
(2013) 08 DEL CK 0145

In the Delhi High Court

Case No : Co. Application 1297-1298 of 2013 in Co. Petition 321 of 2001

Gati Cargo Management Service

APPELLANT

Vs

SBL Industries Ltd.

RESPONDENT

Date of Decision : 13-08-2013

Acts Referred:

Companies Act, 1956 — Section 290, 391, 392, 393, 394
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2013) 8 AD 260 : (2014) 182 CompCas 56

Hon'ble Judges : R.V. Easwar, J

Bench : Single Bench

Advocate : Barun Kumar Sinha, for workmen, for the Appellant; Arun Kathpalia and Mr. Amit Goel for Ex-Management, for the Respondent

Final Decision : Dismissed

Judgement

R.V. Easwar, J.

Co. Appl.1298/2013

Allowed subject to all just exceptions.

Co. Appl.1297/2013

1. This is an application filed by SBL Shramik Samitee, hereinafter referred to as "workmen" under Rule 9 of the Companies (Court) Rules, 1959 for recall of the order passed by this court on 3.7.2013 in C.A. No. (M) 83/2013 and to dismiss the said application which was filed by one P.C. Sen (ex-management). The present applicant is a federation of all trade unions engaged in union activities in SBL Industries Ltd. ("SBL"), the respondent in the main Co. Petn. No. 321/2001, which is sought to be revived. Before I proceed to discuss the protracted controversy and the rival contentions in some detail with the relevant facts and figures, let me give a bird's-eye view of the same. Gati Cargo Management Services ("Gati") filed a creditor's winding-up petition under sections 433(e) /434(1)(a) /439 of the Companies Act, 1956 ("the Act") in the year 2001

seeking winding up of SBL. The petition was admitted by this court and the official liquidator ("OL") attached to this court was appointed as provisional liquidator. In the year 2006 the provisional liquidator was appointed the OL and a final winding-up order was passed. In the year 2007, Gati was paid off and it exited from the scene. Sometime in the year 2008, one P.C. Sen entered the scene with proposals for reviving SBL; he claimed himself to be the ex-director/largest shareholder in SBL, having bought those shares from SRF Ltd., a company which held a majority of shares in SBL; he also expressed his willingness to infuse funds into SBL and revive it, both through himself and through another company by name Gitanjali Infratech Ltd., which was stated to be his strategic partner. Monies were due by SBL to the State Bank of India (SBI), amongst other creditors. P.C. Sen brought in funds to pay off a sum of approximately Rs. 13 crores; the workmen who initially claimed that they would pay off SBI and present a scheme of revival, could not make the payment. Their claim for reviving the company under liquidation (SBL) was finally rejected by this court in orders passed earlier this year (Jan., 2013). This court thereafter directed Sen to file the scheme after taking into account the report of the committee, appointed by this court earlier by order dated 21.1.2009, for scrutinising the claims of the workmen and the claim made by SBI that one loan account remained to be cleared. Finally, P.C. Sen filed Co. Appln. (M) 83/2013 - the first motion joint application - under sections 391-394 of the Act, for implementation of the scheme of arrangement and compromise proposed between SBL (in liquidation) and its creditors. This application was allowed by this Court by order dated 3.7.2013, over-ruling the objections raised on behalf of the workmen that P.C. Sen was not in fact and truth a shareholder of SBL, that the shares were never transferred to him, that the scheme of revival was a make-believe transaction put through by vested interests to exploit the commercial potential of the real estate owned by SBL and that the scheme as propounded by Sen was not in the interests of the workmen but would work to their prejudice. Meetings of the creditors, shareholders etc. were directed to be held on 17th August, 2013. This court also held that at the stage of first motion the workmen have no right conferred upon them to be heard and the proper forum to voice their concerns, if any, was the meeting of the secured creditors directed to be held on 17.8.2013 or at the second motion stage.

2. The present application has been filed by the workmen seeking (i) recall of the aforesaid order passed by this Court and (ii) dismissal of the application filed by P.C. Sen for revival of SBL.

