In Re: M/s Indrama Investment Pvt. Ltd., M/s Select Holiday Resorts Ltd., CAPT. Swadesh Kumar and CAPT. RAM Kohli

Court: Delhi High Court

Date of Decision: June 1, 2012

Acts Referred: Companies Act, 1956 â€" Section 235, 251, 391, 391(1), 391(2)

Citation: (2012) 172 CompCas 271 : (2013) 4 CompLJ 269

Hon'ble Judges: A.K. Sikri, C.J

Bench: Single Bench

Advocate: Anish Upadhyay, Mr. V.N. Kaura, with Ms. Paramjit Benipal, for the Appellant; Ahay Vohra with Mr. Satwinder Singh, Ms. Divya Suman and Ms. Sushma Mathur, Advocates Mr. Ahay Vohra with Mr. Satwinder Singh, Ms. Divya Suman and Ms. Sushma Mathur, Advocates and Mr. Rajiv Bahl Counsel for the O.L., for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sikri Acting Chief Justice

1. Company Petition No.95 of 2004 was a petition under Sections 391 and 394 of the Companies Act, 1956 (hereinafter referred to as ""the Act")

vide which sanction of this Court to the scheme of Amalgamation of Indrama Investment Private Limited (transferor company) with Select Holiday

Resorts Ltd. (transferee company) was sought. This was the second motion. Earlier, the transferor company had filed Company Application,

which was registered as CA (M) No.14 of 2004 under Sections 391(1) and 394 of the Act praying for directions regarding dispensing with the

requirement of convening of the meetings of the equity shareholders and creditors of the transferor company and further directions regarding

convening and holding of meetings of the shareholders and unsecured and secured creditors of the transferee company for the purpose of

considering and approving the scheme of arrangement. The said application was disposed of by this Court vide orders dated 10th February, 2004

dispensing with the meetings of the shareholders and creditors of the transferor company and further directing convening of separate meetings of

the equity shareholders, secured and unsecured creditors of the transferee company. However, meetings of the equity shareholders, secured and

unsecured of the transferee company were held in terms of the orders of this Court and the reports of the Chairperson were placed on record.

Thereafter, the said petition, viz., Co. Pet. 95/2004 was filed for sanction of the scheme of arrangement u/s 391(2) read with Section 394 of the

Act. It was also stated that no proceedings under Sections 235 to 251 of the Act are pending against any of the petitioner companies. Notices of

this petition was issued and was duly served on the Regional Director, Department of Company Affairs, Kanpur. Notice was also advertised in the

newspapers in compliance with this Court''s order dated 21st April, 2004. The Regional Director filed his report in this Court. As per the said

report, he had no objection to the grant of sanction to the scheme of arrangement. In spite of the advertisement of the notice of this petition in the

newspapers, none had filed any objection to the grant of sanction to the scheme of arrangement. Taking note of the aforesaid facts, vide orders

dated 24th August, 2004 scheme of amalgamation/arrangements was sanctioned in the following manner:

In the aforesaid circumstances and having regard to the averments made in this petition and the materials placed on record and the affidavits filed

by the Regional Director, Department of Company Affairs, Kanpur, I am satisfied that the prayers made in the petition deserve to be allowed. I

also do not find any legal impediment to the grant of sanction to the Scheme of Arrangement.

Hence, sanction is hereby granted to the above-mentioned Scheme of Arrangement u/s 391(2) read with Section 394 of the Companies Act,

1956.

Consequent upon the amalgamation of the companies, the Transferor company shall stand dissolved without going through the process of winding

up.

2. After a lapse of about six months, C.A. No.280/2005 was filed u/s 394 (2) and Section 395 (1) of the Act by Capt. Swadesh Kumar, one of

the shareholders questioning the validity of the scheme with prayer for modification/recall of the aforesaid order dated 24th August, 2004 by

withdrawing sanction granted to the said scheme. Within few days thereafter, another shareholder, viz., Shri Ram Kohli came forward and filed

C.A. No.331/2005 with almost similar prayers.

