
(2010) 10 DEL CK 0153

In the Delhi High Court

Case No : Company Application No. 1820 of 2010 in Company Application (M)
No. 135 of 2010

Asia Satellite Telecommunications Co. Ltd.

APPELLANT

Vs

Dish TV India Ltd. and Others

RESPONDENT

Date of Decision : 08-10-2010

Acts Referred:

Companies (Court) Rules, 1959 — Rule 67, 68, 73, 74, 76
Companies Act, 1956 — Section 391, 392, 393, 394

Citation : (2011) 100 CLA 488 : (2011) 161 CompCas 96 : (2010) 120 DRJ
135 : (2011) 105 SCL 25

Hon'ble Judges : Sudershan Kumar Misra, J

Bench : Single Bench

Advocate : Vibhu Bhakru, Pawan Sharma, Anuradha, Vijaya Lakshmi Menon, Ekta, Mehak Khanna, Vrinda and Madhumeet Chauhan, for the Appellant; P.V. Kapoor Suman Doval, Sumit Babbar, A. Anand and Ekta Kalra Sikri, for the Respondent

Final Decision : Dismissed

Judgement

Sudershan Kumar Misra, J.—This application has been moved by M/s Asia Satellite Telecommunications Co. Ltd., raising objections to a composite scheme of amalgamation and arrangement propounded by the respondents, namely, M/s Dish TV India Limited; M/s Integrated Subscriber Management Services Limited; and M/s Agrani Satellite Services Limited, all of whom have moved a first motion application under Sections 391 - 394 of the Companies Act, being CA(M) No. 135/2010, in connection with the said scheme propounded by them.

2. On 4th August, 2010, when the first motion application was taken up for preliminary hearing, counsel for the applicant/objector appeared and stated that he wish to be heard with regard to the relief being sought by the respondents. He further stated that he be granted an adjournment to satisfy this Court about his locus standi regarding the obligation of this Court to hear him on behalf of his client, who wishes to raise certain objections to the grant of relief at this stage

itself, and that this Court was obligated to give him that hearing. He also prayed for an adjournment since he stated that he was not fully prepared to present his submissions on that date itself. This application raising the said objections had been filed on 3rd August, 2010, but were lying under objections in the Registry when the matter was heard on 4th August, 2010.

3. By this application, the objector has alleged that the creditors of the demerged company are likely to suffer because substantial assets are sought to be transferred under the Scheme, as a result of which, the creditors of the demerged company i.e. Dish TV India Ltd., will be unable to recover their debts. It is also alleged that a petition for winding up of the demerged company has also been filed by the objector/applicant, which is pending hearing.

4. Before the matter could be heard, the respondent companies moved another application being Co. Appln. No. 1542/2010 contending that the applicant/objector, who was reflected in the list of unsecured creditors filed by the demerged company, along with the Scheme propounded, showing an outstanding amount of Rs. 2,36,39,254 due to the objector herein, has since been paid and, therefore, the demerged company does not wish to show the said company in its list of unsecured creditors. That application was allowed on 20th August, 2010 when the demerged company was permitted to place a fresh list of unsecured creditors of the demerged company on record after removing the name of the applicant/objector, M/s Asia Satellite Telecommunications Co. Ltd., from that list. However, arguments with regard to the objector's claim to be heard at this stage on the instant application were nevertheless addressed by the applicant.

5. In support of his right to be heard at this stage itself, counsel for the objector relies on the judgment of the Bombay High Court in *In Re: Colaba Land and Mill Co. Ltd* CP. No. 165 of 1975, decided on 27th January, 1976, to support the proposition that merely because Rule 67 of the Companies (Court) Rules, 1959 makes a provision for an ex-parte application, it cannot debar a party interested in the action from placing its views before the Court on whether the proposed order should or should not be made. Reliance was also placed by the objector on *In Re: In Re: Cash and Carry Wholesale Traders Private Ltd., .*

6. Rule 67 and 68 of the Companies (Court) Rules, 1959 are as under:

67. Summons for directions to convene a meeting.- An application u/s 391(1) for an order convening a meeting of creditors and/ or members or any class of them shall be by a Judge's summons supported by an affidavit. A copy of the proposed compromise or arrangement shall be annexed to the affidavit as an exhibit thereto. Save as provided in Rule 68 hereunder, the summons shall be moved ex parte. The summons shall be in Form No. 33, and the affidavit in support thereof in Form No. 34.