3. The contentions raised by Mr. Sinha, learned counsel for the workmen, can be divided into the following main parts:

(a) An application is pending before the BIFR and by virtue of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"), the company petition before this court cannot be proceeded with;

(b) P.C. Sen misrepresented himself as part of the ex-management of SBL; he

was not a director of the said company at any point of time and therefore cannot seek to revive the company;

(c) There is no proof that P.C. Sen was a registered shareholder of SBL; the transfer-deed by which the shares held by SRF Ltd. in SBL were transferred to him was never produced;

(d) P.C. Sen acquired the shares from SRF Ltd. under an agreement dated 5.6.2000 for a paltry sum of Rs. 400/-, which is illusory. This shows that the share purchase was a sham transaction and that P.C. Sen was only a stooge of the owners of SRF Ltd. who did not really want lose control of SBL on account of its attractive real estate potential.

(e) When P.C. Sen acquired the shares, there is no evidence that it was through a public offer as required by the relevant rules of the SEBI.

(f) P.C. Sen succeeded in the revival scheme because he did not disclose the material facts truthfully to the court; several crucial facts were withheld by him from the court when his application in C.A. (M) 83/2013 was allowed.

4. The contentions of Mr. Kathpalia, appearing for the respondent-propounder (P.C. Sen), per contra, are as under:

(a) The order of this Court dated 30.4.2009 records that there was no dispute at any time about the directorship of P.C. Sen. All the documents were submitted to the Registrar of Companies ("ROC") as required by the Act in which full disclosure was made. In fact, by this order he was not allowed to resign from the directorship;

(b) There is no material to doubt the transfer of shares to P.C. Sen, and certainly not at this late stage, and that the transfer was shown in the website of the ROC even in the year 2000;

(c) The applicant has misinterpreted and misunderstood the order passed by this Court on 3.7.2013;

(d) The order of this Court passed on 9.8.2011 read with its order passed on 30.11.2011 would show that P.C. Sen was directed to deposit Rs. 4.91 crores; on these dates, no application u/s 391 of the Act was pending consideration. The workmen were also given an opportunity to settle with the SBI, but they could not do so, leading to the closure of their right vide order dated 7.1.2013. It was only then that P.C. Sen was permitted to settle with the Bank.

(e) In addition to P.C. Sen, his "strategic partner" M/s. Gitanjali Infratech Ltd. was also bringing in money in consideration of which they were allotted shares at a premium. This was one mode of infusing funds into SBL as part of the revival scheme.

(f) There was no failure to disclose any material facts and the court was apprised of all crucial facts at all points of time. The workmen are raising objections

without any basis and that too at a very late stage. There is no basis for saying that the revival scheme is motivated by an evil intention to exploit the commercial potential of the large tracts of land in Ranchi in which the factory of SBL is located or that the scheme would work to the prejudice of their rights. The revival would only benefit them. The workmen were fairly afforded an opportunity to implement the scheme for revival which they could not, and that can be no ground to raise frivolous objections to the scheme propounded by P.C. Sen.

5. I have considered the rival submissions and proceed to render my decision in the following paragraphs.

Was P.C. Sen an ex-director of SBL?

6. There is lack of clarity about the fact. During the proceedings before this court, P.C. Sen has at some point of time claimed himself to be a director and chairman of SBL and this court would appear to have proceeded on that basis. For instance, in its order dated 30.4.2009 passed in the application filed by him in C.A. No. 554/2009, on which reliance was placed by Mr. Kathpalia, it has been observed in paragraph 2 that "there is no dispute that Sh. P.C. Sen was the promoter chairman and director of the company" and that apart from him there were only two directors, viz., Pankaj Kumar Dey and Ashok Chatterjee. There is reference to the fact that P.C. Sen had also submitted the statement of affairs on 18.3.2008. The aforesaid application was filed by him, according to the court, "submitting that Sh. P.C. Sen was not ex-director of the company and that he was only a major shareholder of the company". The court proceeded to note that P.C. Sen was a member of the audit committee and an independent and non-executive director, as per the annual return filed by the company as on 31.3.2005 with the ROC. It was then noted that since the company was under liquidation, the appointment of P.C. Sen and two other persons as additional directors with effect from 28.8.2005 was void (paragraph 8 of the order). Since the appointment itself was void, it was observed in the same paragraph that the "purported resignation" of P.C. Sen w.e.f. 1.9.2005 as chairman of the company "is also of no legal consequence and effect". It would thus appear that P.C. Sen did act as director of SBL for some time, but the court held his appointment void and of no effect. In fact, he had himself filed the application stating that he was not an ex-director but only a major shareholder. All these facts are noted in the above-cited order of this Court.