3. It is these two applications which are the subject matter of present order. Notices in both the applications were issued to the transferee

company and has filed replies to both these applications stoutly contesting the same. Before I indicate the nature of challenge laid to the validity or

approval of the said scheme and the defence of the transferor company thereto, it is deemed proper to state some of the salient aspects of the

scheme of amalgamation which was sanctioned vide orders dated 24th August, 2004, as the narration thereof would facilitate better understanding

of the bone of contention.

4. As pointed out M/s. Indrama Investment Pvt. Ltd. has transferred and amalgamated to M/s. Select Holiday Resorts Ltd. It is, inter alia, in

consideration of transferee company issuing to the equity shareholders of the transferor company shares in the transferee company as provided in

the scheme of amalgamation that the authorized capital of the transferor company as made out in the scheme is Rs. 20,00,000/- divided into

20,000 shares of Rs. 100/- each. The issued, subscribed and paid-up capital of the transferor company is Rs. 18,18,000/- divided into 18,18,000

equity shares of Rs. 100/- each. Similarly, the authorized capital of the transferee company as made out in the scheme is Rs. 30,00,00,000/-

divided into 1,50,00,000 equity shares of Rs. 10/- each being the issued, subscribed and paid up share capital of the company. Apart from the

above, the issued, subscribed and paid-up share capital Rs. 1,50,00,000/- being the 6% redeemable cumulative preference shares of Rs. 10/-

each.

5. In the scheme presented before this Court seeking sanction, it had been claimed/made out therein the circumstances made out which have

necessitated and/or justify the proposed scheme of amalgamation and objects sought amongst others are, inter alia, as follows:

(i) Both the transferor company as well as the transferee company are closely held unlisted companies with a common lineage. The transferor

company is holding approximately 98% shareholding in the transferee company and the balance is held by the individual shareholders, including

family members of Ms. Inder Sharma, the promoter of both the companies whose holding constitutes approximately 1% in the transferee company.

(ii) The transferee company has been incurring losses in its operations and had borrowed high cost funds over a period from the banks and

financial institutions and continues to borrow funds from banks, which are secured by corporate guarantees given by the transferor company.

(iii) Under the scheme, the entire assets and liability of the transferor company will vest in the transferee company with effect from 31st March,

2003 or such other date or dates as this Court shall direct in consideration of the transferee company allotting shares to the shareholders of the

transferor company in the manner indicated in the scheme. It has been provided in Part-II of the scheme in Para Nos. 6.1 to 6.4 thereof that as a

consequence of the sanctioning of the present scheme the value of shares carrying face value of Rs. 10/- each of the transferee company shall be

reduced to Rs. 0.20/- and the remaining to the extent of Rs. 9.80/- shall be cancelled/extinguished. The exchange ratio, it is claimed, has been

arrived at after due consideration of the financial position, profitability and effect of amalgamation in respect of the transferor company and the

transferee company and is considered to the fair and reasonable taking all the circumstances into consideration.

(iv) It is further claimed that by amalgamating the said two companies, the cost and management of the said companies will considerably be

reduced and will result in carrying on the business more economically and efficiently and also in obtaining their main purpose by new and improved

means and enlarging their areas of operation.

(v) As a result of the amalgamation, the business of the two companies can be combined conveniently and advantageously.

(vi) As a result of the amalgamation, the resources of the two companies will be pooled and the transferee company will be able to rationalize and

strengthen its management, finance and it will be able to conduct its business efficiently.

(vii) The amalgamation will result in usual benefits and economies of scale, pooling and consolidation of resources and reduction in the cost of

management and overhead expense and administration.

(viii) The amalgamation will have beneficial results for both the companies concerned, their shareholders, employees, creditors and all concerned.

