(2012) 08 CAL CK 0036

Calcutta High Court

Case No: C.P. No. 626 of 2011

In Re: Kaycee Kala Finvest Pvt. Ltd. and Others		APPELLANT
	Vs	
		RESPONDENT

Date of Decision: Aug. 6, 2012

Citation: (2012) 4 CALLT 253 : (2012) 5 CHN 620

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: A.K. Mishra, for the Appellant; Priyanka Bhuteria for the Central Government, for the Respondent

Judgement

Sanjib Banerjee, J.

The petitioners have not used any affidavit-in-reply to the affidavit filed on behalf of the Central Government. The Central Government has pointed out the unusual share premium obtained by the transferor company. The objection pertains to a matter of public policy. It is surprising that a company has issued shares at a huge premium but has carried on no business and such company does not proffer any justification when an explanation is called for. The proposed scheme and the application for sanction therefore are, in such circumstances, found to be undeserving of consideration. A petition for sanction of a scheme of amalgamation must be made with utmost good faith. The Act provides a special feature - a single-window clearance - for the companies concerned and allows the transfer pursuant to the sanction to be binding on the rest of the word as the order sanctioning a scheme operates almost as an order in rem. It will not do for a company to say that the company Court should not be bothered about the share premium that it charges its shareholders as that is a matter between the company and its shareholders. In a country where judicial notice has been of the enormous amount of black money in circulation and when no explanation is furnished by the petitioners who seek a special favour under a statute as to how a substantial sum of

money in their books of account was generated or dealt with, the company Court will be within its rights to disallow the petition for sanctioning of a scheme on the ground of it being opposed to public policy.

2. There is an increasing trend to obtain undue benefits under orders of Court sanctioning company schemes. For years, there was a practice in this Court under which immovable properties have been transferred by virtue of sanctioned schemes without payment of any stamp duty thereon. For decades, the specious reason cited for not tendering stamp duty was that the transfers of properties pursuant to sanctioned schemes were involuntary transfers. The practice should have stopped on the basis of the reasoning evident in the Supreme Court judgment in General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., but the practice had lingered in this Court for a quarter of century after that pronouncement. Upon it being recently held, on the strength of another Supreme Court judgment, that there would be no exemption of stamp duty payable in inspect of transfers of properties pursuant to sanctioned schemes, there are fewer schemes that are being carried to this company Court.

3. It has also been noticed in several matters that a company was being merged with another or a part of the assets of a company was being demerged for no apparent commercial reason. While it is true that the shareholders of the companies involved and their creditors would be the best suited to assess the commercial sagacity of a scheme propounded under Chapter V of Part VI of the Companies Act 1956. the company Court would be obliged to ensure that matters which are opposed to public policy are not glossed over in course of schemes of merger or demerger being allowed. There have been several companies with little or no business that have recently been parties to schemes of merger or demerger with substantial amounts being shown in such companies'' books of accounts as premia obtained in course of issuance of shares. Again, it is for a company, its shareholders and prospective shareholders to agree on what would be the quantum of share premium - much like the share exchange ratio - that would be paid and the company Court may have little say in the matter, particularly if the share premium appears to have been obtained several months or years prior to the scheme of merger or demerger being propounded. But when the process of the company Court is abused for the purpose of obtaining the imprimatur of Court on a fraudulent or immoral transaction, it would not only be within the jurisdiction of the company Court to arrest the exercise, it would also be its bounden duty to do so. If, in such connection, the company Court or the Central Government raises a query as to the propriety or the reasonableness of the share premium received or the manner of application of such money, the cliched argument that the role of the Court is that of a neutral umpire will not pass muster. The neutrality of the company Court has also to be seen in the light of its constitutional duty to the society and eye for the general public good. If a transferor company in a scheme of amalgamation shows a huge amount by way of premium having been collected for the issuance of

shares in such company which may not be commensurate with the business or assets of the concerned company, both the Central Government and the company Court may seek an explanation in such regard from the parties to the scheme.

4. It is not unusual in this country for book entries to be created and subsequently transferred against undisclosed consideration. If the unique facility provided by the statute is sought to be misused, the company Court would not allow itself to be a party thereto. Several matters in recent times have thrown up useless companies with stupendous share premia being sought to be merged with other companies. Oftentimes, the share premium is only a book entry: and even if the share premium was put in by the allottees of the shares the money would have been funneled out of the company by showing dud investments or disproportionate expenses. In other words, the block shown as share premium would remain without there being any money in the company''s coffers to match the same. These companies would then wait for a group of persons having substantial unaccounted for money and looking for an avenue to convert the black money into white. A scheme of merger would then be propounded only for the purpose of the share premium account passing from one company to another to allow the unaccounted for money with the promoters of the transferee company to be converted into white money upon the scheme being sanctioned. No Court can be a party to such a money laundering exercise which has gained considerable currency in recent times.

5. It is possible that the Central Government''s or the company Court''s suspicion is unfounded in certain cases, but that will depend on the explanation given by the parties to a scheme once it appears that one or more of the companies have an unjustified quantum of share premium.

6. Despite the insinuation in the Central Government''s affidavit in this case, the petitioners have chosen not to deal with the same and there is no explanation which is proffered to Court even at the hearing that would allay the misgivings of the Court.

7. CP No. 626 of 2011 is dismissed on the ground that the companies concerned in this petition have no explanation to offer to the stand taken by the Central Government in its affidavit. The petitioner will pay costs assessed at 1500 GM to the Central Government. Consequently, the orders passed on CA No. 778 of 2011 stand dissolved.

Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.