(2012) 11 MAD CK 0259

In the Madras High Court

Case No : Company Applications No''s. 720 and 721 of 2012

In Re: Agnite Education Ltd.

Date of Decision : 26-11-2012

Acts Referred:
Companies Act, 1956 — Section 153, 391, 391, 391(1), 391(2)

Citation : (2013) 113 CLA 617 : (2013) 177 CompCas 60 : (2013) 3 CompLJ 86

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : T.K. Bhaskar, for the Respondent

Final Decision : Dismissed

Judgement

K.B.K. Vasuki, J.—This company application praying this court to stay all further legal proceedings against the applicant-company pending consideration and approval of the scheme of arrangement and compromise. The company is the applicant in both the applications. The relief sought for in Company Application No. 720 of 2012 is to issue direction for holding and convening of the meeting of creditors of the company for the purpose of considering and if thinks fit for approving with or without modification the scheme of arrangement and compromise proposed to be made between the company and the class creditors of the company, i.e., unsecured creditors whose balance outstanding is above Rs. 10,00,000 and to issue directions as to the method of convening holding and conducting the meeting. Whereas, Company Application No. 721 of 2012 is filed to stay all further legal proceedings against the applicant-company pending consideration and approval of the scheme of arrangement and compromise.

2. Both the company applications are filed along with typed set of papers enclosing copies of memorandum of articles and association and financial statement of the company, board resolution, summary prospects of the applicant-company, order of this court appointing provisional liquidator in C. P. No. 180 of 2009, scheme of arrangement and compromise as annexure F, certificate issued by the chartered accountant certifying the list of class creditors and draft explanatory statement as annexure H.

3. The applicant-company/Agnite Educational Ltd. (hereinafter shortly referred to as "AEL") has in the affidavit filed in support of the applications explained the particulars regarding incorporation of the company, change of its name, main objects of the company, the authorised share capital, issued, subscribed and paid-up capital, the circumstances under which the scheme of arrangement, is proposed between the company and the scheme creditors, salient features of the same, benefits to be derived from the proposed scheme and advantages of the same to all associated with the company and scheme of arrangement, etc.

4. The particulars so furnished would reveal that the company was incorporated on April 10, 1990, under the name and style Teledata Informations P. Ltd. and the name of the company was later on changed to Agnite Educational Ltd., on April 7, 2011 and the main object of the company is to project itself in the field of education and E-learning by different ways and means. In the course of business the company developed Enterprise Resource Planning (ERP) software for shipping and educational institutions. During 2004, the company got equity shares listed in the National Stock Exchange and the company approached its shareholders for raising additional capital by way of rights issued in the ratio of 2:1, i.e., for every one share held in the company, the shareholders would be eligible to subscribe two shares. Subsequently, the company went for Global Depository Receipts (GDR) issued during 2005-06, which are listed on Luxembourg Stock Exchange. In order to expand the business, the company acquired various entities across the globe from 2004-05 resulting in substantial increase in the company turnover during 2006. The company demerged the applicant-company into Teledata Technology Solutions Ltd., Teledata Marine Solutions Ltd. and obtained sanction of this court on October 12, 2007 and invested huge amount borrowed from the State Bank of India, Singapore to acquire 51 per cent, stake in Singapore based entity called eSys Technologies Pte Ltd., which subsequently proved to be a failure due to the act of fraud played by the Singapore based company and all resources of the company got drained. The company initiated various legal proceedings against the Singapore based company, but the company faced collapse of global shipping based industry. The company was unable to repay the amount due to the creditors and the collection from its own debtors also became an issue.

5. During 2010, the company started concentrating on online education organisation providing E-learning for high school studies, skill development and higher education courses and has in alliance with the educational organisation created contents for various courses using E-learning methodology and the contents are ready for selling and the company has been expecting revenues to flow from new line of business and entered into contracts and agreements with the prospective clients. As the company is not having enough resources and investment for the growing business, the present scheme of compromise is proposed, to protect the interest of the stakeholders, shareholders of the company to enable the company to get over the crisis and to revive itself.

6. In 2009 one of the secured creditors/Hong Kong and Shanghai Banking Corporation Ltd. (shortly referred to as HSBC) filed C. P. No. 180 of 2009 for winding up of the company and for appointment of official liquidator and the company petition was admitted and OSA was filed challenging the order of the High Court and the proposed scheme of arrangement and compromise is entered into without prejudice to the right of the company in the OSA. The company has in the proposed scheme admitted that the future earning potential of the company is the basis for entering into the compromise and expressed confidence and faith that the scheme on becoming effective and operative will enable the company to pay off its debts to all class creditors in full and final settlement in the manner as referred to in the scheme with simple interest at 6 per cent, per annum and without any penal charges.

7. It is further stated in paragraph 8 that the scheme shall come into effect only when approved by the requisite majority of class creditors and sanctioned by the High Court with or without conditions and on compliance of the conditions, if any, imposed by the High Court and on filing of certified copies of sanctioned order of the High Court with the Registrar of Companies.