6. It was stated in the petition that pursuant to orders dated 10th February, 2004 passed in CA (M) No.14/2004, meeting of its

secured/unsecured shareholders and equity shareholders were convened which had approved the proposed scheme without any modification. It

was also stated that notices of the said meetings were sent individually to the equity shareholders of the transferee company together with copy of

the scheme of arrangement as well as the statement required by Section 393 of the Act and form of proxy. The notices of the meetings were also

advertised in the two newspapers, i.e., ""The Statesman"" (English) and ""The Dainik Jagaran"" (Hindi) as directed vide orders dated 10th February,

2004. Both applicants claimed that they never received any notice of the meetings. Mr. Ram Kohli stated that he was, in fact, abroad at the time of

publication of the notice in the newspapers. He came to know about the sanction of the scheme only when communication dated 14th December,

2004 was received in connection with the disposal of the odd lots shares held by the members/shareholders of the company. Almost similar kind of

averments are made by the other applicant showing ignorance about holding of the meetings and coming to know of the sanction accorded by this

Court only after receipt of the notice from lawyer in connection with the disposal of the odd lots shares held by him.

7. Mr. Ram Kohli was holding 15,000 equity shares in transferee company for a face value of Rs. 1,50,000/-. As per the scheme, since the share

carrying face value of Rs. 10/-, each of the transferee company was to be reduced to Rs. 0.20/-, he was to get one share for each 500 shares and

in this manner, his 15,000 shares were converted only into 300 shares in the new company. However, he was not allotted even these 300 shares

because of the reason that the scheme further provided that if a person is holding less than 500 shares in the new company, he would no longer

remain a shareholder. His share would be forfeited and he would be paid a value of the share as per the valuation arrived at and shown in the

scheme. The other applicant also met with the same fate. His shareholding in the transferee company before amalgamation was 10,000 equity

shares which became only 200 in the new company. He was also, thus, shown the door by forfeiting shares and paying him value of the said shares

as per the valuation arrived at by the transferee company.

8. Mr. V.N. Kaura, learned Senior Counsel, argued for the applicant in C.A. No.331/2005 and these arguments were adopted by Ms. Anisha

Upadhyay, learned counsel who appeared for the applicant in CA No.280/2005. Mr. Kaura submitted that the applicants have primarily the two

following grievances:

(i) In the scheme of arrangement, the transferor company had stipulated artificial exchange ratio which prejudicially affected the interest of the

applicants.

9. A clever and shrewd device was adopted to oust the individual shareholders except those who wee the family members of Shri Inder Sharma

and this family controlled 99% shares of both the companies. This resulted into the forfeiture of the shares of the persons like applicants exiting

them form the new company after the merger of transferor company with the transferee company.

10. It was highlighted that 99% shares in the transferee company belonged to Mr. Inder Sharma and his family and only 1% shareholding was with

the outsiders who were all individuals. Since all these outsiders are exited from the company, full control of the same now vests with Mr. Inder

Sharma family. Thus, by device of the aforesaid scheme of amalgamation, Mr. Inder Sharma family has gained not only 100% control over the

transferee company, those individuals whose shares are forfeited are not even enumerated properly by dubious methodology of the evaluation of

the shares. In the case of applicant in CA No.331/2005, he was having 15,000 shares of face value of Rs. 1.5 lacs, which he purchased 20 years

ago after holding investment for such a long period. He was not shown the door making paltry payment of Rs. 60,000/-. Same treatment was

meted out to the other applicant.

11. The aforesaid two grievances were sought to be built on the following legal foundation:

(i) Valuation of the shares of the transferee company was not as per the law. Along with the scheme, valuation report of the Chartered Accountant

was filed which reflected Net Asset Valuation basis, as well as profit generating basis.

(ii) The entire exercise was fraudulent and not justifiable. It was argued that in the scheme, it was projected that it is a loss making company and

had borrowed high cost of funds. However, both these premises were wrong which shows that the only fraudulent motive was to gain 100%

control over the company. It was argued that the fraud vitiates everything and thus, the entire process stood nullified.

(iii) Mr. Kaura also argued that the applicants constituted separate class of shareholdings, but no separate meeting was held for them which was

contrary to the procedure provided u/s 391 of the Act. The contention that the applicants constituted a separate class was founded on the

submission that where 99% shares were held by Inder Sharma and family, other shareholders including the applicants could not huddle along with

that class. Being outsiders and in minority, they should be treated as separate class. Even there were two categories:

(a) Persons with 25,000 or more shares; and

(b) Those who are having less than 25% shares and whose shares were forfeited.

