

(2005) 08 SHI CK 0009

In the High Court Of Himachal Pradesh

Case No : Company Petition No. 5 of 2004 and in company Application No. 3 of 2005

In Re: Morepen Laboratories Ltd.

Date of Decision : 02-08-2005

Acts Referred:

Companies Act, 1956 — Section 391(1), 391(6), 393, 433

Citation : (2006) 130 CompCas 368

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

Bench : Single Bench

Advocate : Ajay Kumar, in Company Petition No. 5 of 2004, Bimal Gupta, in Company Petition No. 5 of 2004, Kuldip Singh and Bimal Gupta, in Company Petition No. 5 of 2004, Nahush Shah and Rahul Mahajan, in Company Petition No. 5 of 2004, Neeraj Gupta and Janesh Gupta, in Company Petition No. 5 of 2004, P.P. Chauhan, in Company Petition No. 5 of 2004, Rahul Mahajan, in Company Petition No. 5 of 2004, Sandeep Sharma, in Company Petition No. 5 of 2004, Sanjay Karol, Aman Sood, Rahul Mahajan and Vinay Ranjan, in Company Petition No. 5 of 2004 and Ansul Bansal, in company application No. 3 of 2005, V.N. Kaura, Paramjeet Benipal and Rajesh Mandhotra, in Company Petition No. 5 of 2004, for the Appellant;

Judgement

Arun Kumar Goel, J.—A petition u/s 391(1) of the Companies Act, 1956 (hereinafter referred to as "the Act"), was filed by M/s. Morepen Laboratories Limited (hereinafter referred to as "the company"), having its registered office at Morepen Village, Nalagarh Road, Near Baddi, District Solan. After having examined the same and on being satisfied, on June 28, 2004, following order was passed :

28-6-2004 Present : Shri Sanjay Karol, Sr. Advocate with Sh. Gaurav Khanna and Sh. Aman Sood, Advocates, for the petitioner-company.

Heard learned Counsel. This is a petition u/s 391(1) of the Companies Act, 1956. The petitioner-company has filed this petition stating that its registered office is situate at Morepen Village, Nalagarh Road, Near Baddi, District Solan, Himachal Pradesh. This petition is supported with the affidavit of Sh. P. K. Singh,

authorised signatory on behalf of the petitioner-company in terms of annexure P1, copy of resolution passed by its board of directors in the meeting held on April 30, 2004. A prayer has been made to convene separate meetings for different classes of creditors and shareholders as also to appoint the chairman and alternate chairman for such separate meetings of different classes of creditors and shareholders as mentioned in the body of the petition and to fix the procedure to be followed at the meetings, including vote by proxies. It has also been prayed that the chairman and alternate chairman need to be directed to take necessary steps towards the orders those may be passed by this Court as well as required under law and then to file their reports.

The proposed scheme envisages the object sought to be achieved therefrom, i.e., after following the scheme as proposed, it envisages rescheduling and revision of the principal amount and interest etc., and to repay the foreign currency term loans, rupee term loan, working capital loan, fixed deposits, non-convertible debenture, unsecured loans, vendors' dues, etc., as detailed in the petition. Different creditors of the petitioner-company are the following :

(i) Class I

- a. Term lender (including secured, unsecured and foreign currency)
- b. NCD holders
- c. Working capital lenders
- d. ICDs.

(ii) Class II

- a. Fixed deposits holders

(iii) Class EI

- a. Vendors

(iv) Class IV

- a. Preference and equity shareholders.

Keeping in view the proposed scheme/arrangement, I am satisfied that it would be in the interest of the business of the petitioner-company as well as its creditors and the shareholders, thus, it will be for smooth, as well as for its efficient management. Taking into account over all facts and circumstances of this case, as also the facts detailed in the petition, it is felt that following directions need to be issued in this case :

(a) That meeting of the Class I (supra) creditors, namely term lenders including secured, unsecured and foreign currency, NCD holders, working capital lenders and ICDs will be held at the registered office of the company on September 4, 2004, at 10.30 a.m. for consideration of the scheme arrangement as proposed

by the petitioner-company and after such consideration to approve the same if considered fit and proper with or without modification. Shri Deepak Gupta, Advocate, is appointed as chairman of this meeting and in his absence Shri Ankush D. Sood, Advocate is appointed as alternate chairman.

