The Hon'ble Sri Justice C.V.Nagarjuna Reddy

Company Petition No.241 of 2014

Date: 21.04.2015

Between:

M/s.AIR Liquide Engineering India Private Limited
rep. by its Managing Director Mr.Seshasai Vempati

..... Petitioner/ Transferor Company

Counsel for the Petitioner: Sri S.Ravi for Sri A.Sanjay Kishore

The Court made the following:

Order:

This Company Petition is filed under Sections 391 and 394 of the Companies Act, 1956 (for short 'the Act'), read with Rule 97 of the Companies (Court) Rules, 1959 (for short 'the Rules') for sanction of the proposed scheme of its amalgamation with M/s.Lurgi India International Services Private Limited- Transferee Company.

I have heard Mr.S.Ravi, learned Senior Counsel appearing for Mr.A.Sanjay Kishore, learned Counsel for the petitioner, Mr.B.Appa Rao, learned Counsel representing Mr.B.Narayana Reddy, learned Assistant Solicitor General, and Mr.M.Anil Kumar, learned Counsel for the Official Liquidator.

The petitioner averred that it was incorporated under the Act on 26-05-1992; that its registered office is situated at plot Nos.12 & 13, IDA Mallapur, Nacharam, Hyderabad; that its main objects are to undertake the engineering, designing, marketing, selling, manufacturing, delivering, erection and commissioning or the supervision of manufacturing, delivery and erection of industrial gas production equipment and plants within the Indian Market *etc.*; that its authorized share capital, as on 31-03-2013, was Rs.10 Crores divided into 10 lakh equity shares of Rs.100/- each; that its issued, subscribed and paid-up share capital, as on 31-03-2013, was Rs.4,85,00,000/- divided into 4,85,000 equity shares of Rs.100/- each; and that, thereafter, there has been no change in the share capital.

The petitioner pleaded that the Transferee Company was incorporated on 26-09-2006 with its registered office at D.No.A-24/10, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi; that the authorized share capital of the Transferee Company, as on 31-03-2013, was Rs.1 Crore divided into 10 lakh equity shares of Rs.10/- each; that its issued, subscribed and paid-up share capital, as on 31-03-2013, was Rs.5 lakhs divided into 50,000/- equity shares of Rs.10/- each; and that, thereafter, there has been no change in the share capital.

The petitioner further pleaded that with a view to amalgamate itself with the Transferee Company, it has evolved the proposed scheme of amalgamation; that the proposed scheme of amalgamation would possibly result in centralizing and integrating its operations with that of the Transferee Company, ease of administration, elimination of duplication, rationalization of administrative expenses and greater efficiency in cash management of the amalgamated entity *etc.*

The petitioner further pleaded that its Board of Directors has approved the proposed scheme of amalgamation *vide* resolution dated 26-03-2014, filed as Annexure-G; and that a similar resolution was passed by the Board of Directors of the Transferee Company on 24-03-2014, which is filed as Annexure-H.

It is further pleaded by the petitioner that it has two shareholders *viz*., (i) AIR Liquide International having 4,84,900 equity shares with face value of Rs.100/- each and (ii) Air Liquide Global E & C Solutions France, SA having 100 equity shares with face value of Rs.100/- each; that both of them have given their consent affidavits, filed as Annexure-J; that it has no secured creditors; that it has 181 unsecured creditors; that this Court by Order, dated 01-09-2014, in Company Application No.1041 of 2014, dispensed with the requirement of holding of the meeting of its shareholders and appointed Mr.Maheshwar Reddy Veluri as the Chair Person to convene the meeting of its unsecured creditors; and that accordingly, the Chair Person has convened the meeting of the unsecured creditors and submitted his report, dated 28-10-2014.

This Court, by order, dated 10-11-2014, ordered notices to the Regional Director, South Eastern Region, Ministry of Corporate Affairs, Hyderabad, and the Official Liquidator attached to this Court besides directing the petitioner to cause publication of the same in two daily newspapers *viz*. Business Standard (English) and Andhra Bhoomi (Telugu) of Hyderabad editions. Proof of publication of notice has been filed.

The learned Senior Counsel submitted that no claims/objections were received from any quarter in response to the publication of notice in the newspapers.

Both the Official Liquidator and the Regional Director have filed their respective reports.

The Official Liquidator, in his report, dated 02-03-2015, opined that, basing on the information made available by the petitioner- Company, the affairs of the petitioner appear to have not been conducted in the manner prejudicial to the interests of its members or to the public.

However, the Regional Director, in his report, dated 26-02-2015, raised certain objections, with reference to which, the petitioner has filed his detailed reply, dated 18-04-2015.

