

(2010) 06 CAL CK 0051

In the Calcutta High Court

Case No : A.P.O. No. 330 of 2007, A.C.O. No's. 30 and 60 of 2009, C.A. No. 580 of 2002 and C.P. No. 519 of 1989

ARC Holdings Ltd.

APPELLANT

Vs

Rishra Steels Ltd. and Others

RESPONDENT

Date of Decision : 14-06-2010

Acts Referred:

Companies Act, 1956 — Section 391, 392, 393, 394A, 443

Citation : (2010) 3 CALLT 357 : (2010) 157 CompCas 364 : (2010) 3 CompLJ 47

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Jaydip Kar, Ravi Kapoor and Nilay Sengupta, M.C. Ghosh, Ranjan Bachwat, Ratnako Banerjee and Manju Bhuteria, for the Appellant; D.N. Sharma, for Respondent Nos. 5 and 6, Jishnu Saha, Ashis Mukherjee for Respondent No. 10 and Utpal Bose, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of an unsuccessful applicant u/s 466 of the Companies Act (hereinafter referred to as the Act) and is directed against an order dated December 2, 2005 passed by a learned Single Judge thereby dismissing the said application.

2. The facts giving rise to filing of the present appeal may be summed up thus:

1) The company in liquidation was incorporated in the year 1985 and had gone into liquidation on the June 4, 1990. During the said period, it took loan from Allahabad Bank for the recovery of which the Bank instituted a suit which ended in a decree for a sum of Rs. 3,47,04,232.85p. together with interest at the rate of 12% per annum. The said decree gave time of 60 days to the judgment debtor to pay the said amount with the stipulation that in default, the Bank would be at liberty to sell the property of the judgment debtor by public auction or by private contract. For the inability on the part of the judgment debtor to pay the decretal dues, the Bank put the decree in to execution. In the meantime, the Official

Liquidator having given an advertisement for sale of the factory and assets as a going concern with the obligation to the purchaser to re-employ the workers, the Bank preferred two Special leave applications before the Supreme Court of India against two such orders dated February 23 1998 and July 10, 1998 authorizing such sale.

2) Those two Special Leave Applications were disposed of by granting time of 10 weeks for concluding the sale with further observation that in cases the sale was not concluded within the said period, the order of the High Court directing sale of the company as a going concern would stand set aside and the Official Liquidator should proceed to sell the assets of the company, first, by selling the plant and machinery and other movable assets, and then, the other assets in such a manner that maximum price was fetched keeping the interest of the other creditors. The Supreme Court directed that out of the sale proceeds, first, the decree in favour of the Bank should be satisfied and then, the Official Liquidator should proceed to distribute the balance amount to the creditors in accordance with law.

3) It appears from record, that prior to the filing of the application u/s 466 of the Act out of which the present appeal arises, several similar applications were filed. The first of such applications was filed on June 29, 1992 by some of the contributories, which ended in dismissal. The second one was filed by one Sylvan Commercial Private Limited, which succeeded and one G.S. Surekha was permitted to run the company. The said order was, however, reversed on November 8, 1997 in appeal and the Official Liquidator again took possession of the factory. The application for special leave by Sylvan was dismissed by the Supreme Court of India. The third application was filed by the present appellant on April 29, 1999 which was dismissed on December 21, 1999 by a learned Single Judge of this Court and the appeal preferred against such order by the present the appellant was withdrawn with liberty given by the appellate court to the appellant to file a fresh application. The fourth application was filed by the appellant but the same was dismissed as there was no definite proposal for investment by the appellant for revival of the company.

4) While dismissing the fourth application mentioned above, the learned Single Judge gave liberty to the appellant to file a fresh application disclosing, 1) the entire liability of the company in liquidation, 2) amount of investment the appellant proposed to make, 3) viability statement, 4) projected balance sheet to consider the proposal of the appellant with regard to the repayment of liabilities.

5) Pursuant to such liberty given by the learned Single Judge, another application was filed by the appellant out of which the present appeal arises.

3. The learned Single Judge, as it appears from the order impugned, dismissed the application principally for the following reasons:

1) No provision was made in the scheme in respect of the source of money from which the appellant would be in a position to pay the dues of the Bank.

2) Although the appellant had not disclosed the source of making payment of Rs. 95 lakh in the scheme, it appeared that such scheme is further subject to the permission to be obtained from the State Government and other appropriate authorities for the change of user of the land from industrial use to the residential one.

