

(1998) 03 BOM CK 0053

Bombay High Court

Case No: Company Petition No. 41 of 1998 with Company Application No. 620 of 1997

The Industrial Credit and
Investment Corporation of India
Limited

APPELLANT

Vs

Financial and Management
Services Ltd. and others

RESPONDENT

Date of Decision: March 26, 1998

Acts Referred:

- Companies Act, 1956 - Section 10, 292, 391, 393, 394

Citation: AIR 1998 Bom 305 : (1998) 3 BomCR 471 : (1998) 3 BOMLR 677 : (1999) 98
CompCas 241 : (1998) 3 MhLj 602

Hon'ble Judges: Y.S. Jahagirdar, J

Bench: Single Bench

Advocate: H.K. Vardhan, for Regional Director Department of Company Affairs, Bombay.,
R.A. Kapadia and F.E. Devitre, instructed by Wadia Gandhi and Co., P.K. Samdani, B.B.
Saraf and Basant Trilokani, instructed by V.B. Juries and Miss. Alpana Ghone, instructed by
Crawford Bayley and Co., Virendra V. Tulzapurkar and R.M. Kadam, instructed by M/s.
Amarchand and Mangaldas and Suresh A. Shroff and Co, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

Y.S. Jahagirdar, J.

This petition under the provisions of sections 391 to 394 of the Companies Act, 1956, (for short the "Act") is filed by the Industrial Credit and Investment Corporation of India Ltd. (hereinafter referred to as the "ICICI"), with a prayer to sanction the arrangement as embodied in the scheme of amalgamation annexed at Exhibit "E" to the petition and for a declaration that the said scheme be binding on the parties concerned including equity shareholders, convertible debenture holders, 9.3% redeemable preference shareholders and 9.5% redeemable preference shareholders and creditors of the petitioner- company and all classes of

shareholders and creditors of transferor company.

2. The transferor company, as referred to in the prayer, is I.T.C. Classic Finance Ltd.

3. It is alleged in the petition that the Board of Directors of the petitioner- company approved the scheme on 1st of December 1997. Company Application No. 620 of 1997 was filed on 4th of December 1997 to convene for equity shareholders, convertible debenture holders, etc. and on 5th of December 1997, necessary directions were given by this Court to convene the meeting. Accordingly, the meeting of the shareholders, debenture holders, etc. was held on 12th of January 1998 and the result of the meeting, as borne out by the petitioner, can be summarised as follows :--

"(a) Meeting of the Equity Shareholders

896 Equity Shareholders holding 28,90,05,433 Equity Shares attended and voted.

762 Shareholders holding 28,88,95,632 Equity Shares voted in favour of the scheme.

45 Equity Shareholders holding 69,026 Equity Shares voted against the scheme. The votes of 89 Equity Shareholders holding 40,775 Equity Shares were invalid.

(b) Meeting of the Convertible Debenture holders

39 Convertible Debenture holders holding Rs. 9,63,834 in value of Convertible Debentures attended and voted.

31 Convertible Debenture holders holding Rs. 9,63,736 Convertible Debentures in value voted in favour.

3 Convertible Debenture holders holding 98 Convertible Debentures voted against the scheme.

(c) Meeting of 9.3% Redeemable Preference Shareholders.

4 Shareholders holding 6.50 Crores shares attended and voted.

All voted in favour of the scheme.

(d) Meeting of 9.5% Redeemable Preference Shareholders

5 Shareholders holding 6.20 Crores attended and voted.

All voted in favour of the Scheme."

The Chairman of the meeting filed his report on 13th of January 1998. On the same date, the present petition is filed. After the advertisement in the newspapers as directed by this Court, certain requisitions from the office of the Regional Director were raised which were satisfied by the petitioner.