7. It would thus appear that the matter is not free from doubt, and in fact there is even some confusion and contradictions about it. It is not clear why P.C. Sen would apply to the court stating that he was not a director of SBL when in fact he was found to have been appointed as non-executive director. This court however found that even that appointment was of no effect as it was done after the company went into liquidation. Having regard to the above and the order of this Court passed on 30.4.2009, the factual position appears to be that he was appointed as director and even functioned as such, as seen from the annual

return, but the appointment was of no effect as declared by this court. But that still leaves the question why Sen himself stated in the application (even before this court declared his appointment as director as of no effect) that he was only a major shareholder and not a director.

8. Be that as it may, the issue can be resolved by reference to the provisions of section 290 of the Act, which were in fact referred to by Mr. Kathpalia, the learned counsel for the respondent. That section preserves the validity of the acts done by a director whose appointment is later declared to be void or invalid for any reason.

9. The question may also be looked at from another angle. Even if Sen was never a validly appointed director, that may not matter for the purpose of section 391. Even though a company is under orders of being wound up, that does not prevent a member of the company from applying for revival of the company, as held by this Court in *In Re: Rajdhani Grains and Jaggery Exchange Ltd.*, because even after the passing of the winding-up order, the shareholder continues to be a member of the company and does not become a contributory (who is not eligible to apply for revival u/s 391). Though this decision of Kirpal, J., (as he then was) was rendered in the context whether a shareholder ceases to be a member of the company after the passing of the winding up order and would become ineligible to apply u/s 391 for revival, I am referring to it only to uphold the right of a member of the company - P.C. Sen, in the present case - to apply for revival of SBL. It is not in dispute that he was a major shareholder of SBL and therefore it is irrelevant that he was not a director of the company, even if in fact he never was, in considering the question of his eligibility to apply for revival. This is however subject to the argument of Mr. Sinha, seriously contested by Mr. Kathpalia, that there was no real and effective transfer of shares in favour of P.C. Sen. That argument will now be examined.

Was there a real transfer of shares in favour of P.C. Sen? Was the transaction sham?

10. So far as the first question is concerned, I have good reasons to think that there was. P.C. Sen bought 10,14,853 equity shares of SBL, of the face value of Rs. 1,01,48,530 from four different companies, of which SRF Ltd. was the main company, since it held 9,00,000 shares of SBL; the other three companies held, in the aggregate, the balance of 1,14,853 shares. A perusal of the agreement dated 5.6.2000 shows, inter alia, that SRF Ltd. did not sell the preference shares held by it to P.C. Sen. These were 2,47,50,000 in number of the face value of Rs. 10/- each. The total consideration payable by P.C. Sen for the acquisition of the equity shares was Rs. 400/-, @ Rs. 100/- to each of the four sellers.

11. Mr. Sinha's submission is that the consideration paid by P.C. Sen was so illusory that the transaction has to be held to be a sham. This line of argument is taken at a very late stage and was never put forth earlier before this court. This court had proceeded on the basis that Sen was applying for revival of SBL in his