(b) That meeting of class II (supra), i.e., fixed deposits holders will be at 3.00 p.m. on September 4, 2004 at the registered office of the petitioner-company for consideration of the scheme/arrangement as proposed by the petitioner-company and after such consideration to approve the same if considered fit and proper with or without modification. Justice (retired) Shri V. P. Bhatnagar is appointed chairman of this meeting and failing him, Shri Ashwani Sharma, Advocate is appointed as alternate chairman.

(c) That meeting of the Class III (supra), i.e., vendors, will be at 11.30 a.m. on September 4, 2004, at the registered office of the petitioner-company for consideration of the scheme/arrangement as proposed by the petitioner-company and after such consideration to approve the same if considered fit and proper with or without modification. Shri N. K. Sood, Advocate, is appointed as chairman and in his absence Shri Trilok Chauhan, Advocate is appointed as alternate chairman.

(d) That meeting of Class IV (supra), i.e., preference shareholders will be at 12.30 p. m. on September 4, 2004 at the registered office of the petitioner-company for consideration of the scheme/ arrangement as proposed by the petitioner-company and after such consideration to approve the same if considered fit and proper with or without modification. Shri Kapil Dev Sood, Advocate, is appointed as chairman and in his absence Shri Ajay Mohan Goel, Advocate, is appointed as alternate chairman.

(e) That meeting of Class IV (supra), i.e., equity shareholders, will be at 1.30 p. m. on September 4, 2004, at the registered office of the petitioner-company for consideration of the scheme/arrangement as proposed by the petitioner-company and after such consideration to approve the same if considered fit and proper with or without modification. Shri N. K. Thakur, Advocate, is appointed as chairman and in his absence Shri Sandip Kaushik, Advocate, is appointed as alternate chairman.

(f) Advertisements informing date, time and place of the aforesaid meetings of the different creditors and shareholders (supra) separately of the petitioner-company will be published in accordance with the rules in two newspapers, namely, Hindustan Times in English and Amur Ujala in Hindi, both Chandigarh editions, as also in the Himachal Pradesh Government Rajpatra. These advertisements to be published in the newspapers as well as in Himachal Pradesh Government Gazette with at least 21 days clear notice of the date of the meeting. Notice of these meetings shall also be fixed at the notice board of the petitioner-company at its registered office. In the advertisements/notices, it shall be clearly stated that copy of the proposed scheme/arrangement and the

statements required to be furnished, can be obtained free of costs or charge from the aforesaid registered office of the petitioner-company. A clear notice of 21 days will also be sent to each shareholder as well as creditor of the petitioner-company a prepaid letter posted under the certificate of posting at their respective last known addresses along with copies of the statements as required u/s 393 of the Companies Act, 1956.

(g) So far as above chairmen are concerned, each one of them shall be paid Rs. 50,000 and the alternate chairmen shall be paid Rs. 40,000 each, towards their remuneration, in addition to free transportation from Shimla and back to the registered office of the petitioner-company where meetings have been scheduled to be held. All of them shall also be reimbursed for other miscellaneous expenses (if any) which may be incurred by the petitioner-company. Total amount of remuneration is to be deposited in the Registry of this Court within two weeks from today. On such deposit being made, 50 per cent, to be remitted/paid to the above named chairmen/alternate chairmen by the Registry without their applying, and the remaining 50 per cent, will be paid to them on receipt of their respective reports. Necessary advertisements of the petitioner-company, as also the notices of the meetings shall be sent by the chairmen/alternate chairmen under their respective signatures in the prescribed forms.

(h) Quorum of the meeting of the shareholders will be 3/4th of the persons present and voting. In case of the meeting of the creditors, the voting by proxy is permitted provided the same is filed at the registered office of the petitioner-company 48 hours prior to the date of meetings in the prescribed form duly signed by the person entitled to attend and vote.

(i) The value of the creditors shall be in accordance with the books of the petitioner-company and in case of dispute as regards entries in the books, the chairmen/alternate chairmen conducting the meetings shall determine such value for the purpose of the meetings.

(j) On the conclusion of the meetings chairmen/alternate chairmen shall submit their respective reports to the court along with result of the meetings within seven days of the conclusion of the meetings. The reports shall be duly supported by respective affidavits of the chairmen/alternate chairmen. A copy of this order duly authenticated by the Registrar General of this Court will be made available to the above chairmen/alternate chairmen. Matter be listed on September 13, 2004 before the court.

