

(2005) 07 GUJ CK 0028

In the Gujarat High Court

Case No : Company Application No. 234 of 2005

In Re: Essar Oil Ltd.

Date of Decision : 18-07-2005

Acts Referred:

Companies Act, 1956 — Section 188, 267, 274, 274(1), 274(2)

Citation : (2005) 63 SCL 126

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Mihir J. Thakore and Sunit S. Shah, for the Appellant;

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The applicant, namely, Essar Oil Ltd., has taken out this Judges Summons seeking declaration from this Court that the directors of the applicant-company shall not be treated as disqualified u/s 274(1)(g) of the Companies Act, 1956.

2. An affidavit is filed by Shri Sheikh S. Shaffi, Vice President and Company Secretary of the applicant-company, in support of the Judges Summons. Mr. Mihir J. Thakore and Mr. S.N. Soparkar, learned Senior Counsels are appearing for the applicant-company alongwith Mr. Sunit S. Shah learned advocate. Mr. Navin K. Pahva learned advocate is appearing for Fearless General Finance and Investment Company Ltd., who is objecting to the prayer being granted by this Court. As per oral direction of this Court, a copy of application is given to Mr. Pahva and he is permitted to make submissions.

3. Mr. Thakore learned Senior Counsel appearing for the applicant-Company has submitted that the delay in implementation of the project due to the various circumstances beyond the control of the applicant-company has affected the repayment of borrowings and payment of interest thereon. The applicant-company, therefore, started negotiations to restructure the debts of the applicant-company and requested the principal lenders to refer the matter to Corporate Debt Restructuring Cell (CDR Cell) under the CDR System, which has been set up

under guidelines issued by the Reserve Bank of India. In the meantime, the Part C of CFCDs, which had become 14% Secured redeemable Non-Convertible Debentures (NCD's) of Rs. 105 each in December, 1997, were maturing for redemption on April 20,2003. The applicant-company therefore proposed four schemes of arrangement/compromise in March 2003 viz., (1) holders of debentures interest, (2) holders of debentures holding less than 2,000 fully paid debentures, (3) holders of partly paid debentures and (4) debentures holders holding more than 2,000 fully paid debentures each.

4. The applicant-Company thereafter filed four separate Company Applications being Company Application Nos. 165, 166, 167 and 168 all are of 2003 before this Court proposing different schemes. Out of these four schemes, three different schemes have been approved by the debenture holders and hence the applicant-company has filed Company Petitions being Company Petition Nos. 160,161 and 162 all are of 2003. However, the concerned debenture holders holding more than 2,000 debentures of the applicant-company and the scheme in respect of whom is subject-matter of Company Application No. 166/2003, have adjourned the meeting. Pending disposal of Company Petitions and consideration of the scheme proposed vide Company Application No. 166/2003 by the concerned debenture holders, the Company moved Company Application being Company Application No. 95/2004 praying inter alia for an order that directors of the applicant-company not to be treated as disqualified u/s 274(1)(g) of the Companies Act, 1956 with effect from 20-4-2004 or any other date. This Court has granted the said prayer and disposed of the Company Application No. 95/2004 vide its order dated 1-4-2004.

5. Mr. Thakore has further submitted that a few of the large debenture holders were not in agreement with the Scheme proposed by the applicant Company by way of Company Application No. 166/2003. One of the debenture holders approached this Court by way of Company Application No. 405/2004 inter alia praying that more than 1/4th of the debenture holders are not agreeable to the scheme proposed by the applicant-company and, therefore, the said Scheme proposed for debenture holders holding more than 2,000 debentures have failed. This Court vide its order dated 21-2-2005 disposed of the Company Application No. 405/2004 directing the Chairman of the meeting to hold the meeting on 23-2-2005 or any other adjourned meeting thereafter but not later than 30-6-2005.