own right as member and at no point of time such an objection, questioning the very fact of his shareholding, was taken. Right from the initial stages of these proceedings, the workmen have been appearing. On 9-8-2011, this court made it clear in its order passed in Co. Appl. Nos. 181/2011 & 48/2008 that in case the ex-management was not able to deposit with the Registry the sum of Rs. 4.91 crores, offered as full and final settlement of the dues of the SBI to prove its bona fides, within four weeks, "the Scheme propounded by the ex-management would be deemed to have been withdrawn". The matter was listed for 30-11-2011. In the proceedings which took place before this court on 9-8-2011, the workmen did participate and raised no objection. On 30-9-2011, this court passed orders in Co. Appln. No. 2016/2011, which was an application filed by the ex-management represented by P.C. Sen; notice was issued to all the non-applicants which included the workmen represented by their counsel and a draft of the rehabilitation scheme was directed to be circulated to them. At this point also, no objection was taken on behalf of the workmen. On 30-11-2011, this court passed an order in Co. Appln. No. 2408/2011, filed by the ex-management represented by P.C. Sen, who was personally present in court along with his counsel. The workmen were represented through their counsel. The court noted that the amount of Rs. 4.91 crores was not deposited with the Registry by the ex-management as directed earlier. A prayer was made for extension of time to deposit by four weeks. The prayer was rejected. It was held by this court that the order passed on 9-8-2011 was a peremptory order and the application was therefore not even maintainable. By the order dated 30-11-2011, the court also directed, in the applications filed both by the ex-management and the workmen, that the deputy general manager of the SBI shall meet the representatives of both the sides "and consider the offer made by both the parties". Even on this day (i.e., 30-11-2011) the workmen did not object to the claim of P.C. Sen that he represented the ex-management and therefore had the right to participate in the settlement proceedings with the SBI and that they (i.e., workmen) alone have the right to do so.

12. On 12-10-2012, this court took up for consideration Co. Appln. No. 181/2011, filed by the workmen; no orders were passed and the application was directed to be listed on 7-1-2013. On 7-1-2013, the above application filed by the workmen was taken up for consideration along with the Co. Appln. No. 48/2008 filed by the ex-management, which was for revival of the rehabilitation package. In the order passed by this court on 7-1-2013, the following observations were made:

i) Pursuant to the order dated 30-11-2011, the ex-management has settled the dues to SBI, a fact which was confirmed by counsel appearing for the Bank. Even the preference shareholders were paid off. The workers' dues would be paid as soon as the Committee appointed by the court submits its findings. These observations were made in the application filed by the ex-management.

ii) In view of the fact that the dues to the secured creditors as well as the

preference shareholders have been paid by the ex-management, the scheme presented to the court by the workers does not survive. Their right would arise only if the ex-management failed to present a viable revival scheme. The Co. Appln. No. 181/2011 filed by the workmen was therefore "rendered infructuous and is disposed of as such".

13. On 18-4-2013, this court passed an order on receipt of the report of the Committee appointed to examine the claims of the workmen, directing a copy of the same to be provided to the workmen. This order was also passed in the presence of the counsel for the workmen.

14. It is only then that the ex-management filed Co. Appln. (M) No. 83/2013 which was a first motion joint application filed under sections 391-394 of the Act. It was at this stage that objections were taken by the workmen, including a preliminary objection to the very maintainability of the application for revival on the ground that the revival scheme is prompted by ulterior motives and that the transfer of preference shares to P.C. Sen on 14-3-2012 was illegal and further that even the acquisition of shares by him in the year 2000 was a sham transaction. These objections were countered by the learned counsel for the ex-management.

15. After considering the objections of the workmen and the rival arguments, this court rejected the objections of the workmen on the ground that it was not obligatory for the court to hear the workmen at the first motion stage, for which there was no provision in the Act or the Rules and that the concerns of the workmen may be addressed at the meeting of the secured creditors or at the second motion stage. Accordingly, an order was passed by this court on 3.7.2013 directing meetings of the creditors, shareholders etc. to be held on 17.8.2013.

16. In the present application the workmen seek recall of the order of 3.7.2013 on various grounds. As earlier pointed out, the transfer of shares to P.C. Sen, both under the agreement dated 5.6.2000 (for equity shares) and by virtue of the letter dated 14.3.2012 (for preference shares) have never been questioned. It is too late in the day to question them now. These were not new facts and I am unable to accept the submission of Mr. Sinha, appearing for the workmen, that his clients were not aware of these facts till the date when the first motion application was filed by the ex-management. They have been throughout appearing before this court for a long span of time - almost twelve years, reckoning from the date on which the Co. Petn. No. 321/2001 was filed. They never appear to have seriously questioned the bona fide of the revival scheme propounded by P.C. Sen, except to stake a claim to put forth a scheme themselves; but that right came to an end when this court passed an order on 7.1.2013 in Co. Appln. No. 181/2011, rejecting the application on the ground that their right would arise only if the ex-management failed to pay off the secured creditors and the preference shareholders. That order was accepted by them and I have not been informed of any appeal against the same having been filed by the workmen.

