
(2003) 12 BOM CK 0064

In the Bombay High Court

Case No : C.A. No. 557 of 2003 in C.A. (Ldg.) 880 of 2003 in C.P. No. 387 of 2003

Central Bank of India

APPELLANT

Vs

Roofit Industries Limited

RESPONDENT

Date of Decision : 17-12-2003

Acts Referred:

Companies (Court) Rules, 1959 — Rule 71
Companies Act, 1956 — Section 391(6)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2004) 2 ALLMR 569 : (2004) 4 BC 363 : (2004) 3 BomCR 712 : (2004) 1 ComplJ 473

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : V.V. Tulzapurkar, Sanjay Kothari, D.L. Amin and Avinash Joshi, for the Appellant; P.R. Diwan, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—This application has been moved by the Central Bank of India with a prayer that the court vacate an ex parte order dated 15 October, 2003 passed on an application for the grant of a stay u/s 391(6) of the Companies Act 1956 ("the Act"). On 15 October, 2003, on an application made by Roofit Industries Ltd., the respondent herein, stating that the company was proposing a scheme of compromise/arrangement with its secured and unsecured creditors, an order was passed in terms of minutes. The minutes which were tendered before the court, inter alia, provided that six months thereafter, the company would hold a meeting of the secured and unsecured creditors for considering the scheme of compromise or arrangement. On the same date, an order was prayed in terms of prayer Clauses (a) and (o) of Company Application (Ldg.) No. 880 of 2003 which was in the following terms :

(a) That till the sanction of the scheme/arrangement, this Hon'ble Court be pleased to pass an order staying all legal proceedings including proceedings

under the Securitisation of Financial Assets and Enforcement of Security Interest Act, the commencement or continuation of suits, (including the suits before the Debt Recovery Tribunal, or the Consumer Courts, arbitration suits), and/or any interim proceedings therein, arbitration proceedings, winding up proceedings, criminal proceedings u/s 138 of the Negotiable Instruments Act, 1881 and other criminal cases relating to the non-payment of the dues to the various creditors and classes of creditors (and/or actions taken by the Economic Offences Wing of the Criminal Branch of Greater Bombay Police Department).

(o) That this Hon"ble Court be pleased to direct the Economic Offences Wing of the Criminal Branch of Greater Bombay Police Department to invest in a fixed deposit with any nationalised bank the monies that have been paid and the monies that will be paid to them from time to time by the said company. (bracketed portion excluded)

2. The application was moved ex parte without notice either to the secured creditors or to the banker of the company. Rule 71 of the Companies (Court) Rules, 1959 expressly postulates that though an application u/s 391(6) for the stay of the commencement or continuation of proceedings against the company may be moved by Judge"s summons ex parte, notice of the application shall be given to the petitioner where a petition for winding up of the company is pending. In the present case, the admitted position is that such a petition was, in fact, pending before this court. Despite this, no notice was given.

3. The order dated 15 October, 2003 records that counsel appearing on behalf of the applicant (the respondent herein) stated that the company was depositing Rs. 20 lakh every month towards liability with regard to "various creditors" with the Economic Offences Wing of the Crime Branch of Greater Bombay Police Department ; and the company would continue to do so. It was on the basis of the aforesaid statement that an order came to be passed in terms of prayer Clauses (a) and (o) of the company application. The grant of relief in terms of prayer Clause (o) is not in contest, because it requires investment of the monies deposited with the Police Department in a nationalised bank. However, as a result of the relief sought and granted in terms of prayer Clause (a) -- all proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2000, those before the Debt Recovery Tribunal under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, before the Consumer Courts, arbitration proceedings, winding up proceedings and proceedings u/s 138 of the Negotiable Instruments Act, 1881 all over the country have been stayed.

4. From the facts which have emerged before the court, the statement made before the court on 15 October, 2003 that an amount of Rs. 20 lakh was being deposited to meet the liability towards "various creditors" -- was incorrect since the aforesaid amount was being deposited exclusively to meet the outstanding dues payable by the company to the holders of fixed deposits. This is now an admitted position and is fairly not disputed by counsel for the company.

5. It has been stated in the company application that various proceedings are pending against the company all over the country. There are cases pending against the company u/s 138 of the Negotiable Instruments Act in various courts in Mumbai. Cases are pending before the Co-operative Courts and the Labour Court. There are cases which are in the process of being investigated by the police. Other cases are pending in Ahmedabad, Calcutta, Chennai, Hyderabad and in the State of Uttar Pradesh. Numerous holders of fixed deposits have filed complaints in for a constituted under the Consumer Protection Act, 1986 in different parts of the country including Mumbai, Gujarat, Calcutta, Hyderabad, Rajasthan and Delhi. Several arbitration proceedings are also pending against the company. All these have been stayed on the basis of a patently incorrect and untrue representation made before the court that an amount of Rs. 20 lakh was being deposited with the police to meet the obligations towards various creditors.

6. The Central Bank of India who has moved the court with the company application for vacating the ex parte order has outstandings in the amount of Rs. 28.02 crore as on 21 October, 2003. Besides the Central Bank, which has appeared before this court, Karnataka Bank which is the lead bank in the consortium of lenders, has also appeared before this court to support the application of the Central Bank. The Bank of India has also appeared in the court to support the Central Bank. From the affidavit in support which has been filed with the company application, it emerges that the company has loan outstandings of Rs. 236.86 crore to banks and financial institutions. The Central Bank has submitted before the court that the scheme which has been propounded u/s 391 is entirely vague and bereft of any material particulars. Under the terms of the scheme, for instance, outstanding term loans of Rs. 1.26 crore are sought to be converted, 50 per cent into interest bearing loans and the balance into non-interest bearing loans. The scheme proposes that repayment will commence in October, 2004 and continue up to March, 2018. The interest bearing loan portion will carry interest at the rate of 4 per cent per annum. Similar provision has been made for the payment of dues in respect of working capital loans which are said to be in the amount of Rs. 206 crore. All the banks who are before the court are unanimous in submitting that the scheme is completely lacking in bona fides, and none of the banks has consented to the said scheme.

