

(1998) 10 GUJ CK 0015
In the Gujarat High Court
Case No : Company Application No. 237 of 1998
In Re: Motorola (India) Ltd.

Date of Decision : 16-10-1998

Acts Referred:

Companies Act, 1956 — Section 205, 207, 391

Citation : (2001) 103 CompCas 389

Hon'ble Judges : M.B. Shah, J

Bench : Single Bench

Judgement

1. This application is filed by Motorola (India) Ltd. for direction to convene meetings u/s 391 of the Companies Act, 1956 (hereinafter "the Act") for the purpose of considering and, if thought fit, approving with or without modification the scheme of compromise and arrangement proposed between the applicant-company, its shareholders and its creditors, and for consequential directions.

2. The applicant-company is engaged in the business of manufacturing, buying, selling and processing of industrial oils and other varieties of oils and also other products, like brake fluids and greases. According to the applicant-company, it was making good profits but for last 4-5 years the situation has changed on account of the multinationals and domestic companies having entered in the lubricants industry. The company has in its employment 48 workers. The company has not been able to pay any dividends since 1994-95 and the creditors' outstanding are also overdue. However, the company has now worked out a turn-around strategy in order to overcome the prevailing critical liquidity problems and also pay off its creditors through a scheme of compromise and arrangement between the company and its creditors as also the shareholders which is at annexure B to the application.

3. The company has entered into an understanding for a joint venture proposal with one NRI group which will invest to the tune of Rs. 10 crore. According to the company, it is discussing with few banks for its working capital requirement to the tune of Rs. 10-12 crore. The company also proposes to sell of its office building at a good price.

4. The scheme sets out the various details including the provision for payment of dues of unsecured creditors and trade creditors. The provision for trade creditors is as under :

"Trade creditors : This item represents the outstanding balance in respect of goods/services supplied by various parties to MIL.

(a) The outstanding principal amount, as on the effective date, in respect of trade creditors is proposed to be repaid as under :

(i) The trade creditors whose outstanding principal amount as on the effective date, is less than Rs. 5,000 shall be repaid by MIL within six months from the "effective date".

(ii) The trade creditors whose outstanding principal amount, as on the effective date, is more than Rs. 5,000 but less than Rs. 20,000 shall be repaid in two equal half-yearly instalments commencing six months after the "effective date".

(iii) The trade creditors whose outstanding principal amount, as on the effective date, is more than Rs. 20,000 but less than Rs. 1,00,000 shall be repaid in four equal half-yearly instalments commencing one year after the "effective date".

(iv) The trade creditors whose outstanding principal amount, as on the effective date, is more than Rs. 1 lakh, but less than Rs. 5 lakh, shall be repaid in eight equal half-yearly instalments commencing two years after the "effective date".

(v) The trade creditors whose outstanding principal amount, as on the effective date, is more than Rs. 5 lakh, but less than Rs. 10 lakh, shall be repaid in twelve equal half-yearly instalments commencing two years after the "effective date".

(vi) The trade creditors whose outstanding principal amount, as on the effective date, is more than Rs. 10 lakh shall be repaid in sixteen equal half-yearly instalments commencing two years after the "effective date".

(b) The trade creditors shall waive the interest, if any, applied by them in the account of MIL between 1st October, 1996 and the "effective date" with effect from "effective date", no interest shall accrue on the outstanding principal amount due by MIL to its trade creditors as on the "effective date". Interest on outstanding balance of trade creditors applied by them in the account of MIL till 30th September, 1996 and remaining unpaid as on the effective date shall form part of the outstanding principal amount and shall be repaid as stated in clause II(D)(a) above."

5. Before the application reached the ex parte preliminary hearing, the learned counsel for the petitioner in Company Petition No. 29 of 1997, which is for winding up of the applicant-company, appeared. Similarly, the learned counsel for the different petitioning creditors in various winding up petitions against the applicant-company have intervened. The details of the said petitioning creditors are as under :

-----		Sr. No.	Name of the
party	Amount	-----	-----
1. Jaico Press (P.) Ltd.	23,40,205	2. Bharwani Brs. & Co.	14,99,400
3. Videocon Narmada Electronics Ltd.	7,86,529	4. Petrochem Indst. Ltd.	15,53,261
5. Century Textile & Industries Ltd.	27,49,760	6. Coimbatore Lakshmi Investment	28,56,475
& Fin. Co. Ltd.	7. Lubrizol India Ltd.	91,35,000	8. ATO (I) Ltd.
1,42,030	9. M. P. Parikh Finstocks	6,25,000	10. ITC Classic Finance Ltd.
2,18,83,669	11. Hindustan Petroleum Corp. Ltd.	2,97,42,392	12. Mid India Ind. Ltd.
25,00,000	13. Jeth Jaccques Taru Lalwani	1,52,61,651	14. Radico Khaitan Ltd.
55,00,000	15. Carborundum Universal	15,00,000	16. Vigro Frozen Foods (P.) Ltd.
35,00,000	17. Monsanto Manufacturers (P.) Ltd.	50,00,000	18. Chitra Publicity
	Ltd.		3,13,839
-----		Total	10,29,38,983

