

(2007) 09 CAL CK 0064

Calcutta High Court

Case No: C.P. No. 197 of 2007 in C.A. No. 264 of 2007

In Re: Modus Analysis and
Information P. Ltd.; In Re: GFK
Mode P. Ltd.

APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 21, 2007

Citation: (2008) 142 CompCas 410 : (2008) 2 ComplJ 238 : 112 CWN 313

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: D. Basak and Sudesna Bagchi, for the Appellant; Reetabrata Mitra, for the Respondent

Judgement

Sanjib Banerjee, J.

The petitioners have applied for sanction of a scheme of amalgamation that has been approved by the shareholders of the concerned companies. The petitioners suggest that the transferor and the transferee companies are carrying on business of the same nature and it would be convenient for the businesses to be combined for smooth and efficient management and for proper utilisation of resources.

2. The petition has been advertised as is the usual practice and as required by the Companies Act, 1956, the Central Government has been served. An affidavit has been filed by the Regional Director, Eastern Region, Ministry of Corporate Affairs on behalf of the Central Government. The material paragraph in the Regional Director's affidavit reads as follows:

2. That it is submitted that on examination of the petition in detail and report of the Registrar of Companies, West Bengal, it appears that there is no complaint and representation received against the proposed scheme of amalgamation. The Central Government has, therefore decided, that the petition/application need not be opposed and the matter be decided by the hon'ble court on its merits.

3. No one else has appeared to oppose the petition. It appears from the proposed scheme that there have been inter se transfers of shares to the companies involved. Clause 13(a) of Part II of the proposed scheme records that the shares of the external shareholders of the four transferor companies have been purchased by the transferee company which has resulted in the four transferor companies becoming wholly own subsidiaries of the transferee company. Clauses 13(a) and 13(b) of Part II of the scheme provide as follows:

13(a).-Even though the shares of external shareholders of MAIPL, MMPL, MSPL, RIPL have been purchased by transferee company resulting in transferor companies becoming 100 per cent. subsidiaries of the transferee company after March 31, 2006, the scheme of merger provides for such subsequent changes in the shareholding pattern of transferee companies. The amount due to the external shareholders aggregating Rs. 20,02,400 as detailed in paragraph (e) below, have been shown as a current liability in the post merger balance-sheet of GfK Mode.

13(b).-Upon this scheme becoming operative, the difference of the amount paid for acquisition of shares of transferor companies and book value of assets taken over being Rs. 29,00,000 have been debited to reserves to the extent the balance available, i.e., Rs. 11,24,945 and remaining amount, i.e., Rs. 17,75,055 has been adjusted against the profit and loss account in the books of GfK Mode.

4. Clause 13 (d) of Part II of the scheme provides for payment being made by the transferee company to external shareholders of the transferor companies from whom the shares of the transferor companies have been purchased. It appears that the word "external" has been used to imply shareholders other than those belonging to the group which is in management of all the five petitioning companies in these proceedings. In the chart set out under Clause 13 (d) of Part II of the scheme, the shares of three of the transferor companies have been shown to have been acquired by the transferee company at face value adding up to Rs. 2,200. The 670 shares held by the external shareholders of Mode Services P. Ltd. (MSPL) of face value of Rs. 100 each is shown to be acquired at Rs. 20,00,200. There is no explanation as to the skewed consideration for the acquisition of MSPL shares by the transferee company, nor any attempt to justify such price. All the companies involved are private companies and their shares are not quoted.

5. Ordinarily, such a matter would not detain the court as it would be a matter for the shareholders of the concerned companies and if no shareholder is present to object to such valuation, the court would not waste time over it. It is, however, the implication of Clause 13(b) and the attempt made thereby to adopt a procedure which is at substantial variance with accounting principles, that engages the court's attention. But the Regional Director in his affidavit has not referred to such matter.

6. There is another unusual clause, found in the proposed scheme. Clause 9 in Part III of the scheme provides as follows:

9. All costs, charges and expenses of MAIPL, MMPL, MSPL and RIPL and GfK Mode respectively in relation to or in connection with this scheme and incidental to the completion of the amalgamation of MAIPL, MMPL, MSPL and RIPL with GfK Mode in pursuance of this scheme, shall be borne and paid GfK Mode.

In the event of any of the said sanctions and approvals referred to in the preceding Clause 7 above not being obtained and/or the scheme not being sanctioned by the hon'ble High Court of Kolkata and/or the order or orders not being passed as aforesaid before March 31, 2007, or within such further period or periods as may be agreed upon between MAIPL, MMPL, MSPL and RIPL through and by its board of directors and GfK Mode through and by its board of directors (and which board of directors of each of the companies are hereby empowered and authorised to extend the aforesaid period from time to time without any limitations in exercise of their powers), this scheme shall stand revoked, cancelled and be of no effect, save and except in respect of any Act or deed done prior thereto as it contemplated hereunder or as to any right, liability or obligation which has arisen or accrued pursuant thereto and which shall be governed and be preserved or worked out as specifically provided in the scheme or as may otherwise arise in law and in that event each party shall bear their respective costs.

