(2010) 05 AHC CK 0086

In the Allahabad High Court

In Re: Alps Industries Ltd.

Date of Decision : 17-05-2010

Acts Referred:
COMPANIES ACT, 1956 — Section 391, 392, 393, 394, 433
Negotiable Instruments Act, 1881 (NI) — Section 138, 143

Citation : (2010) 05 AHC CK 0086

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Pankaj Mithal, J.—M/s. Alps Industries Ltd., a company incorporated under the Companies Act, 1956 (hereinafter referred to as the ''Act'') has applied u/s 391 - 394 of the Act for acceptance of a scheme of arrangement between the company and its creditors for its nourishment and rehabilitation by means of Company Application No. 3 of 2010.

2. The Company Judge vide order dated 18.2.2010 in the aforesaid application directed for convening meeting of the creditors of the company on 11.3.2010 and another meeting of the shareholders of the company on 6.5.2010.

3. The matter is posted for 27.5.2010 and in the meantime it is said that the aforesaid two meetings have taken place and majority of the creditors and the shareholders have expressed opinion in favour of the scheme.

4. Till date no application for second motion has been moved.

5. The applicant/company, in the meantime, has moved this application No. 111313 of 2010 u/s 391(6) of the Act for grant of stay of general nature staying all proceedings pending in various tribunals and forums for winding-up, recoveries of debts and other proceedings regarding nonpayment of amounts by the company, commencement or continuation of any suit or proceeding against the applicant/company or its directors, employees, officers and exemployees in connection with the affairs of the applicant/company. The application is founded on the allegation that the applicant/company was a profit making company till

the end of the financial year 31.3.2008 but on account of unforeseen economic recession it has accumulated losses to the extent of Rs. 222,42,04,338.54 (Two Hundred Twenty Two Crores Forty Two Lacs Four Thousand Three Hundred Thirty Eight and Fifty Four Paisa) as per the added balance sheet for the period of 15 months ending 30th June, 2009. The applicant/company as such applied for acceptance of the above scheme. However, in the meantime, proceedings have been initiated by some of the creditors, namely,

(i) Hong Kong and Sanghai Banking Corporation Limited (in short ''HSBC'') being Original Application No. 321 of 2009 before the Debt Recovery Tribunal-II, New Delhi for recovery of Rs. 27,22,92,950.21 (Rupees Twenty Seven Crores Twenty Two Lacs Ninety Two Thousand Nine Hundred fifty and Twenty One Paisa);

(ii) M/s Kotak Mahindra Bank being Original Application No. 40 of 2010 before the Debt Recovery Tribunal, Mumbai for recovery of Rs. 6,01,11,346.54 (Rupees Six Crores One Lac Eleven Thousand Three Hundred Forty Six and Fifty Four Paisa);

(iii) DBS Bank Ltd. being Criminal Complaint No. 25884 of 2010 u/s 138, 151 and 143 of the Negotiable Instrument Act against the senior officers of the applicant/company before the Chief Judicial Metropolitan Magistrate, New Delhi on account of dishonour of cheque of Rs. 33,33,333/- (Rupees Thirty Three Lacs Thirty Three Thousand Three Hundred Thirty Three);

(iv) M/s Kotak Mahindra Bank being Company Petition No. 11 of 2010 u/s 433 and 434(e) of the Act before the High Court of Judicature at Allahabad for winding up of the applicant/company on which notices have been issued.

6. Besides, notices from various creditors including DBS Bank Ltd have been received u/s 433 and 434(e) of the Act and there is every likelihood of more proceedings in this regard being commenced against the applicant/company. Therefore, it is just and proper to stay all such proceedings pending consideration of the scheme.

7. The above application for grant of interim stay has been opposed on behalf of the DBS Bank and M/s. Kotak Mahindra Bank on the ground that the application is vague, it does not discloses the exact stage at which the proceedings mentioned above are pending and the manner in which the applicant company is likely to suffer any loss if these proceedings are permitted to be continued.

8. I have heard Sri Heard Sri B.K.V. Subrahmanyam, Senior Advocate assisted by Sri Saurabh and Sri Manu Khare, learned Counsel appearing for the applicant/company, Sri Naveen Sinha, Senior Advocate assisted by Sri Vikram Chauhan, learned Counsel appearing for DBS Bank and Sri Amit Sthalekar, learned Counsel appearing for M/s. Kotak Mahindra Bank.

9. It has been argued that this Court has power u/s 391(6) of the Act to stay the commencement or continuation of any suit or proceedings including criminal proceedings against the applicant/company pending an application for

consideration of arrangement/scheme u/s 391 of the Act. It has also been submitted that as the scheme has cleared the first stage and the meetings of the creditors as well as share holders have already taken place for accepting the scheme and there is no opposition to the scheme by most of the major creditors, the applicant/company is entitle to be given a chance to rehabilitate itself and, therefore, the Court ought to exercise discretion in granting interim order as prayed for in its favour.