6. Mr. Thakore has further submitted that subsequent to the order passed by this Court in Company Application No. 405/2004 several meetings were held by the applicant-company with the Lender Monitoring Committee in respect of the proposal being considered by certain large debenture holders. The applicant has also held meeting with the said debenture holders from time to time in respect of this proposal. Mr. Thakore further submitted that the Lender Monitoring Committee after evaluation of the proposals and taking into account the sustainability of the Company's cash-flows, sustainability of Company's debt

post-settlement and impact on project completion within scheduled time and cost suggested for the repayment of the dues as on maturity date of the large debenture holders with 5% each down payment immediately and thereafter another 5% at the end of 12 months from the down payment date and the balance within a period of 6 years from the down payment date. In suggesting this 6 years period the LMC paid special attention to the fact that small debenture holders also had a 6 years scheme sanctioned to them and that it is in the interest of all the stakeholders including debenture holders that the project may be completed in the next 24 months as a matter of highest priority. Mr. Thakore has further submitted that even the said proposal which was suggested by the Lender Monitoring Committee did not lend support of the said debenture holders in spite of efforts made by the applicant-company based on the guidelines provided by the Lender Monitoring Committee. The Lenders therefore informed the applicant-company to restructure all the debts in line with CDR sanction. The applicant-company was, therefore, desirous of effecting the restructuring of the financial terms of the existing loans of the Scheme Lenders in accordance with the terms and conditions of the CDR Sanction in the larger interest of the project, the applicant-company and its stakeholders. The applicant-company, therefore, filed Company Application No. 217/ 2005 for convening the meeting of Scheme Lenders and intimated the debenture holders, at the Court convened meeting held on 25-6-2005 to consider the earlier scheme proposed to them, that the applicant-company is withdrawing the said scheme in view of the present scheme having been proposed. Mr. Thakore further submitted that all the debenture holders were not agreeable to the withdrawal proposed by the applicant-Company. The Chairman put the said scheme to vote and the said scheme was not approved by any of the debenture holders holding more than 2,000 debentures.

7. Mr. Thakore further submitted that in Company Application No. 217 / 2005 the applicant-company has proposed a scheme of arrangement and compromise with the Scheme Lenders, i.e., Rupee Term Lenders and Debenture Holders holding more than 2,000 debentures as per the terms set out therein. The said application has come up for hearing before this Court and the Fearless General Finance and Investment Company Ltd., and Unit Trust of India filed their objections to the said Company Application No. 217/2005 for convening meeting of Scheme Lenders to consider the proposed scheme of arrangement and compromise. This Court after hearing them, has passed an order on 30-6-2005 directing to convene the meeting of Scheme Lenders on 28-7-2005.

8. Mr. Thakore further submitted that under the provisions of Section 274(1)(g) of the Companies Act, 1956, a person shall not be capable of being appointed Director of a Company if such person is already Director of a Public Company which has failed to repay its deposits or interest thereon on due date or redeem its debentures on due date or pay dividend and such failure continues for one year or more. Such person shall not be eligible to be appointed as Director of any other Public Company for a period of five years from the date on which such

Public Company in which he is a Director failed to repay its deposits or interest or redeem its debentures on due date or pay dividend. Since the contractual debentures redemption date was 20-4-2003 and since the Company has not redeemed the debentures on that day, on expiry of one year the Directors of the Company shall not be capable of being appointed or reappointed as Directors of other companies. Mr. Thakore further submitted that however, if the scheme is sanctioned, on the sanction of the schemes the debentures redemption date itself would not be 20-4-2003 and consequently the failure envisaged in Section 274(1)(g) qua redemption of debentures will not take place and the present Directors would not be disqualified. He has therefore submitted that a situation has arisen that while the Directors of the Company would stand disqualified yet on the sanction of the scheme they would not be considered disqualified. This can create a hiatus. The Directors of the Company may therefore opt to resign as Directors of the Company and no new Directors of good standing will come forward to be appointed as Director of the applicant-company. This would not be in the interest of the Company including or for the implementation of schemes already sanctioned by this Court. He has, therefore, submitted that it would be just and proper that this Court should issue appropriate directions that the present Directors would not be treated as disqualified u/s 274(1)(g) of the Companies Act, 1956. ,

9. Mr. Thakore has further submitted that Section 274(1)(g) contemplates disqualification of Directors only in cases where Directors are intentionally committing breach of the provisions of this section. It never contemplates to penalise the Directors, who are acting genuinely and in a bona fide manner and there is no slightest interest on their part to defraud its creditors and investors. He has, therefore, submitted that this Court should exercise its powers, inter alia, under Sections 391 and 392 of the Act and also inherent powers to issue appropriate directions that the provisions of Section 274(1)(g) may not be invoked in respect of the applicant-company and its Directors.

