

In Re: Arcoy Overseas P. Ltd.

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Court : Gujarat

Decided On : Mar-28-2005

Reported in : [2006]68SCL255(Guj)

Judge : K.A. Puj, J.

Acts : [Companies Act, 1956](#) - Sections 391, 391(2) and 394

Appeal No. : Company Petition Nos. 164 and 165 of 2004

Appellant : In Re: Arcoy Overseas P. Ltd.

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

Advocate for Pet/Ap. : Swati Soparkar, Adv.

Disposition : Petition allowed

Judgement :

K.A. Puj, J.

1. These are the petitions filed by two petitioner companies for sanction of a scheme of amalgamation of Arcoy Overseas Pvt. Ltd. (the transferor company) with Arcoy Industrial Cements Pvt. Ltd. (the transferee company) under Section 391 read with Section 394 of the [Companies Act, 1956](#).

2. Both the petitioner companies are private limited companies being managed by the same group of management. The transferor company is a trading company engaged in the exports of anti-corrosive materials and chemicals manufactured by the transferee company which is the manufacturing unit for above referred materials. The respective petitions give details about the commercial activities and the financial status of both the companies. Both the companies are profit making companies. The amalgamation is proposed for the synergic advantages. The petitions give details of the advantages that would flow by virtue of the amalgamation of these companies.

3. The meetings of the shareholders of both the petitioner companies were dispensed with in view of the consent letters from all the shareholders approving the scheme being put on record. There are no secured creditors of the transferor company and all the unsecured creditors had approved the scheme in writing through the consent letters. In view of the same, the meetings of the creditors of the transferor company were also dispensed with.

4. After the petitions were admitted, the same were duly advertised in the newspapers (Indian Express dated August 18, 2004, and Loksatta-Jansatta dated August 15, 2004--both Ahmedabad editions) and the publication in the Government Gazette was dispensed with as directed in the order dated August 6, 2004. No one has come forward with any objections to the said petitions even after the publication.

5. Notice of the petition of the transferor company was served upon the official liquidator attached to this Court. He has submitted in his report dated January 25, 2005, that the auditors appointed for the purpose of scrutiny and investigation of the books of account and affairs of the company have submitted their report. After considering the various points mentioned in their report and as per the information and explanations given to them, they are of the opinion that the affairs of the amalgamating company, i.e., M/s. Arcoy Overseas Pvt. Ltd. are not conducted in a manner prejudicial to the interest of the members of the company or to the public interest.

6. Notice of the petitions has been served upon the Central Government and Shri J. M. Malkan, the learned Assistant Solicitor General appears for the Central Government. He has put on record the letter from the Registrar of Companies of Gujarat dated February 21, 2005, and March 15, 2005, along with the letter from the Regional Director, Ministry of Company Affairs, indicating that the Central Government leaves it to this Court to decide after considering some observations in the matter.

7. The first objection that has been raised by the Regional Director is that the exchange ratio has been fixed by the management of the petitioner companies as 1 : 1 and no separate valuation report of the shares of the petitioner companies was obtained. The Regional Director has further observed that the petitioner has, however, subsequently obtained the valuation report dated September 29, 2004, from M/s. Mulani Kajarekar and Co. chartered accountants who have merely certified the said exchange ratio fixed by the management without valuation of shares of both companies. While meeting with this objection, Mrs. Swati Soparkar, learned advocate appearing for the petitioners has submitted that since approximately 99.76 per cent, of the shareholding belongs to the same family and close relatives, it was initially not considered necessary to obtain the valuation report as the directors could decide the same considering the net asset value on the basis of the financial performance of both the companies. She has further submitted that this issue is squarely covered by the decision of this Court in the case of Mahavir Weaves Pvt. Ltd. In re [1995] 83 Comp Cas 180 wherein while overruling the objections and sanctioning the scheme of amalgamation, this Court has held that the wishes of the statutory majority of the shareholders of the companies had to be maintained. There was no unreasonableness in the exchange ratio adopted by the three companies. In this case, the Regional Director has raised the objection with regard to the share exchange ratio fixed by the companies and suggested another ratio. Despite this fact, the court has approved the share exchange ratio adopted by the companies.

