR, New Delhi, under SICA. Hence, NOC of BIFR may be required for the proposed scheme. In this connection, Smt. Swati Soparkar has submitted that in the reference of transferor Company registered before the BIFR, no order has been passed to declare it as sick Company. The transferor Company has also informed BIFR about the proposed scheme as well as present proceeding before this Court. She has also placed, the complete record of correspondence, on record of this Court. She has further submitted that similar issue arose before the Bombay High Court in the

case of National Organic Chemical Industries Ltd., v. Nocil Employees Union, in Company Petition No. 104/2005 with Company Application No. 446 of 2004 and the said petition was decided by the Bombay High Court on 8.6.2005. In view of the objection raised by the Regional Director, the issue which arises in the present proceeding for the determination of this Court is that whether in view of the Provisions of Section 32, of SICA, once the reference having been registered under Section 15 whether this Court is entitled to exercise power under Section 391 to 394 of the Act or by virtue of the overriding effect under Section 32 the provisions of Section 15 to 18 which also provide for preparation and finalisation of the scheme of the sick industrial companies would override the provisions of section 391 to 394 of the Companies Act. Smt. Swati Soparkar has contended that it is immaterial that the reference is registered under Section 15 of SICA and despite the pendency of the reference the Court has ample jurisdiction and power to sanction the Scheme under Section 391 to 394 of the Act. She has further contended that the provisions of Section 22 of of SICA which, inter alia, provide for suspension of the provisions has no application in the present case because the present case is not a suit and, therefore, this Court can proceed under Section 391 to 394 and sanction the scheme. She has further contended that even the provisions of Section 26 of the SICA would also not apply because the bar of the jurisdiction of the Civil Court is given in a very limited manner and only to the cases where the orders are passed by the BIFR and appeal lies therefrom to the appellate authorities under the said statute. The said bar of jurisdiction applies only in case of appeal and does not apply to the present proceedings under Section 391 to 394 of the Companies Act. She has also contended that Section 32 of the Act which has been given an overriding effect applies only to the situation where the provisions of the two statutes are inconsistent with each other and overriding effect is only given to those provisions which are inconsistent with the provisions of SICA. She has, therefore, contended that the provisions of SICA under Sections 15 to 19 as well as the provisions of Section 391 to 394 being not inconsistent with each other the said overriding effect of Section 32 will not be applicable and this Court shall have jurisdiction to entertain and try the present petition and decide the same accordingly.

13. In support of the aforesaid contention that the provisions of Section 22 of SICA have no application to the facts of the present case, Smt. Swati Soparkar has relied on unreported judgment of the Division Bench of the High Court of Himachal Pradesh, Simla in the case of In re Gontermann-Piepers (India) Ltd., decided on 12.7.2004 reversing the judgment of the learned Single Judge which has taken the view that by virtue of the provisions of Section 22 the proceedings under Section 391 to 394 would stand suspended. The Division Bench has reversed the view taken by the learned Single Judge in the case of In re Gontermann-Piepers (India) Ltd., reported in (2005) 57 SCL 225(HP). On a plain and simple reading of Section 22 of the Act it is clear that the suspension of legal proceedings is only in respect of winding up of the industrial company or for execution or attachment of any of the properties of the industrial company or for appointment of the receiver. In so far as the guarantors are concerned, the limited protection is granted that is no suit for recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loan granted to the industrial company shall lie. Thus, the provision of Section 22 did not contemplate the suspension of any proceedings under Section 391 to 394 of the Act and hence there is no question of the proceedings being suspended by virtue of Section 22 of the Act. Similarly, the provisions of Section 26 of the Act also have no application in the present case because the provisions of Section 26 apply only when order is passed or proposal is made under the said Act which becomes appealable then except as provided in the said Act no Civil Court shall have jurisdiction in respect of those matters which are to be decided by appellate authority or the Board which is empowered under the Act to determine the said issues and no injunction can be granted by any Court in respect of any action taken under the provisions of the said statute under provisions of Section 26 shall also have no application.

14. Smt. Swati Soparkar has further submitted that after considering the the judgment of the Karnataka High Court in the case of In re Kirloskar Electric Co. Ltd., reported in (2003) 43 SCL 186 (Kar.) as well as the judgment of the Madras High Court in the case of Ponni Sugars & Chemicals Ltd., and Anr., in C.P. Nos.118 & 119 of 2000 decided on 10.9.2001, the Bombay High Court has taken the view in the case of National Organic Chemical Industries (Supra) that the provisions of Section 15 to 19 of the Act contemplate a scheme where a company