68. Service on company Where the company is not the applicant, a copy of the summons and of the affidavit shall be served on the company, or, where the company is being wound up ,on its liquidator, not less than 14 days before the

date fixed for the hearing of the summons.

7. Counsel for the demerged, transferor and resulting companies, i.e. the respondents herein, relied on *Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another*, and paragraphs 5 to 8 thereof in particular, to support the contention that the essence of Rule 67 is that there is no requirement, at the first motion stage, for the issuance of any notice to any party by the Court for the purpose of issuing directions to convene the meetings.

8. Counsel for the objector does not dispute the proposition that the first motion application is to be moved *ex parte* and that there is no requirement to issue notice as per the Companies (Court) Rules, 1959. He however states that, nevertheless, the judgment of the Supreme Court in *Chembra Orchard's* case (*supra*) does not hold that even if someone were to approach the Company Court of his own accord, he has no right to be heard at the stage of the first motion application itself, and therefore, his client should be given a hearing and his objections to the Scheme propounded be heard and decided at this stage itself.

9. It is appropriate to reproduce the Apex Court's observations in the aforementioned case of *Chembra Orchard's* case (*supra*), at page 1282, as under;

If hearing is required to be given to contributors, creditors and share-holders, then the entire scheme of Section 391 (which is a Code by itself) would become unworkable. Further, when Rule 67 categorically states that Summons for Directions shall be moved *ex parte*, the question of prejudice or rule of natural justice does not come into play. However, there is a rationale for stating that the Summons shall be moved *ex parte* and that rationale is that it is an Application for an Order for Meeting as a preliminary step at the threshold stage and at that stage it is not necessary for the Company to give notice of hearing to the creditors, members and share-holders (see: *Palmer's Company Law*). Further, if one examines Rule 67 in the context of Rule 73, one finds that after Summons for Direction are issued as and when the meeting is ordered to be convened, the notice of the meeting is required to be given to the creditors and/or members or such other classes enumerated in Rule 73. Similarly, under Rule 74 advertisement of the notice of meeting is also required to be published in such newspapers and in such manner as the Judge may direct. This is to be supported by affidavit of service under Rule 76.

10. An objector who wants to be heard stands before a Court as a result of one of two possible circumstances. One circumstance is that he comes to the Court pursuant to a notice issued by the Court. The second is that he comes and stands before the Court on his own. In effect, the issue before this Court is whether a hearing should be granted to a party at the stage when the first motion application is being considered, regardless of how that party comes to stand before the Court. Counsel for the applicant seeks to create a distinction between the granting of a hearing consequent upon a notice being issued by a

Court for that purpose, and the granting of a hearing by a Court because that party happens to appear on its own before that Court at the first motion stage, without notice having been issued to it. To my mind, this distinction cannot be drawn between the two aforementioned situations since the outcome, or relevant factor, with which we are concerned is, in effect, the same, i.e. the granting of a hearing to that party.

11. In Chembra Orchard's case (*supra*), the Supreme Court has made certain observations about the consequence of granting a hearing at the stage of the first motion application. It has held that if Courts began to grant hearing at the first motion stage, Section 391, which is a Code in itself, would become unworkable. It has given reasons and the rationale why the right to a preliminary hearing is not made available to any other party. This is because the scheme of Section 391 and the Rules reasonably protect the interest of any party who may be interested in the proceedings, and any such party would have sufficient opportunity to enlighten the Court as to the true state of affairs before it proceeds to sanction the Scheme at the stage of the second motion.

