* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on : 2nd May, 2013
Judgment pronounced on: 16th May,2013

\+ **CO.APP. 70/2012**

RAM KOHLI ..... Appellant

Through Mr. V.N. Koura with Ms. Paramjeet Benipal, Advocates

versus

INDRAMA INVESTMENT PVT LTD
SELECT HOLIDAY RESORTS LTD ..... Respondent

Through Mr. N.P.S. Chawla, Mr. Satwinder Singh and Mr. Nitin Gera, Advocates

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. By way of the present appeal, the appellant impugns the decision dated 01.06.2012 whereby the application of the appellant under Section 394 (2) and Section 395 (1) of the Companies Act (hereinafter referred to as the said Act), questioning the validity of the scheme of amalgamation sanctioned by the Company Judge vide order dated 24.08.2004, was dismissed.

2. Petition under Section 391 and 394 of the said Act were filed for sanctioning the scheme of amalgamation of M/s Indrama

Investment Private Limited (transferor company) with M/s Select Holiday Resorts Ltd. (transferee company).

3. The transferor company filed an application under Section 391 (1) and Section 394 of the Companies Act for dispensation of the requirement of convening of the meeting of the equity shareholders and creditors of the transferor company. The Company Court while granting dispensation of the said meetings of the transferor company directed convening of separate meetings of equity shareholders, secured and unsecured creditors of the transferee company.

4. Meetings of the transferee company, as directed, were held in terms of the directions of the Company Court and in the respective meetings, the scheme was approved with the requisite majority. After the approval of the scheme petition was filed for sanction of the scheme of arrangement under Section 391 (2) read with Section 394 of the Act.

5. The court vide its order dated 21.04.2004 directed for issuance of notice to Regional Director, Department of Company Affairs, Kanpur and also for advertisement of the said scheme in the newspapers. Pursuant to the notice, the Regional Director filed his report giving his no objection to the grant of sanction to the scheme of arrangement. Despite the advertisement in the newspapers no objections were filed by anyone to the grant of sanction to the scheme of arrangement. Vide order dated

24.08.2004, the scheme of amalgamation/arrangement was sanctioned.

6. After a lapse of about six months, the appellant filed an application under Section 394 (2) and 395 (1) questioning the validity of the scheme with a prayer for modification/recall of the order dated 24.08.2004. Apart from the appellant herein one more shareholder had filed a similar application, however after the impugned order we are informed that he had not carried the matter up in appeal and has accepted the scheme.

7. The appellant was a shareholder in M/s Select Holiday Resorts Ltd (Transferee Company). The transferor company held 98% shares of the transferee company and 1% shares in the transferee company belonged to Mr. Inder Sharma and his family and only 1% of the shareholding was with the outsiders. The appellant had a shareholding of approximately 0.001% (being 15000 shares out of 15,000,000 shares) in the said transferee company.

8. In the scheme that was proposed, the objects that were sought be achieved were as under:-

   (i) "Both the transferor company as well as the transferee company are closely held unlisted companies with a commonlineage. 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 amalgmation 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 result for both the companies concerned, their shareholders, employees, creditors and all concerned.

9. In pursuance to the orders of the court dated 10.02.2004, meeting of the secured/unsecured creditors and equity shareholders of the transferee company was convened and the scheme was duly approved without any modification.

10. Notices of the said meeting were also sent individually to the equity shareholders of the transferee company together with the copy of the scheme of arrangement besides being advertised in two newspapers i.e. 'The Statesman'(English) and 'Dainik Jagran'(Hindi).

11. The case of the appellant is that he never received any notice of the meeting but claims knowledge of the sanction of the scheme only on receipt of communication dated 14.12.2004 with regard to disposal of the odd lots shares held by the members/shareholders of the company.

12. The appellant who was holding 15,000 equity shares, as per the scheme since the value of the shares carrying face value of Rs.10/- had diminished to Rs.0.20 was to get one share for each 500

shares and was thus entitled to only 30 shares in the new company. As per the scheme shares below 50 in number were to be treated as fractions and fractional shares were not to be allotted but were to be sold by the trustees. The Board of Directors of the transferee company were to appoint any bank or financial institution or mutual fund or any of its directors or officers as trustees for the purposes of sale of the fractional shares at the best available price in one or more lots by private sale/placement.

