

IN THE HIGH COURT OF BOMBAY

Appeal No. 308 of 2004 in Company Petition No. 478 of 2003 in Company Application
No. 290 of 2003

Decided On: 04.04.2009

Appellants: **Sandvik Asia Limited**

Vs.

Respondent: **Bharat Kumar Padamsi and Ors.**

Hon'ble Judges:

D.K. Deshmukh and A.A. Sayed, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Iqbal Chagla and D.J. Khambata, Sr. Counsels, H. Toor and Vinayak Vengurlekar, Advs., i/b., Crowford Bayley & Co.

For Respondents/Defendant: Janak Dwarkadas, Sr. Counsel and Sham Jagtiani, Adv., i/b., Ashok Purohit, Adv.

Subject: Company

Acts/Rules/Orders:

Companies Act - Sections 78, 80 and 100 to 105; Companies Act, 1867

Cases Referred:

British and American Trustee and Finance Corporation v. Couper (1894) A.C. 399 (HL); Poole and Ors. v. National Bank of China Limited (1907) A.C. 229 (HL); In Re: Elpro International Limited (2008) 86 SCL 47 (Bom.); In Re: Siel Limited, (2008) 144 Comp Cas 469 (Del) ; British and American Trustee and Finance Corporation Ltd. and Reduced v. John Couper (1894) A.C. 399; In Re: Panruti Industrial Co. (Pvt.) Ltd. AIR 1960 Madras 537; Ex-parte Westburn Surag Refineries Ltd. (1951) A.C. 625; Ramesh B. Desai v. Bipin Vadilal Mehta and Ors. (2006) 5 SCC 638; Trevor v. Whitworth; American Trustee and Finance Corpn. v. Couper; Poole and Ors. v. National Bank of China Limited

Disposition:

Appeal allowed

JUDGMENT

D.K. Deshmukh, J.

1. By this Appeal, the Appellant takes exception to the order dated 16-10-2003 passed by the learned single Judge of this Court in Company Petition No. 478 of 2003. That petition was filed by the present Appellant seeking sanction of the court to the Special Resolution

passed by the company at its extra ordinary general meeting held on 13-6-2003 for reduction of its share capital. The Company had proposed a resolution for reduction of paid-up equity share capital. The Resolution was to the effect that the share capital of the company be reduced by paying off/returning to the holders of equity shares other than the promoters at the rate of Rs. 850/- per share i.e. Rs. 100/- by way of face value + Rs. 750/- premium per share, thereby extinguishing all such shares. The company petition was filed under Section 100 of the Companies Act seeking sanction of the court.

2. That petition was opposed by the Respondents, who are non-promoter shareholders of the company. The company petition was decided by order dated 16-10-2003 and the learned single Judge declined to sanction the resolution for reduction of the share capital. The company, therefore, is in Appeal against that order.

3. The learned Counsel for the Appellant submits that under Section 100 of the Companies Act, a company may if so authorised by its Articles of Association, by special resolution, reduce its share capital in any way. The three instances of reduction of share capital enumerated in Section 100 are only indicative and without prejudice to the generality of the power of the company to reduce its share capital. It is, therefore, submitted by the learned Counsel that every possible method of reduction of share capital of a company is duly encompassed under said Section 100, and is subject to and governed by the provisions of Sections 100 to 104 of the said Act. A company, subject to confirmation by this Court, is free or open to choose the mode or extent of reduction of its share capital. The confirmation of the Court to reduction of the share capital of a company will be refused only if the provisions of Sections 100 to 104 of the said Act are not complied with by the company or if the proposed reduction is unfair or inequitable.

4. The learned Counsel for the Appellant further submitted that it is an established position of law that the holding of a share in a company by a shareholder is holding of a bundle of rights in relation to the company, where such rights are subject to the conditions and/or limitations stated under not only the Memorandum and Articles of Association of the company but also provisions of the Act. As such the equity shareholders of the Appellant (including the Respondents) have held their shares on the clear understanding that said shares could be cancelled/reduced under Sections 100 to 104 of the said Act as well as the Articles of Association of the Appellant. The Articles of Association of the Appellant, in particular Article 8 thereof, clearly provides that the Appellant may (subject to the provisions of Sections 78, 80 and 100 to 105 inclusive, of the Act) from time to time by Special Resolution reduce its capital and any capital redemption reserve account or other premium account in any manner for the time being authorised by law, and in particular capital may be paid off on the footing that it may be called up again or otherwise. The Appellant has fully and completely complied with the provisions of Section 100 of the Act and of the Articles of Association for the proposed reduction of the share capital. It is further submitted by the learned Counsel for the Appellant that under the special resolution passed on 13th June, 2003 an overwhelming majority of equity shareholders (inclusive of majority of the non promoter equity share holders) in their collective commercial wisdom and in a democratic manner have duly resolved for reduction of equity share capital of appellant as embodied in the special