4. In the present proceedings when the petition came up for hearing, no affidavit is filed opposing the scheme from the office of the Regional Director. As a matter of

fact, none of the shareholders or debenture holders or creditors have filed any affidavit opposing the scheme. However, three intervenors have appeared in the proceedings and prayed for being heard in the matter. One is an intervention on behalf of Standard Chartered Bank by way of an affidavit through its Constituted Attorney one Patamada Jappoo Appanna. Affidavit claims that the intervener Bank is the creditor of transferor company viz. I.T.C. Finance Limited and has to recover from the transferor Company a sum of F.Rs. 26,76,53,329.22. It is alleged in the affidavit that to secure due repayment of the dues of the bank, the bank was opposing the amalgamation. At the time of hearing, it was made clear by Mr. Kapadia, learned Counsel for the Bank, that though the affidavit is styled as opposing the scheme proposed, the bank is interested in securing and safeguarding the amounts due to them from the transferor company and since the scheme proposes the arrangement to be binding on the creditors of transferor Company also, the present Company Application for intervention is filed. The application, as submitted by Mr. Kapadia, is essentially aimed at securing and safeguarding the repayment of the bank as is allegedly due from the transferor Company. The second intervention is on behalf of the Financial & Management Services Limited. The said Financial Institution is also creditor of the transferor Company and is interested in securing their dues.

5. The third intervention is on behalf of Bombay Electric Supply and Transport Undertaking (BEST). The intervention is filed as a result of notice received from the petitioner -company to the said Undertaking intimating them about the pendency of the present petition and intention of the present petitioner to proceed with the scheme of amalgamation. It was also intimated to the BEST Undertaking by the letter dated 27th January 1998 written by the present petitioner that if the said undertaking is interested in opposing the petition then they should send to the advocates of the petitioner a notice in that behalf. It appears that as a result of this intimation, the present intervention is filed.

6. At the time of hearing, Miss Ghone appearing for the said intervener BEST, has also made it clear as is done on behalf of the other creditors of the transferor company that the BEST Undertaking is not really concerned with the merits and demerits of the amalgamation scheme but is only interested in safeguarding their dues. Mr. Tulzapurkar, learned Counsel for the petitioner, has stated that the letter is already addressed to the BEST explaining that the claim of BEST as borne out by the records shall be satisfied by the petitioner-company.

7. In view of these interventions at the behest of the creditors of transferor Company, the issue arose as to whether while sanctioning the scheme put before the Court at the instance of the transferee company viz. I.C.I.C.I. and while considering the merits and demerits of the scheme it is open to the creditors of the transferor company to agitate their grievances in the present company petition, the matter was examined in that context as also in the light of the scheme as put forth

along with the petition.

8. Mr. Tulzapurkar, learned Counsel for the petitioner, has submitted and rightly so, that none of the intervenors have seriously opposed to the scheme of the amalgamation. However, all that they want to secure is repayment to them and that issue is totally beyond the jurisdiction of this Court. Since the creditors of the transferor company cannot put forth any claim before this Court in the present proceedings and their claim or validity thereof, cannot be gone into since they have no locus to be heard in the matter initiated by transferee company in the Court which had jurisdiction to entertain the application only at the behest of transferee company since their registered office is at Bombay.

9. Mr. Tulzapurkar has relied on number of authorities which will be referred to hereafter to put forth the proposition that the creditors of transferor company have no right to be heard in the present petition and if that be so, the present arrangement which is essentially between the petitioner and their shareholders and the creditors has been almost unanimously accepted by all the concerned parties and hence, this Court exercising jurisdiction under the provisions of the Companies Act, cannot sit in appeal as an Appellate Authority to scrutinise the wish of the majority of the shareholders and the creditors, but must honour the said majority subject, of course, to the directions that are contemplated u/s 394 of the Companies Act.

