Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY SCHEME PETITION NO. 697 OF 2015
IN
COMPANY SUMMONS FOR DIRECTION NO. 522 OF 2015
WITH
COMPANY SCHEME PETITION NO. 698 OF 2015
IN
COMPANY SUMMONS FOR DIRECTION NO. 523 OF 2015

Eisenmann Surface Finishing Systems India Pvt. Ltd. …Petitioners

---

Mr. Sameer Pandit*, with Ms. Ankita Godbole, i/b Wadia Ghandy & Co., for the Petitioners.*
Mr. N.D. Sharma*, for Regional Director.*
Mr. Vinod Sharma, Official Liquidator, High Court, Bombay*, with Ms. Yogini Chauhan, Deputy Official Liquidator, present.*

CORAM: G.S. PATEL, J
DATED: 18th March 2016

PC:-

1. The only objection taken is in paragraph 3 of the further Affidavit of the Regional Director at page 201. This paragraph reads as follows:

“3. In my affidavit dated 17th December 2015, in para No. 6(d), it was submitted that “the authorized share capital of the transferee company has been exhausted by issue of 3000 equity shares of Rs. 15,000 each and thereby leaving no unissued authorized share capital for further issue of shares in future. If at all, the authorized share capital of the transferor company is merged with transferee company, then the authorized capital of the transferee company would be Rs. 14,50,00,000/- post amalgamation. Out of the above, the transferee company will be in a position to utilize only Rs. 10,00,00,000/- of authorized share capital which was transferred from transferor company to transferee company. If the share exchange ratio as provided in clause 9.1 of the scheme is allowed then the transferee company has to allot 14,39,20,282 no. of equity shares of Rs. 1-/ each. Whereas, the eligible unissued authorized share capital would be only Rs. 10,00,00,000/- post amalgamation. In this regard, it is suggested that the Transferee Company may, to the extent required, increase its Authorised Share Capital to facilitate issue and allotment of Shares as provided in clause 9.1 of the Scheme. In this connection, the Transferee Company may be directed to comply with provisions of section 61/64 of Companies Act, 2013 corresponding to section 94/97 of Companies Act, 1956, in respect of filing of necessary forms with the

Registrar of Companies after payment of necessary filing fee and stamp duty as applicable on the said forms."

2. It is also necessary to set out paragraph 9 at page 204.

"9. The deponent respectfully further submits that the scheme is designed to defeat the provisions of section 611 of the Companies Act, 1956 (corresponding Section 401/403 of the Companies Act, 2013). As per the share exchange ratio provided in clause 9.1 of the scheme, the transferee company has to allot 22 equity share of Rs. 1/- each for every 1 equity share of Rs. 10/- each held in the transferor company. Presently, the transferor company is having 65,41,831 equity shares of Rs. 10/- each. Therefore, the transferee company is required to issue 14,39,20,282 number of equity shares of Rs. 1/- each. The Transferee Company is not having any unutilized Authorised Share on post amalgamation. The Authorised Share Capital of the Transferor Company of Rs. 10,00,00,000/- will be combined with the Authorised Share Capital of the Transferee Company post amalgamation. Therefore, the Transferee Company will have combined unutilized authorized share capital of Rs. <u>10,00,00,000/-</u> for issuing new shares to the shareholders of the Transferor Company, which may not be sufficient to issue 14,39,20,282 number of equity shares of Rs. 1/- each. In that process, the transferee company has to increase its authorized capital from Rs. 14,50,00,000/- to Rs. 18,39,30,000/-. For this increase in authorized capital, the transferee company has to pay registration fee of Rs. 2,91,975/- (approximately to Register of Companies with the Petitioner company in attempting to avoid by dubious method of reutilizing the exhausted authorized share capital for new issue of shares. For easy reference, the registration fees payable to ROC is given in the table below:-