17. No objection was taken at any time to the transfer of shares in favour of P.C. Sen, on the ground of non-existence or non-execution of the transfer deed. In any case, annual returns showing the transfer of shares were filed, as pointed out by Mr. Kathpalia. Moreover, the share sale agreement dated 5.6.2000 itself speaks of the obligation of the buyer (P.C. Sen) to comply with SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 which he has fulfilled by making a public offer to buy shares by an announcement made on 30.9.1999, followed by offer letters sent to the shareholders of the company on 20.10.1999; it also refers to the fact that 58 acceptance letters were received by him for sale of 25,237 equity shares which were "got registered in his name".

These shares, together with the equity shares acquired under the agreement, came to 10,40,090 shares of Rs. 10/- each. It is not disputed that this much shares constituted the majority.

18. A question was posed by Mr. Sinha as to how so many shares could have been acquired for a paltry sum of R. 400/-. Apart from the fact that it is too late in the day to pose the question, there is no material or evidence brought on record by the workmen to show that the agreement for sale of shares was entered into with any fraudulent intention - either to jeopardise the rights of the workers or to exploit the commercial potential of the land owned by SBL in Ranchi. The ex-management had always offered to settle the claims of the workmen. Moreover, even if there was a huge commercial potential for the land, unless the net worth of SBL was so high, the shares would not fetch a high price. The existence and extent of net worth would depend upon various factors, of which the liabilities would constitute a major factor. Huge liabilities which exceed the assets and capital would result in a negative net worth; the shares of a company with a negative net worth cannot fetch a fancy price, perhaps not even the face value. The reason is that the buyer of the majority of shares would practically become the owner of the company and it will be his responsibility to discharge the liabilities. It cannot be expected of a buyer of majority shares of a company with negative net worth to pay a handsome price for the shares and also accept the liability of clearing off the debts. There is precious little material before me from which I can infer that the price paid by P.C. Sen under the share sale agreement of 5.6.2000 is illusory or sham, particularly at this distance of time.

19. The allegation of collusion between SRF Ltd. (owners of the company), the ex-management of SBL and P.C. Sen to defraud the workers and creditors appears to me to be lacking in substance. Apart from the fact that there is no evidence to prove the allegation, it seems to me that it cannot even be inferred. P.C. Sen has not been shown to be the benami of the owners of SRF Ltd., which company held the majority of shares in SBL. There is no suggestion that the funds for the payment of Rs. 13 crores to SBI flowed from them (i.e., those who held shares in SRF Ltd.). To me, it makes no sense to first disgorge the majority shareholding in a loss-making, negative net worth company, and then attempt to

infuse funds into the self-same company through the purchaser of the majority shareholding. No other close connection between the owners of the company which held the majority shares in SBL and P.C. Sen was shown, which could compel or persuade them to favour him, if at all there was any favour. It would appear that SRF Ltd. just wanted to exit because of the liabilities and the negative net worth of SBL, and found a buyer for its majority shareholding in SBL in P.C. Sen, who, along with his strategic partner Gitanjali Infratech Ltd. was adventurous enough to attempt to revive SBL.

20. Attention was drawn to a letter written by P.C. Sen on 27.8.2007 to the AGM, SBI, Shakespeare Sarani, Calcutta, seeking a one-time settlement (OTS). It was pointed out that P.C. Sen has stated therein that in view of the liquidation proceedings pending since 2006 it would be "difficult for me/my associates to utilize this property", the contention being that the quoted words show the true intention of Sen, which (according to Mr. Sinha) is to exploit the property. All that which can be inferred from the quoted words are the anxiety expressed by him about the delay in the liquidation proceedings, which can be shortened if an OTS is entered into. The words "utilize this property" are not capable of conveying any sinister motive. In any case, since P.C. Sen is the sponsor of the scheme, there is nothing wrong if he wants to "utilise this property", by which was meant a profitable use of the assets of the company, unless one is inclined to hold the view that utilisation of property by a businessman for profits is proscribed.