3) There was no indication in the scheme as to the source from which the unsecured creditors would be paid the principal amount of their dues.

4) The appellant did not disclose the names of the unsecured creditors in the application.

5) The sole motive of the appellant was, as it appears from the scheme, to sell the factory land after converting those into various small plots for residential purposes in the disguise of revival of the company in liquidation.

4. Being dissatisfied, the unsuccessful applicant u/s 466 of the Act has come up with the present appeal.

5. During the pendency of the appeal, one Deccan Traders Private Limited, filed an application for being added as respondent in this appeal on the allegation that it has acquired the interest of the Allahabad Bank in the decree obtained against the company in liquidation by virtue of a registered instrument. This Court allowed such application subject to such objection that may be taken by the appellant at the time of hearing of the appeal.

6. Mr. Banerjee, the learned Advocate appearing on behalf of the appellant, has seriously disputed the finding of the learned Single Judge and has contended that the appellant holds 99% of the shares of Rishra Steels Ltd., the company in liquidation and being a 99% shareholder, it has a substantial stake in and is virtually, the owner of the assets and properties of the Company in Liquidation.

7. Mr. Banerjee points out that the company was originally sent to liquidation by reason of its failure to pay a sum of Rs. 1,91,252/- claimed by the respondent No. 3 (National Oil Company), the original petitioning creditor, in the winding-up petition. But subsequently, the original petitioner has not appeared to proceed with the winding-up petition before the learned Single Judge as well as before this Court.

8. Mr. Banerjee submits that the only opposition which has come against the offer of appellant to pay off the dues of the bank and the workers and any other unsecured creditors who may make any claim including the petitioning creditor is from one Sylvan Commercial Pvt. Ltd. (Respondent No. 10) (Sylvan) and persons or companies who have been put forward by the said Sylvan. According to Mr. Banerjee, Sylvan is a company which had proposed an earlier scheme for revival of the company in 1996-97. The only motive of Sylvan was and still is to grab the factory land of the company having an area of approximately 37 acres situated at Rishra, District- Hooghly. Mr. Banerjee submits that on the basis of an order passed by this Court, Sylvan obtained possession of the entire undertaking of the

company from the Official Liquidator and in the garb of cleaning the factory of the company, it has wrongfully and illegally removed the entire plant and machineries of the company. The possession of the factory land of the company was restored to the Official Liquidator after the order sanctioning the earlier scheme was set aside by a Division Bench of this Hon''ble Court and dismissal of the SLP from the order of the Division Bench.

9. Mr. Banerjee contends that the appellant has made the application being C.A. No. 580 of 2002 for the purpose of stay of the winding-up proceeding, inter alia, u/s 466 of the Companies Act, 1956. According to Mr. Banerjee, the appellant, as a contributory or a shareholder has the power to apply u/s 466 of the Companies Act, 1956 for stay of winding up and the Court can make an order staying the proceedings either altogether or for a limited one on terms and conditions as the Court thinks fit. Mr. Banerjee submits that Sections 443 and 446 of the Companies Act, 1956 also empowers the Court to stay a winding-up petition and to deal with all questions whatsoever which relate to or arise in the course of a winding up of the company and by virtue of the aforesaid provisions of the Companies Act, 1956, the Court has the power to retain control over the winding-up proceeding and to ensure the purpose for which the winding-up proceeding should be stayed.

10. According to Mr. Banerjee, the appellant is the only one who has taken interest in protecting the factory land and has spent a sum of Rs. 7,50,000/- for fencing of the said land pursuant to leave granted by an order of the Court dated 14th June, 2007 and has been spending a sum of Rs. 22,612/- a month towards security expenses for protection of the land since June, 2007. No other creditor has come forward for protection of the said land or to expend any money for the protection of the land. This, Mr. Banerjee contends, shows the speculative nature of all other alleged creditors.

11. Mr. Banerjee contends that the learned Single Judge while dismissing the application has not taken into consideration the fact that the Court has to ensure that interest of workers are to be protected in addition to the interest of all creditors. Mr. Banerjee points out that his client has entered into Memorandum of Understanding with workers on 29th April, 1999 and a further Memorandum of Understanding with Allahabad Bank who had a decree in its favour on 17th October, 2002. According to Mr. Banerjee, his client has proposed the scheme for payment to all creditors with feasibility report and fund flow statement. Mr. Banerjee contends that the creditors can only be interested in its dues from the company and cannot insist upon liquidation of the company. Mr. Banerjee submits that his client has expressed its willingness to make payment to the workers and to the bank (to Deccan if it is held to be otherwise entitled to such payment) if the scheme is sanctioned in terms of their agreement. This shows, according to Mr. Banerjee, the bona fide attempt on the part of ARC to make payment of the dues and to revive the company.

