
(1966) 01 CAL CK 0008
In the Calcutta High Court

In Re: Bangeswari Cotton Mills Ltd.

Date of Decision : 17-01-1966

Acts Referred:

Companies (Court) Rules, 1959 — Rule 67, 68, 69, 70, 71
Companies Act, 1956 — Section 391, 391(1), 391(2), 394A

Citation : (1967) 37 CompCas 195 : 70 CWN 486

Hon'ble Judges : Sankar Prasad Mitra, J

Bench : Single Bench

Advocate : B. Das and B. Basak, Amicus curiae, Somnath Chatterjee, for the Appellant;

Judgement

Sankar Prasad Mitra, J.—This is an application u/s 391 of the Companies Act, 1956. The petition has not yet been admitted and a question has been raised as to whether notice of this application, u/s 394A, should be given to the Central Government before any order is made. Section 394A has been introduced by the Companies (Amendment) Act, 1965, which received the assent of the President on 25th September, 1965, and was published in the Gazette of India on 27th September, 1965. The section runs thus:

"The court shall give notice of every application made to it u/s 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections."

2. As the point is of first impression and the application u/s 391 is at the moment being moved ex parte, I requested Mr. B. Das, the learned junior standing counsel, to assist me in this matter. I am grateful to Mr. Das and his learned junior, Mr. Basak, for the help they have given to me in coming to my conclusions. Before I proceed any further, it is necessary to set out the relevant provisions of Section 391 of the Act.

" 39- Power to compromise or make arrangements with creditors and members.--
(1) Where a compromise or arrangement is proposed--

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed under the rules made u/s 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and the contributories of the company.....

(6) The court 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 court thinks fit, until the application is finally disposed of."

3. The procedure, therefore, in the case of a compromise or arrangement with creditors or members is that an application is first made to the court for convening a meeting to consider the proposal. After the meeting has accepted the proposal by the requisite majority, a second application to the court is necessary for the court's approval of the compromise or arrangement. The court has also the power of granting interim stay of suits or proceedings.

4. The point that I am called upon to decide in this application is whether notice to the Central Government has to be given both of the first application for convening a meeting and of the second application for sanctioning the compromise or arrangement.

5. The Supreme Court, in the exercise of its powers u/s 643, has framed certain rules in respect of Section 391. The relevant rules are as follows:

" Rule 67.--An application u/s 391(1) for an order convening a meeting of creditors and/or members or any class of them shall be made by a judge's summons supported by an affidavit.....Save as provided in

rule 68.....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.

Rule 68.--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.

Rule 69.--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:

- (i) determining the class or classes of creditors and/or members whose meeting or meetings have to be held for considering the proposed compromise or arrangement;
- (ii) fixing the time and place of such meeting or meetings;
- (iii) appointing a chairman or chairmen for the meeting or meetings to be held, as the case may be;
- (iv) fixing the quorum and the procedure to be followed at the meeting or meetings, including voting by proxy ;
- (v) 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;
- (vi) notice to be given of the meeting or meetings and the advertisement of such notice;
- (vii) the time within which the chairman of the meeting is to report to the court the result of the meeting ; and such other matters as the court may deem necessary.....

Rule 71.--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 or 398 is pending, notice of the application shall be given to the petitioner in such petition.

Rule 72.--Where an order has been made staying the commencement or continuation of any suit or proceeding under Sub-section (6) of Section 391, any person aggrieved by such order may apply to the court by a judge's summons to vacate or vary such order. Notice of the application shall be given to the applicant at whose instance the order of stay was made and to such other persons as the court may direct...

Rule 79.--Where the proposed compromise or arrangement is agreed to, with or without modification, as provided by Sub-section (2) of Section 391, the company (or its liquidator, as the case may be), shall, within seven days of the filing of the report by the chairman, present a petition to the court for confirmation of the compromise or arrangement. The petition shall be in Form No. 40.

