

(1998) 12 CAL CK 0010

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction In appeal from and order passed in its
Original Jurisdiction G.A. No. 723 of 1997, A.P.O.T. No. 718 of 1997

Bank of India

APPELLANT

Vs

Official Liquidator and Others

RESPONDENT

Date of Decision : 14-12-1998

Acts Referred:

Companies Act, 1956 — Section 235, 251, 391(1), 391(2), 392
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20

Citation : (1999) 1 CALLT 322

Hon'ble Judges : Ruma Pal, J; Basudeva Panigrahi, J

Bench : Division Bench

Judgement

R. Pal, J.—Shree Bajrang Electric Steel Company Private Limited (referred to as the Company) was a sick industrial company under the Sick Industrial Company (Special Provisions) Act, 1985. On 7th September, 1992 the Board of Industrial Finance & Reconstruction (referred to as BIFR) having considered the facts, came to the conclusion that it was Just and equitable that the company should be wound up. Its decision was sent to the High Court u/s 20 of the 1985 Act. An appeal was preferred before the appellate authority for Industrial Finance & Reconstruction, New Delhi (referred to as the AAIFR). The AAIFR dismissed the appeal and forwarded its recommendation to the Calcutta High Court by the order dated 4th February, 1994 confirming the order of the BIFR. The SLP filed was dismissed by the Supreme Court on 21st April, 1994 but leave was given to the parties to raise all Issues as were available to them before the High Court.

2. A writ application was also filed by the company challenging the order of the AAIFR. No order of stay was obtained. The writ application is pending. When the winding up matter came up before the High Court, the court by an order dated 4th January, 1995 directed winding up of the company. The Official Liquidator was directed to take possession. The appeal preferred by the company was dismissed on 23rd August, 1995 by the Division Bench. The SLP was also dismissed by the Supreme Court on 9th February, 1996.

3. By an order dated 2nd July, 1996 the company was directed to be sold as a going concern.

4. An application was then made by the respondent No. 2 proposing a scheme for revival of the company u/s 391 and 392 of the Companies Act, 1956 and for stay of the winding up. No notice of the meeting was served on the secured creditors of the company or on Sanchaita Investments which has got a statutory claim against the company. According to the respondents no notice was required to be given either to the appellant bank which is the secured creditor or Sanchaita Investment as they were not within the classes of creditors contemplated for the purpose of approving the scheme or arrangement or compromise.

5. After the meeting was held of the unsecured creditors an application was made before the High Court for approval of the scheme. The scheme contain clauses which affect, inter alia, the secured creditors as well as Sanchaita. Both Sanchaita and the appellant bank appeared before the learned single Judge and submitted that the scheme should not be approved as it had never been placed for consideration at any meeting of the secured creditors and no notice was given to them at any stage. It was also submitted that in any event the scheme was unfeasible.

6. The learned Judge, however, rejected the submissions of the appellant and Sanchaita Investment and modified certain clauses in the scheme which pertained to the secured creditors and Sanchaita Investment. For example, the scheme as proposed provided for payment of the bank's dues by instalments with simple Interest at the rate of 6% per annum. The learned Judge by the order dated 13th November, 1997 granted simple interest at the rate of 12% per annum. The scheme was sanctioned by the learned single Judge on the ground that if the company was sold there was little likelihood of the creditors both secured and unsecured, statutory creditors and workmen, receiving more than a small portion of their dues but if the scheme were accepted with some modifications and an attempt was made to revive the company it may ultimately prove to be more beneficial to all the creditors and the workmen of the company.

7. This appeal was preferred by the bank. Directions were given for filing affidavits and an affidavit in opposition was filed. A cross objection was also filed by the respondent No. 2 challenging the modification of the rate of Interest. Incidentally, the bank had filed a suit against the company (T.C. Suit No. 5 of 1985). The suit was decreed on 5th January, 1990 and the rate of interest awarded was 18% per annum from January, 1981.

8. The short question before us is whether the bank and other creditors who were not parties to any meeting could be bound by the terms of the scheme and whether the scheme which affects such creditors could at all be sanctioned by the court.