Company Scheme Petition No. 658 & 659 of 2014	**(in Rupees)**
Authorized Share Capital	
Transferee	4,50,00,000
Transferor	10,00,00,000
Combined Authorised Capital (Post Amalgamation)	14,50,00,000
(-) Utilised by Transferee Co.	4,50,00,000
Unutilised Authorised Share Capital of Transferee Co.	10,00,00,000
Amount required for issue of new shares	14,39,20,282
Authorised Share Capital needs to be increased by Transferee Company (Rounded off)	4,39,20,282 4,39,30,000
Fees payable to ROC for increasing Authorised Share Capital of the Transferee Company	2,91,975

3. As I understand it, the only objection being taken by the Regional Director is that since the transferee company has issued 3000 equity shares of Rs. 15,000/- each, it has available to it only an amount of Rs. 10,00,00,000/- as 'authorised share capital'. Clause 9.1 of the Scheme requires the allotment of 14,39,20,282 equity shares of Rs. 1/- each. This would be the *paid up* capital of the transferee company. What in essence is suggested is that the transferee company will have to increase its authorised capital from Rs.14,50,00,000/- post amalgamation to Rs.18,39,00,000/-.

4. It is difficult to follow this reasoning. It is an accepted position that, post-amalgamation, the transferee company will lose its identity and will merge and be subsumed in the transferee company. It is also not in dispute that after the amalgamation, the authorised capital of the transferee company would be Rs.14,50,00,000/-. Indeed, this is specifically so stated in the Affidavit filed by the Regional Director. The use of the word "eligible unissued authorised share capital" in this Affidavit is, in my view, something of a misnomer. Mr. Pandit for the Petitioner is I believe correct in pointing out that once it is accepted that the authorised capital of the company, accepted at being Rs.14,50,00,000/-, exceeds the amount of the paid up capital proposed by the issuance of 14,39,20,282 shares, then no question arises of having to increase the authorised capital or of there being a cap or limit of only Rs. 10,00,00,000/-. In brief, he says that once it is accepted that the transferee company has an authorised capital of Rs.14,50,00,000/-, it is difficult to see how, on the basis of the Affidavit of the Regional Director, the amount of Rs.4,50,00,000/- is to be simply ignored or, as he puts it, "left in limbo". I think he is correct. He is also correct in his reliance on a decision of a Division Bench Judgment of the Calcutta High Court in *Calcutta Stock*

Exchange Association limited v. S. N. Nundy & Co. [1]Paragraph 55 of this decision reads thus:

> "55. In this case Teasdale's case (supra) was referred to and the actual decision was approved of, though James L.J. Pointed out that his earlier view expressed in the judgment in Teasdale's case, that the power to purchase shares by a company would be good, could not be sustained. Teasdale's case was distinguished, because it was pointed out that in that case there was no reduction of capital, but on the contrary the capital was Increased, whereas in Hope's case the effect of the purchase of shares by the company was an actual reduction of capital Breee L.J., at p. 340, pointed out that if the shares were purchased with an intention to re-issue, that would amount to a trafficking in shares, but if it was not intended to re-issue the shares purchased, then in his view the amount of capital represented by those shares was necessarily extinguished, Brett L. J. then made the following observation:
>
> It is true to say that the mere power to accept a surrender or a mere power of forfeiture does not alter the Memorandum of Association, because it is only accepting a surrender from one shareholder for the purpose of procuring another shareholder, or forfeiting the shares of one shareholder for the purpose of

[1] (1950) ILR 1 CAL 235

> obtaining another shareholder; the amount of capital issuable, or which the company has power to issue, is not modified at all."

5. It is clear, therefore, that the amount of issuable capital is not automatically affected by an increase or reduction in the amount of the company's authorised capital. A company may increase its authorised capital but does not necessarily have to increase its paid up capital correspondingly, or vice versa.

6. Having considered the objection as stated in the Affidavit, I do not believe that it is justified. They may have been stated out of a sense of caution, but that is all. I do not see that there is any basis for it in law.

7. As regards the other objections, the Petitioners have proposed certain amendments by an Affidavit dated 19th February 2016. These amendments are acceptable to the Regional Director. The scheme is to stand amended in terms of Exhibit "B" to the Affidavit dated 19th February 2016.

8. The Company Scheme Petitions are allowed in these terms.

(G. S. PATEL, J.)