Where a compromise or arrangement is proposed for the purpose of or in connection with a scheme for the reconstruction of any company or companies, or for the amalgamation of any two or more companies, the petition shall pray

for appropriate orders and directions u/s 394.....

Rule 80.--The court shall fix a date for the hearing of the petition, and notice of the hearing shall be advertised in the same papers in which the notice of the meeting was advertised, or in such other papers as the court may direct, not less than 10 days before the date fixed for the hearing.

Rule 81.--Where the court sanctions the compromise or arrangement, the order shall include such directions in regard to any matter and such modifications in the compromise or arrangement as the judge may think fit to make for the proper working of the compromise or arrangement. The order shall direct that a certified copy of the same shall be filed with the Registrar of Companies within 14 days from the date of the order, or such other time as may be fixed by the court. The order shall be in Form No. 41, with such variations as may be necessary."

6. Mr. Das appearing as amicus curiae submits that the object of Section 394A, which is a new provision in the Companies Act, is to give opportunity to the Central Government to make representations to the court before the court passes any order u/s 391.

7. Learned counsel has urged that notice of every application u/s 391 must be given to the Central Government. This section envisages an application at the initial stage for obtaining the court's directions for convening a meeting of the creditors or the members. The application is made under Sub-section (1) of Section 391. A second application has also to be made under Sub-section (2) of Section 391 by the party proposing the compromise or arrangement for sanction by the court after the meeting has been held. There may also be an application for stay or continuation of suits or proceedings. According to Mr. Das, the Central Government should have notice of all these applications. Mr. Das says that at the initial stage the court may either dismiss the summons or give directions for a meeting. In either event, the court exercises a judicial discretion. And, in the exercise of the discretion, Section 394A contemplates that consideration is to be given to any representation that the Central Government may make. Learned counsel particularly drew my attention to some of the directions that the court may give under rule 69 at the hearing of the summons. The court, for instance, has to fix the time and place of the meeting or meetings. The court has to appoint a chairman or chairmen for the meeting or meetings. In all these matters the Central Government may have its own submissions to make. The Central Government may say that the place fixed for the meeting is not a proper place or the chairman or the person, whose name has been proposed as chairman, is not a desirable person. Then, again, when an application is made for stay under Sub-section (6) of Section 391, the Central Government may have serious objections to an order for stay. In all these matters, before making any order, the court, in view of Section 394A, should take into consideration the representations of the Central Government.

8. These contentions of the learned junior standing counsel deserve careful consideration ; but I have to take into account the law as it stood before the introduction of Section 394A and the problems that the new section has raised. I have already said that by Section 643 of the Companies Act, 1956, power has been given to the Supreme Court to make rules after consulting the High Courts. These rules have been framed by the Supreme Court, relevant portions whereof have been quoted in the earlier part of this judgment. These rules have the effect of an Act of Parliament ; they have been made under a rule-making power conferred by the statute ; they are part and parcel of the statute itself ; and they cannot be ignored in implementing the new provisions in Section 394A : vide *Craies on Statute Law*, 5th edition, page 293, and *T.B. Ibrahim Vs. Regional Transport Authority, Tanjore*, , 298. Rules 67 and 68 of the Companies (Court) Rules, 1959, clearly lay down that an application u/s 391(1) for an order convening a meeting of creditors or members shall be moved ex parte except where the company is not the applicant or the company is being wound up. Similarly, rule 71 provides that an application under Sub-section (6) of Section 391 for stay of commencement or continuation of suits or proceedings may be moved ex parte except where a petition for winding up or a petition u/s 397 or 398 is pending. If, therefore, notice of every application u/s 391(1) or 391(6) has to be given to the Central Government to comply with the provisions of Section 394A, a petitioner's right to move the court ex parte would be completely taken away. The new section gives no indication of the deprivation of this right and creates a conflict between itself and the law which existed prior to its incorporation. In a case like this, it is the duty of the court to try to avoid such conflict and adopt, if possible, the rule of harmonious construction. The rule is that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both (vide *Raj Krushna Bose Vs. Binod Kanungo and Others*, and *Sri Venkataramana Devaru and Others Vs. The State of Mysore and Others*, .