8. The documents produced as annexure C is the resolution of the board of directors dated June 28, 2011, approving the company to enter into scheme of arrangement and compromise and approving the draft scheme of compromise and authorising the managing director to take necessary steps on behalf of the company to obtain approval of the scheme and for implementation of the same.

9. The annexure G enclosed in the typed set of papers is the list of unsecured creditors, whose value of outstanding is in excess of Rs. 10,00,000 as on March 31, 2012. Annexure H is the draft explanatory statement. According to the company, the scheme proposed is between the company and class creditors of the company and the salient features of the same are such that the proposed scheme does not affect any of the shareholders or creditors of the company and hence approached this court for permission to convene, hold and conduct the meeting of the class creditors. The company has also sought for stay of further legal proceedings against the company pending consideration and approval of the scheme of arrangement by this court on the ground that in the event of any legal proceedings being allowed to proceed against the company, the same is likely to prejudice the interest of the company in obtaining approval of the scheme and continuation of legal proceedings against the company is likely to render the scheme of arrangement and compromise for revival of the company to be ineffective.

10. Even at the initial stage, both the applications are sought to be objected to by the Hong Kong and Shangai Banking Corporation Ltd. (HSBC) represented by its assistant manager, who is the petitioner in the winding up petition and who is one of the scheme creditors referred to in annexure G list referred to above. The objections raised herein are not only against the scheme of arrangement and compromise in respect of which approval is sought for in Company Application

No. 720 of 2012 but is also against maintainability of stay application in Company Application No. 721 of 2012 without giving any notice to the objector before or after filing of the application as contemplated under the Companies (Court) Rules, 1959.

11. In the affidavit filed by the assistant manager of the objector/bank, it is contended that the proposed scheme is lacking in bona fides and it is a sham and is not in the interest of the company or public and the proposed repayment schedule of the debts, due to the scheme creditors is not feasible and the scheme is bereft of particulars regarding the source of funds and the scheme of arrangement does, not disclose any concrete funding source. It is also seriously contended that the list of creditors produced along with the scheme is fabricated misleading and warrants detailed enquiry and particulars of other unsecured creditors are omitted to be furnished and they are excluded from the scheme and the scheme is hence filed with mala fide intention to delay winding up proceedings initiated by the objector. It is further contended that in the event of the scheme being sanctioned, the same will be binding on the objector and they are the interested parties to be heard even at the ex parte motion stage.

12. Learned counsel for the company would seriously oppose the claim of the objector to be given notice and be heard at the initial stage. According to learned counsel for the applicant/company, the very purpose of convening the meeting is to ascertain the views of class creditors and the scheme shall become effective and operative only when the same shall be approved by the requisite majority of class of creditors and sanction be obtained from the High Court with or without modification and the conditions if any, be complied with by the company. As the objector is as one of the unsecured creditors in annexure G/list of class creditors, the objector is entitled to raise all objections in the course of meeting proposed to be convened and the objection raised herein is too premature in nature.

13. Heard the rival submissions made on both sides.

14. This court is of the considered view that the right claimed by the objector/ unsecured creditor to be given notice and be heard, before directing convening, holding and conducting of the meeting for which permission is sought for in Company Application No. 720 of 2012 shall be dealt with later and the objection regarding non-compliance of the procedure laid down under the relevant rules for giving notice of stay application in Company Application No. 721 of 2012 to the objector/creditor petitioner in winding up proceedings shall be first gone into.

15. The objector/unsecured creditor is admittedly the petitioner in C. P. No. 180 of 2009 filed for winding up of the company. The application for stay is filed u/s 391(6) of the Companies Act and the relevant rule applicable for filing the application and obtaining ex parte order u/s 391(6) is rule 71 of the Companies (Court) Rules, 1959, which is extracted hereunder :

71. Application for stay.--An application under sub-section (6) of section 391 for stay of the commencement or continuation of any suit or proceeding against the

company may be moved by a Judge''s summons ex parte, provided that where a petition for winding up the company or a petition u/s 397 of 398 is pending, notice of the application shall be given to the petitioner in such petition.

16. Rule 71 expressly postulates that though an application for stay of commencement or continuation of proceedings against the company may be moved by the judges summons ex parte, notice of the application to the petitioner in winding up petition, if any pending, is made mandatory. In this case admittedly, no such advance notice is given by the applicant-company to the objector herein, who is the petitioner in the winding up petition, which is pending on the date of filing of this petition. The averments raised in the affidavit filed by the objector reveals that eSys Information P. Ltd., has also filed another company petition for winding up of the company and the petitioners in both the company petitions are admittedly not given any notice in the stay application.

