

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

Judgement reserved on: 14.01.2016
% Judgement delivered on: 03.02.2016

+ **CO.PET. 669/2014**

**IN THE MATTER OF BEUMER TECHNOLOGY
INDIA PRIVATE LIMITED**

.... Transferor Company / Petitioner No.1

WITH

ENEXCO TEKNOLOGIES INDIA LTD.

.... Transferee Company / Petitioner No.2

Through: Mr Karan Khanna, Adv.

Through: Ms Aparna Mudiam, Asstt. ROC.

Mr Rajiv Behl, Adv. for the OL.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. This is a second motion petition filed jointly by Beumer Technology India Private Limited (i.e. the transferor company /petitioner no.1) and Enexco Teknologies India Ltd. (i.e. the transferee company / petitioner no.2) under Section 391 and 394 of the Companies Act, 1956 (hereafter referred to as the 1956 Act) to seek sanction of the scheme of amalgamation (in short the scheme).

1.1 The transferor and transferee companies, as referred to above, will be collectively referred to as the petitioners hereafter.

1.2 The registered office of the petitioners are located within the territorial jurisdiction of this court. Hence this court has the jurisdiction to entertain and adjudicate upon the present petition.

2. The transferor company was incorporated on 14.05.2004 in the State of Maharashtra. The registered office of the transferor company was subsequently changed from Maharashtra to Delhi vide order of the Regional Director, Western Region, Ministry of Corporate Affairs dated 27.09.2013. Consequent to the relocation of the registered office, the number of the transferor company was changed to U27109DL2004PTC123959 vide the certificate issued by the Registrar of Companies, NCT of Delhi and Haryana (in short the ROC).
3. The transferee company, on the other hand, was incorporated prior in point of time i.e. on 03.05.1985 under the name and style: Enexco Consultants Private Limited. Thereafter, the name of the transferee company was changed twice, once to, Enexco Technologies India Private Limited in 1995, and then, with effect from 13.11.1995 to its present name viz., Enexco Technologies India Limited. The registered office of the transferee company at the time of filing CA(M) No. 96/2014 (i.e. the first motion) was at A-35, Chittaranjan Park, New Delhi - 110 019. Its registered office though was relocated to the current address i.e. C-451, Chittaranjan Park, New Delhi - 110 019.
4. The copies of Memorandum and Articles of Association as well as the profit and loss account and the balance sheet as on 31.03.2013, have been filed by the petitioners.
5. Copies of Board of Directors' (BOD) resolution of even date i.e. 08.11.2012, concerning the petitioners, whereby, the scheme has been approved, are filed with the petition.
6. The petitioners have averred that there are no proceedings pending against them, under Sections 235 to 251 of the 1956 Act.

7. The petitioners had, as indicated above, filed a petition (i.e. the first motion), being: CA(M) No.96/2014, whereby, a prayer had been made for dispensing with, the requirement of convening meetings of shareholders and creditors.

7.1 This court vide order dated 08.09.2014, having regard to the fact that all shareholders of the petitioners had given their consent to the scheme, dispensed with the requirement of convening meetings, as prayed. The court, also noted, that the secured creditors of the petitioners had also given their consent/ NOC, and hence, there was no requirement to convene a meeting with respect to that class of persons / entities. The court, however, despite consent not given by the unsecured creditors of either of the petitioners, dispensed with the requirement of convening meetings, as prayed, having regard to the fact, that the interest of the creditors (i.e. unsecured) will not be adversely affected and rather would be placed in a better position, vis-a-vis their security post amalgamation.

8. The petitioners, thereafter, filed the instant petition (i.e. the second motion). Notice in this petition was issued on 31.10.2014. Notice was accepted on behalf of the Official Liquidator (OL) and the Regional Director (RD). Furthermore, citations were ordered to be published.

9. Pursuant thereto, reply/ representation has been filed by the RD. Citations were published in Delhi Editions of the following newspapers: Business Standard (English) and Business Standard (Hindi), on 02.12.2014. A document establishing publication of citation alongwith the newspaper extracts, was filed by the petitioners.

10. Pursuant thereto, the RD filed its affidavit under Section 394 A of the Act. In the affidavit, the RD relied upon the circular bearing no. 1/2014.

Based on the aforementioned circular, as per the affidavit of the RD, communication was sent to the Income Tax Department seeking its response to the scheme. However, no comment, response of the Income Tax Department has been received in the matter.

10.1 In the affidavit, the RD had adverted to clause 17.2 of part V of the scheme, wherein, it has been stated that in the event of this scheme failing to take effect by 01.04.2013 or by such later date as may be agreed to by the respective Board of Directors (BOD) of the petitioners or their respective delegates, this scheme shall become null and void. The RD made an observation that from the said clause it is not clear as to whether the BODs of the petitioners have agreed to an extension of date after 01.04.2013. Hence, the RD avers in its affidavit that petitioners be directed to state whether they have extended the scheme, if any, before the scheme is allowed.