It was submitted that once the intention was forfeiture with less than 25% shareholders, they should also have been treated as separate class and

shareholders for the purpose of holding the meeting u/s 391 of the Act.

Mr. Kaura, thus, concluded his arguments by mooting a proposal that these applicants be allowed to continue to hold shares 15,000 and 10,000

respectively and as per the arrangement, it would only be 1500 and 1000 in the amalgamated company.

12. Mr. Ajay Vohra, learned counsel appearing for the respondent company countered the aforesaid submissions. He opened his argument by

submitting that the valuation and the shares done by the company was proper and this exercise was undertaken by the Chartered Accountants of

repute who had followed the norms prescribed by the Supreme Court in various judgments for valuing such shares. In this behalf, his submission

was that since it was an on-going concern, ""profit earning method"" was best situated as held by the Supreme Court in Commissioner of Wealth

Tax, Assam Vs. Mahedeo Jalan & Ors. (86 ITR 621) and the judgment of Bombay High Court in Commissioner of Gift Tax, Bombay Vs.

Ebrahim Haji Usuf Botwala, (122 ITR 38). He also submitted that the Chartered Accountants had given rationale for following this system in their

letter dated 04.12.2003.

13. His further submission was that the company was not debt free as alleged by the applicants and there were various loans to be repaid. He

referred to the balance-sheet and also the material to show that these loans were waived off after raising preferential share capital. He submitted, in

this behalf, that the entire arguments of the counsel for the applicants that the amalgamated company was a profit earning company was wrong as

that argument was based on exclusion of depreciation. He submitted that it could not be done in view of law laid down by this Court in

Commissioner of Income Tax Vs. Sain Processing and Weaving Mills P. Ltd., (325 ITR 565). The reasons for profitability thereafter was based

on subsequent events, viz., write off debt of Rs.17 Crore by the parent company and addition of new rooms in the hotel/resort resulting into

additional income. According to him, these subsequent events resulting in profitability of the company after the amalgamation, could not be

transported back in time to hold that at the time of propounding the scheme, the company had profitability. He also pointed out that the secured

loan of Rs.40 Crores had become possible because of M/s. Indrama Limited coming in, thereby adding to the brand value and goodwill of the

company. Mr. Vohra also submitted that the valuation of the shares which was got done by the applicants and file was based on inappropriate

method as the valuation report not only ignored the relevant factors which are to be taken into consideration, but also done taking into

consideration general circumstances which was not permissible as the circumstances prevailing on the date of amalgamation were only to be

considered. He also submitted that the valuation of the shares if taken on yield basis would reflect negative value and if it is taken on average basis

it was coming to only Rs. 2.3 paise per share. However, the shareholders were paid Rs. 4.6 paise per share and thus, they were more than

adequately compensative. He also submitted that both the applicants had shareholding of 0.010% and 0.67% respectively and persons with such

mini-school share holdings could not undue of the majority wanted. He also argued that they could not be treated as separate class for the purpose

of Section 391 of the Act.

14. I have considered the submissions of counsel for the parties. It is not in dispute that the procedure as laid down in Section 391 of the Act was

followed both at the stage of first motion and at the second motion before approving the scheme. We cannot merely go by the shareholding pattern

and because the applicants are having small fractions of shares would not make them a separate class. They remained in the same category as

other shareholders, i.e., equity shareholders. If the contention is accepted, then there would be different categories of shareholdings within the same

class and no such position is postulated in Section 391 of the Act.

15. No doubt, even if it is shown that the procedure prescribed u/s 391 is followed, it is still for the Court to see that the said scheme is not unfair

or equitable before giving its imprimatur thereto. The general rule is that the prescribed majority of the shareholders is entitled to take decision on

scheme of reconstruction/amalgamation, etc. the manner in which it should be carried into effect. It is a matter of domestic concern, one for the

decision of the shareholders of the company, which should be not less than 75%.