12. Generally speaking, after the first motion application is allowed, certain interested parties such as shareholders and creditors are given an opportunity to vote for or against the Scheme at meetings which are convened on the Court's directions. The Chairpersons of these meetings are required to prepare reports of those meetings and place those reports before the Company Court. However, it is still open to any party, including any creditor, who may or may not have been present at the meeting or may or may not have been given an opportunity to be heard at the meeting, to voice his objection against the proposed Scheme after citations calling for objections are published in newspapers. If an objecting party persuades the Court, the proposed Scheme will not survive the second motion stage. With this framework firmly in place, it cannot be said that a party or a creditor is prejudiced by any steps that were taken at the first motion stage. In this case, the objector is, in effect, seeking a hearing as if these proceedings were at the second motion stage and as if all antecedent steps necessary, after the passing of orders on the first motion application, and before the second motion can be considered by the Court, were successfully completed.

13. The issue before this Court is whether it is obliged to hear any objector at this stage. However, the statute and the Rules framed thereunder do not envisage such a hearing at this stage. That is what the Supreme Court has also said in Chembra Orchard's case (*supra*). The reason being that any person who wishes it, will be given a hearing at the stage of the second motion. Therefore, if the Company Court is not obliged to hear a party at the first motion stage, then regardless of how that party stands before the Court, the question of granting that party a hearing does not arise at all. No authority was produced by counsel for the applicant/objector which would enable him to intervene in these proceedings. He was unable to show that, although, admittedly, as held by the Supreme Court in Chembra Orchard's case (*supra*), if the Court were to issue

notice and grant a hearing at the first motion stage, it would render Section 391 unworkable, nevertheless, if a hearing is granted to a party who comes to the court on its own at that stage, Section 391 would not be rendered unworkable.

14. In Chembra Orchard's case (supra), it has been held that Section 391(1) is unique and that there is no obligation for the Company Court to hear anybody at the first motion stage because no prejudice will be caused by not hearing them, for the reason that before any effect is given to any outcome which is likely to affect such parties, they will get a chance to be heard. The legal basis for the universal rule that no matter be heard without previous notice to the other party is that the latter may be adversely affected by the outcome without being afforded an opportunity of being heard before that outcome is arrived at. It is undisputed that every motion with regard to a proposed Scheme u/s 391 can only be sanctioned by the Company Court after the second motion petition is heard, with adequate opportunity to all parties likely to be affected thereby to be heard. Consequently, the requirements of the aforesaid universal rule stand satisfied.

15. Reliance by the objector on In re: Cash and Carry Wholesale Traders Pvt. Ltd. (supra) is unfounded, since that decision relates to Rule 68 of the Companies (Court) Rules, 1959, and not Rule 67, which is the relevant provision and was also directly considered by the Supreme Court in Chembra Orchard's case (supra). I also find myself in respectful disagreement with the ratio in Colaba Land and Mill Co. Ltd. CP. No. 165 of 1975, decided on 27th January, 1976, by the Bombay High Court, for the reason that while the said judgment proceeds on the undisputed universal obligation of courts to hear the side likely to be affected by the outcome of the proceedings; it fails to notice that even if such an opportunity is denied at the first motion stage, no prejudice can ensue since the unique scheme of the Companies Act provides the necessary safeguards while prescribing a complete code for Amalgamations etc. u/s 391 thereof, and any effort to import procedural considerations applied generally elsewhere would prove deleterious to the Scheme of the Act and render it unworkable. Also, in my view, the matter has been set at rest by the Supreme Court in Chembra Orchard's case (supra).

16. To my mind, although the Supreme Court's observations in Chembra Orchard's case (supra), reproduced above, have been made while examining the question as to whether or not there is an obligation on the part of the Company Court to itself issue notices to creditors and shareholders at the first motion stage, for the reasons stated above, in my view, they apply with equal force to the present situation also. For all the above reasons, the applicant's plea for being heard is rejected and the application on behalf of M/s Asia Satellite Telecommunications Co. Ltd. is dismissed as not maintainable at this stage, without going into the merits of the objections raised therein.