2. In Company Petition No. 5 of 2004, Company Application No. 25 of 2004 was also filed u/s 391(6) of the Act wherein interim order staying further proceedings of pending cases in different courts/Tribunals was passed. During the pendency of this company application, this interim order was modified, thereby vacating the order of stay in some cases, whereas in some other cases stay of further proceedings was ordered. This was at the instance of the company. The said order reads as under :

Company Application No. 25 of 2004 :

Heard learned senior counsel.

Issue notice. Shri Bimal Gupta, Advocate accepts notice on behalf of one of the creditors of the petitioner-company, i.e., Nova Scotia Bank Ltd. and on his instructions, Kanwar Kuldip Singh, Senior Advocate, has put in appearance. Mr. Gupta submits that he will be filing reply to this application, as also vakalatnama. Time prayed for is allowed. Let needful be done within two weeks. Till the reply is filed and respondent is heard, further proceedings in all the cases, list whereof is attached as annexures 1A, 2A, 3A, 4A and 5A with the application, will remain stayed. List this application along with Company Petition No. 4 of 2004 on July 19, 2004.

Copy dasti of this order with copies of annexures 1A, 2A, 3A, 4A and 5A will be supplied to learned Counsel for the parties.

3. Another fact that needs to be noticed here is that prior to filing of the Company Petition No. 5 of 2004, as well as thereafter number of company petitions were filed for winding up of the company by its creditors u/s 433 of the Act. As according to all of them, despite notices having been issued as required under law, the company failed to liquidate its liability. Not being able to pay its debts, therefore, it would be just and equitable to order its winding up by this Court. These company petitions are :

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No.	Case	No.	Filed	by
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Coy. Pet. 14/ 2003 SBI Commercial and International Bank Ltd. v. Morpen Laboratoraties Ltd.				
2. Coy. Pet. 4/2004 Bank of Nova Scotia v. Morpen Laboratories Ltd.				
3. Coy. Pet. 7/2004 M/s. Comfort Net Traders v. Morpen Laboraties Ltd.				
4. Coy. Pet. 8/2004 M/s. Morpen Laboratories Ltd. v. SICOM Ltd. 5. Coy. Pet. 2/2005 Himachal Goel v. Morpen Laboratories Ltd. 6. Coy. Pet. 3/2005 M/s. Jeru Manekshaw Contractor v. Morpen Laboratories Ltd.				
7. Coy. Pet. 5/2005 M/s. Shiva Pharmachem v. Morpen Laboratories Ltd.				

4. During the pendency of this company petition, some of the creditors who had filed above referred company petitions also filed applications in this Company Petition No. 5 of 2004 to the effect that arrangement as proposed with the creditors vide annexure P9 is neither bona fide nor is viable so as to subserve the purpose for which Section 391 of the Act has been enacted.

5. All the applicants also prayed for vacation of the order dated June 28, 2004 in Company Application No. 25 of 2004. They further pointed out that even the

order passed u/s 391(1) of the Act on this date also needs to be discharged and consequently Company Petition No. 5 of 2004 dismissed. Numbers of grounds were put forth by all of them suggesting that it is neither bona fide nor on its basis company can be restructured. It deprives the creditors of the company of their rights in the pending litigations. The sole purpose of the arrangement is to provide a cover up for the acts of malfeasance and misfeasance on the part of its directors. Company having lost its financial credibility and substratum, therefore, no fruitful purpose is going to be served by holding of meetings as directed by this Court vide its order dated June 28, 2004. Further according to learned Counsel, this Court has to be prima facie satisfied before directing calling of the meetings. This was only possible after having examined the merit of the arrangement. Classification of creditors was not correct being in conflict with the provisions of the Act. Some of the creditors who are litigating before the Debts Recovery Tribunals at different places in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, could not be deprived of their rights to proceed further and also to reap the benefit of final orders those may be passed by the concerned Tribunals as per law.

6. Besides, this learned Counsel also pointed out by referring to the arrangement annexure P9, that even if it be taken on its face value, still no benefit can be deprived by the company from it. As such they have prayed for rejection of the application by recalling the above extracted order and consequently dismissing both Company Petition No. 5 of 2004 as well as Company Application No. 25 of 2004.