16. Sub-section (2) of Section 391 of the Act provides that such a decision of majority, viz., 3/4th in value of creditors or class of creditors or

class of members as the case may be, shall be binding on all the creditors and share holders of that class as well as on the company. As per

proviso to sub-Section (3) of Section 391 of the Act, the Court, before sanctioning such scheme, has to satisfy that the company or any other

person by whom application is made u/s 391(1) has disclosed to the Court all material facts relating to company, such as the latest financial

position of the company, latest auditor"s reports on account of company, the pendency of any investigation proceedings in relation to the company

u/s 235 to 351, and the like. On the other hand, requirement was also made when the scheme was sanctioned. In such a scenario, before scheme

is to be sanctioned, in what manner the interest of the minority shareholders is to be looked into, is the question.

17. This aspect came up for consideration before this Court in Reckitt Benckiser (India) Ltd. (122 (2005) DLT 612), albeit, in context of

reduction of share capital. In that case also, the scheme of the reduction was such that many shareholders like the applicants in the instant case

were deprivation of their shareholdings on payment of certain price. The Court took note of the general rule that it was the prescribed majority of

the shareholders which is entitled to decide whether there should be a reduction in capital or not. After taking note of various judgments, the Court

has culled out the following principles:

20. The principles, which can be distilled from the aforesaid judicial dicta, are summarised as under:

(i) The question of reduction of share capital is treated as matter of domestic concern, i.e. it is the decision of the majority which prevails.

(ii) If majority by special resolution decides to reduce share capital of the company, it has also right to decide as to how this reduction should be

carried into effect.

(iii) While reducing the share capital company can decide to extinguish some of its shares without dealing in the same manner as with all other

shares of the same class. Consequently, it is purely a domestic matter and is to be decided as to whether each member shall have his share

proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished totally, receiving a

just equivalent.

(iv) The company limited by shares is permitted to reduce its share capital in any manner, meaning thereby a selective reduction is permissible

within the framework of law (see Re. Denver Hotel Co.1893 (1) Ch D 495.

(v) When the matter comes to the Court, before confirming the proposed reduction the Court has to be satisfied that (i) there is no unfair or

inequitable transaction and (ii) all the creditors entitled to object to the reduction have either consented or been paid or secured.

18. It would also be advisable to refer to few cases which were dealt with in the said judgment and may guide this Court how to proceed in the

instant case:

21. At this stage, let me deal with the two judgments cited by the objector to state some further principles culled out therein. These cases are : (i)

Trevor v. Whitworth 12 AC 409 and (ii) Re. Denver Hotel Co. 1893 (1) Ch.D 495 (both these judgments were considered by the House of

Lords in British and American Trustee and Finance Corporation v. Couper (supra). Trevor v. Whitworth (supra) was a case where a limited

company was incorporated under the Joint-Stock Companies Act with the object (as stated in its memorandum) of acquiring and carrying on a

manufacturing business and any other business and transaction which the company might consider to be in any way conducive or auxiliary thereto

or in any way connected therewith. The articles authorise the company to purchase its own shares. The company having gone into liquidation, a

former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation

and no wholly paid for. The House of Lords held that such a company had no power under the Companies Act to purchase its own shares and,

thus, the purchase in question was ultra vires. Claim of the petitioner was, Therefore, rejected. In the process the Court made following

observations which were relied upon by the learned Counsel for the respondent:

Your Lordships then asked in what case, and under what circumstances, such a purchase could be said to be incidental to the objects of a limited

company. In answer to that question the learned Counsel not unnaturally turned to in re. Downfield Stinkstone Coal Company 17 Ch. D. 76, and

suggested that at any rate it might be so when the power was used as an incident of domestic management to buy out share holders whose

continuance in the company was undesirable.

That was the way in which the proposition was put in inre. Dronfield, and Co., where matters had come to a deadlock. But I would ask, is it

possible to suggest anything more dangerous to the welfare of companies and to the security of their creditors than such a doctrine'' Who are the

share holders whose continuance in a company the company or its executive consider undesirable'' Why, share holders who quarrel with the policy

of the Board, and wish to turn the directors out; to answer; share holders who want information which the directors think it prudent to withhold.