17. Learned counsel for the objector cited the following authorities against maintainability of the stay application without one such advance notice to the petitioner in winding up petition (i) In Re: Sharp Industries Limited, and (ii) Central Bank of India Vs. Roofit Industries Limited,

18. The Bombay High Court has in both the cases above cited directly dealt with the objection raised herein as to whether advance notice to the petitioner in the winding up petition in the application u/s 391(6) of the Companies Act is mandatory. In Central Bank of India Vs. Roofit Industries Limited, the application was moved ex parte without giving notice to the petitioner in the winding up petition which was pending before the court. The Central Bank of India filed the company application for vacating the ex parte order. The Central Bank of India was also supported by the Karnataka Bank, which was the lead bank in the consortium of lenders and also by the Bank of India on the ground that the scheme is entirely vague and bereft of any material particulars and none of the banks are consulted for the said scheme. The Central Bank of India produced the copy of the order of the BIFR, passed upon the reference made by the company and also brought it to the notice of the company court at Bombay about adverse remarks made by the BIFR regarding mismanagement of the company and siphoning of its funds and the pendency of appeal before the AAIFR. The Bombay High Court allowed the company application and recalled the ex parte stay order passed u/s 391(6) of the Act. While doing so, it is observed by the Bombay High Court that the relief u/s 391(6) cannot be sought as a matter of course as it has serious ramification for creditors, who have outstanding dues against the company and the institution and continuation of proceedings for recovery of the same by such creditors are brought to a halt by the grant of stay and where the attempt is only to gain time or to defeat the genuine entitlements of the creditors or lacking in bona fides without any attempt to pay the outstanding dues and when the company fails to make a fair disclosure of all the relevant factors and also to produce all the relevant materials which the company is duty bound to do, the company court would be justified in declining to pass orders of stay.

19. In In Re: Sharp Industries Limited, the company moved two Company Applications Nos. 338 and 339 of 2004. While Company Application No. 338 of 2004 is one seeking directions for holding meeting of equity shareholders and secured creditors to consider and approve a scheme of compromise/arrangement proposed by it. Company Application No. 339 of 2004 is one seeking stay of the hearing and final disposal of all the proceedings pending against the applicant/ company its directors, officers, civil/criminal in any court or Tribunal in India or abroad and for consequential injunction order. Company Application No. 338 of 2004 was ordered directing the meeting to be held with usual direction regarding holding and convening of the meetings. While doing so, interim order was passed in Company Application No. 339 of 2004 granting stay for period of twelve weeks. The creditors of the company moved company applications for vacating the interim stay order made in Company Application No. 339 of 2004 on more than one ground. One of the grounds raised therein is referred to in paragraph 10 of the order that notices of the hearing of the application ought to have been given by the company to the applicants under rule 71 of the Companies (Court) Rules. The objection regarding non compliance of rule 71 is dealt with from paragraph 32 onwards in the judgment. Though it is sought to be argued before the Bombay High Court on behalf of the company that as the proceeding of winding up petition is suspended in view of the pendency of the appeal before the AAIFR, the winding up petition cannot be treated as pending, as such, no advance notice is necessary in the stay petition filed u/s 391(6) to the petitioner in the company petition. The Bombay High Court negatived the contention by relying upon the Supreme Court judgment reported in Asgarali Nazarali Singaporawalla Vs. The State of Bombay, and also by duly considering the meaning of the expression "pending" as explained in Black''s Law Dictionary and Stroud''s Judicial Dictionary. It is observed that ambit of the expression "pending" ought to be given liberal interpretation and that the legal proceedings is pending as soon as it is commenced and until it is concluded and even if winding up petition is stayed for any reason so long as it is not finally disposed of and as any order u/s 391(6) would adversely affect the rights of the petitioning-creditors; the company is bound to give notice to the petitioner of the stay application the company proposes to make u/s 391(6). The Bombay High Court has by observing so, dismissed the stay petition in Company Application No. 339 of 2004, but confirmed the order made in Company Application No. 338 of 2004 directing convening of the meeting.

20. As rightly argued by learned counsel for the objector, the observation of the Bombay High Court is squarely applicable to the facts of the present case, as such the petition for stay u/s 391(6) is for want of prior notice to the petitioner in winding up petition as required under rule 71 is liable to be dismissed.

21. Company Application No. 720 of 2012 is filed for convening the meeting of class creditors of the company for the purpose of considering and approving with or without modification, scheme of arrangement and compromise proposed to be made between the company and the said class creditors. Here again, the

application is moved ex parte. The objector, who is one of the unsecured creditors and is the petitioner in the winding up petition, now claims to be heard before issuing any directions for convening the meeting of class creditors.