10.2 The affidavit of the RD also alludes to the fact that it has received information from the ROC vide communication date 27.01.2015 that the petitioners are subsidiaries of Beumer Beteiligungsgesellschaft mbH, located at: Oelder, Strasse-40, 59269, Bechim Germany. Hence the RD in its affidavit indicated that the transferee company be called upon to submit an undertaking to the effect that they would seek necessary approvals as required from Reserve Bank of India (RBI) as required under Foreign Exchange Management Act, 1999 (in short the FEMA) prior to the sanction of the scheme.

10.3 The RD, it appears, also received information from the ROC that the transferor company has one secured creditor whereas as per MCA e-records, it has not yet filed form CHG-1 so far as in terms of the provisions of

Section 77 of the Companies Act, 2013 (in short 2013 Act). Hence, according to the ROC, there was a prima facie violation of section 77 of the 2013 Act. It is in this background that the RD in its affidavit avers that the transferor company ought to be asked to comply with the provisions of Section 77 of the 2013 Act, prior to the scheme being sanctioned.

10.4 Furthermore, RD in its affidavit, re-emphasises the provisions of clause 11.3 of the Part-IV of the scheme, wherein, it has been stated that subject to the provisions of this scheme, the transferee company shall abide by the Accounting Standard-14 issued by the Institute of Chartered Accountants of India (ICAI).

10.5 In response to the concerns raised by the RD, the petitioners filed an affidavit dated 23.05.2015, wherein, it clearly averred that, the petitioners have already passed a BODs resolution of even date i.e. 18.09.2014, extending the date of the scheme to 01.04.2017 or such other date as per the order(s) passed by this court in connection with the petition.

10.6 Therefore, the perceived gap in the scheme has been filled with BODs resolution passed in accordance with clause 17.2 of the scheme.

10.7 The petitioners have also taken a stand in the aforementioned affidavit that the transferee company has furnished an undertaking dated 29.04.2015, to the RD, stating therein that subject to the approval and sanction of the scheme by this court, the transferee company shall adhere to and comply with the applicable RBI requirements, under the extant rules and regulations, as may be amended from time to time, if any, for and on behalf of the transferor company.

10.8 Furthermore, the petitioners clearly refute that the transferor company is in violation of section 77 of the 2013 Act. It has been stated that the

transferor company has availed working capital facilities from Deutsch Bank, AG for an amount of Rs. 330,000,000/- on the basis of guarantee dated 24.01.2013, furnished by Beumer Maschinenfabrik GmbH & Co. KG and Beumer GmbH & Co. KG to Deutsch Bank, A.G. and that on the strength of that Guarantee, working capital limits were granted to the transferor company in lieu of which it paid to Deutsch Bank, AG, interest rate @ 10.5%. Section 77 of the 2013 Act, which creates an obligation to register a charge, was brought into force on 1st April, 2014 and, therefore, the requirement of filing form CHG-1 would apply, only with effect from 01.04.2014. Furthermore, it is averred that since, no charge, whatsoever, has been created by the transferor company, Section 77 of the 2013 Act does not get attracted. Thus, the transferor company, is not required to file form CHG-1. It has been further submitted that even as per section 125 of the 1956 Act, there would be no obligation to register a charge as the guarantee dated 24.01.2013 does not create a charge.

10.9 In response to the petitioners' affidavit, the RD filed another affidavit dated 13.08.2015, wherein it has been averred that a perusal of the e-records maintained under MCA-21 has shown that the petitioners have not as yet filed the copy of the purported BOD's resolution extending the period of the scheme unto 01.04.2017, in compliance of the provisions of section 117(3) r/w 179(3) of the 2013 Act, and therefore, are prima facie in violation of the provisions of Section 117(3) r/w 179(3) of the 2013 Act.

11. The RD in this affidavit though, has taken a stand that in the matter concerning grant of working capital facilities, which is guaranteed by the other entities, there is no requirement to file e-form CHG-1 as per the provisions of Section 77 of the 2013 Act or even as per Section 125 of the

1956 Act.

11.1 In so far as the OL is concerned, he has, inter alia, sought to highlight the contradictions between averments made in the petition/ valuation report and the scheme qua share exchange ratio. In this context, following assertions have been made in the OL's affidavit:

As per valuation report and paragraph 13 of the petition:

“9 (Nine) fully paid up shares of the Transferee Company of Nominal Value of Rs. 10 (Rupees ten only) each shall be issued to the shareholders of the transferor company for every 1 (one) share held by them in the transferor company.”

As per para 10.1.1 of the scheme:

“1(one) Equity share of the face value of Rs. 10 each of transferee company with rights attached thereto as mentioned in the scheme, for every 9 (nine) Equity Shares of Rs. 10 each held in the transferor company...”

11.2 Furthermore, the OL has averred that this court had vide order dated 08.09.2014 directed the petitioners to issue a specific notice to the secured creditors, who had not submitted their BODs resolution along with the no objection certificate; an aspect which even according to him was taken care of by the petitioners.