13. The Scheme of amalgamation/arrangements that was proposed was sanctioned by the Company Court vide order dated 24th August, 2004.

14. The appellant thereafter filed an application under Section 394 (2) and Section 395 (1) of the Companies Act (hereinafter referred to as the said Act), questioning the validity of the scheme of amalgamation/arrangements sanctioned by the Company Court vide order dated 24.08.2004.

15. The application filed by the appellant seeking recall of the approving the scheme of amalgamation was dismissed vide the impugned order dated 01.06.2012. Vide the impugned order, the learned Company Court has noticed that it was 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 stage of second motion before the scheme was approved.

16. Mr. V. N. Kaura, learned Senior Advocate appearing on behalf of

the appellant contended that the appellant and other shareholders whose shareholding was being treated as fraction under the scheme should be treated as a separate class and a separate meeting qua them should have been held.

17. Under Section 391 of the Companies Act, there is only one class of equity shareholders. The decisive factor for determining the class of shareholder is not the shareholding pattern but the category of shares that one holds. All equity shareholders constitute the same class of shareholders. Merely because individuals held small fraction of shares, that would not make them a separate class. All equity shareholders irrespective of the shareholding pattern would constitute the same class. What the appellant is seeking to do is to create a class within a class, which is not what is contemplated in the scheme of Section 391 of the Companies Act.

18. The procedure as prescribed under Section 391 has been duly complied with and the company court has not at one but two stages examined the scheme of amalgamation/arrangement and has found the same not to be unfair or enquitable before giving its imprimatur thereto. The company court at the time of sanction of the scheme has examined the same and has not found the same to be unfair or enquitable. When the appellant sought modifications/recall of the order of sanction of the scheme vide the impugned order, the scheme was re-examined and has been once again found not to be unfair or enquitable.

19. The appellant merely held 15,000 shares out of 15,000,000 shares (i.e. 0.001% shares) in the transferee company. A person holding 0.001% miniscule share holding cannot defeat a scheme approved by at least 99% of the shareholders. Even Section 391 Sub Section (2) provides that a decision of majority i.e. 3/4th in value of the creditors or class of creditors or class of members as the case may, shall be binding on all the creditors and shareholders of that class as well as on the company.

20. In the present case, not only 3/4 majority but 99% of the shareholders have approved the scheme and the court has found that there is disclosure of all relevant facts, material and financial position.

21. We do not find any infirmity in the finding recorded in the impugned order that the appellant did not constitute a separate class of shareholders and that the due procedure as prescribed has been followed.

22. Mr. V.N. Kaura further submitted that the effect of the scheme was that the appellant was being forced to transfer his shares in the company which was not permissible.

23. We find that this aspect has been very elaborately considered by the company court in the impugned order and we are in full agreement with the findings recorded therein. The Company Court has relied on the judgment of *Reckitt Benckiser (India) Ltd*. 122 (2005) DLT 612 to come to the conclusion that the so-called

forceful acquisition of the shares was not prohibited and the present scheme was fair and reasonable and was permissible in law. The said judgment relied upon by the Company Court has examined the law as settled by various judicial pronouncements not only by various High Courts and the Hon'ble Supreme Court but also the principles on the issue by various judgments of the House of Lords.

24. The learned Company Court has found the scheme of amalgamation/arrangements as fair and *bona fide* and not impermissible, we find no reason to take a different view.

25. Learned Counsel for the respondent has drawn our attention to various judgments of the High Courts to contend that similar schemes that provided for exist of the minority shareholders have been examined and upheld therein. In support of his submissions he relied upon the following judgments:-

(i) ITW Signodge India Limited In Re (2004) 52 SCL 147 (AP)

(ii) Matther and Platt Pumps Limited In re C.P.69 of 2010

(iii) Hoganas India Ltd. In Re [2009] 148 Comp Cas Bom

(iv) Organon India Limited 2010 (4) Bom CR 268

(v) Sandwik Asia Limited 2009 (3) BOM CR 57

(vi) Reckitt Benckister (India) Ltd. 122 (2005) DLT 612.