10. Mr. Thakore has further submitted that powers of this Court for enforcing the compromise or arrangement extend to general supervisions for carrying out the compromise or arrangement already sanctioned and which may be approved and sanctioned. This Court has the inherent power to pass an order, as prayed for in this Application, which is necessary for the proper implementation and working of the compromise/arrangement. He has further submitted that this Court has powers of the widest amplitude to give directions for the proper working of the compromise and arrangement. He has further submitted that this Court may pass orders from time to time based on the exigencies created for the effective implementation of the sanctioned schemes and the scheme pending for approval. He has, therefore, submitted that this Court should exercise powers to remove any impediment, difficulty or obstruction which would arise in the working of a scheme of compromise or arrangement, if provisions of Section 274(1)(g) were permitted to be invoked in respect of the applicant and its Directors.

11. Mr. N.K. Pahva learned advocate appearing for Fearless General Finance and Investment Company Ltd., has strongly opposed the present application moved by the applicant-company. He has submitted that Section 274 of the Act starts with mandatory provisions that a person shall not be capable of being appointed director of a Company, if such a person is already a director of the Public Company, which has failed to repay its deposit or interest thereon on due date of redeem its debentures on due date or pay dividend and such failure continues for one year or more. The words used in Sub-section (1) is "shall" and not "may". It is, therefore, mandatory in nature and once the default is committed as envisaged in Section 274(1)(g)(B) the disqualification starts. There is no question of postponing disqualification or waiving the said disqualification. He has further submitted that Sub-section (2) of Section 274 carves out certain exception and it empowers the Central Government to issue notification in the Official Gazette and remove the disqualification only in respect of Clause (d) and Clause (e) of Sub-section (1) of Section 274. Disqualification envisaged in Clause (g) of Section 274(1) does not find its place in Sub-section (2) of Section 274. He has, therefore, submitted that this Court has no power to postpone the disqualification of the Directors of the applicant-company which has already taken place.

12. Mr. Pahva has further submitted that the whole argument canvassed by the learned Senior Counsel Mr. Thakore appearing for the Company is *ex facie* erroneous and based on some hypothesis. It proceeds on assumption that the scheme proposed by the Company is sanctioned and date of redemption is deferred. Such assumption or hypothesis would stop the operation of law. Mr. Pahva has further submitted that section is very clear and there is no ambiguity therein. The law of interpretation says that when the wordings of section are clear and unambiguous the Court should interpret the same in a manner which conveys the natural meaning. In support of this he relied on the decision of *Manik Lal Majumdar and Others Vs. Gouranga Chandra Dey and Others*, wherein it is held that, where the statutory provision is plain and unambiguous, the Court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom. The scope of legislation or its intention cannot be enlarged when the language of the provision is plain and unambiguous. Mr. Pahva further relied on the decision of Hon'ble Supreme Court in the case of *Dayal Singh and Others Vs. Union of India (UOI) and Others*, wherein it is held that the enforceable right to reopen a proceeding, which has attained finality, must exist in the statute itself. The right to get the amount of compensation redetermined must expressly be provided by the statute. Such a right being a substantive one cannot be sought to be found out by implication nor can the same be read therewith. The party, thus, cannot invoke a right by reading the same into a statute although admittedly there exists none. It is a well settled principle of law that the Court cannot read anything into the statutory provision which is plain and unambiguous. The Court has to find out legislative intent only from the language employed in the statutes. Surmises and conjectures cannot be

resorted to for interpretation of statutes.

