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(2014) 1 AD 24 : (2014) 120 CLA 90 : (2014) 124 SCL 113

Delhi High Court

Case No: Co. Application No. 1038 of 2013 and Co. A. (SB) No. 70 of 2011

Anita Raj Garhia and Another	APPELLANT
Vs	
M/s. Asian Hotels (North) Ltd. and Others	RESPONDENT

Date of Decision: Oct. 25, 2013

Citation: (2014) 1 AD 24 : (2014) 120 CLA 90 : (2014) 124 SCL 113

Hon'ble Judges: R.V. Easwar, J

Bench: Single Bench

Advocate: Neeraj Kishan Kaul and Ms. Vanita Bhargava, for the Appellant; Lalit Bhasin, Mudit Sharma and Mr. Tanmaya Nirmal, Advocates for R-1 and R-2, for the Respondent

Final Decision: Dismissed

Judgement

R.V. Easwar, J.
This is an application filed by the applicant seeking the following prayers:-

(a) clarify that the proposed amalgamation of the applicant herein with Asian Hotels (East) Ltd. will not be in violation or breach of the said order dated 24th October 2011;

(b) In the alternative and without prejudice to prayer (a) above, this Hon''ble Court be pleased to appropriately modify the order dated 24 October 2011, so as to specifically exclude the proposed amalgamation of Asian Hotels (East) Limited from the scope of the status quo directed to be maintained thereby;

(c) for ad-interim reliefs in terms of prayers (a) or (b) above;

The applicant is M/s. Forex Finance Pvt. Ltd. It was respondent No. 9 before the Company Law Board in CA 4/2011 borne on the file of the CLB. The proceedings before the CLB were initiated by Asian Hotels (North) Ltd. and Asian Hotels (West) Ltd., the respondents herein. There are also other respondents. The CLB passed an order on

18.10.2011 directing the parties to maintain status quo qua shareholding. Against the order of the CLB, an appeal was filed before this Court by the applicant and others. This Court by order dated 24.10.2011 passed in Co. A(SB)70 & 71 of 2011, inter alia, held as under:

Till the applications being CA Nos. 3 and 4 of 2011 are disposed of, parties are directed to maintain their shareholding in M/s. Asian Hotels (North) Ltd. and M/s. Asian Hotels (West) Ltd.

The CLB was requested to dispose of the CA 3 and 4 of 2011 as expeditiously as possible.

2. The present applicant thereafter filed CA 2111/2012 in Co. A(SB) 70/2011 seeking modification of the order passed by this Court on 24.10.2011, the modification sought for being that the applicant should be permitted to sell the shares in the open market. On this application, this Court in its order dated 6.11.2012 held as under:

After some arguments, it has been agreed that the directions contained in the earlier order of this Court dated 24.10.2011 (which have not been complied with by the Company Law Board (CLB) for the reasons as explained in the present petition) be positively complied. The CLB is directed to dispose of the CA Nos. 3 and 4 of 2011 in CP. No. 2/111/2005-CLB within an outer limit of five weeks from today. Both the parties shall cooperate before the CLB in getting the aforenoted applications disposed off; no adjournment shall be sought. If feed no, the CLB may take up the matter on day to day basis. With these directions this application is disposed of.

3. It appears that the CLB thereafter heard the matter on several dates and ultimately in March, 2013, adjourned the matter with a view to enabling the parties to explore the possibility of a settlement.

4. In the meantime, a scheme of amalgamation of the applicant i.e., M/s. Forex Finance Pvt. Ltd. with Asian Hotels (East) Ltd. is said to have been proposed and approved by the Board of Directors of both the companies at their meetings, subject to necessary statutory sanctions and approvals.

5. In the present application which is claimed to have been filed by way of abundant caution, it is pointed that if the scheme of amalgamation is approved by the Calcutta High Court which is the court having jurisdiction to do so, all the assets of the applicant would stand vested in the transferee-company by reason of sections of 391 to 394 of the Companies Act and all legal proceedings by or against the applicant would be continued by or against the transferee-company, and accordingly the shares held by the applicant in M/s. Asian Hotels (West) Ltd. would also be similarly transferred to Asian Hotels (East) Ltd., which is the transferee-company in the scheme of amalgamation and the continuation of the proceedings against the transferee-company will not affect or prejudice anyone. It is submitted that an appropriate clarification may be issued by this

Court so that the proposed amalgamation, as and when it is implemented, will not be in violation or breach of the order passed by this Court on 24.10.2011. In the alternative and without prejudice it is prayed that this Court may be pleased to appropriately modify its order so as to specifically exclude the proposed amalgamation from the scope of the status quo directed to be maintained. It is stated in the application that though the proposed scheme will not (in the opinion of the applicant) be in violation or breach of the order of this Court, but the applicant is approaching this Court for clarification ex abundanti cautela.