Can it be contended that capital of the company in keeping themselves in power, or in purchasing the retirement of inquisitive and troublesome

critics'' xxxx After all, the inconvenience sought to be avoided arises either from restrictions which Parliament has thought right to impose, or from

the common misfortune of having to pay for what one wants out of one''s own purse, when there is no other way of getting it. If the capital

proposed to be expanded in the purchase of its shares is in excess of the wants of the company, the transaction must be carried out under the

provisions of the Acts to which I shall have presently to refer. If the capital of the company is not in excess of the company''s wants, it certainly

ought not to be diverted from its proper objects. But even then there is no reason why there should be a deadlock. The end in view may still be

attained by means to which no exception can be taken. If share holders think it worthwhile to spend money for the purpose of getting rid of a

troublesome partner who is willing to sell, they may put their hands in their own pockets and buy him out, though they cannot draw on fund in

which others as well as themselves are interested. That, I think is the law, and that is good sense of the matter.

It is clear from the above that the observations were made in the context of deciding as to whether there was power with the company to purchase

its own shares. No doubt, if there is a ploy to oust inconvenience share holders in a scheme for reduction, the Court can treat the same, in a

particular case as unfair or inequitable and reject the proposed reduction.

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23. Facts of British and American Trustees (supra), were as under:

A company carried on business in the United Kingdom and in America, and a portion of its investments and some of its share holders were in that

country. Differences having arisen between the directors in England and the American committee, it was agreed that the American share holders

should take over the American investments upon the terms that the company should cease to carry business in America and that the capital of the

company should be reduced by the amount of the shares held in America. A special resolution for carrying out this agreement was passed and

confirmed. All the creditors of the company had either been paid or had assented to the arrangement.

24. Holding that the arrangement was not ultra virus the company and should be sanctioned by the Court, the House of Lords observed that it was

not beyond the statutory jurisdiction of the Court under the Companies Act to sanction a scheme for reduction of capital of a company which does

not deal in the same way with all shares of the same class. In the process the Court distinguished Denvor Hotel (supra), adn explained the ratio of

Trevor v. Whitworth (supra).

25. Lord Herschell, LC, after quoting Re. Denvor Hotel Co. (supra), made following significant observations:

If all the share holders of a company were of opinion that its capital should be reduced, and that this reduction would best be effected by paying off

one shareholder and cancelling the shares held by him, I cannot see anything in the Acts of 1867 and 1877, which would render it incumbent on

the Court to refuse to confirm such a resolution, or which shows that it would be ultra virus to do so. I do not see any danger in the conclusion that

the Court has power to confirm such a scheme as that now in question, or, any reason to doubt that this was the intention of the Legislature. The

interests of creditors are not involved, and I think it was the policy of the Legislature to entrust the prescribed majority of the share holders with the

decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the

share holders (if there be such) are properly protected by this: that the decision of the majority can only prevail upon it be confirmed by the Court.

This is a complete answer to the argument ably urged by Counsel for the respondent that if all the share holders of the same class were not dealt

with in precisely the same fashion, the interests of the minority might be unjustly scarified to those of the majority. There can be no doubt that any

scheme which does not provide for uniform treatment of share holders whose rights are similar, would be most narrowly scrutinised by the Court,

and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different

thing from saying that the Court has no power to sanction it.

26. One will find, on going through this judgment, that one of the arguments raised was that reduction of the capital was not proportionate but

aimed at a particular class. Lord Watson in his judgment specifically dealt with this aspect and negatived the contention. He relied solely upon the

plea that it is beyond the statutory jurisdiction of the Courts to sanction any scheme for the reduction of capital which does not deal in precisely the

same way with each and every share belonging the same class. If that be the law it is manifest that in some cases the result might be unfortunate.

Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced, or whether some members

shall retain the shares unreduced, the shares of others being extinguished upon their receiving a just equivalent, is purely domestic matter, and it

may be greatly for the advantage of the company that the latter alternative should be adopted. Lord Macnaghten described that the provisions of

the Companies Act, 1867, while permitting a company to reduce its share capital provided sufficient safeguards to ensure that all categories were

duly protected. His Lordships observed:

The exercise of the power is fenced round by safeguards which are calculated to protect the interests of creditors, the interests of share holders,

and the interests of the public. Creditors are protected by express provisions. Their consent must be procured, or their claims must be satisfied.