7. So far as calling of meetings of different classes of creditors of the company in terms of Section 391(1) of the Act is concerned, no doubt the court has to examine the matter and thereafter on being prima facie satisfied with the proposed arrangement has to proceed further by either ordering holding of meetings or by rejecting such application. Suffice it to say in this behalf that if all the grounds urged in opposition to Company Petition No. 5 of 2004, are minutely examined and then any finding is recorded, it is bound to prejudice either of the parties. Reason being that it is held to be viable or otherwise, then during the course of meetings such observation will affect the proceedings. In these circumstances, in my considered view court while examining the proposed arrangement annexure P9, does not have to minutely and threadbare examine the same. However, if the court is satisfied that arrangements/scheme needs to be put to vote by different types of creditors/shareholders, etc., then the meetings are to be held as directed vide order extracted hereinabove. However, if after being satisfied on examination of the arrangement in question the court comes to the conclusion that it is neither bona fide nor viable, then in a given case the company court would certainly reject the application u/s 391(1) of the Act.

8. To be fair to all learned Counsel who appeared while opposing Company Petition No. 5 of 2004, as well as praying for vacation of order dated June 28,

2004, in Company Application No. 25 of 2004, it may be noted that detailed submissions on almost all the aspects as noted hereinabove have been made by them to persuade the court that the interim order needs to be vacated while dismissing the company petition. Those have not been purposely and intentionally gone into. At the risk of repetition it may be appropriate to observe that anything said by this Court after having dealt with such submissions is bound to prejudice either of parties.

9. In the context of submissions of learned Counsel opposing the holding of meeting in terms of the order extracted above, it may be also be appropriate to notice that all these ground pleas would be open to them during the course of holding of meetings. Not only this, when the meetings will take place, the creditors, shareholders, debenture holders, etc., all can either oppose the proposed arrangement or support it. Besides this, they can also either adopt the proposed arrangement as it is or with modifications/additions/alterations, etc. As already observed above, the arrangement can be rejected on any of the grounds on which rejection of Company Petition No. 5 of 2004 was prayed for. Viability of the scheme, its soundness, as well as financial health of the company, etc., will be the questions which shall be open during the course of such meetings not only to the parties who are before the court, but to all others as well, who are not before the court. All concerned can oppose/support the same with or without modifications/additions/alterations. They can reject it also.

10. This court at the first glance when above extracted order was passed, was prima facie satisfied regarding viability of the arrangement, therefore, the said order was passed. Even after having heard learned Counsel for the parties at length, view of this Court remains the same. Therefore, opposition to Company Petition No. 5 of 2004 in my considered view cannot be accepted on behalf of the parties in this case at this stage.

11. Another reason to take this view is that the parties who are present before the court and are opposing the arrangement in question as proposed vide annexure P9, do not constitute the total number of creditors of the company. Thus, after following the procedure prescribed for holding of meetings under the provisions of the Act and after notices having been issued to all concerned, all of them will have a right to voice their views either way during the course of such meetings. Nothing prevents the opponents of Company Petition No. 5 of 2004 to either oppose the arrangement or to suggest any amendment/alteration, etc., thereto.

12. Another submission urged by all learned Counsel opposing the holding of meetings was that no fruitful purpose is going to be served save and except that it will result in delaying the winding up of the company. This submission is too presumptuous at this stage. In case prayer of those opposing the holding of meetings is allowed at this stage and the company is ordered to be wound up for which great emphasis was laid by all learned Counsel (except those appearing for the company), in such a situation except for secured creditors, who shall rank

pari passu with labour but after crown's claims, unsecured creditors, will only be entitled to something, that too share pro rata on their debts being established before the official liquidator. Whereas if finally after holding of meetings arrangement is approved with or without amendments, etc., in such a situation there will be a ray of hope for all classes of creditors for retrieval of their dues. Therefore, it is held that it is not in the interest of anyone at this stage to outrightly reject this application u/s 391(1) of the Act.

13. When the arrangement in question if approved with or without modifications will come before the court, nothing at that stage prevents those who are praying for rejection of Company Petition No. 5 of 2004 to again come forth before the court by making out a case that the approved scheme of arrangement with or without modifications should not be approved by the court. Even at that stage this Court is not bound to accept the scheme in case it is approved with or without modifications. As such, this is an additional ground for not entertaining the plea of learned Counsel to dismiss this company petition.

14. In addition to this, a perusal of annexure P9 does not suggest that it contravenes any provision of law. It further shows that on different terms the arrangement is proposed with different creditors. In this behalf great emphasis was laid by learned Counsel for the opposite side that if the proposed arrangement is carried through, entire litigation will come to an end. Interest is to be waived/deferred on long-term basis. Nothing is being said in this behalf at this stage, as it has already been observed that holding of meetings as ordered on June 28, 2004, will in no manner either effect and/ or hamper the rights of all concerned during such meetings. They can further object to the arrangement in question either outrightly rejecting the same or resolving to adopt it with modifications.

