
(2010) 03 AHC CK 0226
In the Allahabad High Court

DBS Bank Limited

APPELLANT

Vs

Alps Industries Limited

RESPONDENT

Date of Decision : 10-03-2010

Acts Referred:

COMPANIES ACT, 1956 — Section 391, 394

Citation : (2011) 105 SCL 354

Hon'ble Judges : Amitava Lala, Acting C.J.; Ashok Srivastava, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Amitava Lala, A.C.J.

1. This special appeal has been shown as defective because of non-filing of the certified copy of the judgment and order passed by the learned Single Judge. However, since the same has been placed before the Court, the defect is cured and the judgment and order, which is being pronounced herein below, will be issued by giving regular number.

2. The appeal has been filed challenging the order passed by the learned Single Judge dated 8th February, 2010 sitting in company jurisdiction under Judge's summons with regard to the amalgamation under Sections 391 and 394 of the Companies Act, 1956 (hereinafter referred to as "the Act"). The appellant before us is a Bank (being MTM Creditor), which was not present in the Court before the learned Single Judge when the order impugned was passed. The grievance of the appellant is that the learned Judge sitting in Company jurisdiction was pleased to direct to issue notices to all the creditors individually without making a provision for separate meeting for separate categories of creditors. The secured, the unsecured and the MTM creditors have been directed to be served notices and they will be heard in a meeting, which is reflected from the order of the learned Single Judge, therefore, the same is in non-application of mind.

3. Mr. Navin Sinha, learned Senior Counsel appearing on behalf of the appellant -

Bank, has relied upon various judgments of different High Courts as well as of the Supreme Court. On the basis of the probative value of the judgment of a learned Single Judge of the Delhi High Court reported in (2005) 1 Comp LJ 369 (Del) In Re: Siel Ltd., Siel Sugar Ltd., Siel Holdings Ltd., and Shivajimarg Properties Ltd., and on the basis of another judgment of a learned Single Judge of the Bombay High Court reported in (51) Company Cases 266 In Re: Sakamari Steel & Alloys Ltd., Mr. Sinha has submitted that there should be different meetings for different categories of creditors. Ultimately, he relied upon a judgment of the Supreme Court reported in Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another, Mr. Sinha further submitted before us that hearing before the learned Single Judge sitting in Company jurisdiction in making an order for compromise or amalgamation u/s 391(1) of the Act is not a signpost but a check post whereas it is duty of the Court to examine the genuineness and bona fide of the Scheme itself. According to him, Section 391(1) of the Act gives an indication about the creditors and class of creditors, therefore, it is pre-requisite that the cases of class of creditors will be different which cannot be determined in a meeting in respect of all types of creditors. He has also referred to Rule 69(1) of the Companies (Court) Rules, 1959 (hereinafter referred to as "the Rules"), which also speaks determination of class or classes of creditors and/or of members whose meeting or meetings have to be held for considering the proposed compromise or arrangement.

4. Therefore, before calling the other side to make its submission, we have to examine the Scheme of Compromise (hereinafter referred to as "the Scheme"). We have thoroughly gone through the Scheme and found that Parts "C" and "D" are very much specific about the determination of the debt position of the Company as on 31.01.2009, debt profile of the Company with MTM creditors upto 30.06.2009 and restructuring proposal/term loans/derivative losses etc. Therefore, we cannot hold and say that the Scheme is so bad that a Court sitting in Company jurisdiction will not direct the Company to proceed with the compromise or amalgamation with regard to such Scheme. It will be presupposed that the nature of the Scheme speaks itself that the Court presumably understood the Scheme and ambit and then only passed the order and not mechanically. In any view, we have called upon Mr. Shashi Nandan, learned Senior Counsel appearing on behalf of the respondent-Company to explain the position. In turn, Mr. Shashi Nandan, has contended before us that even the judgments, which have been relied on by Mr. Sinha, speak about the stages of proceedings. Firstly, a Judge's summons will be drawn and it will be proceeded before the Court for the purpose of referring the matter for compromise or amalgamation by holding meeting of the creditors and/or shareholders and at the time of confirmation, the Court will consider all pros and cons independently to come to an appropriate conclusion in respect of the proposed Scheme. This is not the stage where everything is to be prejudged. Mr. Nandan has drawn our attention to other parts of the judgment of the Supreme Court in the case of Chembra Orchard Produce Ltd. (supra) and said that the

only scope of the Supreme Court judgment was to consider as to whether convening of meeting of creditors/members to consider the Scheme of amalgamation is required to be heard and decided ex parte as per Rule 69 of the Rules? He has further drawn our attention to paragraph 8 of such judgment, which is as follows:

8. If one reads Rule 67 with Form 33 and Form 34, one finds that essentially the court while issuing such summons is required to apply its mind to checklist indicated in Rule 69 and it needs to be prima facie satisfied about the genuineness and bona fides of the application. One aspect needs to be highlighted. Hearing of the motion ex parte does not mean that the court had not to apply its mind or that the court is not required prima facie to be satisfied about the genuineness or bona fides. However, it is a preliminary step. One more aspect needs to be mentioned. If hearing is required to be given to contributors, creditors and shareholders, then the entire scheme of Section 391 (which is a code by itself) would become unworkable.

5. Mr. Shashi Nandan has further contended placing reliance on the said judgment that the compromise or arrangement can 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. Such a compromise would also take in its sweep any scheme of amalgamation/merger of one company with another. If such a scheme is put forward by a company for the sanction of the court in the first instance, the court has to direct holding of meetings of creditors or class of creditors or members or class of members who are concerned with such a scheme and once the majority in number representing three-fourths in value of creditors or class of creditors or members or class of members, as the case may be, present or voting either in person or by proxy at such a meeting to accord their approval to any compromise or arrangement thus put to vote, and once such compromise is sanctioned by the Court, it would be binding to all creditors or class of creditors or members or class of members, as the case may be, which would also necessarily mean that even to dissenting creditors or class of creditors or dissenting members or class of members such sanctioned scheme would remain binding. However, as we have already indicated above, the Supreme Court has also gone to the extent that it is the duty of the Court, which is called upon to sanction such Scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes but the Court has to consider the pros and cons of the Scheme with a view to finding out whether the Scheme is fair, just and reasonable and is not contrary to any provisions of law and does not violate any public policy.

6. Mr. Shashi Nandan, learned Senior Counsel, further contended before us that when Rule 67 of the Rules categorically states that the Judge's summons for direction shall be moved ex parte, the question of prejudice or rule of natural justice does come into play. Mr. Sinha has joined the issue by saying that even paragraph 8 of the judgment in Chembra Orchard Produce Ltd. (supra), quoted

above, not only speaks of Rule 67 but also speaks of Rule 69 where the Court while issuing such summons is required to apply its mind to check-list. Therefore, even before passing any order for convening a meeting by way of Judge's summons, the Court will apply its mind for the same, not at the stage when they will be called for confirmation.

7. Let us analyse the practical difficulty in respect of carrying out the order of the learned Single Judge. According to us, the Scheme of compromise or arrangement is not such a scheme, which can be ignored by the Court. It makes a separate provision for MTM creditors. Therefore, the only objection on the part of the appellant-creditor before us is procedural and not the substantive one. Therefore, if any illegality is caused by calling upon the meeting of all the creditors to which the MTM creditors might have difficulty in placing their cases, they are at liberty to raise their objection in the meeting itself as well as before the Court at the time of confirmation of the amalgamation. We are not in a position to say, in what way the Company will hold the meeting -either in a meeting on a single day or in different meetings because the shareholders meeting is going to be held after a period of 15 days of holding of the meeting of the creditors, as pointed out by Mr. Sinha himself. Therefore, it can be sincere desire of the Court that when it finds the Scheme purposeful, it is inappropriate for the Company to take into account this aspect and solve the practical difficulty at the time of holding the meeting so that there should not be any grievance amongst themselves otherwise also it is open for them to raise such dispute at the time of confirmation of the scheme of compromise.

8. Since the meeting is going to be held tomorrow, i.e. 11.03.2010, leave is granted to obtain extract of the operative part of this order.

9. With the above observation, we dispose of the special appeal, however, without imposing any cost.

Ashok Srivastava, J.

10. I agree.