

(2009) 02 KAR CK 0043
In the Karnataka High Court
Case No : O.S.A. No. 4 of 2009

Deccan Aviation Limited

APPELLANT

Vs

G.E. Commercial Aviation Services Ltd. and Others

RESPONDENT

Date of Decision : 25-02-2009

Acts Referred:

Companies Act, 1956 — Section 391, 392, 394

Citation : (2009) ILR (Kar) 1466 : (2009) 6 KarLJ 475 : (2009) 3 KCCR 110 SN

Hon'ble Judges : V. Jagannathan, J;K.L. Manjunath, J

Bench : Division Bench

Advocate : Fali Nariman for Holla and Holla, for the Appellant; Naganand for Lawyers INC for R-1, for the Respondent

Final Decision : Dismissed

Judgement

K.L. Manjunath, J.—The appellants were the applicants in Company Application No. 893/2008 and 1081/2008. The respondents filed company Application No. 888/2008. All these applications were filed in Company Petition No. 47/2008.

2. Learned Company Judge by clubbing all the applications disposed of by a common order dated 16.1.2009.

3. Challenging the legality and correctness of the order passed by the Learned Company Judge, these appeals are filed by the appellants.

4. M/s Deccan Charters Limited filed a Company Petition 45/2008, M/s Kingfisher Airlines Limited filed a Company Petition 46/08 and M/s Deccan Aviation Limited filed a Company Petition 47/08. All the three petitions were filed u/s 391 and 394 of the Companies Act requesting the Company Court to sanction the amended composite Scheme of Arrangement proposed by the appellant company so as to bind on the equity shareholders and creditors. The Company petitions were allowed by the Company Judge and the amended Composite Scheme of Arrangement proposed by the petitioners-companies was sanctioned so as to bind the equity shareholders, secured creditors and unsecured creditors of the

aforesaid three petitioners-companies. Accordingly, arrangement of scheme was completed between M/s Deccan Aviation Limited, M/s Kingfisher Airlines Limited and M/s Deccan Charters Limited.

5. It appears, four air crafts were taken on lease from M/s GE Commercial Aviation Services Limited by M/s Deccan Aviation Limited pursuant to agreement of lease. On the ground that unilaterally GE Commercial Aviation Services Limited has cancelled the lease and trying to repossess all the air crafts, the three company applications were filed by Deccan Aviation Limited, namely C.A. No. 860/08, C.A. No. 893/08 and C.A. No. 1081/08. The Company Judge had granted an exparte interim order in C.A. No. 860/08 granting liberty to M/s GE Commercial Aviation Services Limited to seek for modification of vacating the interim order. The said interim order was granted on 31.10.08. Thereafter, M/s GECAS Limited filed an application in C.A. No. 888/08 requesting the Company Court to vacate the exparte interim order granted earlier. During the pendency of these applications, the appellant herein returned two air crafts, namely MSN 2077 AND MSN 3219 and a submission was also made before the Court that steps are being taken to hand over another air craft MSN 3183. Accordingly, the Court permitted the appellant to surrender the three air crafts without prejudice to the respective contentions urged by both the parties in the aforesaid company applications. Subsequently, an order of clarification was made by the company on 26.11.2008 in regard to the manner in which air crafts surrendered by the appellant are to be managed by the respondent.

6. Subsequently, the Learned Company Judge heard the Learned Counsel appearing for both the parties and dismissed the company applications filed by the appellant and allowed the company application filed by the respondent in C.A. No. 888/2008 and thereby interim order granted earlier in C.A. No. 860/2008 is vacated and the other two applications filed by the appellant were dismissed. Challenging these orders, the present appeals are filed.

7. The actual dispute between the appellant and the respondents is in regard to cancellation of lease of four air crafts. The respondent company has granted four air crafts on lease to the appellant under different lease agreements. The respondent company, by terminating the lease granted to the appellant on account of the alleged non payment of rentals, made an attempt to re-possess the air crafts granted and at that juncture three company applications were filed by the appellant u/s 392 of the Companies Act on the ground that the respondent has violated the terms of scheme granted by the Company Court in Company Petition No. 47/08.

8. The respondents contested the case on the ground that the application filed by the appellant were not maintainable since the dispute between the appellant and the respondent is in regard to the contractual obligations arise between the parties on account of lease agreements executed between the parties on various dates and the said transactions are nothing to do with the provisions of Section 392 of the Companies Act. It is also contended by the respondents that the

respondents have already initiated proceedings before the U.K. Court at London and the same is pending.

9. The Learned Judge after hearing the parties, came to the conclusion that Section 392 of the Companies Act has no applications to the case even though the respondent had given consent for scheme of merger, it would not take away the right of the respondent to repossess the air crafts which were given on lease to the appellant on account of default committed by the appellant. The Learned Judge has also referred to Clause 2(7) of the explanatory statement u/s 393 of the Act and came to the conclusion that the appellant has no case on merits and dismissed the applications. Therefore, present appeals are filed by the appellant.

10. Though the matter is listed for preliminary hearing, we have heard the Learned Senior Counsel Sri Fali Nariman for the appellant and Learned Senior Counsel Sri Naganand for the respondents.