6. In the affidavit-in-reply on the question of bona fides, it is pointed out that the conduct of the applicant-company has been such that the applicant-company cannot be trusted with any scheme. The court's attention is invited to the conduct of the company in relation to the dues of the ITC Classic Finance Ltd. which is now merged with the ICICI Ltd. It is pointed out that ITC Classic Finance Ltd. had advanced a sum of Rs. 3,30,20,473 to the applicant-company for purchasing four windmills from the manufacturing company at a cost of Rs. 4.35 crore. The applicant-company paid the said sum of Rs. 3,30,20,473 received from the ITC Classic Finance to the manufacturing company and also a sum of Rs. 1,05,00,000 as its own contribution for purchasing four windmills, aggregating to Rs. 4.35 crore for purchasing four windmills. However, the manufacturing company supplied only two windmills and refunded the sum of Rs. 2,54,24,473 to the applicant-company. The applicant-company was, therefore, required, to refund the amount of Rs. 1,80,96,000 to the ITC Classic Finance. Out of the said refund received from the manufacturing company, the applicant-company not only retained the entire amount of Rs. 2,54,24,473 and did not refund any amount to the TTC Classic but the applicant-company went to the extent of producing a certificate showing that four windmills were supplied to the applicant-company and were installed at the site.

7. Various contentions and submissions are made in the affidavit in reply opposing the same to show the discrepancies and contradictions in the account produced alongwith the scheme. For instance, in the provisional balance-sheet for the period from 1st April, 1996 to 31st March, 1998, under the head "current assets, loans and advances" against columns "Receivables" Rs. 7,162.24 lakh were shown as at 30th September, 1996 and the same were reduced to Rs. 2,774.87 lakh as on 31st March, 1998. Similarly; under the same head, against columns "loan and advances" Rs. 2,417.01 lakh were shown as at 30th September, 1996 which were increased to Rs. 6,344.31 lakh as at 31st March, 1998. It gives an idea that most of these receivables were from the sister concerns and they were subsequently converted into loans and advances.

8. It is further submitted that the present scheme moved by the applicant-company appears to have intended to be a cloak to cover the misdeeds of the directors. Reference is invited to the facts stated and averments made in Company Petition No. 313 of 1997, filed by ITC Classic Finance Ltd. It is further submitted that as per the provisional balance-sheet for the period from 1st October, 1996 to 31st March, 1998, the share capital of the company as on 31st March, 1998 is of Rs. 6,274.38 lakh and reserves and surplus as on that date is of Rs. 1,838.57 lakh. The total of these two amounts would come to Rs. 8,111.95 lakh. As per annexure C, being Schedule to provisional balance-sheet to unsecured loans as on 31st March, 1998, the total amount of unsecured loans is of Rs. 20,92,50,427.99.

9. It is further stated that the company has stated on page 17 under the head "shareholders" that the company had declared a dividend of Rs. 93,54,319 during the financial year 1994-95. However, the company has paid the dividend of Rs. 3,35,029 only. The balance amount of dividend amounting to Rs. 90,19,290, though declared, could not be paid by the company due to the liquidity problems. Once the dividend is declared at the annual general meeting, it becomes a debt due to the shareholders and the company has to pay the amount of dividend within the stipulated period as contained in section 205 of the Act and by not paying the same, the applicant-company has committed an offence u/s 207 of the Act. It is only with a view to get rid of this provision, the company has now proposed in the present scheme that the resolution declaring the said dividend to be revoked and the company should not be liable to pay the outstanding dividend to its shareholders. It was also suggested in the scheme that the shareholders should waive their right to get their dividend declared but unpaid during the financial year 1994-95.

10. There are huge losses incurred by the applicant-company from year to year. Fund flow statement for the period from 1st October, 1996 to 31st December, 1997, filed by the company at page No. 13, shows the cash loss during the period of Rs. 810.69 lakh. The total sale for the period from 1st July, 1995 to 30th September, 1996 was to the tune of Rs. 14,148.17 lakh, which were reduced to Rs. 2,161.92 lakh only during the period from 1st October, 1996 to 31st March, 1998. Similarly, the income during the period from 1st July, 1995 to 30th September, 1996 was to the tune of Rs. 296.92 lakh which was reduced to Rs. 10.70 lakh during the period from 1st October, 1996 to 31st March, 1998. The profit of the company during the period from 1st July, 1995 to 30th September, 1996 was to the tune of Rs. 264.45 lakh whereas the company has incurred a loss of Rs. 2,037.48 lakh during the period from 1st October, 1996 to 31st March, 1998. It is submitted that these facts are indicative of the facts that the applicant-company is commercially insolvent and losing its economic substratum very fast.