9. u/s 391 a compromise or arrangement may be proposed between a company

and its creditors or any class of them or between a company and Its members or any class of them. That the secured creditors and statutory creditors form a separate class cannot be disputed upon an application of the company or of any creditor or member of the company or of the liquidator, the court can order a meeting of the creditors or class of creditors. It is only when at such meeting 3/4th in value of the creditors or class or creditors agree to the compromise or arrangement that the compromise or arrangement will be binding on these creditors or class of creditors provided that the scheme is sanctioned by the court.

10. It would follow that the scheme will be binding only on those creditors in respect of whom a meeting was directed to be held. A meeting was held and the scheme approved by creditors whose claims were 3/4 in value of the total indebtedness amongst them. The insistence on the value of the debt, Indicates that the view of those with the highest stakes would prevail.

11. In this case it is not clear whether the court directed a meeting of the secured creditors. But it is not in dispute that no meeting of the secured creditors of the company interims of section 391(2) was held, nor was any notice given to the secured creditors Including the appellant Bank and Sanchaita of any meeting. If the Bank had received such notice and attended and opposed the scheme, it is doubtful whether the creditors approving the scheme should have the necessary percentage in value to pass the scheme. As matters stand the scheme having been approved only by unsecured creditors could not bind the secured creditors or indeed any other class of creditors.

12. It also follows that the court cannot entertain or sanction a scheme which affects a class of creditors unless that class of creditors has approved the scheme according to the provisions of section 391(1). It is not material that the Bank and Sanchaita Investment appeared before the court when the court was sanctioning the scheme and were heard on merits. The statute precludes the court from entertaining the scheme at all unless the preconditions prescribed are fulfilled.

13. Furthermore, merely because creditors approve the scheme does not mean the court holds no further Inquiry Into the matter when sanctioning the scheme the court in terms of proviso to sub-section (2) of section 391 is bound to satisfy Itself that :

"the company or any other person by whom an application has been made under sub-section (1) has disclosed to the court, by affidavit or other wise, all materials facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any Investigation proceedings in relation to the company u/s 235 to 251, and the like."

14. No such finding is recorded in the Judgment and order under appeal.

15. The court must also Independently assess the validity of the scheme. The law

in our view has been correctly stated by a learned single judge in the case of M.P. Agarwalla v. A. Chatter Singh : 85 CWN 557 when after referring extensively to the authorities the learned Judge said :

"The discretion for stay u/s 466 can only be exercised by the court (1) if the court is satisfied on the materials before it that the application is bonafide (2) the court would be guided by the principles and definitely come to the finding that the principles are applicable to the facts of a particular case, (3) mere consent of all the creditors for stay of winding up is not enough, (4) that offer to pay in full or make satisfactory provisions for the payment of the creditors is not enough, (5) court will consider the Interest of commercial morality and not merely the wishes of the creditors and contributories, (6) court will refuse an order if there is evidence of misfeasance or of irregularity demanding investigation, (7) a firm and accepted proposal for satisfying all the creditors must be before the court with material particulars, (8) the Jurisdiction for stay can be used only to allow in proper circumstances a resumption of the business of the company, (9) the court is to consider whether the proposal for revival of the company is for the benefit of the creditor but also whether the stay will be conducive or detrimental to commercial morality and to the Interest of the public at large, (10) before making any order court must see whether the Ex-directors have complied with their statutory duties as to giving Information to the Official Liquidator by furnishing the statement of affairs, (11) and any other relevant fact which the court thinks fit to be considered for granting or not granting the stay having regard to the particular facts of a particular case."

16. There is no finding as to the viability of the scheme at all by the learned single Judge.

17. The order under appeal therefore cannot be sustained. There would be no useful purpose served in keeping the appeal alive which is accordingly treated as on the days list and the stay application and the appeal disposed of by setting aside the order under appeal. This however would not preclude the trial court from reconsidering the scheme as far as the unsecured creditors are concerned or also ascertaining the wishes of the other classes of creditors of the company if the prayer is duly made before him.

18. In view of our finding that the scheme could not validly include clauses affecting the right of classes of creditors in respect of whom no notice was given and no meeting was held, the cross objection filed by the respondent No. 2 cannot survive and accordingly his cross objection is dismissed.

The appeal itself is allowed without any order as to costs.

19. Appeal allowed.