13. Mr. Pahva further submitted that this Court while acting as a Company Court has no power to grant the relief as prayed in the present application. The present application is not moved under any substantive provision of Companies Act, 1956. Section 274 does not empower the Court to grant any relief on an application moved by aggrieved party before the Court. While considering the applications made to the Company Court under the provisions of Companies Act, the Company Court is entitled to mould the relief and exercise its inherent jurisdiction whenever found necessary to prevent injustice. The Court is, therefore, required to address itself to the question as to under which substantive provision of the Companies Act, the application is made by the applicant. If the application made is found maintainable under some specific substantive provision of the Act, then alone can Rule 9 of the Rules be pressed into service and not otherwise. He has submitted that the applicant has not moved the application under any substantive provisions and hence it is not maintainable. u/s 391 of the Act, the Court can issue directions only to convene the meeting, and no further directions can be issued according to the applicant. The present application is moved requesting this Court to exercise power under Sections 391 and 392 of the Act. In support of his submissions he relied on the decision of Bombay High Court in the case of Kishore Y. Patel v. Patel Engg. Co. Ltd. [1994] 79 Comp. Cas. 53.

14. Mr. Pahva further relied on the decision of this Court in the case of M G. Doshit v. Reliance Petrochemicals Ltd. [1994] 79 Comp. Cas. 830 wherein it is held that the High Court is a special Court or a company court with special Company jurisdiction and the jurisdiction has to be found from specific provisions of the Act. The High Court does not have any general plenary or residuary jurisdiction to deal with all matters and all questions arising under the Companies Act.

15. Mr. Pahva further relied on the decision of P.C. Sriramulu Vs. T.P. Sathyanarayan and others, wherein it is held that under the Company law, there is a distinction between individual membership rights and rights available to qualified minorities. The qualified minority rights are generally enforceable by recourse to civil suits except in case where specific provision is found in the Companies Act: for its enforcement elsewhere. Although the company itself is a creation of law, an artificial person, that does not mean that everything connected with the company and all matters governing the constitution and management of the Company are special rights or liabilities. The right to move a resolution to elect a director of a company is not a special right. Such a right is inherent in the shareholder of the Company, and is independent of the requirements of Section 188 of the Companies Act, 1956, governing other kinds of resolutions,

16. Mr. Pahva further relied on the decision of Karnataka High Court in the case of Mysore Electro Chemical Works Ltd. v. ITO[1982] 52 Comp. Cas. 32 wherein

it is held that the jurisdiction of the Company Court u/s 392 of the Companies Act, 1956, after it has sanctioned a scheme for reconstructing a company in winding up does not empower the court to issue directions which do not relate to either the sanctioned scheme itself or its working in relation to the Company which the scheme seeks to reconstruct, and Sections 392 and 394 have refrained from making any specific provision and left the matter to directions by the Court.

17. Mr. Pahva has further relied on the decision of Hon"ble Supreme Court in case of Rama Narang v. Ramesh Narang [1995] 4 SCL 150 wherein it is held that Section 267 of the Companies Act, 1956, is mandatory. The use of the word "shall" brings out its imperative character. It provides that after the commencement of the Companies Act, 110 person who has suffered a conviction by a court of an offence involving moral turpitude shall be appointed or employed or continued in appointment or employment by any company as its managing or whole time Director. The section not only prohibits appointment or employment after conviction but also expects discontinuance of appointment or employment already made prior to his conviction. The Court has further observed that the provision contained in the Companies Act have relevance to the management of the affairs of companies incorporated under that law. The operation of Section 267 would take effect as soon as conviction is recorded by a competent Court of an offence involving moral turpitude. Sections 267, 274 and 283 constitute a code whereunder a Director, Managing Director and the whole time Director are visited with certain disqualifications in the event of conviction. The Companies Act itself makes a distinction in the matter of fixation of the point of time when the disqualification becomes effective in the case of a Director and a Managing Director. That is because of the fiduciary nature of the relationship. The Court has also observed that the purpose of Section 267 is to protect the interest of the shareholders and to ensure that the management of the affairs of the company and its control is not in the hands or a person who has been found by a competent Court to be guilty of an offence involving moral turpitude and has been sentenced to suffer imprisonment for the said crime. The Court has further observed that in a situation where the order of conviction may incur a disqualification, as in this case, the attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the issue since u/s 389(1) it is under an obligation to support its order as for reasons to be recorded by it in writing. No one can be allowed to play hide and seek with the Court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualification has ceased to operate. The Court has found that in the instant case the appellant indulged in an exercise of hide and seek in obtaining the interim stay without drawing the pointed attention of the Delhi High Court that stay of conviction was essentially to avoid disqualification u/s 267 of the Companies Act. The appellant did not approach the Delhi High Court with clean hands if the intention of obtaining the stay was to avoid the disqualification u/s 267 of the Companies Act. Since the appellant had not sought any order from