resolution. Section 100 of the said Act does not contemplate separate class meetings of distinct classes of shareholders of a company. Assuming that separate class meeting of promoter group and the non-promoter group were to be held by the Appellant, it is pertinent to note that the special resolution was passed by an overwhelming majority of 99.95% of the votes polled by the equity shareholders present and voting (i.e., significantly well above 95.54% of the total paid up equity share capital of the Appellant held by the Sandvik Promoter Companies); and that only about 0.05% of the votes polled by the equity shareholders present and voting were against and opposed the special resolution. The Appellant submitted that the reduction of equity share capital proposed by the Appellant is fair and equitable to the non-promoter equity shareholders. The Appellant with effect from 9th September 2002 has been delisted on the stock exchanges, with result that the equity shares of the Appellant on and from 9th September, 2002 could not be freely traded. The Appellant by the proposed reduction of equity share capital provided a valuable and reasonable mode of exit to the non promoter equity shareholders of the Appellant. The Appellant for the proposed reduction of equity share capital duly evaluated a lucrative price of Rs. 850/- per equity share of the Appellant, which was much more than the book value of an equity share of the Appellant (the book value per equity share of the Appellant as on 31st August, 2003 was Rs. 687/- per equity share). As mentioned above, the fact that an overwhelming majority voted in favour of the said special resolution in itself proves the fairness and equity of the proposed reduction of equity share capital of the Appellant. It is submitted that a miniscule number of equity shareholders (inclusive of Respondents) ought not and should not be permitted to override the vote or wish of the overwhelming majority of the equity shareholders of the Appellant, for the proposed reduction of equity share capital which ex-facie is fair and equitable. In support of this submission, the learned Counsel appearing for the Appellant relied on following judgments:

(i) British and American Trustee and Finance Corporation v. Couper (1894) A.C. 399 (HL) page 403;

(ii) Poole and Ors. v. National Bank of China Limited (1907) A.C. 229 (HL) page 237;

(iii) In Re: Elpro International Limited (2008) 86 SCL 47 (Bom.);

(iv) In Re: Siel Limited [MANU/DE/9436/2007](#);

5. On the contrary, on behalf of the Respondents, it was submitted that the first objection to a scheme for reduction is that a public company that has invited participation from the public and which wishes to retain its character as a public Ltd.Co., cannot be permitted in law to extinguish the entire class of public shareholders by mooted a scheme for reduction of capital under Section 100-105 of the Act, so as to facilitate the real object of the scheme, that being to make the company a 100% subsidiary of the Promoters. This proscription by the law would be more so applicable where the public company would continue to remain a public company, albeit unlisted, even after the scheme for reduction is sanctioned, and would therefore be able to invite participation of the very public after having forced out the erstwhile public, by use of the brute majority/voting strength of the

promoter shareholders, by compulsory purchase/reduction of their shareholding. Although Section 100 of the Act speaks of reduction of share capital of "any of its shares" and "in any way", the Section cannot be applied and interpreted to undermine and negate the overwhelming legislative policy and intent which can be gathered from the other provisions of the Act and related legislation, which is directed towards preventing the forced acquisition of shares of the public or the extinguishment of the entire class of public shareholding. The learned Counsel, therefore, submits that in this connection it is pertinent to note that a basic attribute of a public company is (i) that it is enable a Pvt.Co. entitled to invite the public to subscribe to its shares and (ii) that its shares are freely transferable under Section 111A(2) of the Act. It is submitted that the right to transfer shares freely, includes the right to retain or hold shares. A scheme of reduction that forcibly acquires shares of the entire class of public shareholding, would abrogate this basic principle, which allows shareholders of a public company to retain its shares. It is further submitted that in the light of the above provisions, a scheme for reduction like in the present case, cannot be resorted to in order to extinguish entire class of public shareholders. Section 100 of the Act, while recognizing that it is for a company to frame a scheme for reduction and much autonomy is left to the company in this regard, cannot be applied to undermine and destroy the basis fabric of the Act and related provisions of law that are intended to protect the rights of the publics shareholding in a public limited company. In addition to above, the scheme for reduction is inherently unfair and inequitable on the affected/minority shareholders and therefore under the well settled principles of law that would apply, the same is not liable to be sanctioned. It is submitted that every scheme for reduction of capital, after compliance with the requirements of Section 100- 104 of the Act, is subject to confirmation of the Court. The mandatory requirement of confirmation of a reduction of capital by the Court is a statutory safeguard for the protection, inter alia, of the minority shareholders. In exercising its supervisory jurisdiction when considering an application for confirmation of a reduction of capital, the Court has to consider whether the reduction of capital is fair and equitable qua creditors, shareholders (of every class individually and collectively), and in the interest of the public. The fairness and equity standards applicable are to be understood in the broad sense and not in the technical and narrow sense. The learned Counsel appearing for the Respondents relied on following judgments in support of his submission:

(i) British and American Trustee and Finance Corporation Ltd. and Reduced v. John Couper (1894) A.C. 399, page 405;

(ii) In re Panruti Industrial Co. (Pvt.) Ltd. AIR 1960 Mad 537;

(iii) Ex-parte Westburn Surag Refineries Ltd. (1951) A.C. 625;

(iv) Elpro International Limited-Unreported Judgement dated 22nd June, 2007;

(v) Reckitt Benckiser (India) Limited- Unreported decision dated 31st May, 2005;

6. It is submitted whilst the law permits, and the Courts have the power to confirm, a scheme for reduction, which applies selectively to some shareholders of a class, and not

all, any such scheme that does not provide for uniform treatment of shareholders, would be most narrowly scrutinized by the Court. No such scheme ought to be confirmed unless the Court is satisfied that it will not work unjustly or inequitably. The Court must examine whether the reduction is fair between classes of shareholders or whether the reduction would work injustice between different classes of shareholders. In determining whether a scheme for selective reduction of capital, which differentiates between shareholders of one class by resulting in the compulsory extinguishment of capital of some shareholders of that class, is fair and equitable, it would be most relevant to consider whether the affected shareholders were treated as a separate sub-class for the purpose of meetings to approve the scheme or whether the scheme contained any other safeguard to prevent a forced acquisition of shares of the targeted shareholders. Applying the above principles, it is submitted that the inherent unfairness of the scheme is in the fact that the Promoters voted in favour of the scheme for reduction of capital only because their share had been excluded from the scheme of reduction. The Respondent No. 5, would, if excluded from the purview of the scheme of reduction, have also voted in favour of the scheme to afford to other shareholders an opportunity to liquidated their shareholding and exit the company. However, the scheme if intended to be for and equitable to the public shareholders ought to have provided the following works in bracketed portion of the proposed resolution viz. "as well as those shareholders who wish to retain their shares" in which case the scheme of reduction would have been as inapplicable to public shareholders as the promoter group. A proper and fair scheme would, therefore, have been one where all other shareholders, other than the Promoters, who wanted to retain their shares, were excluded from the Resolution so that their shares would not be subject to the forcible reduction of capital by compulsory acquisition. This would have allowed all those other shareholders, who otherwise support the scheme to give the remaining shareholders an exit option, to vote in favour of the scheme alongwith the Promoters, without their shareholding getting affected. In other cases under Section 100 of the Act, where a scheme has been sanctioned, this safeguard was a part of the scheme and shareholders who did not want their shares to be forcibly acquired were allowed to indicate so, and their shares were then not affected by the scheme for reduction. Alternatively, the unfairness in the scheme in this connection is also manifest in the fact that there was no separate class meeting for the sub-class of those shareholders who were affected by the scheme. This separate class meeting (in addition to the general meeting of all shareholders under Section 100 of the Act) would be a minimum fairness requirement to ensure that the resolution affecting the shares of minority shareholders is not determined by the majority promoters, who though unaffected, would be able to decide the fate of the minority shareholder. The inequity in allowing the Promoter (majority) alone to vote and decide the fate of the minority public shareholders, is that whilst they are being treated as a class apart and are outside the scheme of reduction, that classification is not maintained for voting on the scheme, and they are given a right to vote, it is not being suggested that this class meeting would be a substitute for the special resolution that would be required under the procedure of Section 100 of the Act, however, this would meet with the standard of fairness so that the affected class can consider and determine the fairness of a scheme uninfluenced by the presence and voting strength of the majority, who are differently placed. This was the procedure followed in the case of Reckitt (supra) and ought to have been followed in the present case as well.

