
(2010) 03 CAL CK 0065
In the Calcutta High Court
Case No : C.A. No. 383 of 2007

AOP (India) (P.) Ltd. Workers Union

APPELLANT

Vs

Official Liquidator

RESPONDENT

Date of Decision : 08-03-2010

Acts Referred:

Companies Act, 1956 — Section 391, 391(1), 394, 466, 529A

Citation : (2010) 160 CompCas 102 : (2011) 105 SCL 75

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Debangshu Basak and Deepanath Roychowdhury, for the Appellant; Nimish Mishra, S.S. Basu, Rabindranath Saha and Susanta Dutta, for the Respondent

Judgement

Sanjib Banerjee, J.—C.A. No. 383 of 2007 is the first application in point of time made by some workers along with an alleged well-wisher of the company (in liquidation) invoking Sections 391, 394 and 466 of the Companies Act, 1956 in the same breath. The applicants in CA No. 383 of 2007 expressed a pious wish to run the business of the company (in liquidation) and obtained an interim order on 2-7-2008. The order stayed the winding up of the company for a period of six months. Paragraph 4.2 of the order referred to a solitary applicant and recognized such solitary applicant to be an ex-worker and a contributory holding "35 per cent share" in the company (in liquidation). The order of 2-7-2008 also recorded as follows:

The ex-workers and the applicants have found a strategic partner in the applicant No. 6 who is ready and willing to invest sums for revival of the said company. From the viability report of the chartered accountant, the customers of the company (in liquidation), are prestigious organization and, in the event, such customers give business to the company (in liquidation) its revival may be possible.

2. A committee of management was formed under the aegis of a special officer

and the committee was directed to function for a period of six months. The order also required the views of the unsecured creditors of the company (in liquidation) to be ascertained at a meeting to be held u/s 391(1) of the Companies Act. The order noticed that despite advertisements no secured creditor of the company had stepped forward to oppose the arrangement.

3. The order of temporary stay of winding up, probably made u/s 466 of the Act, has not been continued after the expiry of the six months following the order of 2-7-2008. The applicants have continued to run and manage the business of the company and have used all its assets without any sanction of law or leave of Court or any moral or equitable authority. This, by itself, would call for the applicants in C.A. No. 383 of 2007 to be debarred from having anything to do with the assets of the company (in liquidation).

4. C.P. No. 253 of 2009 has been made ostensibly in connection with C.A. No. 383 of 2007. There is a mistake not only in procedure but in substance in the opening lines of C.P. No. 253 of 2009. If C.A. No. 383 of 2007 was filed in connection with C.P. No. 577 of 2004, C.P. No. 253 of 2007 could not have been filed as a sequel to C.A. No. 383 of 2007.

5. The procedure needs to be referred to, to elucidate the point. C.P. No. 577 of 2004 was obviously the petition on which the order of winding up was made on 8-3-2006. Upon an order of winding up being made, subsequent applications relating to the company (in liquidation) may be taken out at any stage subject to their permissibility under the Act and the Rules, but all such subsequent applications need to bear the number of the petition on which the company was directed to be wound up. An application u/s 466 of the Companies Act, as every beginner at a company law class is aware, has to proceed by accepting the order of winding up and without questioning it. An application u/s 466 is generally made with an application number and is tied to the company petition number on which the order of winding up was made. In the company jurisdiction, almost invariably a petition precedes an application in the sense that there has to be a company petition before a company application can be filed because the petition is the main matter and the applications are the interlocutory or incidental proceedings therein.

6. There is one major exception. In case of a scheme of amalgamation or arrangement it is an application which precedes a petition with an underlying undertaking furnished by the applicant to Court that it would take out the petition. There is a basis for this reversal of the general order. An applicant in Section 391 proceedings ordinarily seeks leave to convene meetings, whether of shareholders or creditors or other classes of persons connected with the company. It is the result of the meeting or meetings which decides as to whether the scheme that is propounded and placed for approval at the meetings needs to be carried to Court. If the proposed scheme is defeated at any of the meetings, there may not arise the question of carrying the scheme to Court as the statutory pre-condition for the Court to consider the scheme would not have

been met.

7. It is in these circumstances that it is surprising how C.P. No. 253 of 2009 was brought by relying on C.A. No. 383 of 2007 since C.A. No. 383 of 2007 was not a stand alone application u/s 391 of the Companies Act, but was, for whatever strange reason, a combined application under Sections 391, 394 and 466 of the Act rooted to C.P. No. 577 of 2004. But to forget the procedure and to return to the merits--if there be any--of the matter.

8. In neither C.A. No. 383 of 2007 nor C.P. No. 253 of 2009 have the applicants (or the Petitioners) sought to demonstrate or obtain the support of all classes of persons whose support is indispensable for even the wild dream of the workmen running the business of the company (in liquidation) to come true. First, the contributories of a company (in liquidation), who are its erstwhile shareholders, had to approve of a scheme; secondly, the secured creditors in whose favour the assets may have been mortgaged or otherwise charged would have had to consent whether unanimously or to the extent of the statutory threshold; and, finally, the requisite support of the unsecured creditors of the company both in value and in number had to be achieved. To attempt to control the assets of a company (in liquidation) without complying with all the three conditions would be opposed to public policy and utterly illegal.

9. C.P. No. 253 of 2009 has two Petitioners. C.A. No. 383 of 2007 carried six applicants. That the Petitioners here have tried to link this petition to the earlier application without the identity of the parties is, in itself, a fraud on Court.