10. Mr. Kapadia, Mr. Samdani and Miss Ghone for the intervenors have pointed out that in all this process the persons whose interest is required to be safeguarded and the interest which would really be adversely affected, would be the creditors of the transferor company who are entitled to know as to against whom they should proceed and who should be made responsible for payment of their dues since they cannot be left in the lurch and should not be made to run after the company which would not be after amalgamation, financially sound to bear and satisfy their claims. Therefore, to the extent to secure and safeguard the dues payable to them by transferor company, they have right to be heard even in this proceeding though they are neither the shareholders nor the creditors of the transferee company. The learned Counsel has also vehemently submitted that the scheme being one as approved by the directors of the transferee company as also the transferor company, it is essential that the transferee company be made to accept their outstandings and dues and should be made to abide to a condition of taking over their liabilities and, therefore, to safeguard that the creditors of transferor company should be heard in the proceeding.

11. Counsels for the intervenors, however, have not indicated that the present petitioner would be financially unable to satisfy their claims but insist on a clause to safeguard their dues and further state that the factory whether they have right to appear in the petition moved or pending at the instance of transferor company of which they are the creditors, is not relevant. It may be that they have a right to be

heard in both the forums but they being vitally interested in the arrangement of the scheme of amalgamation they should be heard in the proceeding and clause safeguarding the interest of the creditors of the transferor company should also be incorporated in the scheme while sanctioning the same.

12. Before I deal with the submissions and refer to the various authorities cited at the bar, it needs to be mentioned that it is common ground that the application at the instance of transferor company which is I.T.C. Classic Finance for sanction of this very scheme is already filed and is pending in the High Court at Calcutta. It is also common ground that, at-least, two of the intervenors barring the BEST Undertaking, have already appeared in the proceedings and have put forth their claim against the transferor company and the scheme of amalgamation in the context of their claims against the said company.

13. To appreciate the submissions, firstly, it is necessary to refer to section 10 of the Companies Act indicating jurisdiction of the Court. Section 10 of the said Act, which is relevant for our purpose, reads as follows :--

"Jurisdiction of courts.

10. (1) The Court having jurisdiction under this Act shall be--

(a) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2);"

Thus, since the transferee company is having its registered office at Bombay, the petition is moved in this Court and the transferor company has its registered office at Calcutta and hence, the petition at their instance is filed in the High Court at Calcutta. Since initiation of proceedings for the same scheme are in two different courts whether a direction to club both the proceedings is necessary was considered by this Court in the matter, Bank of India Ltd. v. Ahmedabad Manufacturing & Calico Printing Co. Ltd., reported in 1972 Comp Cas. 42 and a safeguard is provided that the sanction shall operate only after the necessary orders u/s 394 of the said Act are obtained by both the transferor company and the transferee company. The provisions of the Act do not make it obligatory that the scheme though one and the same should be considered by any one Court having jurisdiction. The proceedings have to be governed by section 10 in so far as the jurisdictional aspect is concerned. The resultant final order would obviously be dependent on both transferor and transferee company obtaining necessary sanction from the Court of competent jurisdiction.

14. It is necessary first to appreciate the scope of inquiry by this Court exercising jurisdiction under sections 391 and 393 of the Companies Act. The Apex Court while dealing with this issue, has crystalised with precision the scope of the inquiry under

these sections. Mr. Tulzapurkar has rightly placed reliance on the said ruling in the matter of [Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.,](#). On considering the said judgment and the ratio as laid down therein, it is obvious when the Company Court is called upon to sanction the scheme, though, the Court is not to go by ipse dixit of the majority of shareholders or the creditors, the Court has to consider pros and cons of the scheme to find out whether it is fair, just and reasonable and is not contrary to the provisions of the liability. While honouring the majority expressed in the meeting and while finding out whether the scheme is fair and reasonable, the Court, exercising power under sections 391 and 393 should be guided by the corporate and commercial wisdom of the concerned parties. The jurisdiction that the Court is supervisory and not an appellate. The Apex Court has observed in the judgment (supra) as follows :--

"The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The propriety and the merits of the compromise or arrangement have to be Judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties."

