

(2006) 04 AHC CK 0043
In the Allahabad High Court
Case No : Company Petition No. 29 of 1999
In Re: Banaras Beads Ltd.

Date of Decision : 28-04-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 36, 9
Companies Act, 1956 — Section 176, 391, 393, 394, 397

Citation : (2006) 132 CompCas 548 : (2006) 6 CompLJ 342 : (2006) 72 SCL 178

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : R.P. Agarwal, for the Appellant; Navin Sinha and Vipin Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Sunil Ambwani, J.—Heard Shri R. P. Agarwal, learned counsel for the petitioner companies and Shri Navin Sinha, senior advocate assisted by Shri Vipin Sinha for Shri Raj Kumar Gupta, the objector to the scheme of amalgamation considered for approval in the meetings of the shareholders of the companies and creditors of the transferor company convened by the court and held on February 6, 1999, under the orders of this Court u/s 391 of the Companies Act, 1956 (in short "the Act").

2. The Banaras Beads Ltd. with its registered office at A1, Industrial Estate, Varanasi, the transferor company is sought to be amalgamated with the BBL Beads Limited with its registered office at the same address at Varanasi, the transferee-company. The scheme does not give the background of disputes between the two groups of shareholders, which were sought to be settled through an arbitration of the hon'ble Mr. Justice A.N. Gupta, the then sitting judge at Lucknow Bench. He gave an award on November 1, 1998, between the two parties namely "AKG Group" led by Shri Ashok Kumar Gupta, resident of Varanasi. Smt. Rekha Gupta (wife), Shri Sidharth Gupta (son), Km. Deepali Gupta (daughter) and Smt. Vaishali Gupta (married daughter) and his HUF known as Ashok Kumar Gupta HUF on the first part; an "RKG group" led by Shri

Raj Kumar Gupta, resident of New Delhi, Smt. Pushpa Gupta (wife), Akash Gupta (son), Km. Nidhi Gupta (daughter) and his HUF known as Raj Kumar Gupta HUF on the second part. In the award the arbitrator observed that "AKG group" holds 31.96 per cent, and "RKG group" 31.92 per cent, shares in Banaras Beads Limited, and that the company is holding shares in 13 other public limited and private limited companies.

3. The arbitrator, in para. 15.08 of the award, in the best interest of the parties, directed as follows:

15.08 : To ensure smooth implementation of the scheme of arrangement envisaged under this award, I direct that at the general meetings of the shareholders/creditors of Banaras Beads Ltd. convened for the purpose of consideration and approval of the scheme of arrangement, neither Sri Ashok Kumar Gupta nor Sri Raj Kumar Gupta nor any other members of the two groups (including their associate companies) shall attend such meeting(s) personally. Smt. Resham Devi Gupta, and in her absence Smt. Vinod Kumari Gupta, as hereinafter provided, shall attend the said meeting(s) as their attorneys to support the scheme of arrangement. I further direct that by virtue of this award and without any further deed, the said ladies, in alternative, shall be deemed to have been duly appointed as their attorneys by the respective members of the AKG group and the RKG group and their associate companies, for the limited purpose of attending the said meetings and to vote for them. However, if necessary under law, Sri Ashok Kumar Gupta and Sri Raj Kumar Gupta shall ensure that proper proxy forms are also duly signed/executed by each of the concerned members of their respective groups and the associate companies, appointing Smt. Resham Devi Gupta, and in her absence Smt. Vinod Kumari Gupta, as their proxies to attend and vote at such meetings of the shareholders/creditors, and further ensure that the said proxy forms are deposited with the company within the stipulated time.

4. The award was challenged before the District Judge, Varanasi u/s 34 of the Arbitration and Conciliation Act, 1996. The District Judge, Varanasi, rejected the application against which FAFO No. 809 of 1999 is pending in this Court.

5. In the meantime, Shri R.P. Agarwal, advocate, appointed by the arbitrator in the award filed an application u/s 391 read with Section 394 of the Companies Act in the court on February 24, 1999, for convening meeting of the shareholders of the companies and creditors of the transferor company. This court by its order dated December 15, 1998, convened the meetings to be held on February 6, 1999, appointing Shri K.M. L. Hajela, advocate, as chairman and Shri S.K. Garg, advocate, as the alternate chairman.