12. According to Mr. Banerjee, the Deccan as an assignee of Allahabad Bank

cannot claim any right which is contrary to the Memorandum of Understanding of 17th October, 2002. Deccan is bound by the terms of the Memorandum of Understanding of 17th October, 2002 as Deccan claimed to have stepped into the shoes of Allahabad Bank.

13. Mr. Banerjee further contends that the deed of assignment from Allahabad Bank to Deccan is illegal and bad for the following reasons:

i) The Memorandum of Understanding between Allahabad Bank and ARC was entered into on 17th October, 2002 and the Clauses-4 and 5 of Memorandum of Understanding recognize that time may be extended for obtaining sanction of the scheme. At the time of rejection of the application of ARC on 2nd December, 2005, the Allahabad Bank had supported the appellant which implies that the Memorandum of Understanding was extended beyond the period of four months from 17th October, 2002;

ii) The appeal was preferred on 8th February, 2006. During the pendency of appeal, according to Allahabad Bank, there was termination on 3rd May, 2007 and assignment on 2nd August, 2007. The appeal was admitted on 17th July, 2007, but bank did not mention anything about termination or any proposed assignment. Interim order was passed in appeal on 25th July, 2007;

iii) The assignment deed made and executed during the pendency of the appeal without leave of the Appellate Court, is mala fide. It appears that there were two assignment deeds on 2nd August, 2007 by which Allahabad Bank first assigns the debt to Calcutta Securities Private Limited for the same sum of Rs. 3.80 Crore and again Calcutta Securities Private Limited assigns by another deed of 2nd August, 2007 to Deccan Traders Private Limited. The assignment deeds are all drawn up by M/s. Sandip Agarwal & Co., Advocates who had been representing Sylvan in all proceedings.

iv) The consideration which has been shown to be paid by Calcutta Securities Private Limited in the first Deed of Assignment of 2nd August, 2007 is also on account of Deccan Traders Private Limited. It is not explained in the Deed of Assignment as to why there had to be two deeds on 2nd August, 2007.

v) The assignment by Allahabad Bank is illegal and bad as Allahabad Bank did not have the power to make any assignment under the Banking Regulation Act.

vi) The assignment is without notice to the appellant which has resulted in an unilateral change in contract between the appellant and Allahabad Bank, which could not have been done;

vii) Allahabad Bank has not disclosed as to why in August, 2007 it has purported to assign the debt at the same value of Rs. 3.80 Crore without informing the appellant.

viii) The Deed of Assignment acknowledges the existence of the Memorandum of Understanding of 17th October, 2002 between Allahabad Bank and the appellant

and as such, the Deccan is bound by the terms of the Memorandum of Understanding and should not be allowed to contend to the contrary. Deccan does not suffer any injustice as it has purchased the debt at Rs. 3.80 Crore with notice of the pending proceeding and the agreement of 17th October, 2002. It has taken a chance and should not be allowed to reap speculative benefit from the assignment.

14. Mr. Banerjee further contends that the earlier order of the Supreme Court dated 26th September, 2000 is not relevant for the present purpose on the ground that the said order was passed in execution proceedings initiated by the Allahabad Bank and the order has lost its force by reason of subsequent Memorandum of Understanding dated 17th October, 2002 entered into by the Allahabad Bank with the appellant by agreeing to accept Rs. 3.80 Crore in full and final satisfaction of its claim. Moreover, the order dated 26th September, 2000 of Supreme Court did not contemplate the situation of any scheme proposed by the appellant for revival of the company on the basis of the Memorandum of Understanding of 17th October, 2002.

15. Mr. Banerjee, therefore, prays for setting aside the order impugned and allowing the application filed by his client.

16. Mr. Kar, the learned Advocate appearing on behalf of the respondent No. 8 and Mr. Saha, the learned Advocate appearing on behalf of the respondent No. 10 have opposed the contentions of Mr. Banerjee. The learned Advocate appearing on behalf of the respondent Nos. 4 to 7 have opposed the appellant while some of the members of the respondent Nos. 5 and 6 have supported the appellant.

17. The only question that arises for determination in this appeal is whether the learned Single Judge was justified in rejecting the prayer of the alleged revival of the activities of the company in liquidation on the basis of the materials on record.

