

(2013) 07 DEL CK 0465

Delhi High Court

Case No: Co. Petition 609 of 2012

In Re: Emeter India Pvt. Ltd.

APPELLANT

Vs

RESPONDENT

Date of Decision: July 2, 2013

Acts Referred:

- Companies Act, 1956 - Section 235, 236, 237, 238, 239

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

Bench: Single Bench

Advocate: K.S. Pradhan, Dy. Registrar of Companies for the Regional Director, Mr. Rajiv Bahl, for the Official Liquidator, Mr. Sharad Vaid and Ms. Shilpi Jain, for the Appellant;

Judgement

R.V. Easwar, J.

This second motion petition has been filed under Sections 391 to 394 of the Companies Act, 1956 ("Act") by Emeter India Private Limited (hereafter referred to as "Petitioner Transferor Company") seeking sanction of the Scheme of Amalgamation ("Scheme") of the Petitioner Transferor Company with Siemens Technology and Services Private Limited (hereafter referred to as "Transferee Company"). The registered office of the Petitioner Transferor Company is situated within the National Capital Territory of Delhi, within the jurisdiction of this Court. The registered office of the Transferee Company is situated at Mumbai in the state of Maharashtra, outside the jurisdiction of this Court.

2. The details of the dates of incorporation of the Petitioner Transferor Company and the Transferee Company, their respective authorized, issued, subscribed and paid up capital have been given in the Petition.

3. The copies of the Memorandum and Articles of Association as well as the latest audited annual accounts for the year ended 31st March, 2012 and unaudited financial statements made upto and as on 31st August 2012 of the Petitioner Transferor Company and the latest audited annual accounts for the year ended 30th

September 2011 and unaudited financial statements made upto and as on 31st August 2012 of the Transferee Company have also been enclosed with the CA (M) 179 of 2012.

4. The copies of the resolution passed by the Boards of Directors ("BoDs") of the Petitioner Transferor Company and the Transferee Company approving the Scheme have also been enclosed with the CA (M) 179 of 2012.

5. It has been submitted by the Learned counsel for the Petitioner Transferor Company that no proceedings under Sections 235 to 251 of the Act are pending against the Petitioner Transferor Company or the Transferee Company.

6. A copy of the Scheme has been placed on record and the salient features of the Scheme have been detailed in the petition. The Scheme provides that upon sanction of the Scheme by the Court, it will take effect from the Appointed Date which is 1st April 2013. It has been submitted in the petition that the Petitioner Transferor Company is a wholly-owned subsidiary of the Transferee Company and upon the Scheme coming into effect, all shares held by the Transferee Company in the share capital of the Petitioner Transferor Company shall stand cancelled and in lieu thereof, no new shares shall be allotted nor any payment be made by the Transferee Company to any person whatsoever.

7. The Petitioner Transferor Company had earlier filed CA (M) No. 179 of 2012 in this Court seeking directions for dispensation from convening and holding the meetings of the shareholders and creditors. By the order dated 5th December 2012, this Court allowed the application and dispensed with the requirement of convening and holding the meetings of the shareholders and the creditors of the Petitioner Transferor Company.

8. The Petitioner Transferor company had thereafter filed CA No. 2332 of 2012 in CA (M) 179 of 2012 stating, inter alia, that (i) Petitioner Transferor Company is the wholly owned subsidiary of the Transferee Company and no new shares shall be issued by the Transferee Company, thus, the Scheme does not entail any reorganization of the capital of the Transferee Company and (ii) Petitioner Transferor Company is a profit making company having a positive net worth and as such, the rights and interest of any of the shareholders or creditors of the Transferee Company will not be affected by the Scheme and accordingly sought directions for dispensation from approaching the Transferee Company's jurisdictional High Court at Bombay for seeking sanction of the Scheme, which was disposed of by order dated 16th January 2013. By this order, following the orders in Auto Tools India Pvt. Ltd. [Co. Appl. (M) No. 41 of 2010], [In Re: Sharat Hardware Industries P. Ltd., , Mahaamba Investments Ltd. Vs. IDI Limited, , Andhra Bank Housing Finance Limited Vs. Andhra Bank](#), and the order dated 23rd April 2012 passed by this Court in Co. Appl. (M) 63 of 2012 (Prosell Field Marketing Pvt. Ltd.), the Court allowed the Application and dispensed with the requirement of Transferee

Company having to approach the Bombay High Court for sanction of the Scheme.