22. The objector has by way of their objection raised serious allegations against, the company in proposing the scheme as if the scheme is complete sham and nominal one and lacking in bona fides and against the interest of the company or public and the same is not feasible and does not show any concrete effort to repay its unsecured creditors and the application is filed with false and factually incorrect statement regarding the amount due to the objector bank and the list of unsecured creditors is misleading warranting thorough enquiry and certain contingent creditors and other unsecured creditors, who initiated legal proceedings for recovery of the amount due to them and obtained decrees shall be deemed to be in the same class as the other unsecured creditors, but are omitted from the present scheme and UCO Bank who has initiated proceedings before the Debts Recovery Tribunal and eSys Information Technology P. Ltd., who is the petitioner in the winding up petition, are omitted to be included in the list. It is, seriously contended by learned senior counsel for the objector that convening of the meeting for consideration and approval of the scheme as called for is not a matter of course and automatic and as the proposal of compromise is not confined to the company or its creditors if any, the court u/s 391(2) will have to be satisfied about the reasonableness of the compromise, public interest or creditors'' interest and bona fides of the applicant. It is contended, that the courts rule u/s 393(1) is very special and useful vital and pragmatic and, very important and as the court is empowered to supervise, the scheme, the court is bound to examine the essential features of the scheme at the stage whenever it is launched. In the event of any doubt arises in the mind of the court, it should not hesitate to reject the scheme or to ask for the additional materials to safeguard the interest of all concerned or to make necessary observation. While giving directions, so that the creditors, members and the company can take note of the pitfalls and loop holes and defects of the scheme and the court has jurisdiction to refuse to issue direction to convene meeting if the circumstances so demand and the court has jurisdiction even to refuse sanction of the scheme approved by the company and the creditors concerned. It is argued that section 391(1) is not a sign post but it is a check post, wherein, it is the duty of the court to examine the scheme and satisfy itself about the viability of the scheme, the court in arriving at such satisfaction, all the parties interested in the action should be in the interest of justice heard and it is the essence of justice to give a hearing and natural justice requires it and there is no reason to deny the objector herein, who is one of the unsecured creditors to be heard at the ex parte motion stage.

23. Per contra, the right so claimed by the objector at the threshold stage is seriously opposed by the applicant/company by taking shelter upon company rules 67 to 69. Both the objector and the respondents have also in support of their, respective contentions for and against right of the objector to be heard at

the threshold stage in the application u/s 391(1), cited, the following authorities.

24. The authorities cited on behalf of the objector are:

(i) (1953) 23 CompCas 161 (Trav Coch) (A. M. Muhammed Abdulla Tharaganar v. Official Liquidator, Cape Comorin General Traffic Co. Ltd.);

(ii) (1977) 47 CompCas 662 (Bom)

(iii) In Re: Sakamari Steel and Alloys Ltd.,

(iv) National Textile Workers'' Union and Others Vs. P.R. Ramakrishnan and Others,

(v) N.A.P. Alagiri Raja and Company Vs. N. Guruswamy and Others,

(vi) Ramakrishna Industries (P.) Ltd. and Others Vs. P.R. Ramakrishnan and Others,

(vii) Rainbow Denim Ltd. Vs. Rama Petrochemicals Ltd.,

(viii) In Re: Sharp Industries Limited,

(ix) Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another, and

(x) In Re: Cash and Carry Wholesale Traders Private Ltd.,

25. The authorities cited on behalf of the applicant-company are : (i) Rainbow Denim Ltd. Vs. Rama Petrochemicals Ltd., and (ii) Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another,

26. The general principles laid down in all the authorities cited on behalf of the objector are that the proposal for the arrangement of compromise is not confined to the company or its liquidator and the company court while deciding the application, has to consider whether the company is qualified to sponsor a scheme, motive and real intention of the company behind sponsoring the scheme, whether the company, is really intending to save itself from liquidation or to clear up part or whole of the amount due to class creditors, whether all similarly placed are covered under the scheme and whether all statutory informations are available. The court is further bound 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 it does not violate any public policy. The court is justified in refusing to sanction the scheme if the court finds that it is unconscionable or an illegal scheme or is otherwise unfair and unjust to the class of shareholders or creditors for whom it is meant. It cannot be said that even if the scheme has got requisite majority in support of the creditors or members or any class to them for whom the scheme is mooted by the company concerned. The company court need not act merely as a rubber stamp and almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the court it would bind even

the dissenting shareholders or creditors, the company court will have to judge the question of viability of the scheme and has to keep in mind the fairness of the scheme qua right of the minority shareholders, while putting its seal of approval on the scheme concerned.

27. In In Re: Sakamari Steel and Alloys Ltd., , the Bombay High Court has laid down the following circumstances as some of the outstanding circumstances to be taken into account for sanctioning the scheme by the court (a) the proposal for the scheme was made in good faith; (b) the scheme is fair and reasonable; (c) the scheme will yield to a smooth and satisfactory working; (d) the scheme does not offend the public or commercial morality; (e) the scheme is not detrimental to the interest of the creditors or members or public interest; and (f) the scheme does not violate the Companies (Acceptance of Deposit) Rules, 1975, or nullify the protection afforded under those rules. It is further observed therein that the court u/s 392 is to empower and supervise the scheme at the stage, when it is launched and the court can satisfy itself as to the viability of the scheme and there cannot be casual or mechanical approach at the time of giving direction as the court rule is useful, vital and pragmatic and section 391(1) is not a sign post, but a check post, whereas it is the duty of the court to examine the genuineness and bona fides for itself and even at the stage of issuance of summons, for direction to convene a meeting, the company judge has to apply his mind and prima facie satisfy itself about the genuineness of the scheme.