9. The only way to avoid this conflict between Section 391 and the rules framed thereunder, on the one hand, and Section 394A, on the other, is to hold that notice is to be given to the Central Government before the court sanctions a compromise or arrangement on an application u/s 391(2). Rule 80 of the Companies (Court) Rules, 1959, or any other rule framed u/s 391(2) does not create any bar to this notice as the court has no obligation to make any order or give any directions of a conclusive nature on an application moved ex parte. It seems to me that the purpose of enacting Section 394A was that the court should hear the representation of the Central Government before passing any final orders on applications for compromise or arrangement. This difficulty does not arise with regard to Section 394 as there can be only one application under that section and the rules do not say that orders can be obtained ex parte. It is true that, while construing a statute, the court cannot take into consideration the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament; but these statements may and do often furnish valuable historical

material in ascertaining the reasons which induced the legislature to enact a statute : Gujarat University v. Shri Krishna Ranganath, [1963] 2 S.C.R. 26 and State of West Bengal Vs. Union of India, . With this end in view, I have looked into the Statement of Objects and Reasons and Notes on Clauses relating to Bill No. 64 of 1964 which was moved in Parliament to amend further the Companies Act of 1956. The note on Clause 50 is as follows :

" Based on the recommendation in paragraph 46 of the Commission's Report, the proposed Section 394A makes it obligatory on the court to give notice to the Central Government of every application made to it u/s 391 or 394 and to take into consideration the representations made by that Government, before passing any order on the proposed compromise or arrangement or scheme of amalgamation. This would enable the Government to study the proposal and raise such objections thereto as it thinks fit in the light of the facts and information available with it, and also place the court in possession of certain facts which might not have been disclosed by those who appear before it so that the interests of the investing public at large may be fully taken into account by the court before passing its order."

10. It will be seen that, according to this notice, the Central Government is required to study the proposal for a compromise or arrangement and raise such objections thereto as it thinks fit. The proposal does not take a final shape till it has been passed by the meeting or meetings of creditors or members. When, therefore, the final proposal is brought before the court for its sanction, the court has to give notice to the Central Government and to hear its representations. The note refers to paragraph 46 of the report of the Commission of Inquiry on the administration of Dalmia-Jain Companies. The relevant portion of this paragraph is as follows:

" Section 400 of the Companies Act should be suitably amended to provide for issue of notice to, and consideration of the representations, if any, submitted by the Central Government, by the court before it passes the final orders on an application made to it under Sections 391 to 394."

11. Section 400 of the Companies Act provides for notice to the Central Government of applications under Sections 397 and 398. Instead of amending this section to include applications u/s 391 or 394, Parliament, it appears, has enacted the new Section 394A. As this new section has been based on paragraph 46 of the Commission's Report, the intention obviously was that, before passing any final order u/s 391 or 394, the court would give notice to the Central Government.

12. I have already said that the Statement of Objects and Reasons merely gives to the court the historical background of a piece of legislation ; but the conclusion which I have arrived at, namely, that notice of an application u/s 391(2) only has to be given to the Central Government, appears to be in conformity with this background. Parliament, it must be presumed, knew the

provisions of the various rules the Supreme Court had framed u/s 391 and, if the intention was that notices of applications under Sections 391(1) and 391(6) should also be served on the Central Government, the right given to a petitioner to move these applications ex parte should have been expressly taken away. The fact that that has not been done shows that the words " any order " in Section 394A must be construed to mean " any final order ". Consequently, the words " every application " mean an application u/s 391(2) or Section 394. I hold, therefore, that at this initial stage of the present proceedings no notice to the Central Government is necessary.