10. The Petitioners in C.P. No. 253 of 2009, buoyed no doubt by the temporary stay that they obtained on 2-7-2008, have not even chosen to seek the permission of the secured creditor or of the contributories of the company. The Petitioners have chosen only to seek the sanction of a scheme on the basis the purported approval thereof by unsecured creditors of the company (in liquidation). It is only at the hearing that the Petitioners admit that the consent of both the secured creditors and the contributories would be necessary and seek directions in such regard. Such change of tack is obviously to delay the matter and continue the Petitioners' illegal control over the assets of the company (in liquidation) through the now defunct committee of management.

11. The Petitioners are, in a sense, complete strangers to the assets and the business of the company (in liquidation) in that a workers' union and an ordinary worker are not expected to be in control of a company or its books or records nor be able to assert the extent of indebtedness of a company or make any admission in such regard on behalf of the company. Nothing that these wishful Petitioners can say would bind the company (in liquidation) or help the Court assess the quantum of indebtedness of the company (in liquidation) to its secured or its unsecured creditors.

12. The second Petitioner claims to be the holder of 36 per cent shares in the company. To start with, this is a false impression that is given by the second

Petitioner. Upon a company going into liquidation, its shares are not transferable and the transfers are void unless specific approval in such regard is obtained from the Court presiding over its winding up. Section 536 of the Companies Act leaves no doubt on such aspect. It is the admitted position that the purported transfers on the basis of which the second Petitioner claims to be a 36 per cent shareholder in the company were all effected (illegally, no doubt) after the order of winding up was made.

13. The order of 2-7-2008 was, at the highest, an order keeping the order of winding up in suspended animation. Such a temporary order would not altogether wish away the order of winding up of the company made on 8-3-2006.

14. Only one secured creditor has appeared. Bank of India says that it has a claim in excess of Rs. 19 lakh and insists that without such payment being made upfront the bank would not consider the purported scheme propounded by these Petitioners. The bank also insists that an undertaking must be furnished by the company, whoever it may be run by, that the bank would be paid 36 equated monthly instalments of about Rs. 1.31 lakh beginning March, 2010. The interest of the secured creditors of a company (in liquidation) come ahead of the interest of the unsecured creditors. For any scheme for revival of a company (in liquidation), the approval of the secured creditors is the first step that needs to be taken before the unsecured creditors can be looked at. If the assets of a company (in liquidation) are sold, Section 529A and Section 530 of the Companies Act instruct that the secured creditors will get the proceeds therefrom along with the workmen of the company ahead of the unsecured creditors. No attempt was made by the applicants in C.A. No. 383 of 2007 or the Petitioners in C.P. No. 253 of 2009 to obtain the prior approval of the secured creditor, if there be only one, before proceeding to convene a meeting of the unsecured creditors. That an advertisement was published to which the secured creditor did not respond, will not amount to a waiver of the secured creditor's rights.

15. The Petitioners in C.P. No. 253 of 2009 submit that the workmen would be entitled to stand on the same footing as the secured creditor and to the extent the quantum of the workmen's dues are well in excess of the quantum of the secured creditors' dues, the workmen's wishes should hold sway. This is an argument in theory made without any factual footing. Who are these two Petitioners to assert the extent of the company's dues to the workmen? The company law in the country has not been undergone such a sea change to allow a trade union and a solitary ex-workman masquerading as the messiah for all the workmen to urge that the figures of the company's debts that they put up are sacrosanct and have to be accepted by the company Court in assessing whether they ought to be allowed a free rein of the company without reference to the erstwhile shareholders or the secured creditor of the company.

16. The Petitioners in C.P. No. 253 of 2009 have no ground to stand on. In any event, since the strategic partner referred to in C.A. No. 383 of 2007 and in the order of 2-7-2008 has now pulled out, the basis of the ill-conceived exercise has

vanished into thin air. It is submitted on behalf of the Rabindranath Saha, the sixth applicant in C.A. No. 383 of 2007, that he is no longer desirous of financing the scheme that had been propounded. If the financier had backed out then the Petitioners in C.P. No. 253 of 2009, whatever else their other legal rights may be, do not have any scheme to carry forward. Not unexpectedly, the well-wisher of company that the workmen brandished in C.A. No. 383 of 2007 now has only harsh and unkind words for the second Petitioner in C.P. No. 253 of 2009.

17. The half-baked scheme with which the Petitioners in C.P. No. 253 of 2009 have approached Court, the unequivocal assertion of the secured creditor of the company that it is not willing to support the scheme unless paid a substantial amount affront, the inability of the Petitioners in C.P. No. 253 of 2009 to put such money on the table immediately and the pulling out of the front man that the applicants in C.A. No. 383 of 2007 had brought--would all result in both C.A. No. 383 of 2007 and C.P. No. 253 of 2009 being dismissed.

18. The committee of management under the special officer appointed by the order dated 2-7-2008 will continue only for the purpose of guarding the assets of the company (in liquidation) till such time that the Official Liquidator takes possession thereof. The special officer heading the committee of management will forthwith call upon the Official Liquidator to take possession of all assets of the company (in liquidation). The special officer, who has meticulously prepared a report that has been placed in Court, will tally the list of inventories prepared at the time that he had taken possession and will make over all assets of the company (in liquidation) matching such list of inventories to the Official Liquidator as expeditiously as possible, and preferably within a period of four days from the date of receipt of an authenticated copy of this order.

19. The second Petitioner in C.P. No. 253 of 2009, the principal person who had engineered the misadventures that were C.A. No. 383 of 2007 and C.P. No. 253 of 2009, will pay costs assessed at 2000 GM to the Official Liquidator.

20. In view of the categorical assertion on behalf of Rabindranath Saha that the scheme propounded by the workers in C.A. No. 383 of 2007 is not being supported by him, C.A. No. 489 of 2009 is disposed of without any order.

21. A copy of this order will be provided with utmost expedition by the secured creditor, Bank of India, to the special officer appointed in the matter.