7. It will appear from such clause that despite seeking an order for sanction of the proposed scheme, the petitioners seek to reserve a right whether or not such order of sanction would be implemented. Apart from the impropriety of such attempt, such clause is open to misuse. It is surprising how such clause could escape the attention of the Regional Director who has exhorted in his affidavit that the scheme may otherwise be sanctioned.

8. The purpose of a petition for sanction of a scheme being required to be served on the Central Government under the Companies Act, is to allow the Central Government to look into the mechanics of the scheme and to apprise the court upon scrutiny as to the legality, propriety and reasonableness of the clauses thereof. The Central Government is required to ensure that there is procedural compliance by the concerned companies and that the terms of the scheme are not opposed to public policy and that no attempt is made thereby to defraud revenue or otherwise bypass statutory or fiscal requirements.

9. The most common objection that the Regional Director refers to these days is the attempt by a number of petitioners seeking sanction of a scheme to avoid payment of fees under Schedule X of the Companies Act. But it is for the Central Government also to look into the terms of the scheme to ascertain whether the Accounting Standards are sought to be bypassed and a blanket sanction of court is sought to be obtained in a matter that the court may not be equipped to easily detect. It is required of the Central Government to ensure that accounting tricks in any proposed scheme are discerned and the matter is reported to court. Though the court looks into the scheme before sanctioning the same, if stakeholders, be they

shareholders or Government Departments or creditors do not object, the court generally does not go through the individual terms of a scheme with a toothcomb to unearth anything untoward.

10. By the time the court receives the petition for sanction, it would have been advertised and all and sundry would have been invited to oppose or support the scheme. The Central Government would have had a chance to scrutinise the same. If at such stage, there is no opposition, the company court permits the scheme, which is essentially an agreement involving the various companies and their shareholders, to go through. The primary purpose of a scheme is to offer a single-window clearance for various statutory requirements without the petitioners needing to apply severally. The other purpose for a court sanctioning scheme is to bind the dissentient shareholder or creditor, subject to the court's satisfaction that an unfair arrangement is not foisted on the dissenting member or creditor.

11. Though the company court need not wait for the Central Government's 11 comments upon the expiry of the time given to the Central Government to file an affidavit in such proceedings, as a matter of practice, the company judges are loathe to proceed without the Central Government's comments. The Central Government's observations are relied upon by the company courts and the objections raised need to be overcome by the petitioners. When the Central Government files an affidavit which carries no objection, the court would not ordinarily look into the terms of the agreement between the persons concerned that have been reduced to clauses in the proposed scheme, particularly if no one else appears after advertisements to oppose the scheme.

12. It is in such context that it is surprising that Clause 13 of Part II and 12 Clause 9 of Part III of the proposed scheme in these proceedings appear to have been overlooked by the Regional Director and the notice of court was not drawn thereto. There have been matters in recent times where objections that ought to be taken by shareholders have been espoused by the Regional Director even in private limited companies where the concerned shareholders have not objected. There have been matters where typographical mistakes have been detailed in the affidavits filed by this Regional Director and mistakes in figures have been pointed out. In the light of the meticulous, and sometimes irrelevant, details that this Regional Director refers to in filing affidavits objecting to a scheme, it is difficult to appreciate how the substantially more important matters as found in Clause 13 of Part II and Clause 9 of Part III of the proposed scheme herein, escaped his attention.

13. It is a matter of regret that adequate assistance is not received from the 13 Central Government in matters where the court may not have the wherewithal or accounting acumen to assess the impact of certain clauses in a scheme. Assistance has not been obtained even when asked for and at least in one matter, in C. P. No. 95 of 2007 (Areva T and D India Ltd., In re [2007] 138 Comp Cas 834 (Cal)), the order dated July 5, 2007, passed by this Court records that no assistance was rendered by

the Central Government in matters relating to accounting that formed part of that scheme.

14. It is necessary that a copy of this order should be sent by the Registrar, 14 Original Side, to the Secretary, Ministry of Corporate Affairs, Shastri Bhawan, New Delhi, so that the anomalous treatment of matters and notices by this Regional Director can be looked into by him and, if necessary, appropriate measures be taken.

15. As far as the present scheme is concerned, the same is rejected, though 15 it must be said that the petitioners have offered to delete the offending part of Clause 9 of Part III of the scheme.

Urgent photostat certified copies of this order, if applied for, be issued to the parties upon compliance with requisite formalities.