

(2005) 03 GUJ CK 0003

In the Gujarat High Court

Case No : Company Application No. 93 of 2005 in Company Application No. 1 of 2005

Export Import Bank of India

APPELLANT

Vs

Shree Rama Multi-Tech Limited

RESPONDENT

Date of Decision : 18-03-2005

Acts Referred:

Companies (Court) Rules, 1959 — Rule 69

Citation : (2005) 03 GUJ CK 0003

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Mihir H. Joshi and Sandeep Singhi, for Singhi and Co, for the Appellant; S.N. Soparkar and Tushar P. Hemani, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The applicant, namely, Export Import Bank of India has taken out this Judge's Summons making following prayers which are in the alternative and without prejudice to one another :-

(a) This Hon"ble Court be pleased to recall its order dated 24.02.2005 and first determine the "Class-C" Creditors under the Scheme proposed by the respondent by excluding the applicant therefrom;

OR IN THE ALTERNATIVE

(b) This Hon"ble Court may be pleased to recall its order dated 24.02.2005 and determine / constitute a separate Class of Creditors, out of the Creditors mentioned in "Annexure-B" to the Scheme, having rights similar to the applicant for its Secured Short Term Finance of Rs. 10 Crores;

OR IN THE ALTERNATIVE

(c) This Hon"ble Court may be pleased to recall / modify its order dated 24.02.2005 by directing that no separate meeting of "Class-C" Creditors is

required to be convened on 22.03.2005;

2. An affidavit is filed by one Mr. Devanand Rajak, Chief Manager of the applicant Bank in support of the Judges' Summons. Mr. Mihir Joshi, learned Senior Counsel along with Mr. Sandeep Singhi appeared for the applicant Bank. The main grievance raised by the applicant in the present application is that the classification which is made by the Company is not just and proper and the applicant Bank has wrongly classified Class-C category to the Scheme. It is stated that the Scheme is essentially providing for restructuring the debts of the Secured and Unsecured Creditors of the respondent. In the scheme, the list of Secured Creditors are mentioned in Annexure A to the Scheme and the list of Unsecured Creditors are mentioned in Annexure B to the Scheme. Though both the assistances lent by the applicant i.e. Rupee Term Loan of Rs. 25 Crores and Short Term Finance of Rs. 10 Crores are secured, in Annexure A to the Scheme, the applicant's exposure in respect of Rupee Term Loan of Rs. 25 Crore alone is mentioned by the respondent. It is further stated that the Scheme of Compromise and arrangement proposed by the respondent is only in respect of those Secured Creditors who have first charge and those Secured Creditors who have second charge. The Rupee Term Loan of Rs. 25 Crores lent by the applicant to the respondent falls under the category of "Secured Creditors with First Charge" or "Class-A" Creditors. Though the Short Term Finance of Rs. 10 Crores is secured, no Scheme is proposed by the respondent for the Secured Creditors falling in the category of such Short Term Finance.

3. Mr. Joshi has further submitted that assuming that the Scheme proposed by the respondent seeks to also restructure the Short Term Finance of Rs. 10 Crores lent by the applicant, the classes of Creditors falling under Annexure B have been wrongly constituted. The Short Term Finance of Rs. 10 Crores has been secured by the respondent by creating a charge over the movable fixed assets in favour of the applicant. Hence, the Company has wrongly put the applicant in "Class-C" Creditors in "Annexure-B" to the Scheme. Mr. Joshi has further submitted that the Scheme being proposed by the respondent was already circulated by ARCIL to the Secured and Unsecured Creditors of the respondent Company for their views. For the said purpose, a meeting of Secured and Unsecured Lenders was held on 15.09.2004 and in the meeting of the Unsecured Creditors more than 25% in value of the Unsecured Creditors had objected to the Scheme proposal and the same was rejected by more than 25% in value of the Unsecured Creditors after deliberation, discussion and consultation. He has, therefore, submitted that no fruitful purpose would be served by once again, convening the meeting of the Unsecured or "Class-C" Creditors of the respondent.