11. Sri Nariman taking us through Section 392 of the Companies Act, contends that the Learned Judge has committed a serious error in rejecting the applications of the appellant without considering the provisions of Section 392 of the Companies Act. According to him, when the respondent had no objection for grant of scheme, it was the duty of the Court to supervise in order to give effect to the scheme of arrangement sanctioned by it to achieve its object Therefore the Learned Senior Counsel contended that the order of the Learned Judge of the Company Court has to be set aside and the case of the parties has to be reconsidered by this Court considering the far reaching effect of the cancellation of agreement entered into between the parties as the main object of the appellant is to take the air crafts on lease and other lessors may also unilaterally cancel the lease, in which event, the entire business of the appellant would collapse. Therefore, he requests us to allow the applications.

12. He further contends that, based on the agreement entered between the parties and based on the present act of the respondent, even other agreements of lease entered into between the appellant and other companies with similar clause would also get prejudiced. He further relied upon the judgment of the Supreme Court in the case of J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, to contend that the judgment of the Learned Company Court is opposed to the rulings of the Hon''ble Supreme Court.

13. Learned Senior Counsel Sri Naganand appearing for the respondent contends that Section 392 has no application to the facts and circumstances of the case. According to him, as a lessor of the air crafts, the respondent had no objection for merging of Kingfisher Airlines with Deccan Aviation and also for a composite scheme which has been arrived at between three groups of companies, but the respondent did not agree that even if the lessee fails to pay the rentals due to the lessor, it would give up its right to recover the instalments payable by the appellant and he never gave up his right to exercise his legal rights and other remedies open to him. Therefore, he requests the Court to dismiss the

applications.

14. Having heard the Learned Counsel for the parties, we have to consider whether the company Judge has committed any error in dismissing the company applications filed by the appellant and in allowing the application filed by the respondents for vacating the exparte interim order.

The facts of the case are not in dispute to the following extent.

It is not in dispute that the appellant had taken four air crafts on lease from the respondent company. It is also not in dispute that there was a proceeding u/s 391 and 394 for drawing a scheme in respect of three group of companies and it is also not in dispute that pursuant to the scheme of arrangement, scheme is also implemented and actually there is no dispute amongst those three companies. The dispute in the present case is only in regard to the right of the respondent in repossessing four air crafts which were given on lease to the appellant. In this background, we have to consider under what circumstances Section 392 of the Companies Act can be pressed into service by the appellant who has taken four air crafts on lease against his lessor when it is not one of the conditions of the scheme of arrangement u/s 391 and 394 of the Companies Act.

Section 392 of the Companies Act reads as hereunder:

Section 392. Power of High Court to enforce compromises and arrangements -
(1) Where a High Court makes an order u/s 391 sanctioning a compromise or an arrangement in respect of a company, it-

a) shall have power to supervise the carrying out of the compromise or arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the Court aforesaid is satisfied that a compromise or arrangement sanctioned u/s 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made u/s 433 of this Act.

(3) The provisions of this Section shall so far as may be. also apply to a company in respect of which an order has been made before the commencement of this Act u/s 153 of the Indian Companies Act, 1913 (VII of 1913), sanctioning a compromise or an arrangement.

15. The Learned Senior Counsel Sri Naganand relying upon Section 392(1)(a) and (b), contends that it is for the company Court to supervise the carrying out of the compromise or arrangement and make such order or at any time thereafter give such directions in regard to any matter or make such

modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

16. In this case, admittedly, there was no compromise entered into between three groups of companies in the company petition, it is only by way of arrangement. If we correctly understand the provisions of Section 392(1)(a) and (b), the company Court can exercise its power to supervise only to give effect to the arrangements which was entered into among the three companies and not the dispute between the lessor and lessee. In this case there is no arrangement between the appellant and the respondent to the effect that even if any default is committed by the appellant in making the rentals payable to the respondent, the respondent shall have to keep quiet without taking any action either to repossess air crafts or to recover the instalments payable by the appellant.

17. Sri Nariman, Learned Senior Counsel relying upon the judgment of the Supreme Court in J.K. (Bombay) Private Limited case contends that since the respondent is also a creditor by virtue of the provisions of Section 391 of the Act, the scheme of arrangement is statutorily binding even on the creditors. Therefore, he contends that the Court has got power to supervise.

18. The Hon"ble Supreme Court in S.K. Gupta and Another Vs. K.P. Jain and Another, has also ruled, to what extent Section 392(1) can be applied and under what circumstances, directions can be issued. A combined reading of these two Judgements, we are of the opinion that the Court can intervene and give directions only to implement the Scheme of arrangement in the light of the Scheme of arrangement and not in respect of a dispute falls outside the Scheme of arrangement.

19. Therefore, we are of the opinion that the Judgments relied upon by the Learned Senior Counsel for the appellant has no application to the facts and circumstances of this case.

20. Mr. Nariman, further contends that there was an arrangement between the appellant and the respondent in the month of September 2008. Therefore, the Learned Company Judge has not considered the fact of such arrangement between the parties.

21. So far as this arrangement is concerned, it is nothing to do with the scheme of arrangement u/s 392. If there is an arrangement between the appellant and the respondent separately, the aggrieved person has to work out his remedy elsewhere before an appropriate Court or before the competent authority. Without doing so, by invoking Section 392, the appellant cannot request the Company Court to give any directions or to supervise the lease transaction between the appellant and the respondent.

22. In the circumstances, we do not find any reasons to interfere with the well considered order of the Learned Company Judge.

Accordingly, we dismiss these appeals and it is open for the appellant to work out

its remedy elsewhere, if it is so aggrieved by the order of termination of the lease, in accordance with law.