6. The meetings were advertised to be convened by the chairman. Before the meeting could be held, an application was filed by Shri Ashok Kumar Gupta and others, the defendants u/s 9 of the Arbitration and Conciliation Act, 1996 (the Act of 1996) before the District Judge in Case No. 640 of 1998 (under Section 34

of the Act of 1996) for an ad interim injunction in terms of the arbitration award restraining Shri Raj Kumar Gupta and others, the plaintiffs from attending the meeting of shareholders of M/s. Banaras Beads Limited. The District Judge, Varanasi passed an order on February 1, 1999, in purported exercise of powers u/s 9(d) of the Act of 1996, restraining Shri Raj Kumar Gupta and others from attending the meeting and permitted their presence only through Smt. Resham Devi Gupta and in her absence Smt. Vinod Kumari Gupta.

7. The meetings were held on February 6, 1999, and according to the report of the chairman the resolution to approve the scheme of amalgamation was passed by the majority of the members present and voting.

8. Shri Raj Kumar Gupta holding 14.57 per cent, fully paid up equity shares and representing 17.75 per cent, shares held by his wife, son, daughter and HUF (total 32.15 per cent.) in opposition to the scheme on April 15, 1995, alleging that the arbitration award was not accepted by him. He had challenged the award before the District Judge, Varanasi. He is the promoter of the company. Shri Ashok Kumar Gupta has resigned from the board of directors on August 16, 1997, and that his resignation was accepted by the board on May 2, 1998. He had no authority to represent the company, however, he proceeded to file the scheme before the court of which he has acquired knowledge from the newspapers. On December 9, 1998, he had filed a caveat in the District Court, Varanasi. He was not allowed to participate in the meeting and to have his voice as shareholder with 32.15 per cent, value in terms of Sections 87 and 176 of the Companies Act, 1956. In paragraph 24 of the additional affidavit he stated as follows:

24. That on arrival at the registered office of the company on February 6, 1999, the deponent and others as above were not allowed to enter the premises under police protection on the basis of the District Court, Varanasi's order dated 1st February, 1999 (copy annexed herewith as annexure 4). That the deponent and Shri Ajit Kumar Gupta were not even allowed to submit the written dissent letters dated February 6, 1999 (copies annexed herewith as annexures 5A and B). Directors have a statutory right to attend meetings.

9. Shri R.P. Agarwal admits that in pursuance of the order passed by the District Judge on February 2, 1999, the police force was called to maintain peace and that Shri Raj Kumar Gupta and his family members were not allowed to enter in the premises where the meeting was held.

10. Shri Raj Kumar Gupta, thereafter, filed a petition under Sections 397 and 398 of the Companies Act, 1956 as minority shareholder complaining of oppression and mismanagement before the Company Law Board. In this petition the Company Law Board passed the following order on April 29, 1999:

When the petition was taken up for hearing, considering the fact that even though the company is a public limited company, major shareholding in the company is within the family of the petitioners and respondents and also taking

into consideration that the parties have been attempting to settle the dispute for quite sometime including referring the dispute to an arbitrator, we have advised the parties that they should try to resolve the dispute amicably. Counsel for the parties and petitioner No. 1 and respondent No. 2 who were present in person have expressed their willingness to attempt at a settlement and accordingly with their consent, the following directions are given:

1. Status quo in regard to the management of Varanasi and Delhi units will be maintained as it existed before the EOGM held on March 18, 1999, and petitioner No. 1 will be entitled to draw remuneration and other perquisites as prevailing prior to that date.
2. Respondent No. 2 and petitioner No. 1 shall ensure that whatever was being done earlier in relation to the cross transactions between the Delhi and Varanasi units will continue to be maintained and all assistance will be given by them for preparation of accounts, audit of accounts, etc.
3. Both petitioner No. 1 and respondent No. 2 will independently propose terms of settlement to put an end to the disputes between the parties and place those proposals before us by July 20, 1999. These proposals will be considered by us on August 3, 1999, at 2.30. We shall try to bring about an agreeable solution to the disputes after discussing the same with the parties directly, if necessary.
4. In the meanwhile, neither of the parties will pursue any of the legal proceedings which have been initiated by them and pending before any court or legal authority.