Considering in the light of the observations as indicated by the Apex Court, the inquiry in the present proceedings assumed very limited compass.

15. The scheme, as presented, has not been opposed in the present petition by any of the shareholders or class of creditors. The condition as envisaged in Clause 21 for making the scheme operative has been complied with as stated by the Counsel for the petitioner including the contribution by way of infusion of funds by I.T.C. to the extent of Rs. 350 Crores. I have examined the scheme clause-wise. Clause 3(a) of the scheme clearly commits taking over all the debts, liabilities, duties and obligations of the Transferor Company by the petitioner Transferee Company. Clause 8 of the scheme in fact also safeguards the unknown transact or with the transferor company by providing as follows :--

"The transfer of the said Assets and the said Liabilities of the Transferor Company to the transferee Company and the continuance of all the contracts or proceedings by or against the Transferee Company shall not affect any contract or proceedings relating to the said Assets or the said Liabilities already incurred by the Transferor Company on or before 1st December 1997."

16. Clause 6 of the scheme also provides for continuance and initiation of suits and actions for the dues of Transferor Company against the Transferee Company. The financial stability of the petitioner company is not doubted and hence, the material

as is placed before the Court, there is nothing to warrant any additional directions and/ or order while sanctioning the present scheme.

17. However, in the light of the prayer in the petition to the effect "that the Arrangement as embodied to the scheme of Amalgamation being Exhibit "E" to the petition be sanctioned by Hon"ble Court so as to the binding on all parties concerned including the Equity Shareholders, Convertible Debenture holds, 9.3% Redeemable Preference Shareholders and 9.5% Redeemable Preference Shareholders and Creditors of the petitioner company and all classes of Shareholders and Creditors of the Transferor Company." Whether it is necessary to hear the intervenors on the question of sanctioning the scheme will have to be considered in the light of submissions of the Counsels.

18. Section 391 of the Companies Act speaks of a compromise or arrangement between company and its creditors or class of them or between company and its members or any class of it. The modalities of working out the arrangement and the procedure for the same is provided thereafter. However, essentially it is an arrangement between the company and its creditors and members. When the petition is by the transferee company by the order directing them to call the meeting, such meeting is essentially restricted to the shareholders of such company or the class of creditors as may be directed. The person who has no right to attend the meeting of such company, who has obtained the orders, can possibly have no right to hear in the petition initiated by such company. Section 394 of the Companies Act contemplates that the compromise or the arrangement, as has been proposed, the Court either by sanctioning such compromise or arrangement, accepts the same in toto or may provide for certain safeguards as provided in section 394 of the Act. The provisions, as they stand, do not contemplate a direction pertaining to the creditors of the company other than the one at whose instance the petition is moved. Since the scheme is essentially an arrangement between the company and its members and the shareholders and/or creditors or class of them, any person not falling in this category, cannot possibly, under the provisions as they stand, come before the Court when the sanction of such scheme or arrangement is considered. For the persons, who would be otherwise affected by the scheme, sufficient safeguards procedural as well as remedial are provided in section 392 of the Act which provide that when the Court makes an order sanctioning the arrangement or compromise u/s 391 of the Act, the Court always has the power of carrying out such compromise or arrangement. The enforcement of compromise and the directions as contemplated may also reserve in the order of winding up at the instance of the person interested in the affairs of the company.

19. While considering identical issue, the Gujarat High Court in the case of Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. Bank of India Ltd., reported in 1972(42) Comp Cas 493 has observed as follows :--

"After examining the scheme from the point of view of the petitioner, that is the transferee company, it must be said, without the least fear of being contradicted, that the scheme of amalgamation by which a huge sum of Rs. 14.70 crores with its accumulated interest would be available to the petitioner, both for its expansion as well as for its liquid finances, would undoubtedly be a scheme which is such as a man of business applying its commercial judgment, from his own narrow personal angle, would approve. This Court is not concerned with examining the scheme from the point of view of the members of the transferor company. That aspect must have been examined by the Bombay High Court, while sanctioning the scheme, at the request of the transferor company. I would, therefore, conclude by saying that, from the point of view of the transferee company, the scheme is such as a man of business would readily approve."