We have examined the judgments referred to by the respondent and are in agreement with the principles laid down therein.

26. The Company Court while examining the scheme of

amalgamation/arrangement does not have the jurisdiction to act like an appellate authority to scrutinize the scheme minutely or to arrive at an independent conclusion whether the scheme should be permitted or not when the majority of the creditors or the shareholders have approved the scheme as required by Section 391 (2) of the Companies Act.

27. The Company Court does not act as a court of appeal and does not sit in judgment over the view of the concerned parties as the same is in the realm of the corporate and commercial wisdom of the concerned parties. The court has neither the expertise nor the jurisdiction to go into the commercial wisdom exercised by the creditors and shareholders of the company who have ratified the scheme by the requisite scheme majority. The Company Courts jurisdiction to that extent is peripheral and supervisory and not appellate. The court cannot undertake the exercise of scrutinizing the scheme placed before it with a view to find out whether a better scheme could have been adopted by the parties. When the scheme is sanctioned by the requisite majority, the jurisdiction of the company court is to examine whether the scheme is fair and reasonable and whether or is not it is violative of any provisions of law or whether it is contrary to any public policy.

28. Learned senior Advocate for the appellant further submitted that an option should have been given to the appellant whether to continue as a shareholder or whether to accept the amount being offered and to exit. We find no merit in the submission inasmuch

as the scheme as a whole has to be considered and the court cannot substitute the scheme. The scheme of acquisition of shares of minority as mentioned hereinabove has been held by various judicial pronouncements to be lawful, provided it is not done with ulterior motives or mala fides. On examination of the facts and circumstances we do not find that the scheme is mala fide or actuated by ulterior motives. The Company Court has found the scheme to be bona fide and reasonable and in the interests of the company and we find no reason to take a different view.

29. The learned counsel for the respondent pointed out that the scheme was sanctioned in the year 2004 and has in fact being implemented in 2004 itself and majority of the shareholders whose shares were acquired under the scheme have already accepted their money and it is only the present appellant who possesses only 0.001% of the shareholding is approaching to the court for rejecting the scheme. We find force in the submission of the learned counsel for the respondent that a shareholder holding only 0.001% shares cannot be permitted to hold the company to ransom where 99% of the shareholders have accepted the scheme and the majority of the remaining shareholder comprising 1% have accepted the scheme and taken the moneys in lieu of their shares. Much water has flown under the bridge for this court now to interfere with the scheme of amalgamation/arrangement.

30. As noticed herein above, the scheme has been examined by the Company Court not only at the time when it was sanctioned in

2004 but also at the time of the passing of the impugned order. The company Court has found the scheme to be reasonable bona fide and not unjustified. We see no reason to take a contra view to the view taken by the learned Single Judge.

31. We may also note that the present appeal has been filed under section 483 of the Companies Act which forms part of Part – VII of Chapter – II. Part VII deals with winding up of a company. In the present case, we are concerned with a scheme of amalgamation/arrangement which would be governed by Part – VI, Chapter – V dealing with Arbitration, Compromises, Arrangements and Reconstructions. In fact, under section 391 of the Companies Act there was earlier a provision of appeal under sub-section (7) which since stands deleted without creating a corresponding provision for appeal. The present appeal has been filed impugning the order dismissing the application seeking recall of the sanction of the scheme which would virtually amount to being an appeal against the order of review.

32. The moot point, thus, arises, whether the impugned order is at all appealable by seeking recourse to a different provision meant for winding up of a company. Since we had heard the appeal on merits and found that the finding of the learned Single Judge holding that the scheme to be fair and reasonable do not call for any interference, we leave this question open.

33. We find no infirmity in the impugned order and the appeal being

devoid of merit is accordingly dismissed with no orders as to costs.

SANJEEV SACHDEVA, J.

MAY 16, 2013 **SANJAY KISHAN KAUL, J.**
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