The public, the share holders, and every class of share holders, individually and collectively, are protected by the necessary publicity of the

proceedings, and by the discretion which is entrusted to the Court until confirmed by the Court the proposed reduction is not to take effect, though

all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the company, as it were,

makes a new departure.

With these safeguards, which are certainly not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the

incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free.

19. No doubt, in that case since the company had given option to such shareholders to continue to hold shares. However, it would be of interest to

note that M/s. Reckitt Benckiser (India) Ltd. passed special resolution proposing the reduction of equity capital which resulted in depriving those

shareholders also from holding the shares any longer. Scheme for this purpose was filed for approval and by means of Co. Pet. No.228 of 2010

which has been approved by the Company Judge vide orders dated 03.10.2011 dismissing the objections of those minority shareholders. The

same very contentions were advanced which was raised before us by the application. Following discussion from the said judgment is also worth to

reproduce:

41. In Organon (India) Ltd. (supra) another Single Judge of Bombay High Court specifically rejected the argument of forcible acquisition of public

shareholders in context of a Scheme of Reduction. In the said judgment, it held as under:-

13. Mr. Lakhani has first submitted that such reduction of the share capital proposed by the petitioner company, by paying off the public holders of

equity shares, other than the promoter shareholders and given them certain compensation, amounts to a forceful acquisition of the shares held by

them. He states that such action on the part of the petitioner-company is against the principles of natural justice, corporate democracy and

corporate governance.

He states that such reduction tantamount to a sophisticated corporate mafiaism.

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19. This Court is, however, bound by the decision of the Division Bench of this Court, reported in Sandvik Asia Ltd. v. Bharat Kumar Padamsi

(2009) 91 CLA 247 (2009) 111 (4) Bom. LR 1421, concerning the reduction of capital of Sandvik Asia Ltd. The learned Single Judge of this

court, had refused confirmation of the proposal for reduction of Sandvik Asia Ltd. on the ground that the promoters group could virtually bulldoze

the minority shareholders and purchase their shares at the price dictated by them. The learned Single Judge found that the minority shareholders

were not given any option under the proposal. Hence, the learned Single Judge concluded that such schemes for reduction of capital were totally

unfair and unjust. In appeal, the Hon''ble Division Bench held that they were bound by the law laid down by the Hon''ble Apex Court in Ramesh B

Desai v. Bipin Vadilal Mehta (2006) 73 CLA 357/(2006) 5 SCC 638 (SC) where the Apex Court recognised the judgment of the House of

Lords in the case of British & American Trustee & Finance Corporation (supra). The Learned Bench also referred to the judgment in Poole v.

National Bank of China Ltd. (1907) AC 229 (HL), the relevant portion of which is as follows:

19.The dissenting shareholders do not demand, and never have demanded, better pecuniary terms, but they insist on retaining their holdings which

in all reasonable probability can never bring profit to any of them and may be detrimental to the company.

20. The learned Bench granted sanction to the reduction of capital, overruling the order of the learned Single Judge in Sandvik Asia Ltd. (supra),

and posited as follows:

Once it is established that non-promoter shareholders are being paid the fair value of their shares, at no point of time it is even suggested by them

that the amount that is being paid is way less and even the overwhelming majority of no promoter shareholders having voted in favour of the

resolution shows that the court will not be justified in withholding its sanction to the resolution. [para 9]

21. An SLP (Petition for Special Leave to Appeal (Civil) No. 12418/2009) filed therefrom, was dismissed by the Hon''ble Apex Court, by its

order dated 13th July, 2009. Thus, this Court is bound by the decision of the learned Division Bench and cannot withhold sanction to the special

resolution for reduction of capital, unless there is some patent unfairness regarding the fair value of the shares or there is lack of an overwhelming

majority of non-promoter shareholders who vote in favour of the resolution.