9. The Petitioner Transferor Company has filed the present petition seeking sanction of the Scheme. By order dated 21st December 2012, notice of the petition was directed to be issued to the Regional Director, Northern Region ("RD") and also the Official Liquidator ("OL") attached to this Court. Citations were also directed to be published in the "Statesman" (English edition) and in "Jansatta" (Hindi edition). An affidavit of service and publication has been filed by the Petitioner showing compliance regarding service of the petition on the RD and the OL, and also regarding publication of citations in the aforesaid newspapers on 1st February 2013. Copies of the newspaper cuttings, in original, containing the publications have been filed along with the affidavit of service.

10. In response to the notice issued in the petition, the RD has filed his affidavit/Report dated 4th March 2013. In his affidavit, the RD, inter alia, has stated that the shares of the Transferee Company are held by a foreign company viz. M/s. Siemens Pvt. Ltd., Singapore. Further, the Transferor Company was also a subsidiary of a foreign company, M/s. eMeter Corporation, USA and later on became a subsidiary of the Transferee Company and, therefore, the RD has submitted that the Petitioner Transferor Company may be asked to give an undertaking for all compliances with the Reserve Bank of India ("RBI") as required under Foreign Exchange Management Act, 2000 ("FEMA") for the above transactions involving foreign banks/entities, if deemed fit and proper by the Court.

11. In view of the above submissions made by the RD in his aforesaid affidavit, the Petitioner Transferor Company has filed an affidavit dated 15th March 2013 and confirmed, acknowledged and assured this Court and has also undertaken that all compliances in relation to the above transactions involving foreign companies/banks/entities, as required under FEMA have been and shall be duly made and that there is no contravention of FEMA regulations in this regard.

12. Pursuant to the notices issued in the petition, the OL sought information from the Petitioner Transferor Company. Based on the information received, the OL has filed his report dated 18th March 2013 wherein he has stated that he has not received any complaint against the proposed Scheme from any person/party interested in the Scheme in any manner and that the affairs of the Petitioner Transferor Company does not appear to have been conducted in a manner prejudicial to the interest of its members or to public interest, subject to his submissions given in para 9 and 10 of his report.

13. An affidavit dated 3rd May 2013, giving point wise reply to the aforesaid report of the OL, has been filed by the Petitioner Transferor Company with this Court in which it has been submitted:-

(i) with regard to paragraph 9 of the aforesaid report of the OL, that:-

◆ Petitioner Transferor Company had paid off all the unsecured creditors under the head "trade payables" appearing in its trial balance as on 31st October 2012 and had also provided a certificate dated 7th November 2012 of an independent Chartered Accountant, M/s. R.S. Kelkar & Co, confirming and certifying that all amounts due to unsecured creditors of the Petitioner Transferor Company as on 6th November 2012 had been paid off in full.

◆ paragraph 5.2 of the Scheme read with sub-clause (g) of paragraph 2.1.11 of the Scheme provides for transfer and vesting of all the debts, liabilities, duties and obligations of the Petitioner Transferor Company to the Transferee Company pursuant to the orders of the High Court sanctioning the Scheme, made u/s 394 of the Act, without any further act or deed, thus providing for assumption of all liabilities of the Petitioner Transferor Company as on the Appointed Date i.e., 1st April 2013 by the Transferee Company.

◆ As per the financial statements of the Petitioner Transferor Company as on 31st August 2012, its assets were far in excess over its total liabilities (of Rs. 200.78 lacs), by a significant amount as its net worth stood at Rs. 509.26 lacs and also, as per financial statements of the Transferee Company as on 31st August 2012 as against total liability of Rs. 21,049.41 lacs, its net worth stood at Rs. 35,060.41 lacs and as such, its total assets were far in excess of its total liability as on that date.