Lastly, the learned Counsel submitted that the scheme and in particular the manner of classification coupled with the absence of any real option to the non-promoter shareholders to remain a shareholder, is entirely unfair and oppressive to the minority shareholders. A scheme for reduction of capital cannot be a guise to forcibly acquire the minorities' shareholding so as to enable the majority (promoter) group to become a 100% owner of the company. Apart from this, there is no other commercial or business reason for the selective reduction of capital that would eliminate all outside and non-promoter shareholding of the Appellant.

7. The law relating to reduction of share capital of a company is contained in Sections 100 to 105 of the Companies Act. Section 100 authorises the company limited by shares having a share capital, if so authorised by its Articles of Association by special resolution to reduce its share capital in any way. So a company can reduce its share capital,

(i) if there is a provision in its Articles of Association permitting it to do so;

(ii) If it has passed a special resolution for that purpose and;

(iii) If such a resolution is sanctioned by the court;

Perusal of Section 100 further shows that a company can reduce its share capital in any way. In the present case, it is nobody's case that the special resolution passed by the company is invalid or has not been passed by following the procedure laid down by the Companies Act. It is also nobody's case that in the Articles of Association of the Company there is no provision authorising the company to reduce its share capital. It is also nobody's case that the amount that is being offered to the non-promoters share holders is not just or fair. The only objection raised is that the scheme for the reduction of share capital proposed by the special resolution wipes out a class of share holders namely the non-promoter share holders and this, according to the objectors, is unfair and inequitable. The question, therefore, that is to be considered is whether the special resolution which proposes to wipe out a class of shareholders after paying them just compensation can be termed as unfair and inequitable. The Supreme Court in its judgment in the case of *Ramesh B. Desai v. Bipin Vadilal Mehta and Ors.* [MANU/SC/2996/2006](#), in paragraph 11 has observed thus:

11. The vexed question of the legality of the purchase by a limited company of its own shares was set at rest by the decision of the House of Lords in *Trevor v. Whitworth* since which it has been clear law that a limited company cannot purchase its own shares except by way of reduction of capital with the sanction of the court. (See Buckley on the Companies Act, 14th Edn. p.1499.) In the same decision it was also held that even express authority to the contrary in the memorandum was unavailing. The main reasons for this prohibition were that such a purchase could either amount to "trafficking" in its own shares, thereby enabling the Company in an unhealthy manner to influence the price of its own shares on the market, or it would operate as a reduction of capital which can only be effected with the sanction of the court and in the manner laid down in the statute (see Palmer's Company Law, 23rd Edn., p.440), in Guide to the Companies Act by A.

Ramaiya (16th Edn., p.951) apart from Trevor v. Whitworth, British and American Trustee and Finance Corpn. v. Couper has also been referred to as a leading authority on the subject....

8. The Supreme Court has thus said that the judgment of the House of Lords in the case of British and American Trustee and Finance Corpn. is a leading authority on the subject of reduction of share capital by a company. Therefore, we have to see as to what is the law laid down by the House of Lords in its judgment in the case of British and American Trustee and Finance Corporation Ltd. The facts which are relevant and material in that case were as follows:

A company limited by shares had power under its articles to reduce its capital by paying off capital. The shares were divided into ordinary shares partly paid up, and founders' shares fully paid up. The company had carried on business both in England and the United States, but, it being found impossible to do so in both countries with advantage it was determined that the company should cease to carry on business in the United States, that the American investments should be made over to the American shareholders, their shares being cancelled, and that the English shareholders should take the English assets, receiving an agreed sum by way of adjustment. This arrangement was carried out by special resolution providing that the capital should be reduced by paying off the shares (both ordinary and founders') held by the American shareholders (the capital represented thereby being in excess of the wants of the company), and that such shares and all liability thereon be wholly extinguished. The company presented a petition praying the Court to confirm the resolution. All the creditors were either paid or assented to the arrangement. The confirmation by the Court was opposed by one shareholder.