the Delhi High Court for stay of the disqualification he was likely to incur u/s 267 of the Companies Act on account of his conviction, it cannot be inferred that the High Court had applied its mind to this specific aspect of the matter and had thereafter granted a stay of the operation of the impugned judgment. The interim stay granted by the Delhi High Court must, therefore, be read in that context and cannot be extended to stay the operation of Section 267 of the Companies Act. Based on this issue Mr. Pahva has submitted that earlier an application is moved before this Court and order is obtained for convening the meeting. It has not been pointed out that the applicant is also seeking relief from this Court against invocation of Section 274(1)(g) against the Directors of the applicant-company. This material fact has been concealed by the applicant from this Court and hence the relief as prayed for in the present application should not be granted on the ground that the scheme of arrangement and compromise with the debenture holders is pending and if it is approved the date of redemption would be differed and in that case there would not be breach of provisions of Section 274(1)(g) of the Act.

18. After having heard the learned advocates appearing for the respective parties and after having considered the facts stated, averments made and contentions raised in the affidavit filed in support of the Judges Summons and after having gone through the authorities cited before the Court, the Court is of the view that there is no dispute about the fact that the scheme of compromise and arrangement is proposed by the applicant-company with the Scheme Lenders, which inter alia includes debenture holders holding more than 2,000 debentures. There is no dispute about the fact that this Court has issued directions for convening of the meeting which is to be held on 28-7-2005. There is also no dispute about the fact that earlier this Court has passed an order in Company Application No. 95/2004 on 1-4-2004. This Court has taken a view that since the scheme of compromise/arrangement is pending for sanction of this Court, the relief prayed in this application is required to be granted to the applicant-Company with some modification in this wise that by virtue of the provisions of Section 274(1)(g) of the Act, the Directors of the applicant-Company would not be disqualified for their appointment in other Companies only on the ground that the debentures were not redeemed on their due date and such default continued for one year from the due date. The Court has, therefore, held that the Company would not be treated as defaulter within the meaning of Section 274(1)(g) of the Act on account of non-payment of debentures on their due date, in view of the pendency of the scheme of arrangement/compromise before this Court, till one month after the scheme is sanctioned or otherwise disposed of by this Court. The Court has also made it clear that the applicant-Company shall proceed with the hearing of the petitions proposing the schemes of compromise and arrangement on their respective date of hearing and shall not cause any delay or avoid such hearing, otherwise, protection granted by this Court shall be withdrawn. From this direction it is very obvious that the Court has granted the protection till one month after the scheme is sanctioned or otherwise disposed of by this Court. The

meeting of the debenture holders was ordered to be convened latest by 30-6-2005. The meeting was convened on 25-6-2005. The Scheme of compromise and arrangement between the Company and the debenture holders holding more than 2,000 debentures has failed and hence the protection granted by this Court remains in operation till 24-7-2005. To overcome this difficulty, the applicant-Company has proposed another scheme whereby a new class of Scheme Lender is created and debenture holders holding more than 2,000 debentures are put in the said class and, thereafter, permission is sought for convening the meeting of the scheme lenders, which is now ordered to be held on 28-7-2005. This attempt on the part of the Company is nothing but causing delay or avoid the hearing of the scheme and hence as held by the Court earlier the protection granted by this Court is required to be withdrawn.