In view of the above it is submitted by the Petitioner Transferor Company that the interest of all the unsecured creditors of the Petitioner Transferor Company could in no way be prejudiced in case the Scheme is sanctioned by the Court under Sections 391 to 394 of the Act and more so, because the financial position of the Transferee Company is even better than that of the Petitioner Transferor Company and therefore, after sanction of the Scheme by this Court and the Scheme becoming effective, the unsecured creditors of the Petitioner Transferor Company would be entitled to a far better asset cover in respect of their debts due from Petitioner Transferor Company prior to such amalgamation.

(ii) with regard to paragraph 10 of the aforesaid report of the OL, the Petitioner Transferor Company has submitted that there was an inadvertent and unintentional typographical error in recording the figure of Rs. 6,58,00,000/- as Rs. 65,80,000/-, the amount of consideration at which all its shares had been transferred by Siemens AG, Germany to the Transferee Company, in resolution No. 4 passed by the BoDs of the Petitioner Transferor Company at its meeting held on 14th December 2012, which mistake has been taken note of and rectified by the BoDs of the Petitioner Transferor Company at their meeting held on 5th April 2013.

(iii) As for the observation of the OL in paragraph 10 of his aforesaid report to the effect that Auditor of the Transferee Company had, in his report in the Balance Sheet as on 30th September 2011, qualified the report and stated that material discrepancies were noticed on physical verification of fixed assets, it is submitted by

the Petitioner Transferor Company in its aforesaid reply to the OL's report that the discrepancies on physical verification of fixed assets as noticed by the auditor of the Transferee Company, had been appropriately given effect to by the Transferee Company in its books of accounts and in fact, the Auditor of the Transferee Company had himself, in the very subsequent line in the same paragraph (i)(b) of the Annexure to his report dated 12th December 2011, very clearly stated that "these have been properly dealt with in the books of accounts", which sentence has not been reproduced by the OL in his aforesaid report and as such the Transferee Company has taken proper care of the discrepancy found on physical verification by dealing with property in its books of accounts.

(iv) In para 12 of the OL report, the OL has stated that it had not received any complaint against the proposed Scheme from any person/party interested in the Scheme in any manner until the date of filing of his report.

14. No objections have been received to the Scheme from any other party. Mr. Manish Mohan, the authorised signatory of the Petitioner Transferor Company as also its Counsel have filed separate affidavits, both dated 15th March 2013, and it has been submitted by and on behalf of the Petitioner Transferor Company at the hearing before this Court that neither the Petitioner Transferor Company nor their Counsel has received any objection pursuant to citations published in the newspapers.

15. In view of the approval accorded by the shareholders of the Petitioner Transferor Company as well as the Transferee Company by giving their consent to the Scheme in writing and the Court waiving the convening and holding of the meetings of the shareholders and the creditors of the Petitioner Transferor Company by order dated 5th December, 2012; representation/reports filed by the RD and the OL to the proposed Scheme and the reply Affidavit in response to the reports of the RD and the OL filed by the Petitioner Transferor Company there appears to be no impediment to the grant of sanction to the Scheme. Consequently, sanction is hereby granted to the Scheme under Sections 391 and 394 of the Act. The Petitioner Transferor Company will comply with the statutory requirements in accordance with law.

16. The certified copy of the order shall be filed with the Registrar of Companies within 30 days from the date of receipt of the same. In terms of Sections 391 and 394 of the Act and in terms of the Scheme, the whole of the undertaking, business, properties, assets, rights and powers of the Petitioner Transferor Company be transferred to and vest in the Transferee Company as a going concern without any further act or deed. Similarly, in terms of the Scheme, all the liabilities, duties and obligations of the Petitioner Transferor Company be transferred to and vest in the Transferee Company without any further act or deed. Upon the Scheme coming into effect, the Petitioner Transferor Company shall stand dissolved without winding up.

17. It is, however, clarified that this order shall not be construed as an order granting exemption from payment of stamp duty or taxes or any other charges, if payable in accordance with any law; or permission/compliance with any other requirement which may be specifically required under any law.

The Petitioner Transferor Company states that it would voluntarily deposit a sum of Rs. 50,000/- (Rupees Fifty Thousand) in the Common Pool Fund of the OL within three weeks from today. The statement is taken on record.

The Petition is allowed in the above terms.

Order Dasti.