18. At this stage it would be apposite to refer to the following observations of the Supreme Court in the case of Meghal Homes Pvt. Ltd. v. Shree Niwas Girni K. K. Samiti and Ors. reported in AIR 2007 SC 3078 referred to by Mr. Kar, which should be followed by a Court before taking decision of staying the order of winding up for the purpose of examining the proposed scheme of revival:

We see no difficulty in reconciling the need to satisfy the requirements of both Sections 391 to 394A and Section 466 of the Companies Act while dealing with a Company which has been ordered to be wound up. In other words, we find no incongruity in looking into aspects of public interest, commercial morality and the bona fide intention to revive a company while considering whether a compromise or arrangement put forward in terms of Section 391 of the Companies Act should be accepted or not. We see no conflict in applying both the provisions and in harmoniously construing them and in finding that while the court will not sit in appeal over the commercial wisdom of the shareholders of a company, it will

certainly consider whether there is a genuine attempt to revive the company that has gone into liquidation and whether such revival is in public interest and conforms to commercial morality. We cannot understand the decision in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* (supra) as standing in the way of understanding the scope of the provisions of the Act in the above manner. We are therefore satisfied that the Company Court was bound to consider whether the liquidation was liable to be stayed for a period or permanently while advertent to the question whether the Scheme is one for revival of the company or that part of the business of the company which it is permissible to revive under the relevant laws or whether it is a ruse to dispose of the assets of the company by a private arrangement. If it comes to the latter conclusion, then it is the duty of the court in which the properties are vested on liquidation, to dispose of the properties, realize the assets and distribute the same in accordance with law.

19. Bearing in mind the aforesaid principles, we now propose to consider the scheme proposed by the appellant.

20. It is admitted that the company in liquidation was an industrial undertaking at the time of passing the order of winding up. In the proposed scheme, it has been admitted that the step taken in the past for revival of the industrial undertaking having failed, industrial undertaking of the company was not viable. Moreover, the plant and machinery of the company having been stolen, it is admitted in the scheme that commencement of manufacturing activities would entail massive capital investment, and there is no prospect of any person making such investment. It is stated therein that as the factory of the company is spread over 37 acres of land, the said land can be conveniently used for carrying on real estate business and it was therefore proposed to "revive and rehabilitate the company by carrying on real estate business" subject to the sanction of the company court.

21. It is indicated in the scheme that the Allahabad Bank is the only secured creditor of the Company and an agreement has been entered into with the said Bank for repayment of its dues. The number and particulars of unsecured creditors has not been indicated in the scheme, although on last occasion, similar application was dismissed by the Company Court on that ground with liberty to file fresh application disclosing the particulars of such unsecured creditors. In the scheme, there is no proposal of re-employment of any of the employees of the Company but the proposal is for payment of their dues within a specified period by treating them as terminated employees. It is further pointed out that the proposed scheme is subject to the approval of the state government and other appropriate authorities for change of user of the land from industrial purpose to residential purpose.

22. It is, therefore, apparent that the object of the scheme is not to revive the activities of the wound up company but it is a ruse to dispose of the assets of the company by a private arrangement and in such a situation, as pointed out by the

Apex Court in the case of Meghal Homes Private Ltd. (supra), it is the duty of the Court in which the properties are vested on liquidation, to dispose of the properties, realize the assets and distribute the same in accordance with law.

23. Therefore, without entering into the question whether the agreement of the appellant with the Allahabad Bank is still subsisting or whether the respondent No. 8 has taken a valid assignment from the Allahabad Bank, we feel no hesitation to conclude that the proposed scheme does not come within the purview of Section 466 of the Act justifying staying of the order of winding up of the company. Moreover, we find substance in the contention of Mr. Kar, the learned Advocate for the respondent No. 8, that without removing the lacuna pointed out by the company court while rejecting the similar application by disclosing the particular of the unsecured creditors, the appellant was not even entitled to maintain another application.

24. We, therefore, hold that the application u/s 466 of the Act was not at all maintainable at the instance of the appellant without removing the defects pointed out by the learned Company Court while rejecting the earlier application and at the same time, even on merit, the same deserves dismissal as the object of the scheme is to distribute the assets of the wound up company by private arrangement and thus, it is for the Official Liquidator to immediately take step for sale of the assets.

25. The learned Single Judge, therefore, rightly dismissed the application and we find no reason to interfere with the order impugned. The appeal is, thus, devoid of any merit and is dismissed with costs.

26. I agree.