6. Explaining the background of the litigation pending before the CLB and the events leading up to the filing of the present application, it is pointed out on behalf of the applicant that the underlying concern in the litigation was that the shareholding pattern in M/s. Asian Hotels (West) Ltd. shall not be in violation of the take-over rules framed by SEBI which meant that there should be no increase in the shareholding pattern and it is in this context that this Court directed the parties to maintain status quo of the shareholding and that this direction of the court would not in any manner be violated if the applicant transfers the shares to the transferee-company. According to the learned senior counsel for the applicant, the only result of the amalgamation scheme, if approved, would be that instead of the applicant holding the shares, it would be the transferee-company which would be holding the shares. There will be no increase or reduction in the shares held by any entity in Asian Hotels (West) Ltd. as a result of the amalgamation. Attention is drawn to the order dated 6.11.2012 passed by this Court in CA 2111/2012 and it is submitted that the application, which was for permission to sell the shares in the open market was disposed of by this Court and no longer survives and that the said application has nothing to do with the amalgamation and that it was only for permission to sell the shares in the open market. It is contended that it could never have been the intention of this Court, when it passed the order on 24.10.2011, to prevent the applicant from amalgamating or merging with another company or companies and all that the applicant was seeking was only a clarification that if and when the Calcutta High Court approves the scheme of amalgamation, the transfer of shares by operation of law from the applicant to M/s. Asian Hotels (East) Ltd., the transferee-company, cannot be construed to be in violation of this court''s order.

7. The learned counsel for the respondent raised the following submissions. The application, according to him, is not maintainable under Rule 9 of the Company (Court) Rules, 1959. No lis is pending in this court in which case alone Rule 9 of the Company Court Rules is applicable. This Court in its order dated 24.10.2011 had directed the parties "to maintain their shareholding" in M/s. Asian Hotels (North) Ltd. and Asian Hotels (West) Ltd., which would strictly mean that the status quo should be with reference to both (a) the parties (owners of the shares) and (b) with reference to the number of shares or percentage of shareholding. It is submitted that if the applicant amalgamates with another company, the process would involve a transfer of shares to the transferee-company in which case there will be a disturbance to the status quo position

qua the parties, in as much as instead of the applicant holding the shares it would be the transferee-company i.e., Asian Hotels (East) Ltd. which would be holding the shares. It is also submitted that the scheme of amalgamation has not been filed before this Court and nothing is known about the same and the applicant cannot be granted its request in the absence of the full and complete details thereof. My attention was drawn to prayer No. (ii) in CA 4/11 before the CLB which is to the effect that respondent No. 9, the applicant herein, shall be restrained from selling or alienating or otherwise dealing with equity shares of Asian Hotels (West) Ltd. or in part thereafter until the disposal of the petition. The submission is that any clarification made by this Court as prayed for by the applicant would render the proceedings/prayer before the CLB infructuous, a result which cannot be countenanced.

8. In his rejoinder, the learned senior counsel for the applicant contended that the respondent has not shown any prejudice that would be caused to it if the clarification is made as prayed for by the applicant and that on mere assumptions or presumptions no impediments can be caused to the scheme of amalgamation which would be placed before the Calcutta High Court for sanction. It is also submitted that this Court, by clarifying its order in the manner desired by the applicant, would not be impinging on the jurisdiction of the Calcutta High Court; all that it would be doing is to clarify that the transferor of the shares pursuant to the amalgamation scheme, as and when the claim is approved by the Calcutta High Court, shall not be construed as a violation of its status quo order.

9. On a careful consideration of the matter, I am unable to accede to the request made in the application. I may straightaway state that I cannot subscribe to the contention advanced on behalf of the respondent that no clarification of an order passed by this Court can be issued within the parameters or rule 9 of the CCR. The primary considerations for the applicability of the ruling are the prevention of the abuse of the process of this Court and the ends of justice. If an order passed by this Court needs to be clarified in the interest of justice or to meet the ends of justice, I believe it can be done in terms of Rule 9. It is not necessary that a lis should be pending before the Court so that the Rule can be invoked. Having said that, I am unable to overrule the other points raised on behalf of the respondent. The first point, namely, that "status quo" requires that both the parties who held the shares and the number of shares or the percentage of the shareholding cannot be changed seems to me to be well-taken. I am unable to subscribe to the submission made on behalf of the applicant, namely, that so long as the number of shares or the percentage of the shareholding does not change, it does not matter as to who or which entity holds the shares. In the corporate world, the holder of shares has certain rights (and liabilities) and shareholding does play an important role in taking control of the companies. A status quo order with regard to the shareholding binds the parties before the Court. If it is held that so long as the number of the shares or the percentage of the shareholding does not change, it does not matter who or which entity holds the shares, then there is a danger of the parties wriggling out of the sweep of the

status quo order; it may even enable the transferee-company in the present case to sell the shares in the open market or to a person or entity involved in the litigation before the CLB which could give him or it an advantage or benefit in the litigation or in the matter of gaining control over the company, and to claim immunity that since it (transferee-company) was not a party before this Court, there is no violation of the order passed by this Court. There can thus be the possibility of an indirect circumvention of the status quo order which can thwart the very purpose or object of passing such an order. I also find force in the submission that the scheme of amalgamation has not been placed before this court, nor is it made known to the respondent and therefore it would be impossible to assess the real motive behind the move.

10. In the course of the arguments, the learned counsel for the respondents did say that the order passed by this Court on 24.10.2011 cannot thwart the scheme of amalgamation. Relying on this statement, the learned senior counsel for the applicant contended that at the same breath the respondent cannot object to the clarification being issued. I think that what the learned counsel for the respondent meant to convey was that the order passed by this Court has nothing to do with the validity of the amalgamation scheme, if it is otherwise legal and valid, and nothing beyond that. I am not inclined to hold that by making the statement, the learned counsel for the respondent intended to convey that he had no objection to the clarification being issued. In the above circumstances, I am afraid that no clarification as prayed for by the applicant either in the application or in the course of the arguments before me, can be issued in respect of the order passed by this Court on 24.10.2011. The application is accordingly rejected with no order as to costs.