20. This question also came up for consideration in the context of an application made by transferee company before the Delhi High Court in the matter of Telesound India Ltd. In re, reported in 1983 (53) Comp Cas 926. The landlord styling himself as a creditor of the transferor Company sought to intervene in the petition. The question that was posed was as follows :--

"Whether the creditors of a transferor-company, and any other persons having interest in the transferor-company or interested in its business assets or any contract with it, other than the members of it, were entitled to vote on a scheme for its amalgamation with another, by virtue of the fact that on amalgamation, their interest may in some way be affected, in that on amalgamation they would all be compelled to deal, in substitution of the transferee-company, with the amalgamated company, and in the case of formation of a new company on amalgamation of two companies with a new entity ?"

While dealing with this question, the learned Judge of the Delhi High Court held that the arrangement in the nature of amalgamation is a result of an agreement between amalgamating company and its members as well as corresponding agreement between the transferee company and its members and there is, therefore, no provision for participation of persons other than the members of two companies to vote on an arrangement of amalgamation proposed between a company and its members. The learned Judge has observed in his judgment as follows :--

" a number of safeguards have been provided, notably by the provisions of sections 392 and 394A, an anomaly appears to exist in the Act inasmuch as the creditors of the transferor-company which is being amalgamated, were not entitled as of right at any stage to participate in the process of the consideration or the sanction of any compromise or arrangement proposed between the company and its members, which may eventually result in the amalgamation of the company by its absorption in the other or by merger of the two to create the third. There is no provision of notice to the creditors of any such proceedings at any stage, either

prior to the making of the order, or subsequent thereto, except in so far as the creditors may have notice of it by public advertisement, although the creditors of a company, which is sought to be merged in any other, and completely absorbed in the transferee-company would, by the process of amalgamation, be compelled to deal with and become the creditors of another company, whether the existing company or a new company, that may come into existence, even though the creditors or some of them may have had no dealings with such new entity and may have, therefore, no confidence in its management."

The learned Judge who has delivered this judgment in the case of Telesound India Ltd. (supra), also had an opportunity to deal with this issue in the case of Union of India v. Asia Udyog P. Ltd. & others, reported in 1974 (44) Comp Cas 359 and I wish to quote the observations of the learned Judge with a concurrence and complete agreement with view expressed therein since I am also of the opinion that the position emerging from the existing provisions disentitling the persons, who are otherwise vitally affected by the scheme of amalgamation, from participating interest in the proceedings initiated at the instance of transferor or transferee company needs to be suitably remedied. It is an accepted fact that the scheme on its sanction is one and the same. It is also an accepted fact that as observed in the case of Telesound India Ltd. (supra) that when the transferor company and the transferee company are under the jurisdiction of different courts, there is no requirement that both the companies should go to the same Court for sanction of the scheme. It is essential that the persons who are adversely affected by such scheme should have an option to agitate their grievances irrespective of the fact whether they are members or creditors of the transferor company or transferee company. This is more so, since the scheme is one and the same. Such scheme since asked to be binding on all such persons, there is no reason why these persons should not be afforded an opportunity of hearing. I must hasten to add that such opportunities must ordinarily be restricted not to question the bona fides or correctness of the wisdom shown by the shareholders and the class of shareholders or the creditors while sanctioning the scheme, but should be restricted only to the extent of safeguarding the interest of such adversely affected persons. It is not always that such adversely affected persons are aware of niceties of law pertaining to the jurisdictional aspect. Wherever such persons are located, they should be afforded reasonable opportunities of being heard, at-least, to the extent of safeguarding their dues. I am making these observations in the context of amalgamation of companies and the creditors of transferor company. The learned Judge, in the case of Union of India v. Asia Udyog P. Ltd. (supra), has observed as follows, which I quote with full approval and concurrence.

