

In Re: Shyam Telecom Ltd.

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Court : Rajasthan

Decided On : May-08-2006

Reported in : [2007]135CompCas387(Raj); 2006(4)WLC668

Judge : Shiv Kumar Sharma, J.

Appellant : In Re: Shyam Telecom Ltd.

Disposition : Petition allowed

Judgement :

Shiv Kumar Sharma, J.

1. The issue springing for consideration in this petition under sections 391(2) and 394 of the Companies Act seeking approval of the scheme of arrangement by the four petitioner companies, is as to whether an unsecured creditor whose alleged dues have been bona fide disputed has a locus standi to oppose the sanctioning of the scheme ?

2. A perusal of the record demonstrates that objector M/s. In Touch Technology India Pvt. Ltd. (for short the 'objector company') claims to be an unsecured creditor of Shyam Telelink Ltd. (petitioner No. 3). The objector company filed a winding up petition against petitioner No. 3 (S. B. Company Petition No. 26 of 2004). This Court vide order dated December 14, 2004, dismissed the petition with the following observations:

After going through the contents of the reply of the respondent-company dated December 26, 2002, and the letter of the petitioner dated November 26, 2002, I am satisfied that the respondent-company has raised bona fide dispute in the matter of claim of the petitioner. It is not a moonshine defence nor can it be said to be manufactured or concocted as the same has been raised by the respondent-company much before the statutory notice of the winding up. That apart, it is not the case where for the recovery of the amount of alleged dues against the respondent-company, the petitioner has no remedy. It has efficacious and effective remedy of filing the suit and it cannot be permitted to use the forum of winding up in the matter where, prima facie, the respondent-company has raised a bona fide dispute against the claim of the petitioner.

3. The objector company preferred special appeal under Section 483 of the Companies Act against the said order. The appeal stood admitted by the Division Bench of this Court on August 31, 2005, but no interim order was passed. The special appeal is lying pending for final hearing. In the mean-while, undeniably, the objector company invoked arbitration proceedings by referring the matter to the Indian Council of Arbitration.

4. It appears that petitioner No. 1 is a listed company carrying on the business of manufacturing of telecom/transmission equipment and providing telecommunication services (unified telephony services) through its wholly owned subsidiary companies. Petitioner No. 2 is a wholly owned subsidiary of petitioner No. 1. It is primarily engaged in manufacturing of telecom/ transmission equipment. Petitioner No. 3 is also a wholly owned subsidiary of petitioner No. 1. It is primarily engaged in the business of rendering telephony services. Petitioner No. 4 is a company incorporated with the object to promote and form other companies and association for the execution of undertakings, works, projects in the telecom industry and to hold shares or other securities in the companies engaged in the telecom sector.

5. Broadly speaking the scheme of arrangement is consisting of two parts:

(i) First part deals with the amalgamation of petitioner No. 2 into petitioner No. 1.

(ii) Second part deals with transfer of liabilities of amalgamated company, i.e., petitioner No. 1 to the tune of Rs. 200 crores to petitioner No. 4 and in lieu thereof transfer of investment of petitioner No. 1 in the equity shares of petitioner No. 3 to petitioner No. 4 at par value of Rs. 200 crores scheme further provides distribution of equity shares of petitioner No. 3 to the shareholders of petitioner No. 1.

6 The petitioner companies have sought approval of scheme on the following grounds:

(a) The proposed arrangement would result in enhanced operational focus.

(b) The arrangement would result in the optimum utilization of available resources. This would help reducing the operating and administrative cost and thus would enable petitioner No. 1 to meet its business requirements in an efficient manner.

(c) Economics of scale and operational synergy will obviate duplication of efforts.

(d) The arrangement will result in improved asset base, and enable the company to raise resources for future growth and expansion of the business.

(e) Shareholders will be able to capture the true intrinsic value of their shares.

(f) Future business directions of manufacturing business and service business indicate areas of divergence in growth of profiles and product offerings, segregation of these businesses therefore in different companies would create two independent focused entities having necessary flexibility to pursue their individual growth strategies.

(g) Enable the management of the two companies to focus on their individual operations resulting into reduction in overall costs of managements and operations.

(h) induction of strategic investors in both businesses. (i) Real valuation of both business of manufacturing and services to the shareholders of petitioner No. 1.

(j) At present petitioner No. 1 holds investment in two companies and therefore the shareholder of petitioner No. 1 does not get any benefit on account of performance

of subsidiaries. The scheme is also intended to achieve enhanced liquidity for the shareholders of petitioner No. 1 in respect of both manufacturing operations telephony services individually.

(k) The listing of two separate companies will create more advantage to the existing shareholders as well as to the prospective investor/shareholder who can decide upon making his investments either in services or in manufacturing business.

7. Petitioner No. 1 (being a listed company) pursuant to listing agreement, submitted the scheme of arrangement to the Bombay Stock Exchange and the National Stock Exchange and both the Stock Exchanges have conveyed their no objection to the scheme vide their letter dated August 2, 2005, and August 12, 2005.