(S. Balasubramanian) (Dr. A.K. Doshi)

11. Shri R.P. Agarwal submits that the meetings were held in accordance with law and the scheme has been approved by 83.25 per cent, of the shareholders of the transferor company, which included 38.62 per cent, by proxy and 32.08 per cent, through attorney. The meeting of the shareholders of the transferee-company (which is new company) approved the resolution by 100 per cent, majority. The creditors of the transferor company also approved the scheme of amalgamation. There are no creditors in the newly formed transferee-company. Shri Agarwal further submits that the background and the objects of the scheme, the arbitration award and its effect was disclosed in the explanatory statement u/s 393 of the Companies Act. The meetings were held to give effect to the terms of the arbitration award, which has become final between the parties. The challenge under arbitration award u/s 34 of the Arbitration and Conciliation Act, 1996, has failed. He further submits that the District Judge, Varanasi was competent to pass an order u/s 9 of the Act of 1996, as the arbitrator gave the award in para. 15.08 for the representation of both the groups only through their attorneys, nominated by the arbitrator.

12. Shri R.P. Agarwal submits that the scheme is liable to be confirmed and that having failed in the attempt to get the resolution disapproved, Shri Raj Kumar

Gupta filed the petition complaining of oppression and mismanagement. According to Shri R. P. Agarwal this Court in the alternative may keep the matter pending till the Company Law Board decides the matter.

13. The request to keep the matter pending cannot be sustained. Either the scheme prepared in the year 1999, has to go through or not. This court cannot await the decision of the Company Law Board, which is exercising powers under Sections 397 and 398 of the Companies Act, 1956 on the issue of oppression and mismanagement. The parties may have agreed on April 24, 1999, to resolve their disputes through intervention of the Company Law Board, which has wide powers to resolve the disputes including powers to change the board or to direct transfer of shares after its proper valuation. The agreement to submit to the jurisdiction of the Company Law Board cannot indefinitely stall the proceedings under Sections 391 and 394 of the Companies Act. Now about seven years have passed since the meetings were held.

14. Shri Navin Sinha submits that shareholders must have their voice proportionate to their share value in the meeting. The infringement of the right of the shareholder under Sections 87 and 176 of the Companies Act, 1956 vitiates the proceedings. The order passed by the court convening the meeting did not restrict a class of shareholders to be represented only through attorneys nor such an order could be passed unless the parties had agreed for such an arrangement. The fact that the nominees were also named for proxies makes the position worse, as the award gagged the shareholders voice in the meetings.

15. Shri Navin Sinha further submits that interim measures directed by the court u/s 9 of the Act of 1996 cannot extend to giving directions with regard to the meeting convened by the High Court u/s 391 of the Companies Act. The interim measures for protection and preservation of the properties, interim custody or sale of goods or to secure the amount in dispute in the arbitration do not include intervening in or modifying the orders of the High Court. Section 9 of the Arbitration and Conciliation Act, 1996, is quoted as below:

9. Interim measures, etc., by court.--A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court:

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings ; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the

subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence ;

(d) interim injunction or the appointment of a receiver ;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

16. A perusal of the powers given by way of interim measure to the court either before or during arbitral proceedings or at any time after making the award are primarily for protection and preservation of the properties and not for giving directions in terms of the arbitration award under challenge before the same court, which may intervene with the statutory rights of the shareholders and the directions of the High Court to convene meetings of the shareholders. In case such directions were to be sought, the petitioner could have asked the High Court to give the directions. Shri Ashok Kumar Gupta group requested the court to convene the meetings u/s 391 of the Companies Act, 1956, without making any prayer, to enforce para. 15.08 of the arbitration award. Further, I find that once the arbitration award was challenged, even this Court could not have given direction taking away the statutory right of the shareholders to participate, discuss and raise objections to the scheme in the meeting.