8. Mrs. Soparkar has further relied on the decision of the hon'ble Supreme Court in the case of Miheer H. Mafatlal v. Mafatlal Industries Ltd. [1996] 87 Comp Cas 792 wherein while reproducing the observations made by the Madras High Court in the

case of Kamala Sugar Mills Ltd. In re [1984] 55 Comp Cas 308 has held that the observations made by the court represent the correct legal position on this aspect. The Madras High Court has observed that 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. After discussing the various methods of valuation and the case law on the subject, the hon'ble Supreme Court has further observed that there is no substance in this contention canvassed on behalf of the appellant that the exchange ratio was ex facie unfair to the equity shareholders of the transferee company. In this connection, the observations made by the chartered accountant duly appointed by the official liquidator pursuant to the direction of this Court are also relevant.

9. In his report dated January 6, 2005, he has submitted that M/s. Mulani Kajarekar and Co., Chartered Accountants of Ahmedabad was appointed for the purpose of determining the said exchange ratio for the proposed merger of the petitioner companies and the said report was submitted by the said firm of chartered accountant on September 29, 2004. The chartered accountant has summarised the considerations which were weighed with M/s. Mulani Kajarekar and Co., chartered accountants for arriving at the fair and equitable exchange ratio for the merger of the petitioner-companies and those considerations are : (i) Shareholders of both the companies are common and the shareholding patterns of the both companies are also same, (ii) Resolution passed at the extraordinary meeting of the shareholders of both the companies held on June 30, 2004, and in case of both the companies, the shareholders were in unanimity for passing of the resolution. Thus the said exchange ratio was bona fide fixed and in common interest of the shareholders of both the companies and no financial injury is inflicted upon the shareholders. It is further observed that based on the above considerations, the companies' chartered accountants have given the opinion that

the exchange ratio fixed in the proposed scheme of amalgamation of M/s. Arcoy Overseas Pvt. Ltd. with M/s. Arcoy Industrial Cements Pvt. Ltd. is fair and proper.

10. Considering the submissions of Mrs. Swati Soparkar and the observations made by the chartered accountant in his report which is annexed by the official liquidator along with his report and also considering the legal position as propounded in the aforesaid judgments, the court is of the view that the objection raised by the Regional Director with regard to share exchange ratio is not sustainable and it is accordingly overruled.

11. The second objection raised by the Regional Director is that on the appointed date, i.e., March 31, 2003, the transferee company was having secured creditors of Rs. 2,10,13,849 and unsecured creditors, i.e., to say unsecured loans of Rs. 3,44,94,759 and other creditors other than unsecured loans of Rs. 87,38,182. The meeting of such creditors has not been conducted by the transferee company nor such meeting has been got dispensed with by this Court. In this connection, Mrs. Swati Soparkar has submitted that this Court has, taken the view in a number of cases that the meeting of the transferee company in respect of the creditors is not required especially when the transferee company itself is a profit making unit. Even otherwise, pursuant to the advertisement issued, no one has come forward raising any objection against the proposed scheme and hence, this objection also stands overruled.

12. The third objection which is raised by the Regional Director is that the petitioners have produced the provisional balance-sheet dated March 31, 2004, and hence, the petitioners should be directed to produce the audited balance-sheet as on March 31, 2004, in each of these petitions so as to comply with the provisions of the proviso to Section 391(2) of the Act. In respect of this objection, the petitioners have filed the additional affidavits before this Court and along with these additional affidavits, the audited balance-sheets of both the companies as on March 31, 2004, were produced on the record of these two petitions. Mrs. Swati Soparkar has submitted that there is no much difference in the provisional as well as final balance-sheets. In any case, the final balance-sheets were produced before the Regional Director and he has not raised any objection after considering

the final balance-sheets except the objections which are raised in his communication dated February 8, 2005. She has, therefore, submitted that none of the objections raised by the Regional Director is tenable and hence, the scheme proposed by the petitioners and duly approved by all concerned should be sanctioned by this Court.

13. After having heard the learned advocate appearing for the petitioners and after having considered the objections raised by the Regional Director and explanation given vis-a-vis those objections and after having considered the report of the official liquidator as well as the report of the chartered accountant attached with the report of the official liquidator, the court is of the view that the objections of the Central Government do not merit acceptance. The court is also of the view that the amalgamation would be in the interest of the companies and their members and creditors. In this view of the matter, the prayers made in para. 15(a) of both the petitions are hereby granted.

14. The petitions are disposed of accordingly. So far as the costs to be paid to the Central Government, standing counsel is concerned I quantify the same at Rs. 3,500 per petition. The same may be paid to the learned advocate Shri J. M. Malkan.