8. The petitioner companies vide Company Application No. 5 of 2005, sought direction for convening the meeting of shareholders and creditors of petitioner No. 1 and creditors of petitioner No. 2. Dispensation of convening of the meetings of the creditors of petitioner No. 3 meetings of shareholders of petitioners Nos. 2 and 3 and meetings of the shareholders and unsecured creditors of petitioner No. 4 was also sought. This Court vide order dated August 22, 2005, directed petitioner No. 1 to convene a meeting of the shareholders and unsecured creditors of the company. Petitioner No. 2 was also directed to convene the meeting of secured and unsecured creditors of the company. Mr. Manoj Pareek, advocate was asked to act as chairman of the said meetings. Pursuant to the said order public notices were issued by petitioners Nos. 1 and 2 in the news papers Times of India (Jaipur edition) and Rajasthan Patrika (Jaipur Edition) on September 6 and 7, 2005. Notices were also sent with copy of the scheme and the explanatory statement as required under Section 393 of the Companies Act along with the forms of proxy individually to the shareholders, creditors and unsecured creditors. The meetings were thereafter held on September 30, 2005, under the chairmanship of Mr. Manoj Pareek, advocate. The meeting of shareholder of petitioner No. 1 was attended by 56 shareholders personally or through proxy and the total number of value of their shares was Rs. 1,92,98,358 and Rs. 19,29,83,580 respectively. The meeting of

unsecured creditors of petitioner No. 1 was attended by 10 unsecured creditors and the total value of their debt was Rs. 1,83,00,41,820. The meeting of secured creditor of petitioner No. 2 was attended by 2 secured creditors and their total value of debt was Rs. 25,05,77,165. The meeting of the unsecured creditors of petitioner No. 2 was attended by 54 unsecured creditors and their value of debt was Rs. 17,30,993.20. The scheme of arrangement was read over and explained in these meetings and it got the approval of the meetings. The chairman reported the result of each meeting to this Court on October 17, 2005. As per the report of chairman the scheme of arrangement was approved unanimously. In support of the report the chairman filed his affidavit.

9. The objector company filed objections to the petition for sanction of scheme. It was, inter alia, stated in the objection petition that objector company was the creditor and as on date an amount of Rs. 72,95,200 along with interest was due and payable by petitioner No. 3 to the objector company but neither any notice for the creditors meeting has been served upon it nor has the petitioner supplied copy of the petition to the objector company. Facts regarding winding up application noticed by me in the forgoing paras of the order, have also been incorporated in the objection petition. A prayer has been made to direct petitioner No. 3 to convene/reconvene the meeting of creditors and to refuse the approval of the scheme of arrangement.

10. The official liquidator (for short OL) submitted its report on December 20, 2005. After having considered books of account, auditors report, director's report and statutory records, official liquidator concluded that all shareholders of the company would be benefited from the scheme of arrangement. It has also been observed that the affairs of the transfer company have not been conducted in a manner prejudicial to the interests of its members and creditors and it has no objection if, upon sanctioning of the scheme of arrangement, the transferor company is ordered to be dissolved within the meaning of Section 394(l)(iv) of the Companies Act, 1956.

11. I have pondered over the rival submissions and carefully scanned the material on record.

12. It is well-settled that in order to get any relief, the objecting creditor must show:

(i) that there is a debt due to him and the debt is either admitted by the company or the court prima facie comes to the conclusion that the debt is due.

(ii) that the creditor would be adversely affected by sanctioning of the scheme.

(iii) that the scheme is unjust and unfair to the creditors or any class of creditors to whom the objecting creditor belong.

(vide Zee Interactive Multimedia Ltd., In re [2002] 111 Comp Cas 733 (Bom)).

13. In the instant case, as already noticed objector company's claim is not admitted and there is a controversy which has been noticed by this Court in the order dated December 14, 2004. Although special appeal against the said order stood admitted but the operation of the order passed by the single Bench was not stayed. The objector company in the meanwhile invoked arbitration proceedings by referring the matter to the Indian Council of Arbitration.

14. It also appears that the single Bench, vide order dated August 22, 2005, while dispensing with holding of the meeting of the creditors of petitioner No. 3, observed that petitioner No. 3 is only a confirming and endorsing party and the creditors of this company are not affected by the scheme of arrangement.

15. Having closely scrutinised the scheme of arrangement, I am of the opinion that it is not unjust and unfair to the creditors or any class of creditors.

16. The Bombay High Court in Mayfair Ltd., In re and Zodiac Clothing Co. Ltd., In re [2004] 122 Comp Cas 748 : [2004] 2 BCR 234, indicated that petition for a sanction of a scheme under Section 391 of the Companies Act is not a tool in the hands of the creditor to recover the debt or to coerce the company to pay, especially when the debt is not admitted. The objecting creditor must show to the court that the scheme is mala fide or fraudulent and is likely to adversely affect him or the creditors or the class of creditors to whom he belongs. The provision of sections 391 to 394 cannot be utilised or permitted to recover disputed money. Such creditors have other remedy to pursue and recover their amount dues.

17. In the instant case where the alleged dues have been bona fide disputed and arbitration proceedings in regard to said dues have been invoked in my opinion, the objector company has no locus standi to oppose the sanctioning of scheme of arrangement.

18. I do not find any other objection on record to show that the creditors like the objector company would at all be affected if the scheme as such, is sanctioned. The judicial powers in the matters of sections 391 and 394 of the Companies Act can be involved only when it is revealed that the whole scheme is unfair, unreasonable, contrary to law and public policy. Instant scheme of arrangement to my mind does not come in these categories. The scheme appears to be fair, reasonable, according to law and in the interest of the shareholders.

19. For these reasons the petition stands allowed and the scheme of arrangement is sanctioned in terms of prayer clauses (a) to (c). Annual general meeting shall stand deferred for three months. Costs of Rs. 2,500 to the official liquidator to be paid by the petitioner within two weeks from today.

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