21. I am therefore unable to hold that the transaction of transfer of shares to P.C. Sen was sham and was made with a view to benefit him at the cost of the workmen and the creditors of SBL or was a fraudulent transaction with ulterior motives.

Is the pendency of BIFR proceedings a bar on the present proceedings before this Court?

22. The answer to this question must be in the negative. Though much arguments were addressed on this point by Mr. Sinha initially, on the basis of S. 22 of SICA, that the present proceedings cannot continue in view of the pendency of proceedings before the BIFR and some authorities were also cited in support of the argument, he was unable to show whether any proceedings were at all pending before the BIFR and if so what proceedings were pending. He merely referred to a status report (Annexure A-2 to the application) from the website of BIFR which shows that Case No. 492/2002 in the name of SBL Industries Ltd., "abated" with the date of the last order being 28.12.2005. The only inference from this status report can be that no proceedings are pending in BIFR under SICA. No other papers were filed to show that the factual position is different from what is shown in the status report; it was the duty of the applicant, having raised a vehement objection on this ground, to back it up and demonstrate how section 22 of SICA would apply to the present proceedings. The objection has turned out to be a damp squib - much ado about nothing! Moreover, even in the orders passed on 12.11.2003 and 30.11.2004, this Court

observed that no applications were pending before BIFR and on that basis dismissed the applications filed by SBL.

23. Since no proceedings have been shown to be pending under SICA before the BIFR, the argument based on section 22 of SICA need not be further examined.

Is the propounder of the revival scheme guilty of concealment of material facts?

24. It was repeatedly urged by Mr. Sinha for the workmen that P.C. Sen did not furnish the complete facts, or furnished misleading information, before this court. Some of these were (a) that there was no public offer to purchase shares by P.C. Sen, a fact not made known to the court; (b) that he claimed to be an ex-director of SBL, while he was not; and (c) that the directors' report was not filed along with the balance sheet as on 31.3.2005.

25. I have already noticed that the share sale agreement dated 5.6.2000 itself confirms the fact that P.C. Sen had made a public offer to purchase shares in accordance with the SEBI rules and had also received 58 written offers through which he acquired 25,237 shares of SBL which were duly registered in his name. As regards the question about his holding the position of a director, I have already discussed this aspect; there is no need to repeat it here. As regards the non-filing of the directors' report with the balance sheet, at worst it may amount to an irregularity inviting some action by the ROC. It has no impact beyond that on the present proceedings.

26. Two decisions of this court were cited by Mr. Sinha: (i) Shyam S. Rastogi Vs. Nona Sona Exports P. Ltd., and (ii) Bhagwan Singh and Sons P. Ltd. Vs. Kalawati and others, Both the judgments are by D.R. Khanna, J., sitting singly. In Shyam S. Rastogi (supra), it was held that it is the duty of the company court to look at the motivation of the propounder and the merits of the revival scheme. In that case, no positive scheme of revival was put forth and there were only general averments; no balance sheets were produced at all, nor any profit and loss accounts were even prepared; no details with regard to the creditors and the amount of debts due by the company were forthcoming; there was no information to show the progress of the business, commitments or orders for the export; there were no financial assurances from any investor; no list of assets was filed. It was in these circumstances held by this court that the revival scheme was worthless, vague and too generalised. It was in this context observed that the "company court is not a mere conduit pipe or stamping authority to whatever scheme that may be laid before it" and that it is for the court to unearth the motivations in such schemes, which are often oblique. These observations are not attracted to the present case. The other judgment (supra) deals with a case where the scheme was found to be mala fide and conceived to thwart the claims of three creditors. It was also found by the company court that the company had withheld the full material facts and its latest financial position. This situation, as discussed earlier, does not obtain in the present case. The ratio of these two judgments of this court is not attracted to the case before me. For

the above reasons, I hold that no case has been made out for recall of the order passed by this Court on 3.7.2013 in Co. Appln. (M) No. 83/2013. I would hesitate to say that the present application is frivolous; I however think it is ill-advised and that is the reason for my not imposing costs on the applicant-workmen.

The application is dismissed.