

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

Judgement reserved on: 12.02.2016

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Judgement delivered on: 15.03.2016

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CO.PET. 287/2012

M/S BDR HOMES PVT LTD & ORS

..... Petitioners

Through: Mr. Sudhanshu Batra, Sr. Advocate with Mr. Ashish Aggarwal and Mr. Ashish Virmani, Advocates
Mr. Jayant K. Mehta and Mr. Rishi Sood, Advocate
for the applicant in CA 321/2014.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

CA No. 321/2014

1. This is an application filed by objector by the name of D.D. Global Capital Ltd., seeking recall of order dated 20.02.2013, passed in CP No. 287/2012. By virtue of the said order, this court had sanctioned the scheme of amalgamation (in short the scheme) in favour of 13 companies. As per the scheme sanctioned, twelve (12) transferor companies merged in a company, by the name of BDR Builders and Developers Private Limited (hereafter referred to as the BDR).

2. The applicant was a shareholder of transferor company no. 9, namely, one Gulab Buildtech Private Limited and transferor company no. 10, namely, Verma Buildtech & Promoters Private Limited. The applicant was allotted, prior to the amalgamation, 103200 shares of a face value of Rs. 10 each at a premium of Rs. 490 per share in transferor company no. 9. Thus, the applicant, paid an issue price of Rs. 500 per share, and thereupon, expended a total amount of Rs. 5.16 crores. Similarly, the applicant bought 22590 shares, of a face value of Rs. 100 each, at a premium of Rs. 4900 per share of transferor company no. 10. The applicant thus paid an issue price of Rs. 5000 per share for purchasing

shares in transferor company no. 10. The total amount defrayed, in this behalf, was a sum of Rs. 11,29,50,000/-.

2.1 Admittedly, the applicant made these investments after seeking approval of its Board of Directors (in short the BOD) and making its interest, known in, investing the amounts in transferor company no. 9 and 10. The requisite approvals of its BOD were taken in March, 2011. This aspect is not disputed by either the applicant or BDR.

2.2 The applicant is, principally, aggrieved by the fact that no sooner did it make the investment in the transferor company no. 9 and 10, a scheme of amalgamation was proposed which involved, inter alia, amalgamation of these two companies along with ten other companies with BDR. The applicant claims that prior to the sanction of the scheme of amalgamation, by this court, it held 4.50% and 21% of the equity stake in transferor company no. 9 and 10 respectively, which, upon amalgamation, got reduced to 2.97%.

2.3 There is though, no dispute about the fact that in so far as the transferor company no. 9 and 10 were concerned, the share exchange ratio was 1:1 and 1:12 respectively.

2.4 Clearly, on the aforementioned share exchange ratio, the applicant in its capacity as the shareholder of transferor company no. 9 and 10, is entitled to the following shares: In respect of shares held in transferor company no. 9, the applicant is entitled to issuance of 1,03,200 shares, whereas, in respect of shares held in transferor company no. 10, the applicant is entitled to issuance of 2,71,080 shares.

3. In this context, the applicant raises the following grievances, as articulated by its counsel. Submissions on behalf of the applicant were made by Mr Jayant Mehta, Advocate, while, on behalf of BDR, arguments were advanced by Mr Sudhanshu Batra, learned senior counsel.

3.1 Mr Mehta, learned counsel for the applicant, submitted that the order dated 20.02.2013 needed to be recalled, for the following reasons:

(i) That the order dated 28.05.2012, which came to be passed by this court, whereby, the meetings of the shareholders was dispensed with, inter alia, with respect to transferor company no. 9 and 10, was pivoted on falsehood, in as much as, the communication, purportedly, sent to the shareholders of the said transferor companies to obtain their consent/ no-objection, to the proposed scheme, was never received.

(ii) Having regard to the fact that the equity stake of the applicant in the BDR has been considerably scaled down, it could not have been in the best interest of the applicant and in any event was contrary to public interest.

4. On the other hand, Mr Batra, learned senior counsel for BDR made the following submissions:

(i) That notices were dispatched to the shareholders of the various transferor companies, including the applicant, to seek their consent/ no-objection to the then scheme of amalgamation. Consents of the shareholders and creditors of more than 3/4th (in value) had been obtained, which was reflected in the order of this court dated 28.05.2012 and, accordingly, the meeting of the said class of persons/ entities was dispensed with.

(ii) In so far as the shareholders of transferor company no. 9 were concerned, 95.5% (in value) had given their consent. There were a total number of 28 shareholders in transferor company no. 9, out of which 27 had given their consent.