4. Mr. Joshi has submitted that at the time when certain directions for convening the meeting were given, the Company has not come forward by disclosing necessary facts and the order for convening the meeting was obtained by concealing certain material facts. The said order is, therefore, required to be recalled. The Court has ample powers to consider the objections raised by the

applicant at this very first stage. In this connection, he invited the Court's attention to Rule 69 of the Companies (Court) Rules, 1959. It is specifically provided in the said Rule that upon the hearing of the summons or any adjourned hearing thereof, the Judge shall, unless he thinks fit for any reason to dismiss the summons, give such directions as he may think necessary with regard to determination of the class or classes of Creditors and/or of members whose meeting or meetings have to be held for considering the proposed compromise or arrangement. Here in the present case, admittedly, the applicant is the Secured Creditor and Charge is already created in favour of the applicant. There will not be any proper classification in putting the applicant in "Class-C" Category as the "Class-C" is only with regard to Unsecured Creditors. He has, therefore, submitted that it is ex-facie, illegal and in contrary to the provisions contained in Rule 69 of the Companies (Court) Rules, 1959.

5. He has further relied on the decision of HAWK INSURANCE COMPANY LIMITED wherein the Court has observed that it might be thought that the structure of the statutory provisions required the Court to consider, at the first stage when deciding whether or not order a meeting or meetings to be summoned, whether the scheme proposed was a single compromise or arrangement with all the Creditors with whom it was to be made or was (on a true analysis) two or more linked compromise or arrangements with creditors whose rights put them in several and distinct classes. That has not been the practice in the Companies Court. The Court has further observed that the existing practice merits re-examination.

6. Mr. Joshi has further relied on the decision of this Court in the case of COMMERZBANK AG v. ARVIND MILLS LTD. (2002) 110 COMP CASES 539 wherein the Court has observed that the Court would like to anxiously consider the legal aspect agitated because a finding on the legal points may bring a logical end to the dispute at preliminary or say first stage of the proceedings. The Court has further observed that unless the Court is satisfied to the cause with all sensitivity and gravity that the case pleaded by the applicant Bank is acceptable to a substantial extent only then it would give rise to exercisable jurisdiction. The next question thereafter would be whether the same should be exercised or not. Looking to the purpose and the scheme of the Companies Act, here equity has a role to play. Even if such plea is found acceptable even then this Court can reject the prayer for recalling the order keeping all questions open permitting the applicants to pursue the same issue after making due deliberation in the meeting called. In the said case also, the Court after applying various tests and after carving out relevant principles of identifying distinct or separate class, has taken the view that having regard to the set of legal proposition and facts of present case available on record, prima facie it appears that the application filed by the applicant-Banks for recalling the order passed by this Court on June 13, 2001 requires to be rejected and accordingly, it was disposed of without granting the prayers as prayed for in the said application with an observation that the applicants may agitate all the issues at the time while participating in the

meeting, if they so desire. The Court has also granted liberty to the applicant to raise all the issues which are raised and argued before the Court afresh as and when the scheme proceedings came up for confirmation before the Court.

7. On the basis of the statutory provisions and the law laid down by different Courts, Mr. Joshi has strongly urged that if the applicant does not fall in any of the Categories which are enumerated in the Scheme and if the Scheme is not at all applicable to the applicant, there is no need to drive the applicant to attend to the said meeting and to participate in the said meeting. In no case, the decision that may be taken in the said meeting is binding to the applicant.