I shall now deal with each of those objections and the reply thereto submitted by the petitioner hereunder:

Objection:

The Regional Director has referred to the observations of M/s.S.R.Batliboi & Company. LLP, Chartered Accountant *vide* its Certificate, dated 19-11-2014, regarding the accounting treatment as under:

> "I respectfully submit that M/s.S.R.Batliboi & Co. LLP, Chartered Accountant *vide* their Certificate, dated 19-11-2014, has observed that "the accounting treatment contained in the Scheme is not in violation of the requirements of Section 211 (3C) of the Companies Act, 1956 (which are deemed to be applicable as per Section 133 of the Companies Act, 2013, read with Rule 7 of the Companies (Accounts) Rules, 2014) except for the matter referred in Para 11.7, wherein the Company should have proposed to account the 'consideration' in respect of shares to be issued at fair values as per AS-14 and recognize the 'Securities Premium' instead of transferring the surplus arising between the aggregate values of assets acquired and the aggregate of (a) the liabilities acquired (b) amount recorded as share capital issued and allotted and (c) reserves of the Transferor Company recorded by the Transferee Company to the 'Capital Reserve Account', of

> goodwill, if any, as per the requirement of Para 19 of Accounting Standard 14, 'Accounting for Amalgamations'. It is, therefore, submitted that the petitioner Company may amend Para 11.7 of the Scheme accordingly."

Reply:

The petitioner, while seeking to justify the accounting method proposed in the Scheme, eventually, stated as under:

> "However, the petitioner company undertakes to comply with the observations of the Chartered Accountant and recognize any surplus in the 'securities premium' account as desired"

Finding:

This concession made by the petitioner is, accordingly, placed on record.

Objection:

In his report, the Regional Director has invited the attention to Note 41 to the financial statements wherein the Company sold its E & C service business on a going business basis under a slump sale arrangement and is exploring the alternative future business options. The patent company is committed to support and has agreed to defer payment of its dues of Rs.1,254.73 lakhs. Pending conclusion on the future business model/activity, the management has not undertaken any assessment on the recoverability of certain assets as mentioned below:

> (i) Balances with statutory/government authorities of Rs.745.86 lakhs (including CENVAT Credit of Rs.553.66 lakhs and work contract tax recoverable of Rs.192.20 lakhs) and MAT credit recoverable of Rs.671.77 lakhs.
> (ii) Net realizable value and usability of inventory of Rs.851.35 lakhs.

The Regional Director further stated as under:

> "Pending the assessment on the recoverability of the aforesaid assets and identified business models and RBI approval for deferment of group payment to its overseas payment company for which application has already been made, the Company has not recorded any adjustments/write offs against these assets in the financial statements. Accordingly, we are unable to comment on adjustments that may arise in this regard in these financial statements."

Reply:

> "The petitioner- Company hereby submits that, in the matter of deferment of payment of its dues of INR 1,254.73 lakhs to the patent company, an application was filed with the Reserve

Bank of India (RBI) and is currently awaiting their approval. A copy of the said application is filed herewith as Annexure I. The Company would be in a position to act upon the same after receiving directions/instructions from the Reserve Bank of India. Also as a matter of good governance, the liability has been adjusted while determining the value of the petitioner- Company. Hence, there would not be any undue loss to the members/shareholders of the Transferee Company."

Conclusion:

In the light of the clarification given by the petitioner, as above, this objection of the Regional Director shall not come in the way of approval of the proposed scheme of amalgamation.

Objection:

"In Note 34 to the Financial Statement contained in the Scheme, the future obligation towards payment of dues which might arise against shortfall of committed exports is not quantified and that in the absence of the related documents, the Regional Director is not in a position to comment on the impact arising out of the same and whether the company should record any provision in the financial statements in this regard."

Reply:

"As regards the future obligation of

> payment of dues, the same is on account of Export Obligation Discharge Certificates and in this regard, the Company had approached the Joint Director General of Foreign Trade, Hyderabad, and has been continuously following up with them; a copy of the application, filed with the Joint Director General of Foreign Trade, Hyderabad, is filed herewith as Annexure II; as the matter is pending approval/confirmation from the said Authority and in pursuance of Clause 4 of the Scheme (which provides for transfer of all liabilities as on the appointed date), the transaction shall not be prejudicial to the Department in any way as the financial position of the Company will be strong when compared to that of the petitioner- Company."

Conclusion:

As the transferee, whose financial position is stated to be stable, has undertaken to discharge the future liabilities, the objection is not sustainable.

Objection:

With reference to Note 49 to the Financial Statements, for potential liability of Rs.397.00 lakhs, the Company is held liable for deducting/withholding tax at the higher rate as applicable to a foreign company and the same is not recoverable from the service providers and no provision in that regard was made in the Scheme.