(iii) It was stated that in so far as transferor company no. 10 is concerned, 79% (in value) had given their consent. As regards number of share holders,

who had given their consent, it was submitted, that 11 out of 12 shareholders of transferor company no. 10, had given their consent.

(iv) This apart, it was contended that in so far as matters pertaining to valuation of shares and fixation of share exchange ratio are concerned, these are aspects, which are within the domain of the concerned companies and, therefore, this court would not sit in an appeal over such a decision, which had commercial connotations, unless, a fraud is shown to have been played or, the decision taken is shown to impinge upon the public interest. For this purpose, learned counsel relied upon the judgement of the Supreme Court in the case of ***Miheer H. Mafatlal vs Mafatlal Industries Ltd. AIR 1997 SC 506.***

(v) Furthermore, it was submitted that at the second motion stage, as directed by this court, notice of hearing was published in two newspapers i.e. Statesman [English (Delhi Edition)] and Veer Arjun [Hindi (Delhi Edition)]. The argument advanced was that, assuming without admitting, the applicant did not receive the communication seeking its consent/ no-objection with regard to the, then, proposed scheme of amalgamation, it surely, had received notice at the second motion stage.

(vi) In view of the above, Mr Batra also adverted to the fact that on 08.03.2013, two separate communications were sent to the applicant seeking surrender of the original share certificates held by it in transferor company no. 9 and 10, to which, no reply was received. According to the learned counsel, the applicant, admittedly, filed the captioned application rather late in the day, which is, on or around 31.01.2014.

(vii) It was also the submission of Mr Batra that the instant application was motivated, in as much as, the promoter/ director of the applicant, one, Mr Sanjay Gambir, is also holding shares in a company by the name of Renaissance Buildcon Private Limited, which was, inveigled in disputes with BDR. In

support of this submission, it was also contended that criminal proceedings initiated, were pending before concerned forums.

5. Having heard the learned counsel for the parties, what is primarily to be decided in the present proceedings is: as to whether the non-receipt of communication issued to seek consent/ no-objection to the then proposed scheme of amalgamation, in the facts and circumstances of this case, would set at naught the order dated 20.02.2013, whereby, the said scheme was, ultimately, sanctioned.

6. As would be evident from the facts detailed out above, the applicant invested substantial amounts in both transferor company no. 9 and 10. In respect of the transferor company no. 9 for a share of a face value of Rs. 10, a premium of Rs. 490 was paid. Similarly, in respect of the transferor company no. 10, for a share whose face value was Rs. 100, a premium of Rs. 4900 was paid. Accordingly, the applicant invested a sum of Rs. 5.16 crores in transferor company no. 9, while a sum of Rs. 11,20,50,000/-, was invested, in the shares of transferor company no. 10.

6.1 Ordinarily, if such a huge investment was made, the applicant would have, to my mind, ensured that due diligence was carried out and the requisite papers, which led to investment of such substantial amounts, would have been filed with the application. This aspect I must state was brought to fore during the course of the arguments.

6.2 Be that as it may, what is important is, at least, from the point of view of the issue at hand, are the averments made in paragraph 8 of the reply filed by BDR. In paragraph 8 of its reply, BDR has denied the suggestion that communication seeking consent/ no-objection to the proposed scheme of amalgamation was not sent to the applicant.

6.3 As a matter of fact, with the additional affidavit, filed on behalf of BDR, formats of the communication seeking consent/ no-objection of the shareholders of various companies, which included the transferor company no. 9 and 10, have been appended.

6.4 Having said so the question is: would this assertion of the transferee company by itself suffice?

6.5 Answer to this question would depend on the facts and circumstances obtaining in each case. Having said so, it is well settled that inadvertent omission or a bonafide mistake in failing to issue notice under Section 391 of the Companies Act, 1956 is not fatal to the resolution passed at a meeting either of the shareholders or creditors or class thereof if, the resolution passed has approval of a majority comprising of $3/4^{\text{th}}$ in value.

6.6 In the instant case, BDR has denied the suggestion that notices were not issued to the applicant. The applicant, before the sanction of the scheme of amalgamation, admittedly held, in transferor company no.9, only 4.5% of the equity stake, while, in transferor company no.10, the applicant held 21% of the equity stake. At the first motion stage, consents were obtained from shareholders of transferor company no.9 which amounted to 95.5% in value, whereas in numbers, 27 out of the 28 shareholders, in transferor company no.9, had given their consents.