10. The provision of Section 391(6) of the Act is very clear and unambiguous. It reads as under:

391. Power to compromise or make arrangements with creditors and members. -

(1) ....

(2) ....

(3) ....

(4) ....

(5) ....

(6) The Tribunal may, at any time after an application has been made to it under this section stay the commencement or continuation of any suit or proceeding against the company on such terms as the Tribunal thinks fit, until the application is finally dispose of.

11. The use of word ''may'' in the above provision signifies the discretion available with the court and that it is not mandatory for the court to stay the commencement and continuation of the suit or proceeding as soon as an application u/s 391 - 394 of the Act is moved in each and every case. It empowers the court whenever an application has been made u/s 391 of the Act to stay the commencement or continuation of any suit or proceeding against the company in exercise of its discretion.

12. The aforesaid provision takes within its sweep the institution as well as continuation of suit or proceeding or both but it is difficult to comprehend to read along with it the proceedings of the criminal nature. The object of the aforesaid provision is to avoid coercive and distress proceedings of financial nature against the company seeking rehabilitation so that the scheme for such rehabilitation/ nourishment etc. may not be hampered. It therefore takes into its fold the proceedings in context with the financial and economic matters of the company only. The criminal proceedings generally are concerned with punishing persons found guilty of any offence and are independent and not connected with the financial process of rehabilitation.

13. The use of the words ''suit'' and ''proceeding'' simultaneously in the above provision also has a definite purpose and intend. The word ''proceeding'' has been used in conjunction with the word ''suit'' which is very relevant and material

in interpreting the true intent behind using it together with the word ''suit''. The expression ''suit or proceeding'' used above connotes that proceedings referred to above must be in relation to or in context with a suit which obviously relates to proceedings of a civil nature. Thus, excluding from its ambit all criminal proceedings.

14. It is also of importance to note that had their been any intention of the legislature to embrace within the expression ''suit or proceeding'' the proceedings of criminal nature it would have said so clearly or would have used the word ''proceedings'' only instead of ''suit or proceeding''. The word ''proceeding'' independently would have been of a very wide amplitude. Therefore, the protection permissible under the aforesaid provision is only in respect of civil liabilities of the company or its officers.

15. In Uma Investments Pvt. Ltd., the Bombay High Court while considering this very provision of Section 391(6) of the Act held that a proposal by the company for any arrangement to be forwarded u/s 391 is concerning the civil liabilities and, as such, it is not possible that the power u/s 391(6) can be used for freezing criminal proceedings as well. The object of the aforesaid provision is not to provide an umbrella of protection to a company and its directors facing punishment, fine or both for an offence or for violation of any law, rule or regulation and, therefore, such criminal proceedings can be commenced and continued notwithstanding pending consideration of a scheme for compromise or arrangement u/s 391 of the Act.

16. A similar view was reiterated by His Lordship of the Bombay High Court in reference to the case of Sharp Industries Limited (2005) 123 Company Cases 60 (Bom) and in interpreting the word ''proceedings'' occurring in Section 391(6) of the Act held that it does not takes within its ambit the criminal proceedings. In this case criminal proceedings u/s 138 of the Negotiable Act were involved.

17. In context with Section Section 446(1) of the Act the expression ''suit or other legal proceedings'' have been used. Learned Single Judge of the Delhi High Court in D.K. Kapur Vs. Reserve Bank of India and Others, ruled that the above expression would not include within its ambit the proceedings relating to criminal prosecution.

18. The reliance by Sri Subrahmanyam upon the decision of learned single Judge of Gujrat High Court on the case of In Re: Divya Vasundhara Financiers Pvt. Ltd., to the effect that expression ''proceedings'' appearing in Section 391(6) of the Act would include not only civil proceedings but criminal proceedings cannot be accepted and followed in view of the fact that the said decision has been taken note of by the Bombay High Court in the case of Sharp Industries Ltd. (supra) and disagreeing with the same, the earlier view of the Bombay High Court in the case of Tamil Nadu v. Uma Investments Pvt. Ltd. (supra) has been reiterated and held to be correct one.

19. Even the Gujrat High Court in reference Divya Vasundhara Financiers Pvt. Ltd

(supra) in paragraph 16, while granting partial stay of criminal complaint only for the reason that His Lordship''s predecessor had even stayed criminal proceedings while considering the provisions of Section 391(6) of the Act observed as under:

This clause obviously has nothing to do with the pending criminal cases, or future criminal cases which may be filed by the creditor-complainants against the concerned Directors of the Company.