8. The respondent Company has filed its reply through its authorised signatory Shri Sharad C. Patel. Mr. S.N. Soparkar, learned Senior Counsel appearing for the respondent Company has raised the preliminary objection against maintainability of the present application. He has submitted that the objections raised in the Affidavit in support of the Judge's Summons are premature and thus not maintainable and, therefore, the respondent does not propose to deal with and reply to the various averments, allegations and contentions made in the application individually. He has further submitted that it is open for the applicant to raise all valid objections at the meeting of the Creditors directed to be convened by this Court and only thereafter, if any valid objections survive, the same can be raised before this Court. Any objections to the classification, merits, reasonableness, bonafide and workability of the Scheme at this juncture are highly inappropriate and premature. Pursuant to the order passed by this Court, the applicant should first attend the meeting of the Creditors scheduled on 22.03.2005 and only then, it can raise all the valid and legal objections permissible under the law. The whole purpose of calling the meetings of the Creditors and giving notices of meetings to the Creditors is to invite the Creditors to attend the meeting and point out the difficulties or lacunae, if any, and to raise objections including that of classification, in the Scheme and try to convince respondent as well as other Creditors of the class to approve or not to approve the Scheme with or without modification. If objections are raised and entertained in this manner, the whole process and purpose of law in calling the meetings of the Creditors etc. prescribed under the statute would get defeated. The classification of the Creditors in "Class-C" has been done properly and appropriately. Hence, there is no misclassification of the Creditors in "Class-C" as alleged by the applicant. He has, however, fairly conceded that the word "Unsecured" after the name of the applicant in Annexure B to the Scheme is an inadvertent typographical error which has crept in for the reasons that originally the said debt was unsecured and, therefore, the word "unsecured" has tagged on even after the same became secured. He has further submitted that the applicant is the Secured Creditor and shall be treated as such. However, the charge in its favour is a subservient charge in absence of the permission to create a pari passu charge in favour of the applicant. Hence, the applicant was put in "Class-C" Category. He has further submitted that if the relief prayed for in the application is granted, great prejudice would be caused to the respondent

Company in as much as restructuring of debts of institutions and banks would be in jeopardy and on the contrary, if the meetings are convened as directed by this Court and the Scheme sails through, no prejudice would be caused to any one.

9. With regard to the applicant's objection that the classification has not been properly done, Mr. Soparkar has invited the attention to the definition of other Creditors or "Class-C" Creditors given in Clause (n) of the definition part of the Scheme. Clause (n) covers three type of Creditors. The first part of Clause (n) deals with the "Other Creditors" by which Class A & B Creditors are excluded. The second part of Clause (n) deals with only those Creditors who had lent money to the Company as on cut off date with a commitment from the Company for creation of security on the fixed assets of the Company without there being any creation of security due to operational and technical difficulties. The third part of Clause (n) includes the residuary Creditors and the applicant falls in that category. It includes all Creditors either Secured or Unsecured in respect of funds borrowed as financial assistance by the Company from time to time and remaining outstanding as on the cut off date. He has further submitted that it is the Company's perception of classification and if ultimately it is found to be an incorrect classification, the same can be discussed in the meeting and can be examined at the time when the substantive petition is filed before this Court and hence, at this stage the Court should not go into this aspect of the matter.

10. Mr. Soparkar has relied on the same decision of this Court on which Mr. Joshi has placed reliance i.e. *COMMERZBANK AG v. ARVIND MILLS LTD.* (2002) 110 COMP CASES 539. In that case also, the Court has made it very clear that even if such plea is found acceptable even then this Court can reject the prayer for recalling the order keeping all questions open permitting the applicants to pursue the same issue after making due deliberation in the meeting called.

11. Mr. Soparkar has further relied on the decision of the Hon'ble Supreme Court in the case of *MIHEER H. MAFATLAL v. MAFATLAL INDUSTRIES LTD.* (1996) 87 COMP CASES 792 wherein the Court has observed that it is profitable to refer to what the learned author Palmer in his treatise on Company Law, 24th edition has to say :

"The Court does not itself consider at this point what classes of creditors or members should be made parties to the Scheme. This is for the Company to decide, in accordance with what the scheme purports to achieve. The application for an order for meetings is a preliminary step, the applicant taking the risk that the classes which are fixed by the Judge, usually on the applicant's request, are sufficient for the ultimate purpose of the section, the risk being that if in the result, and we emphasise the words "in the result, they reveal inadequacies, the scheme will not be approved."