(emphasis supplied)

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44. It is also settled law that a valuer''s report is not to be interfered with by a Court in the absence of any fraud or illegality - which allegation is

missing in the present petition. In fact, Supreme Court in Hindustan Lever Employees'' Union v. Hindustan Lever Ltd., 1995 Supp (1) SCC 499

has held ""Mr. Ashok Desai, appearing on behalf of TOMCO, has argued that the valuation of shares had to be done according to well-known

methods of accounting principles. The valuation of shares is a technical matter. It requires considerable skill and experience. There are bound to be

differences of opinion among accountants as to what is the correct value of the shares of a company. It was emphasised that more than 99% of the

shareholders had approved the valuation. The test of fairness of this valuation is not whether the offer is fair to a particular shareholder. Mr Jajoo

may have reasons of his own for not agreeing to the valuation of the shares, but the overwhelming majority of the shareholders have approved of

the valuation. The Court should not interfere with such valuation.

(emphasis supplied).

19. This answers most of the arguments of the applicants.

20. One other aspect remains to be considered, viz., arguments of the applicants that the entire this is designed in such a way to control 100%

equity by Sharma Family and to eliminate minority shareholders like applicants and this motive in extinguishing the entire class of outside

shareholders was improper and Court could look into this aspect. The question is as to whether it was an unfair or inequitable arrangement. As

pointed out above, it has been held by the Court that merely because the arrangement results in extinguishing some shares and resulting into 100%

shareholdings in the hands of a particular group cannot be treated improper per se.

21. Coming to the valuation, I find that the auditors adopted profit earning method, which is held to be a valid method for on going concern. In its

letter dated 04.12.2003, the Chartered Accounts gave their justification in the following manner:

In our opinion, CCI Valuation seems to be most appropriate as both companies are unlisted companies, no realistic future cash flows can be

projected for either of the companies as the tourism trade as well as investment business at stock exchanges are of highly volatile nature and data

available for hotel companies pertain to either hotel chains or those owing five star properties.

We enclose herewith the calculation sheets for the valuation of the shares of the respective companies on the basis of CCI guidelines which give the

respective valuations as under:

Company ""HPL"" - Rs.38,028 per share (share of Rs.100 each) Company ""SHRL"" - Rs.2.30 per share (share of Rs.10 each)

On the aforesaid basis, the share exchange ratio in reverse merger of ""HPL"" into ""SHRL"" translates into 16533 shares of ""SHRL"" of Rs.10 each

being issued for each share held in ""HPL"".

The present share capital of ""HPL"" is 18,180 shares of Rs.100 each aggregating to Rs.18,18,000. If the above share exchange ratio is maintained,

it would mean issue by ""SHRL"" 30,05,69,940 shares of Rs.10 each to the shareholders of ""HPL"" in lieu of the shares held in ""HPL"". The

aggregate share capital of ""SHRL"" in such a case would exceed Rs.300 crores, post amalgamation and the expanded equity share capital of

SHRL"" after allotment of shares to the shareholders of ""HPL"" would make it extremely difficult for the company to service its shareholders.

22. Mr. Vohra may be right in his submission that the events had taken place after the amalgamation and the circumstances under which

profitability of the company has increased cannot be relevant consideration for valuation of the shares or to judge the profitability of the company at

the time when the decision for amalgamation was taken for the stake holders. Therefore, the report filed by the applicants also cannot be accepted.

23. We may also refer to the following observations of the Supreme Court in the case of Hindustan Lever Employees Union v. Hindustan Lever

Limited (1995) (Suppl.) (1) SCC 499:

The Court''s obligation is to be satisfied that the valuation was in accordance with law and it was carried out by an independent body.... The

valuation of shares is a technical matter. It requires considerable skill and experience. There are bound to be differences of opinion among

accountants as to what is the correct value of the shares of a company. It was emphasised that more than 99% of the share holders had approved

the valuation. The test of fairness of this valuation is not whether the offer is fair to a particular shareholder.... Mr. Jajoo may have reasons of his

own for not agreeing to the valuation of the shares, but the overwhelming majority of the share holders have approved of the valuation. The Court

should not interfere with such valuation.

Apart from showing the effect of this amalgamation, the applicants have not been able to show ulterior motives. We, thus, do not find any merit in

these applications, which are accordingly dismissed.