28. The legal proposition laid down in all the judgments cited above cannot be disputed. What is disputed herein is whether the petition u/s 391(1) seeking direction to convene the meeting shall be moved ex parte and whether the notice of hearing at the threshold stage of issuing direction to convene meeting is required to be given to its members, shareholders or creditors.

29. In this regard, the relevant rules to be looked into are rules 67 to 69, which read as follows :

67. Summons for directions to convene a meeting.--An application u/s 391(1) for an order convening a meeting of creditors and/or members or any class of them shall be by a judge''s summons supported by an affidavit. A copy of the proposed compromise or arrangement shall be annexed to the affidavit as an exhibit thereto. Save as provided in rule 68 hereunder, the summons shall be moved ex parte. The summons shall be in Form No. 33, and the affidavit in support thereof in Form No. 34.

68. Service on company.--Where the company is not the applicant, a copy of the summons and of the affidavit shall be served on the company, or, where the company is being wound up, on its liquidator, not less than 14 days before the date fixed for the hearing of the summons.

69. Directions at hearing of summons.--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 in respect

of the following matters :-

(1) determining 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;

(2) fixing the time and place of such meeting or meetings;

(3) appointing a chairman or chairmen for the meeting or meetings to be held, as the case may be;

(4) fixing the quorum and the procedure to be followed at the meeting or meetings, including voting by proxy;

(5) determining the values of the creditors and/or the members, or the creditors or members of any class, as the case may be, whose meetings have to be held;

(6) notice to be given of the meeting or meetings and the advertisement of such notice;

(7) the time within which the chairman of the meeting is to report to the court the result of the meetings; and such other matters as the court may deem necessary.

The order made on the summons shall be in Form No. 35 with such variations as may be necessary.

30. The reading of the relevant rules reveals that under rule 67 an application u/s 391(1) for an order convening a meeting of creditors and/or members of any class of them shall be by a judge''s summons supported by an affidavit as an exhibit thereto. Save as provided in rule 68 hereunder, the summons shall be moved ex parte. The summons shall be in Form No. 33 and the affidavit in support thereof in Form No. 34. Only where the company is not the applicant, the copy of the summons and the affidavit shall be under rule 68 served on the company or where the company is being wound up on its liquidator. Rule 69 prescribes the matters in respect of which directions may be issued by the company court, while issuing summons for the hearing of the application.

31. In this case, the company is the applicant herein, as such, no summon as contemplated under rule 68 is ordered. Further, no winding up order is passed till date in the winding up petition, as such, the question of issuing notice to the official liquidator does not arise. Hence, the instant case is one which falls under rule 67 and not under rule 68.

32. The question that arises for consideration herein is whether the application falling under rule 67 shall be moved ex parte or notice of hearing is required to be sent to any of the parties interested in the proposed scheme of arrangement and compromise.

33. The hon''ble Supreme Court in the judgments cited on the side of the petitioners reported in Rainbow Denim Ltd. Vs. Rama Petrochemicals Ltd., and

Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another, , dealt with this aspect directly and answered the issue in negative. The short question which arose for "determination" in the civil appeal is referred to in paragraph 1 of its judgment in Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another, "whether the application filed by the company u/s 391(1) of the Companies Act is required to be heard and decided ex parte as per rule 67 of the Rules".

34. The few facts which are relevant to duly understand the view of the Supreme Court are that Company Applications Nos. 354 to 359 of 2003 are filed by the company under sections 391 to 394 of the Companies Act. When the company applications came before the company court, query was raised as to whether it was necessary to hear the shareholders before issuing direction for holding meeting of the shareholders or creditors. The Division Bench of Karnataka High Court on a reference answered the above question of law stating that hearing of all parties was necessary before the company court could issue directions to convene a meeting u/s 391(1) of the Companies Act and ex parte order in this connection could not be passed and the said order was challenged before the Supreme Court. The Supreme Court has after extracting rules 67 to 69, rules 73 to 76 and rules 79 and 80 and Forms Nos. 33 and 34 for issuing summons for directions to convene a meeting and Form No. 34 affidavit in support of summons, discussed the question in paragraphs 8 to 11 and has ultimately arrived at conclusion in paragraphs 13 and 14. The hon''ble apex court quoted with approval observation of the Supreme Court in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., and the Bombay High Court in In Re: Sakamari Steel and Alloys Ltd., and decided the issue, that no hearing is necessary at threshold stage.