7. A perusal of the affidavit in support of the company application that was filed by the respondent in support of the application for stay u/s 391(6) would show that almost the entire affidavit was devoted to the difficulties which were faced by the company and the manner in which the company proposes to infuse funds in future. Thereafter, there is a statement that the company has introduced a scheme of compromise/arrangement. In support of the application for the grant of a stay u/s 391(6), there is only a bald averment that "in the circumstances aforesaid -- it is just fair and proper and in the interest of all concerned that pending the sanction of the scheme for compromise, this court to stay all the proceedings against the company".

8. An order u/s 391(6) cannot be sought as a matter of course. The court, undoubtedly, has a wide discretion to pass an order, at any time after an application has been made to it u/s 391(6), staying the commencement or continuation of suits or proceedings against the company. The court is empowered to grant such relief as it thinks fit until the application is finally disposed of. An order of stay u/s 391(6) has serious ramifications for creditors who have outstanding dues against the company, and the institution or continuation of whose proceedings are brought to a halt by the grant of a stay. It is a settled principle of law that an order of stay u/s 391(6) is not a matter of course, and the court should have due regard to the conduct of the applicant, the averments in support of the application and to the question as to whether there is a bona fide attempt to pay the outstanding dues. The court would be justified in declining to pass orders to stay in a case where the attempt is only to gain time or to defeat the genuine entitlements of the creditors. For the reasons already recorded, that appears to be so in the present case. Even the meeting of the creditors that was proposed was six months after the order of the court. In the meantime, all proceedings, civil and criminal are sought to be halted. There is a complete want of bona fides on the part of the company. The position in law is elucidated in the judgment of Mr. Justice R.L. Agarwal speaking for this court in *In Re: Sakamari Steel and Alloys Ltd.*, and in a judgment of Mr. Justice Y.K. Sabharwal (as the learned Judge then was) in *Kamal Plastic Industries v Roxy Enterprise (P) Ltd.* (1991) 3 Comp LJ 183 (Del): (1991) 72 Comp Cas 61 (Del).

9. In the present case, while moving the court for grant of a stay u/s 391(6) -- there was a passing reference in paragraph 9 of the affidavit in support to the fact that the reference which had been made by the company u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 "did not succeed before BIFR" and that the appeal which has been filed before the AAIFR is pending. The order of the BIFR has not been annexed. At this stage, it is not necessary to comment upon the merits of the proceedings before the AAIFR since the appeal is pending. However, the order of the BIFR which has now been placed on the record by the Central Bank discloses that the BIFR has found that the management of the company has siphoned away its funds and the net worth would have become positive if excess discounts and concessions and unjustified writing off of bad debts were not to be allowed. The BIFR observed, thus :

"To conclude, the net worth of the company of Rs. 56.78 crore comprising paid-up capital of Rs. 27.94 crore and free reserves of Rs. 28.84 crore was reportedly fully eroded by accumulated losses of Rs. 96.78 crore as on 30 June, 2002. However, as discussed above, losses aggregating Rs. 105.64 crore on account of excess discounts and concessions (Rs. 65.85 crore), unjustified writing off of bad and doubtful debts (Rs. 8.17 crore), unjustified increase in advertisement expenses (Rs. 4.81 crore), unexplained writing off of capital works-in-progress (Rs. 1.23 crore), excess consumption of raw material (Rs. 21.72 crore) and interest on advance extended to related parties (Rs. 4.36 crores) cannot be allowed and required to be deducted from the total loss figure of Rs. 96.73 crore.

Accordingly, the net worth of the company would be positive by Rs. 65.69 crore as on 30th June, 2002."

9.1 However, it is not necessary or appropriate for this court to delve further into those proceedings since the appeal is pending. An applicant who seeks relief u/s 391(6) is under a duty to make a fair disclosure. This has not been done, while moving an application u/s 391(6) -- the company was duty bound to produce before the court all relevant material which has not been produced in the present case. In my view, it will neither be appropriate nor in the interest of justice for this court, in exercise of its powers u/s 391(6), to restrain the secured creditors including banks and financial institutions from taking recourse to the proceedings which have been instituted before the Debt Recovery Tribunals under the Recovery of Debts Due to Banks and Financial Institutions Act. This is particularly so in view of the law laid down by the Supreme Court in Allahabad Bank Vs. Canara Bank and Another, which recognised the exclusive jurisdiction of the Debt Recovery Tribunals in the matter of adjudication under the Act and in the execution of orders passed under the provisions of the Act. Moreover, the stay which was sought before the court, and which has been granted also relates to other criminal proceedings instituted by creditors, inter alia, under the provisions of Section 138 of the Negotiable Instruments Act, 1881. No such stay, in my view, can be granted having regard to the conduct of the company, which has emerged before the court.

10. In the circumstances, I am of the view that the company application has to be allowed. The company application is accordingly, allowed and is made absolute in terms of prayer Clause (a). The order dated 15 October, 2003 passed u/s 391(6) of the Act granting relief in terms of prayer (a) shall accordingly, be recalled.

11. Stay of this order is refused.