Reply:

The petitioner has submitted that the aspect of withholding tax in respect of the particular transaction was carried out in the financial year 2009-10; that the petitioner approached the Income Tax Settlement Commission (ITSC) with an application, dated 31-05-2011, for the assessment years 2007-08 to 2010-11; that the ITSC *vide* its order, dated 11-11-2012, has provided the terms of settlement on various matters including the above aspect; and that the tax liability based on the said settlement order was already paid. The petitioner has filed proof of payment of tax as Annexure III.

Conclusion:

As the tax liability has already been discharged, this objection does not survive.

Objection:

Before the petitioner has conducted slump sale of its E & C Service business, it has not obtained sanction under Sections 391 to 394 of the Act.

Reply:

The petitioner has clarified that it has transferred its Engineering and Construction business to AIR Liquide Global E & C solutions India Private Limited (formerly known as Lurgi India Company Private Limited) on a going concern basis by way of a slump sale pursuant to agreement to transfer business and that such a sale does not fall within the purview of Sections 391 to 394 of the Act and hence, it does not require the approval of the High Court.

Conclusion:

At the hearing, Mr.S.Ravi, learned Senior Counsel has submitted that unless the Company seeks to enter into compromise or arrangement with its creditors or any class of them or with its members or any class of them, it is not mandatory for a company to seek sanction of any arrangement such as a sale entered between a company and a third party.

I find merit in this submission. Unless any arrangement falls under either of the two provisions of clauses (a) and/or (b) of Section 391 (1) of the Act, it is not necessary for the petitioner to seek sanction of the arrangement. Section 293 of the Act placed restrictions on the powers of the Board of Directors of a Public Company, or of a Private Company, which is subsidiary of a Public Company, and if any sale is being made against the interests of the shareholders, they are entitled to approach the Company Law Board under Section 397 or 398 of the Act.

The fact that no shareholder has complained of the sale itself indicates that no one is aggrieved with the same.

Objection:

The Regional Director has pointed out that M/s.Tube Products Incorporate has filed its objections before the Registrar of Companies by stating that the petitioner is liable to pay a sum of Rs.4.95 Crores for certain supplies made by it and that therefore, the petitioner is required to file no objection certificate obtained from the said Company.

Reply:

The petitioner has denied any liability by stating that the said objector has failed to execute the contract entered into with it as per the terms of the work order, as a result of which, it has suffered financial losses owing to which it has disputed its liability.

Conclusion:

If M/s.Tube Products Incorporate had any objection to the proposed arrangement, it ought to have filed its objections before this Court. As no such objections have been filed before this Court, the objections, if any, raised by it before the Registrar of Companies cannot be countenanced in this Company Petition.

Objection:

Lastly, the Regional Director has pointed out that the petitioner has failed to file its balance sheet and profit and loss account for the financial year ending 31st March, 2014 and thereby, violated the provisions of Sections 166, 210, 159 and 220 of the Act and Sections 96, 129, 92 and 137 of the Companies Act, 2013 and therefore, the said offences may be compounded and the appointed date may be shifted to 01-04-2014.

Reply:

In his reply, the petitioner has stated that it has submitted its balancesheet, profit and loss account and annual return for the financial year ending 31st March, 2014, with the Ministry of Corporate Affairs on 11-04-2015. In proof of the same, it has filed a copy of the acknowledgment.

Conclusion:

The petitioner has placed before the Court, Order, dated 19-12-2014, in Company Petition No.571 of 2014, filed by the Transferee Company, whereby the Delhi High Court has sanctioned the proposed scheme of amalgamation.

Mr.S.Ravi, learned Senior Counsel, has submitted that even assuming that the petitioner has violated any statutory provisions, and thereby, made itself liable as per law, the Transferee Company is bound to discharge those liabilities.

In the light of the above discussion and the clarifications issued by the petitioner with reference to each of the objections raised by the Regional Director, and in the light of Order, dated 19-12-2014, passed by the Delhi High Court in Company Petition No.571 of 2014, I do not find any legally sustainable objection for not approving the proposed scheme of amalgamation.

Hence, the proposed scheme of amalgamation is sanctioned with effect from the appointed date *i.e.,* 01.04.2013. The petitioner-Transferor Company is ordered to be dissolved without going through the process of winding up. The petitioner shall, within 30 days from the date of receipt of a copy of this order, cause a certified copy of the same to be delivered to the Registrar of Companies, Hyderabad, and take all other consequential actions in pursuance of the approval of the proposed scheme of amalgamation.

The Company Petition is, accordingly, allowed.

(C.V.Nagarjuna Reddy, J)

Dt: 21st April, 2015
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