35. For better understanding paragraphs 8 to 11, 13 and 14 of the Supreme Court judgment are extracted hereunder (page 685 and 689 of 147 Comp Cas) :

If one reads rule 67 with Form No. 33 and Form No. 34, one find 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 of 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. Further, when rule 67 categorically states that summons for directions shall be moved ex parte, the question of prejudice or rule of natural justice does not come into play. However, there is a rationale for stating that the summons shall be moved ex parte and that rationale is that it is an application for an order for meeting as a preliminary step at the threshold stage and at that stage it is not necessary for the company to give notice of hearing to the creditors, members and shareholders (see : Palmer''s Company Law). Further, if one examines rule 67 in the context of rule 73, one finds that after summons for direction are issued as and when the meeting is ordered to be convened, the notice of the meeting is required to be given to the creditors and/or members or such other classes enumerated in rule 73. Similarly, under rule 74 advertisement of the notice of meeting is also required to be published in such newspapers and in such manner as the judge may direct. This is to be supported by affidavit of service under rule 76.

The analysis of the above rules indicates that there is a clear dichotomy between the threshold stage of issuance of directions to convene a meeting and the subsequent stage of a notice of meeting which is contemplated by rule 73 and for that precise reason rule 67 states that the summons shall be moved ex parte.

Our view is supported by various judgments of this court and the High Courts...

In the case of In Re: Sakamari Steel and Alloys Ltd., the learned single judge of the Bombay High Court held that section 391(1) is not a sign-post but a check-post whereat it is a duty of the court to examine the genuineness and the bona fides of the scheme for itself.

A reading of the above judgment would, therefore, show that at the stage of issuance of summons for directions to convene a meeting, though the company judge has to apply its mind, prima facie, on the genuineness of the scheme, basically the entire exercise is to verify whether the numerous conditions prescribed in rule 69 are satisfied read with Form No. 33 and Form No. 34...

Be that as it may, there are observations in the said judgment, with respect, with which we do not agree, both on the interpretation of rules 67 and 69 on one hand as also on the basis of the practical effect of the interpretation given by the High Court in the present case. If at the threshold stage of directions to convene a meeting hearing is required to be given to the members as held in the impugned judgment the scheme of the Companies (Court) Rules, 1959, will become unworkable.

36. The hon''ble apex court has also in the other judgment gone to the extent of saying that the appropriate time for the company judge to consider the scheme is subsequent to approval thereof by the shareholders and creditors of the appellant-comp any. In Rainbow Denim Ltd. Vs. Rama Petrochemicals Ltd., the company sought for permission to dispense with calling of meetings of its shareholders and creditors, the company judge declined to make such order, but made observations that affect the viability of the proposed scheme. The appellant carried the matter before a Division Bench, the Division Bench dismissed the appeal, when the same was challenged before the Supreme Court, the Supreme Court set aside the order of the company court and the appellant-company was given liberty to move the High Court for direction for calling meeting of its shareholder and creditors and then to move further application for sanctioning the scheme, while doing so, it is observed by the Supreme Court that

would be the appropriate time for the company judge to consider the scheme.

37. The Supreme Court has in paragraph 13 of the judgment reported in Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another, observed that at the stage of issuance of summons for directions to convene a meeting, though the company judge has to apply his mind, prima facie, on the genuineness of the scheme, basically the entire exercise is to verify whether the numerous conditions prescribed in rule 69 are satisfied read with Form No. 33 and Form No. 34.

38. The observation of the Supreme Court in this case is also extracted in paragraph 8 of the judgment of the Division Bench of our High Court in In Re: Cash and Carry Wholesale Traders Private Ltd., cited on the side of the objector. The Division Bench has referred to the same while making distinction between the cases falling under rules 67 and 68 and the Division Bench is pleased to observe that the observation of the Supreme Court was made in an application under rule 67 and as per which, in the cases arising out of rule 67, it is not necessary for the company to give notice of hearing to the creditors, members or shareholders. Whereas the same is not applicable to cases falling under rule 68, the Division Bench held the observation of the Supreme Court to be inapplicable to the facts of the case in hand only because the same falls under rule 68. The Division Bench has in paragraph 8 observed as follows :

8. This was approved in Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another, which was strongly relied on by the appellant. In Chembra Orchard Produce Ltd. v. Regional Director of Company Affairs Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another, the Supreme Court was dealing with an application under rule 67. Paragraph No. 7 of the judgment makes this clear. Rule 68 deals with a case where the company is not the applicant as in the case on hand. So cases arising out of rule 67 may not apply. Further, in paragraph No. 9, the Supreme Court only, held that it is not necessary for the company to give the notice of hearing to the creditors, members and shareholders.

