



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

PRACHI
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NANDIWADEKAR

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WRIT PETITION NO.556 OF 2019

1. Asset Auto India Private Limited)
a Company incorporated under the)
Provisions of Companies Act, 1956)
Having its registered office at Bungalow)
No.3, Union Park, Plot No.14,)
Near Ashok Kumar Complex, Chembur,)
Mumbai – 400 071.)
2. Asset Motors Private Limited)
a Company incorporated under the)
Provisions of Companies Act, 1956)
Having its registered office at Bungalow)
No.3, Union Park, Plot No.14,)
Near Ashok Kumar Complex, Chembur,)
Mumbai – 400 071.)
3. Asset Education Centre Private Limited)
a Company incorporated under the)
Provisions of Companies Act, 1956)
Having its registered office at The Reverie)
805, Bhandarkar Road,)
Pune 411 004.)
4. ION Events and Exhibition Private Ltd.)
a Company incorporated under the)
Provisions of Companies Act, 1956)

Having its registered office at 501/502,)
5th Floor, East Wing, Shorab Hall,)
Pune 411 004.)

5. Aceperkins Enterprises Private Limited)
a Company incorporated under the)
Provisions of Companies Act, 1956)
Having its registered office at Bungalow)
No.3, Union Park, Plot No.14,)
Near Maitri Park, Sion Trombay Road,)
Chembur,)
Mumbai – 400 071.)

....Petitioners

V/s.

1. The Union of India)
Through its Principal Secretary)
Ministry of Corporate Affairs,)
“A” Wing, Shastri Bhavan,)
New Delhi 110 001.)

2. The Regional Director (Western Region))
Ministry of Corporate Affairs)
Having its office at Everest, 5th Floor,)
100, Netaji Subhash Marg,)
Mumbai – 400 002.)

3. The Registrar of Companies, Mumbai)
100, Everest, Netaji Subhash Marg,)
Mumbai – 400 002.)

4. The Registrar of Companies, Pune)

PCNTDA Park, 1st and 2nd Floor,)
Akurdi, Pune – 411 044.) ...Respondents

Mr. Akshay Petkar a/w Mr. Pranav Shah, Mr. Aniket Malu and Mr. Venkatesh Shinde for petitioners.

Mr. Parag Vyas a/w Ms. Karuna Yadav for respondents.

**CORAM : K.R. SHRIRAM &
JITENDRA JAIN, JJ.**

DATE : 1st AUGUST 2024

Oral Judgment (Per K. R. SHRIRAM) : -

1 Considering the facts and circumstances of the case, with consent of Counsel, we have decided to dispose the petition at the admission stage itself.

2 Rule.

Rule made returnable forthwith. Respondents waive service.

3 Five petitioners are companies with common Directors and Shareholders. Petitioner nos. 2 to 5 are wholly-owned subsidiary companies of petitioner no.1. Petitioners are aggrieved by an order dated 12th November 2018 passed by respondent no.2, i.e., Regional Director, Western Region, Mumbai, rejecting the application of petitioners for processing the scheme of amalgamation between petitioner nos.2 to 5 with petitioner no.1.

4 It is petitioner's case that respondent no.2 has illegally rejected the application under Section 233 of the Companies Act, 2013 ("Companies Act") without any authority of law.

5 Petitioners, vide their notices dated 10th January 2018 invited objections/suggestions in respect of the Scheme of amalgamation from the Registrar of Companies and the Official Liquidator as required under Section 233(1)(a) of the Companies Act read with Rule 25(1) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("the said Rules").

6 On 24th April 2018, the equity shareholders of petitioner no.1 approved the scheme of amalgamation with petitioner nos.2 to 5. The equity shareholders of petitioner nos.2 to 5 also approved the scheme of amalgamation in respective general meetings of the equity shareholders and final draft of scheme of amalgamation was prepared as approved by petitioners.

7 Petitioner no.1 being the Transferee Company in the proposed amalgamation submitted an application dated 26th April 2018 for approval of scheme of amalgamation under Section 233 (2) of the Companies Act in the Form prescribed being Form No.CAA.11 as per Rule 25(4) of the said Rules. Relevant documents were annexed. Copy was also submitted to the Official Liquidator as well as the Registrar of Companies. Petitioners also

submitted vide communication dated 28th September 2018 to respondent no.2 additional documents.

8 Respondent no.2, by an order dated 12th November 2018, which is impugned in this petition, rejected the application of petitioners submitted under Section 233 of the Companies Act for the scheme of amalgamation on the sole ground that petitioner nos.2 to 5 are not solvent as per the balance sheet as on 31st March 2017.

9 Mr. Petkar submitted that the order has been passed by respondent no.2 without any authority of law because under Section 233 of the Companies Act, the Regional Director, viz., Respondent no.2 could not have passed the order of rejection. Mr. Petkar submitted that if respondent no.2, after receiving any objection/suggestion or for any reason, is of the opinion that such a scheme is not in the public interest or interest of the creditors, respondent no.2 ought to have filed an application before the National Company Law Tribunal (NCLT) within period of sixty days of the receipt of scheme stating its objections and requesting the Tribunal to consider the scheme under Section 232 of the Companies Act. Mr. Petkar submitted that the order dated 12th November 2018 is without jurisdiction and hence bad in law and requires to be quashed and set aside.