6.7 Similarly, in so far as transferor company no.10 was concerned, 79% in value, had given their consents. In terms of numbers, 11 out of the 12 shareholders of transferor company no.10, had given their consents.

6.8 Quite clearly, a majority comprising of more than $3/4^{\text{th}}$ in value of the shareholders in both, transferor company no.9 and 10, had given their consents. Therefore, even if, it is assumed that notice was not issued to the applicant, the scheme could not be set aside on this ground alone.

6.9 It is only when, the court, is satisfied that a large number of creditors and / or shareholders have, with malafide intention, not been issued notice, and that, such, non-issuance of notice, has seriously affected their interest, the sanction granted to the scheme can be set aside.

7. In this behalf, the observations made in the case of : ***Bhagat Ram Kohli V. Angel's Insurance Co. Ltd., Delhi, 1937, 007 C-C 0161***, which were based on somewhat similar provision obtaining in the Indian Companies Act, 1913, being apposite, are extracted hereafter :-

“..1. That Mr. Bhagat Ram Kohli not having been served with a notice of any of the meetings that were held between the Company and its creditors was not bound by the decision arrived at in those meetings; and

2. That he being a judgment-creditor did not belong to the class of the creditors who held the meetings and was hence not bound by the compromise.

3. We have heard counsel at length and have come to the conclusion that there is no force in either of the points raised.

Section 153 does not make it obligatory either upon the Court or the Company to serve a notice of the creditors' meeting on each and every creditor of the Company and we have not been referred to any law which would invalidate a decision arrived at by the creditors and the Company in the absence of any individual creditor. On the other hand, at page 364 of Rustomji's Company Law a case has been cited in which it was held that where there was an inadvertent omission to advertise a scheme of arrangement under Section 153 but it was satisfactorily proved that thirty out of thirty one shareholders of the Company had received the notices, the meetings had in substance been held in the manner prescribed and the Court would not insist on further meetings being convened. Moreover as we interpret the law, the only safeguard intended to protect the interest of the creditors is that provided in sub-section (2) of section 153. In either words, if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise, or arrangement, if

sanctioned by the court, is binding both on the creditors or members and the company. In the case before us, it is not urged that the majority required by sub-section (2) was not present or had not been notified and, in these circumstances, the objection raised by Mr. Bhagat Ram cannot prevail...”

(emphasis is mine)

7.1 There is another aspect of the matter, which is that, the facts and circumstances, as obtaining in this case, would demonstrate that the applicant had knowledge of the pendency of proceedings, in this court, at the second motion stage.

7.2 I have come to this conclusion in view of the fact that the BDR has asserted, quite clearly, that notice of hearing was published on 09.07.2012, in Statesman [English (Delhi edition)] and Veer Arjun [Hindi (Delhi edition)].

7.3 This aspect has not been refuted by the counsel for the applicant. It is, however, contended by Mr Mehta that it is quite possible that the applicant did not notice the publication carried in the two newspapers referred to above.

7.4 To my mind, this answer of Mr Mehta is not tenable in law. The applicant, if anything else, would be deemed to have knowledge of the proceedings pending in this court for obtaining sanction of the then proposed scheme of amalgamation. Undoubtedly, an affidavit was filed at the relevant stage by the petitioners before this court that they had not received any objections to the scheme from any of its shareholders and/or creditors.

7.5 Clearly even at the second motion stage, opportunity was available to the applicant to intercede in the matter.

7.6 What compounds the difficulties of the applicant is its failure to respond or move the court even after it received the communication dated 08.03.2013, calling upon it to surrender original share certificates pertaining to transferor company no. 9 and 10. BDR in order to support its contention that

communication dated 08.03.2013 was sent to the applicant, seeks to place reliance upon the speed post receipts as also the tracking report. These documents clearly show that the applicant was delivered the two letters, which are, as noted above, dated 08.03.2013, on 09.03.2013. On the other hand, the applicant moved the court, only in January, 2014. According to me, timely intervention in these matters is of utmost importance.

7.7 The other argument of Mr Mehta that share valuation is faulty, is not supported by any cogent material. These are bald submissions, which are not backed by any cogent material. The mere fact that the shareholding of the applicant in the transferee company has got reduced to 2.97% (from 4.50% and 21%, as held in transferor company no. 9 and 10, respectively), will not, to my mind, help the cause of the applicant.

8. Therefore, for the reasons given above, I find no merit in the application. It is, accordingly, dismissed.

RAJIV SHAKDHER, J

MARCH 15, 2016

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