39. In the judgment reported in In Re: Sharp Industries Limited, , the Bombay High Court dealt with the issue regarding issuance of notice under rule 71 to the petitioner in the winding up petition in an application u/s 391(6). The facts of the case involved therein reveals that the company filed two applications Company Applications Nos. 338 and 339 of 2004 and while Company Application No. 338 of 2004 is one for identical relief for directions for holding meeting of equity shareholders and secured creditors. Company Application No. 339 of 2004 is filed seeking stay of the hearing and final disposal of pending proceedings. Both the applications are ordered ex parte without notice to the concerned, when the same was challenged by the creditors the Bombay High Court is pleased to set aside the order made in stay petition in Company Application No. 339 of 2004 for want of advance notice which is mandatory under rule 71 and is pleased to make absolute the order made in Company Application No. 338 of 2004 and the same

is hence, more in support of the stand taken by the applicant-company.

40. In N.A.P. Alagiri Raja and Company Vs. N. Guruswamy and Others, case also, the emphasis laid down is more upon the obligation of the court to satisfy itself about the feasibility or otherwise of the proposed scheme and bona fides of the applicant in the application u/s 391(1) at the threshold stage. The High Court has in the judgment laid down the principle that the company court is not without any power to refuse to call for the meeting. The objection raised by the official liquidator and creditors, who filed the winding up petition and who were made parties in the application filed u/s 391(1) of the Companies Act is against the locus standi of the petitioners to maintain the application and as to whether the competent person to file an application is only the official liquidator or the creditor or any class of the creditors or any member of the company and as to whether the court is bound to consider the viability or otherwise of the proposed scheme at the stage of filing application u/s 391(1). The question as to whether the petition u/s 391(1) shall be moved ex parte under rule 67 or not is not dealt with by the Madras High Court.

41. The next authority cited by the objector reported in National Textile Workers'' Union and Others Vs. P.R. Ramakrishnan and Others, arises out of proceedings in winding up petition and as the procedure for dealing with winding up and petition for amalgamation are not the same, the ruling is not applicable to the facts of the present case, even otherwise, the Full Bench of the Supreme Court has in National Textile Workers'' Union and Others Vs. P.R. Ramakrishnan and Others, case decided the right of the workers of the company to be heard in the main winding up petition. It cannot be disputed herein that the right to raise their objection if any, is available to the shareholders or creditors, when the scheme of arrangement after approval in the meeting is placed before the court for sanction.

42. The next authority cited on behalf of the objector is Ramakrishna Industries (P.) Ltd. and Others Vs. P.R. Ramakrishnan and Others, , wherein, the case is related to winding up and not amalgamation. In that case, the question whether the hearing of the respondent is necessary at threshold stage, is not considered. What is considered is the inherent powers of the court to do all acts which are necessary to prevent abuse of process of the court or to advance the cause of justice and the court is bound to satisfy itself about prima facie case and the interest of shareholders have to be kept mind, while the application is objected to or not. The observation is not much helpful to support the argument advanced on the side of the objector.

43. The next authority cited on behalf of the objector (1953) 23 CompCas 161 (Trav Coch) (A M: Muhammed Abdulla Tharaganar v. Official Liquidator, Cape Comorin General Traffic Co. Ltd.) which is also arising out of winding up proceedings and the question arose for consideration is whether the liquidator is a Competent person to file an application u/s 153 of the Indian Companies Act for the proposal of the scheme and it is answered in the negative by holding that in the case of the company being wound up, the liquidator is an additional and

not an exclusive person, who could make an application for the proposal of the scheme and the same is also not applicable to the facts of the present case.

44. The (1977) 47 CompCas 662 (Colaba Land and Mill Co. Ltd., In re) is a stray case, wherein the Bombay High Court expressed its view that the rule providing for moving ah application ex parte, cannot debar a party expressing interest in the action from placing its view point that the proposed order should or should not be made the view expressed by the Bombay High Court cannot be held to be good law in view of the observation of the Supreme Court in the latest judgments cited above.

45. Here is the case, wherein/the objector has sought for an audience before this court before considering the present application on merits only in their capacity as one of the unsecured creditors and the petitioner in the winding up petition and the objector is in both the capacities, not entitled to get the right of personal hearing at the initial stage. As the relief sought for in this application is only to convene and holding meeting of the scheme creditors and as the objector is one of the scheme creditors shown as SI. No. 4 in annexure G in the list, the objector is entitled to raise all their objections in the meeting to be convened in respect of which the permission is sought for herein and at any other appropriate stage permissible under law, as such, the right of hearing claimed by the objector at the present stage is negatived.

46. As far as the proposed scheme of arrangement is concerned, the same is entered into between the company and class of creditors. It is settled law that the court is at the initial stage bound to consider and prima facie satisfy about the genuineness of the scheme and it can be only in the light of the averments raised in the petition and also in the light of the various clauses incorporated in the draft scheme. The petitioner-company has attached copy of the explanatory statement as required u/s 393 of the Companies Act as annexure H along with the application, in and under which relevant particulars regarding the main objects of the company as per the memorandum of association, nature of the business activities of the company, its turn over and net profit for the last 10 years, its future plans, terms and conditions of the settlement and compromise, projection and future business of the company and the expected cash flow of the company, pre and post scheme shareholding pattern, details of the litigation and proceedings, directors and shareholding of the directors and the documents available for the articles of association are furnished.