"Although the provisions contained in Chapter V of the Act of 1956, inter alia, with regard to compromise or arrangement and reconstruction of companies are a considerable improvement on the corresponding provisions in the Act of 1913, & not a number of safeguards have been provided notably by the provisions of

sections 392 and 394A, an anomaly still appears to exist in the Act inasmuch as the creditors of the company which is being amalgamated are not entitled as of right at any stage to participate in the process of the consideration or the sanction of any compromise or arrangement proposed between a company and its members which may result in the amalgamation of the company by its absorption in the other or by the merger of the two to create a third and there is no provision for a notice to the creditors of any such proceedings at any stage either prior to the making of the order or subsequent thereto except in so far as the creditors may have notice of it by public advertisement, although the creditors of a company which is sought to be merged in any other and be completely absorbed in the transferee-company would in a sense be adversely affected by the amalgamation because the creditors have dealt with the transferor-company and may have done so because they had confidence in its management and would by the process of amalgamation be compelled to deal with and become the creditors of another company whether an existing company or a new company that may come in existence even though the creditors or some of them may have had no dealing with such new entity and may have, therefore, no confidence in its management. The appropriate authorities should consider the desirability of remedying the situation, inter alia, by incorporating a provision which may entitle the creditors of the company concerned to be suitably associated with the proceedings so as to better secure the interests of the creditors."

It has to be mentioned here with some anxiety that though such a view is expressed in a judgment delivered as back as on 19th December 1973, no wheels seem to have moved in that direction. In the days when the concept of locus has travelled much beyond its bounds as experienced by the courts in 1973 and when the courts have gone to the extent of permitting the workers to be heard in the proceedings for winding up since they are considered as persons vitally affected in the proceeding see A.I.R. 1983 SC 75 in the case of National Textile Workers' Union etc. v. P.R. Ramakrishnan & others, there is no reason why there should not be suitable amendments permitting the participation of persons who are to be affected in the proceedings initiated either by transferor or transferee company, at least, to the extent of safeguarding either their interest or for providing modalities of safeguarding the same. If in a given case, Court considering such a scheme, is of the opinion that it lacks in such safeguards, it should be open to the Court even at the instance of a member or a creditor, inter se, of transferor or transferee company irrespective of the fact as to who has applied for the sanction, to provide for such safeguard. That, however, requires necessary amendment to the main section and it is only hoped that appropriate authorities would consider desirability of remedying the situation. I am only reiterating the hope and opinion as expressed by the Delhi High Court as back as in 1973.

21. Taking overall view of the entire scheme of the sections, it is apparently clear that under the said provisions of the Companies Act, as they stand, the persons who

are intervenors who are neither shareholders, members nor creditors of the transferee company which is before the Court, have no locus to be heard in the present proceeding. However, they will be entitled to agitate their claims and grievances in the petition initiated by the transferor company, of which they are the creditors in the High Court at Calcutta. About the merits of the scheme, I have already adverted in the foregoing paragraphs of the judgment. No modification in the scheme, as accepted by the majority of the shareholders and to which no objection is raised by the Regional Directors by filing affidavit, is warranted. The scheme sufficiently takes care of all the contingencies including the claims of the creditors. The contributions, as contemplated having been made substantial funds, are now available with the transferee company to satisfy any claim that may be made against the transferee company. Hence, the company petition deserves to be allowed in terms of prayer Clause (a) with a clarification that the scheme shall bind the creditors of the transferor company and other persons who are interested in the affairs of the transferor company only upon appropriate orders being passed by the Calcutta High Court in that behalf. The scheme shall become operative only after the same is granted and to the extent, it is granted by the High Court at Calcutta.

22. With this modification, the Company Petition is disposed of. However, there shall be no order as to costs.

In view of the disposal of the company petition, the company application is also disposed of as infructuous.

23. Petition allowed with directions.