17. In *Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.*, , the Supreme Court explained the powers u/s 9 of the Act of 1996 in para. 13 as follows (headnote):

The purpose of enacting Section 9, read in the light of the Model Law and Uncitral Rules is to provide "interim measures of protection". The order passed by the court should fall within the meaning of the expression "an interim measure of protection" as distinguished from an all-time or permanent protection. The court u/s 9 only formulates interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated.

18. In First Appeal from Order No. 809 of 1999 challenging the order of the District Judge, Varanasi, rejecting the application u/s 34 of the Act of 1996, this Court has passed the following order:

Since Mr. R.P. Agarwal has appeared on behalf of respondent No. 1 no notice need be served upon respondent No. 1.

Let notices be served on respondents Nos. 2 to 5 through court as well as personally outside the court and through their learned counsel representing them in the learned trial court within one month and file an affidavit of service on the next date of listing.

The scheme formulated by the arbitrator shall be subject to the consideration of the High Court on its merit and the parties may participate in the proceedings before the High Court without prejudice to their rights and contentions and the operation of the award shall be subject to the approval of the scheme by the High Court in the said proceedings which shall be independent of this appeal.

The interim order shall continue till April 30, 2000. List on April 5, 2000.

19. The jurisdiction of the company court in the matters of sanctioning the scheme has been explained by the Supreme Court in *Hindustan Lever and Another Vs. State of Maharashtra and Another*, , as follows (headnote of *Hindustan Lever and Another Vs. State of Maharashtra and Another*,

The jurisdiction of the company court while sanctioning the scheme is supervisory only. While exercising its power in sanctioning the scheme of amalgamation, the court is to satisfy itself that the provisions of statute have been complied with, that the class was fairly represented by those who attended the meeting, that the statutory majority was acting bona fide and not in an oppressive manner and that the arrangement is such as which a prudent, intelligent or honest man or a member of the class concerned and acting in respect of the interest might reasonably take. While examining as to whether the majority was acting bona fide, the court would satisfy itself to the effect that the affairs of the company were not being conducted in a manner prejudicial to the interest of its members or to public interest. The basic principle underlying such a situation is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties, the same being that it should not be unfair, contrary to public policy and unconscionable or against the law. Once these things are satisfied the scheme has to be sanctioned as per the compromise arrived at between the parties. The court would have no further jurisdiction to sit in appeal over the commercial wisdom of the class of persons who with their eyes open give their approval, even if, in the view of the court a better scheme could have been framed.

20. The award is still under challenge in appeal against the order, rejecting 2 objections u/s 34 of the Act of 1996. The company court is at liberty by the appellate court, to consider the scheme on its merits. I do not find it just and equitable to sanction the scheme on the grounds, (1) that the shareholders having 32.15 per cent, shares holding in the transferor company were restrained from participating in the meetings; (2) the order passed by the District Judge on February 1, 1999, u/s 9 of the Act of 1996 was wholly without jurisdiction; and (3) that Raj Kumar Gupta has filed a petition under Sections 397 and 398 of the Companies Act, 1956 before the Company Law Board in which both the groups have acquiesced to the jurisdiction of the Company Law Board, in that they have not challenged the order of the Board dated April 24, 1999, and have agreed that they shall not pursue any other legal proceeding initiated by them and pending before court or legal authority ; (4) The meetings of the shareholders of the companies were not held in accordance with the provisions of the Companies Act.

A group of shareholders of the companies representing 32.15 per cent., shareholders were restrained by police force to enter the venue of the meeting on February 6, 1999, in pursuance to the orders passed by the District Judge having no jurisdiction to interfere in the matter. They were sought to be represented through their attorneys, who used proxies in terms of the arbitration award, without their consent. The award is still under challenge, as it has not been accepted by the objectors. The scheme as such cannot be said to be approved by the statutory majority, which acted in a bona fide manner. Further, the scheme is not found to be based on any broad or general principles inherent in any compromise or settlement.

21. The confirmation petition is dismissed.