47. The list of class creditors whose outstanding is above Rs. 10,00,000 is enclosed as annexure G. The scheme explains the parties to the scheme, objects of the company as per the memorandum of association, activities of the company, the salient features of the settlement of compromise, terms of interim compromise and settlement and adjustment of payment against scheme debt, general terms applicable to entire scheme and the scheme also provides for approvals, and modifications, conditions and events upon the compliance of which, the scheme shall be sanctioned and implemented. The petitioner has also

filed along with the petition the financial status of the applicant-company, board resolution, summary of prospects of the applicant-company, copy of the order of this court in C. P. No. 180 of 2009, etc.

48. The combined appreciation of various aspects averred in the light of the documents available herein would prima facie show reasonableness, viability and feasibility of the proposed scheme. There is no objectionable features to negative the proposed scheme at the threshold stage and to refuse, to issue appropriate directions to convene meeting. The salient features of the scheme may be subjected to close scrutiny by the creditors and other members if any and the merits and demerits of the scheme may be duly considered by the class creditors, as and when the same is placed for sanction before this court.

49. Hence, this court having prima facie satisfied with the bona fide of the applicant and the genuineness of the proposed scheme, is inclined to issue the following directions to convene the meeting :

(i) The meeting of the creditors of the Agnite Education Ltd./the applicant-company be convened and held at New Woodlands Hotels 72-75, Dr. Radhakrishnan Road, P. B. No. 626, Mylapore, Chennai-4 on January 28, 2013 at 10.00 a.m. for the purpose of considering and, if thought fit, for approving with or without modification (s), the scheme of arrangement and compromise between Agnite Education Ltd. (AEL) and the class of creditors;

(ii) At least 21 clear days before the meeting of the creditors of the applicant-company to be held as aforesaid, a notice convening the said meeting, at the place, date and time aforesaid and stating that copies of the scheme of arrangement and the statement required to be furnished pursuant to section 393 of the Companies Act, 1956 and also the forms of proxy can be obtained free of charge at the registered office of the applicant-company and/or at the office of its advocates shall be published once in each of the newspapers, namely, English daily New Indian Express and Tamil daily Dinamani;

(iii) That, in addition, at least 21 clear days before the said meeting of the creditors of the applicant-company to be held as aforesaid, a notice informing the said meeting at the place, date and time aforesaid, together with the copy of the scheme of amalgamation and arrangement, a copy of the statement required to be sent u/s 393 of the Companies Act, and prescribed form of proxy, shall be sent by registered post with acknowledgment due addressed to each one of the creditors to their respective addresses as registered in the books of the said company or to their last known addresses;

(iv) That the settling and approving of the form of advertisement, form of proxy, form of notice, statement required to be furnished pursuant to section 393 of the Companies Act to accompany the notice by the Assistant Registrar of this court is dispensed with. The applicant-company undertakes to:

(a) issue notice, convening the meeting of the creditors as per Form No. 36;

(b) issue statement containing all the particulars as per section 393 of the Companies Act, 1956;

(c) issue Form of proxy as per Form No. 37; and

(d) advertise the notice convening the meeting as per Form No. 38. The above said undertaking is accepted.

(v) That Justice Malai Subramanian (retired judge High Court, Madras) shall be the chairman of the aforesaid meeting of the creditors of the Agnite Education Ltd./the applicant-company to be held at New Woodlands Hotels, 72-75, Dr. Radhakrishnan Road, P. B. No. 626, Mylapore, Chennai-4 on January 28, 2013, at 10.00 a.m., or any adjournment or adjournments thereof;

(vi) That the chairman appointed for the aforesaid meeting do issue advertisement and send out the notices of the meeting referred to above;

(vii) That the quorum of the said meeting of the creditors shall be six creditors of the company present-in-person or by proxy;

(viii) That voting by proxy be permitted, provided that a proxy in the prescribed form duly signed by the person entitled to attend and vote at the meeting, is filed with the company at its registered office at "First Hoor, No. 37/1, Velachery Tambaram Main Road, Velachery, Chennai-42 not later than, 48 hours before the meeting;

(ix) That the value of shares of each member shall be in accordance with the books/register of the applicant-company and where the entries in the books/ register are disputed, the chairman shall determine the value for the purpose of the aforesaid meeting and his decision in that behalf shall be final;

(x) That the chairman appointed for the meeting of the creditors do report to this court, the result of the above said meeting within one week from the date of the meeting and the report shall be verified by his affidavit disclosing all the particulars as to what happened in the said meeting. The fee for Justice Malai Subramanian, who is appointed as chairman for the meeting of creditors of the applicant-company, is fixed at Rs. 1,00,000.

The company petition shall be presented on or before February 11, 2013.

In the result Company Application No. 720 of 2012 is accordingly ordered. Company Application No. 721 of 2012 is dismissed.