15. For taking this view it may also be appropriate to observe that it is not known as to in what manner other creditors, shareholders, etc., would react during the course of meetings and the parties opposing Company Petition No. 5 of 2004 admittedly do not represent the entire body of creditors, etc., of the company.

16. Now coming, the application u/s 391(6) of the Act, i.e., Company Application No. 25 of 2004, so far as matters which are pending before different Recovery Tribunals at different places against the company are concerned, keeping in view the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993, as well as the decision of the Supreme Court in Allahabad Bank Vs. Canara Bank and Another, am satisfied that these being proceedings under a special statute which is later in point of time to the Act, proceedings in such cases cannot be stayed. In these circumstances, it is held that so far proceedings in all the cases which are pending before different Debts Recovery Tribunals either at Delhi, Bombay or elsewhere in the country are concerned, those cannot be stayed under the said Act and accordingly to this extent the order passed in Company Petition No. 25 of 2004 on June 28, 2004 needs to be modified.

17. Here another question crops up for consideration by this Court. It is to 1 the effect that in case Tribunals are allowed to pass final orders, in such a situation it is felt that it is likely to prejudice the company during the course of meetings. Consequently, such class of creditors is not likely to agree to the arrangement either suggested by annexure P9 or as may be proposed during meetings with modification. Therefore, the question that would arise is how to adjust the equities till the meetings are held and reports of the chairpersons/co-chairpersons are received.

18. After having given thoughtful consideration, it is felt that it would be in the interest of justice, as well as in the interest of all the parties to allow such proceedings pending before the Debts Recovery Tribunals anywhere in the country to continue, but no final order shall be passed therein till the final outcome of the meetings u/s 391(1) of the Act and receipt of reports by this Court. Directions in this behalf can be and in fact in the peculiar facts and circumstances of this case will be issued after the reports of meetings are received as ordered on June 28, 2004.

19. So far as other cases pending in different courts are concerned, matter regarding vacating the stay order therein would also be taken up for consideration after the receipt of the reports of the meetings those may be held and till such time the order regarding stay in such proceedings will remain in force. Ordered accordingly.

20 To be fair to learned Counsel for all the parties who supported/opposed Company Petition No. 5 of 2004 and Company Application No. 25 of 2004 in it, it may be noted that number of decisions were cited at the Bar for the propositions argued by them. However, for the view that has been taken in this order those have not been discussed as it was not felt necessary.

21. As a result of aforesaid discussion, it is ordered that meetings of different classes of creditors as directed on June 28, 2004 will now be held at the time and place as mentioned in the said order on October 3, 2005. For holding meeting of Class-I creditors, Shri Deepak Gupta, Advocate, (as his Lordship then was), was appointed as the chair person. Now Shri H. K. Bhardwaj, Advocate is substituted in his place. To this limited extent said order is modified. Reports of meetings to be filed in court immediately as per law by the chairpersons/co-chairpersons at the earliest and in any case before October 24, 2005.

22. For passing of further orders in Company Application No. 25 of 2004 and all other company applications case is ordered to be listed on October 26, 2005 in court.

23. Registry is directed to send a copy of this order to all the chairpersons as well as co-chairpersons who are directed to proceed further in the matter in terms of order dated June 28, 2004 read with this order.

Company Application No. 25 of 2004.

24. List on October 26, 2005 for further orders.

Company Applications Nos. 29, 32, 33, 34, 35, 36, 47, 49, 50, 51, 52, 54, 68, 70, 73, 77 of 2004, 2, 3, 8,10, 13,15,17,19, 22, 31, 37, 39, 41, 43, 44, 46, 48, 50, 52 and 54 of 2005.

25. No order in view of the order of the day passed in Company Petition No. 5 of 2004.

Company Applications Nos. 82 of 2004, 7, 9,12,14,16, 18, 21, 30, 36, 38, 40, 42, 43A, 45, 47, 49, 51, 53 of 2005.

26. Since learned Counsel for the applicants were heard in Company Petition No. 5 of 2004, as such these applications call for no orders. All the applications stand disposed of accordingly.

Company Application No. 81 of 2004.

27. Allowed and reply is taken on record.