It is clear from the facts narrated above that effect of the Court sanctioning the special resolution was that the class of share holders namely the American share holders would have been extinguished, and sanction to this resolution was opposed only by one share holder. In so far as the present case is concerned, the position of the objectors is as follows:

95. 54% share capital is held by the promoters; Balance 4.46% is held by non-promoters; In the special general body meeting the special resolution was passed by the majority of 99.95% of the votes polled by the equity share holders present at the voting. It means that only 0.05% of the votes polled by the equity share holders present and voting were against and opposed the special resolution.

In the present case, the effect of sanctioning the special resolution is a class of share holders namely the non-promoters share holders will be extinguished. Therefore, on facts, there is similarity. Now we will consider the judgment of the House of Lords in the case of British and American Trustee and Finance Corporation Ltd.

In his speech, Lord Harschell after referring to the Companies Acts 1867 and 1877 said

It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected, nor is there any limitation of the power of the Court to confirm the reduction except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured." Later on, dealing with the case before the House, he says: "The interests of creditors are not involved, and I think it was the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect.

By way of caution he adds this observation:

There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar would be most narrowly scrutinized by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it." Lord Watson takes the same view. His words are these: "Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced or whether some members shall retain their shares unreduced, the shares of others being extinguished upon their receiving a just equivalent is a purely domestic matter, and it might be greatly for the advantage of the company that the latter alternative should be adopted.

Lord Maenaghten said,

The creditors are protected by express provisions. Their consent must be procured or their claims must be satisfied. The public, the shareholders, and every class of shareholders individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion which is entrusted to the Court. Until confirmed by the Court the proposed reduction is not to take effect though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner and the company, as it were, makes a new departure. With these safeguards, which certainly are not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free.

The subject was again considered by the House of Lords in its judgment in the case of *Poole and Ors. v. National Bank of China Limited*, referred to above. In that case, the effect of the court sanctioning the special resolution for reduction of capital share was that the class of shareholders called founder shareholders was to be extinguished. The House of Lords after referring to its own judgment in the case of *British and American Trustee and Finance Corporation* extensively observed thus:

In the present case creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The only questions, therefore, to be considered are these: 1. Ought the Court to refuse its sanction to the reduction out of regard to the interests of those

members of the public who may be induced to take shares in the company? and 2. Is the reduction fair and equitable as between the different classes of shareholders?

Now the directors gave the shareholders the fullest information as to the reasons for the reduction and the causes which led them to propose it. All this is explained in the petition. It has not been suggested that the proposed reduction is open to any objection on public grounds. The question, therefore, must be this: Is it fair as between different classes of shareholders? The only objection put forward is made on the part of an insignificant number of holders of founders' shares. There are two individuals who hold five founders' share each, and there is a public company holding thirty-four founders' shares. The directors, in their circular to the shareholders, stated that these shares were of no commercial value. That is not denied. It is proposed to pay the dissentient shareholders the par value of their shares out of profits, and to extinguish the founders' shares, because their continued existence would render it difficult, if not impossible, for the company to raise further capital. The dissenting shareholders do not demand, and never have demanded, better pecuniary terms, but they insist on retaining their holdings, which in all reasonable probability can never bring any profit to them, and may be detrimental to the company. I think that Farwell J. was quite right in disregarding their opposition. The learned judges of the Court of Appeal did not dissent from the view of Farwell J., but there was some expression of doubt and hesitation.

9. In our opinion, the above quoted observation of the House of Lords from its judgment in the case of Poole & ors, referred to above, squarely apply to the present case. In our opinion, once it is established that non-promoter shareholders are being paid fair value of their shares, at no point of time it is even suggested by them that the amount that is being paid is any way less and that even overwhelming majority of the non-promoters shareholders having voted in favour of the resolution shows that the court will not be justified in withholding its sanction to the resolution. As the Supreme Court has recognised that the judgment of the House of Lords in the case of British & American Trustee and Finance Corporation Ltd. is a leading judgment on the subject, we are justified in considering ourselves bound by the law laid down in that judgment. As we find that there is similarity in the facts in which the observations were made in the judgment in the case of British & American Trustee and Finance Corporation, we will be well advised to follow the law laid down in that case. In our opinion, therefore, the learned single Judge was in error in declining to grant sanction to the special resolution.

10. In the result, therefore, the present appeal succeeds and is allowed. The order impugned in the appeal is set aside. The Company Petition No. 308 of 2004 granted in terms of prayer Clause (a).

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