10 Mr. Vyas reiterated what is stated in the affidavit in reply filed through one Rakesh Tiwari affirmed on 6th December 2019. In the affidavit

also, the stand taken by respondent no.2 is that petitioner nos.2 to 5 were not solvent companies and, therefore, the Central Government has power to reject the scheme.

11 We do not agree with the stand taken by respondent no.2.

12 Section 233 of the Companies Act, 2013 reads as under :

“(1) Notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely:—

(a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company;

(b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. of the total number of shares ;

(c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and

(d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

(2) The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

(3) On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government

shall register the same and issue a confirmation thereof to the companies.

(4) If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days:

Provided that if no such communication is made, it shall be presumed that he has no objection to the scheme.

(5) If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal within a period of sixty days of the receipt of the scheme under sub-section (2) stating its objections and requesting that the Tribunal may consider the scheme under section 232.

(6) On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit:

.....”

13 Sub-section (1) of Section 233 prescribes the pre-conditions for parties to comply with before entering into the scheme of merger or amalgamation. These pre-conditions as quoted above in Section 233(1) have been complied with.

Sub-section (2) of Section 233 prescribes for the Transferee Company to file a copy of the scheme so approved in the manner as may be prescribed with the Central Government, the Registrar and the Official Liquidator where the registered office of the company is situated.

Undisputably, this has also been complied with.

Sub-section (3) of Section 233 provides for the Central Government to register the scheme and issue a confirmation thereof to the companies if the Registrar or the Official Liquidator has no objections or suggestions to the scheme. Undisputably, there are no objections/suggestions that the Central Government, which would be respondent no.2, has received from the Registrar or the Official Liquidator. In view thereof, sub-section (4) will not be applicable to the facts of this case.

Sub-section (5) of Section 233 provides that if the Central Government, i.e., respondent no.2-Regional Director, after receiving the objections/suggestions or for any reason is of the opinion that such a scheme is not in the public interest or interest of the creditors, it may file an application before the NCLT within a period of sixty days of the receipt of the scheme under sub-section (2) stating its objections and requesting that the Tribunal may consider the scheme under Section 232. Admittedly, respondent no.2 has received the scheme under sub-section (2) on 28th September 2018. The sixty days period would have expired on 27th November 2018. Before even filing the application to the Tribunal under sub-section (5), respondent no.2 not having received any objections/suggestions from the Registrar or the Official Liquidator, should have formed an opinion that the scheme was not in public interest or interest of

the creditors.

14 As noted earlier, ninety per cent of the creditors or class of creditors of respective companies as required under clause (d) of sub-section (1) of Section 233 have approved in writing the scheme. In the case at hand, the only document is the impugned order dated 12th November 2018. The short order reads as under :

“Sir,

With reference to the subject cited above, I am to draw your kind attention towards Rule 25(2) of the Companies (Compromises, Arrangements & Amalgamations) Rules, 2016 which provides as follows :

For the purpose of clause (c) of sub-section (1) of section 233 of the Act the declaration of solvency shall be filed by each of the companies involved in the scheme merger or amalgamation in Form No. CAA 10 alongwith the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 before convening the meeting of members and creditors for approval of the scheme.

It is observed that Transferor Company 1, 2, 3 and 4 are not solvent as per Balance Sheet as at 31/03/2017 schedule filed with the Application.

As such, Competent Authority have decided to reject the Application with liberty to file fresh as per Law.”

15 Even assuming for the sake of arguments, the observation mentioned in paragraph 3 of the quoted portion of the impugned order amounts to forming an opinion, still respondent no.2 could not have rejected the application but instead should have filed an application before the NCLT on or before 27th November 2018 stating its objections and requesting that the Tribunal may consider the scheme under Section 232.

This is a mandatory provision because respondent no.2 had to form an opinion that the scheme is not in public interest or in the interest of the creditors, notwithstanding no objections having come from the Registrar or the Official Liquidator or each of the companies involved in the merger of filing of declaration of solvency with the Registrar and the scheme having been approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in the meeting convened by the company.

16 On a conjoint reading of sub-sections (2), (3), (4) and (5), the phrase “may” used in sub-section (5) will have to be construed as mandatory. We say so because if the Government is of the view that the scheme is not in the public interest or in the interest of the creditors then same is to be decided by the Tribunal. If the phrase “may” in sub-section (5) is used as optional then company involved in the amalgamation scheme would be at the mercy of the Central Government if the scheme is rejected without any adjudication. It is, therefore, mandatory for the Central Government to make an application before the Tribunal and get adjudication on said issue.

17 In the instant case, the declaration of solvency has been filed. The scheme has also been approved as required by sub-section (1) of Section 233. The said section does not empower respondent no.2 to reject

the declaration filed but if at all respondent no.2 is of the opinion that any of the conditions is not satisfied then appropriate application has to be made to the Tribunal within the prescribed period objecting to the scheme.

18 Respondent no.2 not having followed the mandatory procedure prescribed, the impugned order dated 12th November 2018 is bad in law. The same is hereby quashed and set aside.

19 We having quashed and set aside the impugned order dated 12th November 2018, the consequences under Section 233 of the Companies Act thereof shall follow.

20 Petition disposed.

(JITENDRA JAIN, J.)

(K.R. SHRIRAM, J.)