11.3 The OL has further stated that no complaint against the scheme has been received by him from any interested person or party. The OL has also averred in his report that on the basis of information supplied by the petitioners, it appears, the affairs of the transferor company have been conducted in a manner which could not be construed as being prejudicial to either the interest of their members or the public at large. In other words, affairs of the company, according to the OL, did not fall foul of the

provisions of the second proviso of Section 394(1) of the Act.

11.4 As regards the concern raised by the OL, in respect of share exchange ratio, the petitioners filed an affidavit dated 29.06.2015, wherein, they have taken a stand that due to an inadvertent error/ oversight made in clause 10.1.1 of the scheme, it has been stated that upon the coming into effect the scheme, the transferee company shall issue and allot to the equity shareholders of the transferor company equity shares in the ratio of 1 (one) equity share of the face value of Rs. 10 in the transferee company for every 9 equity shares of the face value of Rs. 10 each in the transferor company. The petitioners further averred that it is a matter of record that upon coming into effect of the scheme, the transferee company shall allot and issue to the equity shareholders of the transferor company equity shares in the ratio of 9 (nine) fully paid up shares of the transferee company of nominal value of Rs. 10 each for every 1 (one) share held by them in the transferor company. This is sought to be justified by placing reliance on the copy of the share valuation report placed on record along with CA(M) No. 96/2014.

12. To be noted, the scheme in clause 8.1 of part-II of the scheme provides that the permanent employees of the transferor company who are in its employment as on the effective date shall become the permanent employees of the transferee company with effect from the effective date without any break or interruption in service.

12.1 Furthermore, as per clause 12.1 of Part-V of the scheme, the transferor company shall stand dissolved without being wound up.

13. In any event, notwithstanding what is stated by the petitioners, the transferee company will file an undertaking with this court, within two weeks from today, stating therein, that it will take over and defray all

liabilities of the transferor company. It is also made clear, that the Income Tax Authorities or the Reserve Bank of India (RBI) or any other statutory authority will be entitled to proceed against the transferee company qua any liability which it would have fastened on to the transferor company for the relevant period, and that, which may arise on account of the scheme being sanctioned.

13.1 Notwithstanding the above, if there is any deficiency found or, any violation committed of any provisions of the RBI Act or any other statute, the sanction granted by this court to the scheme will not come in the way of any action being taken in accordance with law, against the concerned persons, directors and officials of the petitioners.

14. As indicated above, the OL has indicated, that no objections have been received by him, from any person and / or interested party qua the scheme. Furthermore, the OL has also indicated that the requirement of the second proviso of Section 394 (1) of the 1956 Act are met.

15. Thus, a perusal of the affidavit of the RD and the OL and the response of the petitioners would show, in nutshell, that the following concerns have been made:

(i) With regard to extension of the scheme beyond 01.04.2013: As indicated above, the petitioners have passed a BOD resolution on 18.09.2014 extending the date of the scheme to 01.04.2017 or such as other date as this court may fix while sanctioning the scheme.

(ii) In so far as registration of charge under Section 77 of the 2013 Act is concerned, the stand of the petitioners in their affidavit-in-rejoinder appears to be correct that there is no requirement to register any charge as the working capital facility extended in favour of the transferor company was

based on the guarantee dated 24.01.2013 furnished by the companies whose names are referred to in paragraph 10.8 above. This position, to my mind, as correctly argued by the petitioners, would have obtained even under section 125 of the 1956 Act.

(iii) The third concern which raised by the OL, sought to bring out the apparent inconsistency in the petition and the scheme with regard to the share exchange ratio. This has been adequately answered by the petitioners in their affidavit-in-rejoinder.

15.1 Therefore, in my view, having regard to the above, all concerns and objections of the RD and the OL stand duly addressed.

16. Accordingly, in view of the approval accorded to the scheme by the shareholders and creditors of the petitioners and, given the fact, that the concerns of the RD and the OL, as indicated above, have been duly taken care of, in my opinion, there appears to be no impediment in the grant of sanction to the scheme. Consequently, sanction is granted to the scheme in terms of Section 391 and 394 of the 1956 Act. The petitioners will, however, comply with all statutory requirements, as mandated in law. A certified copy of the order, sanctioning the scheme, will be filed with the ROC, within thirty (30) days of its receipt.

16.1 In terms of the provisions of Section 391 and 394 of the 1956 Act, and in terms of the scheme, the entire undertaking, properties, rights and powers of the transferor company will stand transferred to and / or vest in the transferee company without any further act or deed. Similarly, in terms of the scheme, all liabilities and duties of the transferor company shall stand transferred to the transferee company without any further act or deed. Upon the scheme coming into effect, the transferor company shall stand dissolved

without having to follow the process of winding up.

16.2 It is made clear, that this order will not be construed as an order granting exemption from : payment of stamp duty or, taxes or, other penalties/ charges, if any, payable, as per the relevant provisions of law or, from any applicable permissions that may have to be obtained or, even compliances that may have to be made, as per the mandate of law.

17. Resultantly, the petition is allowed and disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

FEBRUARY 03, 2016

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