12. Mr. Soparkar has, therefore, submitted that looking to the Scheme of the Act and the decided case law on the subject, and even while disposing of Company Application No. 01 of 2005, the observations made by this Court, this is not the

stage at which the objections raised by the applicant can be effectively and purposefully considered. The entire Scheme is quite open for consideration of the body of Shareholders and Creditors. There is enough scope for discussion, deliberation and consultation. In the meeting itself, if the Creditors reject the Scheme, the question which is raised in the present application does not assume any significance. If the Scheme is approved, the applicant has an effective remedy to raise these very objections at the time when the substantive petition is filed before this Court seeking sanction to the Scheme in question. He has, therefore, submitted that this Court should not interfere at this stage and the application be summarily rejected.

13. After having heard the learned advocates appearing for the respective parties and after having considered the relevant statutory provisions and the authorities cited before the Court and after having gone through the relevant Clauses contained in the Scheme, the Court is of the view that this is not the proper stage where the Court should interfere in the matter. Though the Court has heard the parties to some extent on the issues raised in the present application, the Court, however, does not think it fit and proper to express any opinion as to whether the classification made by the Company and putting the applicant in "Category - C", qua Short Term Finance of Rs. 10 Crores, is just and proper. There is no denial of the fact that the Court has ample power to go into the merits of the objections at this stage and the Court has jurisdiction to entertain such objections even at this stage. However, the discretion is left with the Court as to whether such objections are entertained at this stage or not. The Court has to exercise its discretion keeping in mind all pros and cons of the matter. The cardinal principle for exercising the discretion at this stage is as to whether by allowing the Company to go on with the meeting would cause any irreparable loss or damage to the objector or whether the objector is left with no other remedy at any subsequent stage. While approving the classification proposed by the Company for the purpose of convening the meeting, what is required to be seen at this stage is the perception of the Company and not the perception of other persons including Creditors, Shareholders etc. There is bound to be some difference of opinion about the classification. However, such grievance can be ventilated at the time of meeting and even in the meeting such grievance is not redressed, the objector is not left remediless. The outcome of the meeting has to be placed before the Court in the form of the Chairman's report and substantive petition shall have to be filed seeking sanction to the Scheme. At this stage, all objections are considered by the Court. The Act and the Rules framed thereunder require the public notice and Court gives its final verdict only after considering the objections raised against the Scheme. Since this stage has not yet come and the applicant has come at the earlier stage, even if there may be some merits in the objections raised by the applicant, the Court does not think it fit and proper to exercise its discretion and grant the relief claimed by the applicant in this application. The Court also does not want to close the doors for the applicant. It is left to the applicant as to whether to attend to the meeting and to participate

in the proceedings of the meeting. It is also open for the applicant to raise all these objections which are raised in the present application. If the applicant's objections are considered at the meeting and its grievance is redressed, this Court's indulgence may not be required in that case. If the applicant is not satisfied with the outcome of the meeting, it is always open for the applicant to approach this Court once again and raise all the objections against the outcome of the meeting.

14. In view of the above discussion and the finding given by the Court on the preliminary issue, the Court does not accept the plea of the applicant to recall its order dated 24.02.2005, and determine, at this stage, the "Class - C" Creditors under the Scheme proposed by the Company by excluding the applicant therefrom. The Court also does not accept the alternative plea of the applicant at this stage, to determine / constitute a separate class of Creditors, out of the Creditors mentioned in Annexure - B to the Scheme, having rights similar to the applicant for its Secured Short Term Finance of Rs. 10 Crores. If the Court ultimately finds that the classification is wrongly made and there is no commonality or similarity of interests between the applicant and others in "Category - C" Creditors, the Scheme fails and Court will not put its seal to the Scheme. The Court also does not accept the second alternative plea of the applicant to direct the Company not to convene the separate meeting of "Class - C" Creditors on 22.03.2005.

15. In the above view of the matter and without going into the merits of the objections raised by the applicant at this stage, the Court refuses to exercise its discretion at this stage and to grant any relief as prayed for in the present application. It is, however, open for the applicant to agitate all the issues at the time while participating in the meeting if the applicant so desires. The applicant is also granted liberty to raise all the issues which are raised and argued before the Court afresh as and when the Scheme proceedings come up for confirmation before this Court.

16. Subject to the aforesaid observations, the application is accordingly rejected without any order as to costs.