which has become sick can register itself with the BIFR which is vested with the power under the provisions of the said Act which shall thereafter after making enquiry may provide for package for rehabilitation of the Company and/or make the company viable so that the business of the company can continue. The provisions of Section 391 to 394 of the Company Act, 1956 also similarly provide for rearrangement of the Company's business by way of granting amalgamation, demerger and/or by sanctioning of the scheme of compromise which also has very same purpose and object to revive and/or make the company more viable and efficient. The provisions of the Act though provide for different methods of doing so, they are not inconsistent with each others. Apart from this, the provisions of SICA operate in a slightly different sphere i.e., the case where the net worth of the company has become negative, whereas the provisions of Section 391 to 394 have no such requirement as condition precedent and this provision can even operate in cases where the companies are doing quite well and are seeking to rearrange their business for the efficient management or better business prospects and thus seek to amalgamate or emerge their business operation. The Court has, therefore, taken the view that there is no inconsistency between the provisions of Section 32 of the SICA and the provisions of Section 391 and 394 of the companies Act and hence there is no question of provisions of Section 32 of the SICA being made applicable to the present case. The Court has, therefore, ample power and jurisdiction to grant sanction of the scheme under Section 391 and 394 of the Companies Act, 1956 despite the fact that the transferor company's reference is pending before the BIFR.

15. The fourth objection raised by the Regional Director is that no specific waiver order obtained from this Court in respect of creditors meeting of the transferee Company. In this regard, Smt. Swati Soparkar submitted that it is not necessary to obtain the consent of the creditors of the transferee Company as no compromise is expected from them and the scheme does not affect their rights in any manner. Moreover, the transferee Company continues to exist and continues its operations.

16. The fifth objection raised by the Regional Director is that the Regional Director has received complaint letter from Canbank Venture Capital Fund one of the shareholders, wherein it has been alleged that the transferor company has

committed a breach of the equity subscription Agreement and therefore they are opposing the scheme. In this regard Smt. Swati Soparkar has submitted that the said letter is already placed on the record of this Court alongwith the petition of the transferor Company. The reference to the same is also given in Para 15(ii) of the said petition. She has further submitted that since it pertains to the dispute between one of the directors of the transferor Company and the said Fund in its capacity as a shareholder, the same is not relevant for the present proposed scheme, particularly, considering the fact that the scheme has been approved by the statutory majority of the shareholders at the meeting. Canbank Venture Capital Fund Ltd., vide their letter dated 12.8.2005 informed the Chairman and Managing Director of the transferor Company that the scheme has been received by them only 10.8.2004 by Email and they have not been given sufficient time to consider the scheme and arrived at a decision. They have, however, placed their disapproval of the scheme on the ground that terms offered to them in respect of the equity held by them in the Company are prejudicial to their interest and contrary to the obligations spelt out in the Equity Subscription Agreement entered into with them. They have also drawn attention to Clause 6.4.1.(XI) of the Equity Subscription Agreement dated 30.12.1999 according to which SUnless otherwise agreed to by CVCFL, the Company shall not undertake or permit any merger, consolidation, re-organisation, scheme or arrangement or compromise with its creditors or shareholders or effect any scheme of amalgamation or reconstruction. They have, therefore, informed the Company to strictly follow the terms of contractual obligation in this regard.

17. Smt. Swati Soparkar has submitted that the similar issue arose before the Bombay High Court in the case of Garware Polyester Ltd., and while confirming the decision of the learned Single Judge of the Bombay High Court the Division Bench of the same High Court has taken the view vide its order and judgment dated 12.4.2004 that there was negative covenant in the agreement between the appellants and the respondent company whereby the respondent Company was precluded from filing any such petition without the consent of the appellant. The Court has taken a view that any such clause will be hit by Section 28 of the Contract Act, which provides that every such agreement which is in restraint of legal proceedings, is void, and the common subscription agreement under which

all such financers are given such particular right by way of negative convenant. The Court has further taken the view that it was not special right given only to the appellant but was available to all the debenture holders and it was further held that such a clause would be hit by Section 28 and therefore it should be held as void.

18. Smt. Swati Soparkar has submitted that the above matter was taken before the Apex Court and the Hon'ble Apex Court has also confirmed the view taken by the learned Single Judge of the Bombay High Court in the aforesaid case. She has, therefore, submitted that the above Clause on which the reliance was placed by CVCFL is null and void and it cannot prevent the petitioner Company from approaching this Court for sanction of the Scheme of Amalgamation. She has alternatively submitted that even, otherwise, the requisite majority has approved the scheme and hence this contention has no merit on whatsoever.

19. After having heard Smt. Swati Soparkar learned advocate for the petitioner Companies and Mr. J.M. Malkan learned Asst. Solicitor General for the Central Government and after having considered the detailed submissions made by them and the authorities relied upon before the Court, the Court is of the view that all the objections raised by the Regional Director have been properly explained and on considering the legal position in respect of each of these objections, the Court is of the view that there is no much substance in those objections. The said objections do not survive and the Scheme of Amalgamation proposed by the petitioner Companies would be in the interest of the Company, members and the creditors. Prayers in terms of paragraph 21 (B) of Company Petition No. 66/2005 and Prayers made in paragraph 20(A) of Company Petition No. 67/2005 are hereby granted.

20. The petitions are accordingly disposed off. So far as the cost to be paid to learned Asst. Solicitor General is concerned, the same is quantified at Rs. 3500/- per petition. The same may be directly paid to learned Asst. Solicitor General Mr. J.M. Malkan.