20. The judgment and order of the Jaipur Bench of the Rajasthan High Court in Reference TCI Infrastructure Finance Ltd. II (2007) BC 359 : RLW 2007(2) Raj 1956 holding that the word ''proceeding'' in Section 391(6) is a term of wide import and includes within its sweep criminal proceeding also cannot be of any help to the petitioner as the said view has been expressed by taking into consideration the decision of the Gujrat High Court in Divya Vasundhara Financiers Pvt. Ltd (supra) without any reference or consideration of two comprehensive judgments of the Bombay High Court referred to above on the subject. The reasoning of the Bombay High Court in the above decision appears to be more sound and logical and therefore I prefer to follow the same coupled with my own reasoning expressed above.

21. An attempt has been made to draw a distinction between criminal proceedings which may entail punishment and those which may result in financial implications. I am afraid that such a distinction cannot be approved as the commission of an offence ultimately ends in imposition of a punishment or fine or both but that would not be of financial nature and the criminal proceedings u/s 138 of the Negotiable Instrument Act with which the court is presently concerned also has no financial implication particularly of the nature which may obstruct or jeopardise any scheme of compromise or arrangement under consideration for rehabilitation of the company as the said proceedings are primarily for punishment and imposition of fine for infringement of the provisions of the Act.

22. The view taken by me above can easily be explained by means of an illustration. There may be a case where during the course of workers resentment an unfortunate incident takes place and one or more workers are killed and a first information report is lodged against the officers of the company and after investigation the matter is committed to the sessions trial. The question would be whether such a trial can be stayed in exercise of power u/s 391(6) of the Act, if the company chooses and files an application for consideration of an arrangement for its rehabilitation. The answer would definitely be in a big ''no'' as a proceeding of such a criminal nature would have no impact on the working of the company vis-a-vis its rehabilitation or any scheme for the purpose.

23. In this view of the matter, I am of the considered opinion that the expression ''suit or proceeding'' used in Section 391(6) does not cover proceedings of criminal nature and the same are not liable to be stayed merely for the reason a scheme is pending consideration.

24. Now coming to grant of interim stay in respect of the commencement or

continuation of the proceedings of civil nature, it has been fairly submitted at the Bar by both the parties that the proceedings before the Debt Recovery Tribunals have been set at naught in appeals though with liberty to initiate fresh proceedings before the appropriate forum of jurisdiction and, as such, no such proceedings are presently pending.

25. Now the only proceeding of the civil nature which remains is the Company Petition No. 11 of 2010 on which only notices have been issued so far. The same is pending before this very Court. It prima facie does not have any adverse impact upon the consideration of the scheme and in any case as it is being dealt with by the same court, it can always be kept in abeyance if felt necessary at any stage in future. It would therefore be prudent and in the interest of all concerned to have the aforesaid company petition dealt with along with this application u/s 391 of the Act. Accordingly, I am of the view that no fruitful purpose shall be served by staying the proceedings of the company petition. It may proceed simultaneously with the present proceedings.

26. So far the apprehension of the applicant/company that on the basis of certain legal notices already issued fresh proceedings may be initiated, I am of the view that they may at best lead to institution of fresh winding up petitions before this Court, all of which may be clubbed and dealt with harmoniously along with the pending company petition and the Company Application No. 3 of 2010 without adversely affecting the merits of the scheme/arrangement.

27. The purpose of granting interim stay/injunction is ordinarily to preserve the subject matter under litigation and to ensure that no irreparable loss or injustice is caused to the litigating party pending the litigation. The grant of such interim relief ought not to be arbitrary and unreasonable. To avoid any arbitrary or fanciful exercise of discretion it is necessary that the discretion has to be guided by law. It must be governed by rule and must appeal to reason on the touchstone of well established judicial principles based upon equity. In this view of the matter the fundamental principles for grant of interim stay or injunction as enshrined in Order XXXIX Rule 1 C.P.C. can always be pressed into service along with host of other factors which may be relevant in a given situation for exercising such discretionary powers.

28. In the instant case, on a careful perusal of the pleadings made, I find that application does not contain any foundation so as to establish that the balance of convenience is in favour of the applicant/company and that it would suffer irreparable loss in the event interim stay of the proceedings is not granted. It may be true to some extent that as the proposal of the applicant/company for its rehabilitation has been carried out in the two meetings it may be justified in saying that it had succeeded in establishing a prima facie case. However, with regard to the balance of convenience and irreparable loss, the manner in which the above referred pending proceedings of the civil nature or those likely to be commenced are going to affect the cause of the applicant/company vis-a-vis proposed scheme is not clear. The court is at loss to understand as to how and in

what manner the applicant/company would be prejudiced with the continuation of these or other similar kind of proceedings.

29. In the facts and circumstances, I do not find that the balance of convenience lies in favour of the applicant/company and that it would suffer irreparable loss and injury with the commencement or continuation of the alleged proceedings. Accordingly, no case has been made out so as to enable this Court to exercise its discretion in its favour at this stage.

30. Accordingly, I am not inclined to exercise my discretion to grant interim stay to the applicant/company of the general nature, as prayed for at this juncture and it is left open for the applicant/company to move afresh in this regard as and when occasion arises.

31. The application is accordingly rejected.