19. The Court is of the view that the order passed on 1-4-2004 in Company Application No. 95/2004 was an ex parte order. Nobody was heard in the matter. Various points which are raised by Mr. Pahva, learned advocate appearing for Fearless General and Finance Investment Company Ltd., in the present application had not been considered by the Court while deciding the said application. The Court has not addressed itself to the point as to whether the Court being the Company Court is competent to make such declaration that the Directors of the applicant-Company may not be disqualified for their appointment in other Company by virtue of provisions contained in Section 274(1)(g) of the Act. The Court has also not considered the strict interpretation of the provision of Section 274(1)(g) of the Act, as now contended by Mr. Pahva in the present application. Section 274(1)(g) is very clear and unambiguous. It is mandatory in nature as held by the Hon'ble Supreme Court in the context of Section 267 of the Act, which deals with disqualification of the Managing Director. The Court has also not considered earlier the provision of Section 274(2) which carves out the exception only in case of Section 274(1)(d) and Section 274(1)(e). However, no exception is carved out so far as Sub-clause(g) is concerned. Thus, the said subsection must be given its natural meaning and once the default is committed the disqualification starts, which cannot be postponed or differed on assumption that if the scheme would be sanctioned, the date of redemption would be differed and in that case there may not be any violation of Section 274(1)(g) of the Act. The Court is considering the application now and as on this date admittedly the default is committed. The debentures are not redeemed. The debenture holders are neither paid any principal amount nor interest accrued thereon. Even if it is accepted that the protection granted by this Court is in operation up to 24-7-2005, the disqualification would start from 25-7-2005 and it cannot be further delayed merely on account of scheme having been proposed by the applicant-Company and meeting for considering of the said proposal is scheduled to be held on 28-7-2005. Thereafter the substantive petition may be filed before this Court which may or may not be sanctioned by this Court. On the basis of all this ifs and buts invocation of provision of Section 274(1)(g) cannot be stopped as it would amount to grant stay against operation of law.

20. The argument of Mr. Thakore that scheme is being considered by the Scheme Lenders and this Court has ample power to monitor the period of pre-and post-sanction of the scheme does not render any assistance to the applicant as once an attempt is made by the applicant-Company. A separate class of debenture holders holding more than 2,000 debentures was created. Meeting was convened. However, the scheme has failed in that meeting and to overcome the said difficulty a new scheme is proposed, whereby new class of Scheme Lenders is created and debenture holders holding more than 2,000 debentures are put in the said class. It is nothing but to over-reach the process of this Court and to deny the benefits to the debenture holders, who are otherwise eligible since long. There is also no substance in the argument of Mr. Thakore that if the Directors of the Company are disqualified for being appointed as Directors in the other Company, no benefit is going to accrue to the debenture holders. On the contrary the Directors would opt for leaving directorship of this Company and they would continue to remain as Directors of the other Company, and the same would be at the detriment of the applicant-Company. If the Directors of the applicant-company are keen and desirous of salvaging the applicant-Company from its present state of affairs, they would prefer to remain with the applicant-Company rather than to go with the other Company. In any case by stating that the circumstances were beyond the control of the applicant-Company because of which the project could not be commenced and debentures could not be redeemed etc., the Directors could not absolve themselves from their responsibility as they were incharge and in the control of the affairs of the company. The Court cannot ignore the fact that the debenture holders holding more than 2,000 debentures more particularly, financial institutions like Fearless General Finance and Investment Company Ltd., and UTI are also answerable to their investors and if the debentures are not redeemed alongwith the interest accrued thereon they are also answerable to their members and investors who have put faith in them and invested the amount with them. The Court, therefore, takes strict view in the matter and interprets the provision in the strict sense which in no uncertain terms disqualifies the Directors of the Company from being appointed as Directors of the other Company by virtue of the default committed by them in paying the redemption amount with interest to the debenture holders on their due date of redemption.

21. In the above view of the matter and due to the reasons stated hereinabove, the present application is accordingly rejected without any order as to costs.