11. In response to the aforesaid objections lodged on behalf of the Lubrizol (India) Ltd., petitioner in Company Petition No. 29 of 1997, affidavit-in-rejoinder

dated 24th September, 1998 has been filed on behalf of the applicant-company. It is stated that after this court's order, passed on 20th April, 1998 appointing provisional liquidator, the same has been stayed in OJ Appeal and the Division Bench has recorded in its order dated 29th April, 1998 that it will be open to the applicant-company to move a scheme u/s 391. As regards the proceedings between the ITC Classic Finance Co. and the applicant-company, it is submitted that the allegations made with regard to the windmills is the subject-matter of criminal proceedings and the applicant has already filed Misc. Criminal Application No. 5222 of 1997 for quashing the same and since the matter is sub-judice, the applicant-company would not make any further comments. The stay orders dated 10th December, 1997 and 22nd December, 1997 passed in the said proceedings are produced at annexure C. So also the copy of the memo of the miscellaneous criminal application and annexures are produced.

12. Mr. Soparkar has strongly relied upon the provisions of rule 67 of the Companies (Court) Rules, 1959 to contend that the directions for convening meetings of the creditors and the shareholders can be sought even ex parte and, therefore, the petitioning creditors are not entitled to any audience at this stage. Whatever objections they have can be raised at the time when the scheme is discussed at the meeting of the unsecured creditors. Apart from the opportunity that they will get at the meeting of the creditors, even thereafter there will be public advertisement and at the hearing of the application for sanctioning of the scheme the petitioning creditors will have an opportunity of being heard by this court.

13. Mr. Soparkar has further submitted that, in view of the judgment of the Supreme Court in the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., even at the final hearing of the proceedings u/s 391 of the Act where the court is to decide whether to sanction the scheme or not, the role of the court is very limited. The court is not to sit in appeal over the wisdom of the shareholders and the creditors. The role of the court is confined to ensuring that the game is properly played. It is, therefore, submitted that the petitioning creditors of the winding up petitions have no right to object to the directions being issued for conducting meeting of the shareholders and the creditors and the application deserves to be granted.

14. On the other hand, Mr. B. J. Shelat with Mr. U. P. Vyas, Mr. Puj, Mr. Amar Bhatt, Ms. Parikh for Trivedi & Gupta, Mr. Dhaval C Dave and the learned counsel for other petitioning creditors have strongly opposed the application. It is submitted that the scheme is not moved bona fide but is moved in order to delay the hearing of the winding up petitions. It is further submitted that the proposed scheme is nothing but a subterfuge to stall the genuine creditors and is meant to benefit others by further dissipation of the assets of the company. It is also detrimental to the public interest.

15. At the hearing of this petition, it was inquired from the learned counsel for the applicant-company as to whether the NRI with whom the memorandum of

understanding has been entered into on 12th April, 1998 as well the bankers have made firm commitments to supply the funds to the applicant-company as the scheme is entirely depending upon the funds to the tune of Rs. 10 crore being supplied with the joint venture proposal with one NRI group; Rs. 12 crore as working capital from the banks and Rs. 5 to 6 crore from the non-productive assets of the applicant-company. The learned counsel for the applicant has submitted that the NRI group has made firm commitment but as far as the finance from the banks are concerned the same is only at the negotiation stage. No further details of any such negotiations have been brought to the notice of the court and it is submitted that it is only after the creditors and shareholders of the company approve the proposed scheme that it may be possible to persuade the bankers to make available funds to the tune of Rs. 10 to 12 crore.

16. Without intending to express any opinion on the subject-matter of the criminal proceedings, it appears to the court that, in view of the serious allegations being made regarding non-refund of the amount of Rs. 1.80 crore to the ITC Classic Ltd. (now amalgamated with ICICI Ltd.) in respect of the nonpurchase and non-installation of the two windmills out of the four windmills for which advance was made by the ITC Classic Finance and in view of the fact that out of the unsecured creditors to the tune of Rs. 20.90 crore, unsecured creditors to the tune of Rs. 10.29 crore have not only filed winding up petitions but are also opposing the proposed scheme, this does not appear to be a fit case for granting the prayer made by the applicant-company for convening the meetings of the creditors and the shareholders of the applicant-company.

17. The court has considered the submissions that as per the decision of the Supreme Court in *Mihir H Mafatlal* case (supra) the court has to play a very limited role but the ratio of the said decision is required to be appreciated in the context of the controversy involved in that case, where the challenge made by the shareholder was to the share exchange ratio fixed in the scheme of amalgamation and the Apex Court had held that if substantial majority of the shareholders and the creditors have approved the scheme it was not for the court to sit in appeal over their wisdom. In the instant case, however, the court is not concerned with any such controversy and the basic question is whether the court should allow the company to convene meeting of the shareholders under the aegis of the court u/s 391 of the Act. Even in the case of *Mihir H Mafatlal* (supra) the Apex Court has reiterated the principle laid down by the Apex Court in the case of *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.* [1994] 14 CLA 39 / [1995] 83 Comp Cas 30, wherein the court has observed that the proposed scheme of compromise and arrangement must not be found to be violative of any provision of law and not contrary to public policy and for ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

18. In the case of decisions in *In Re: Sakamari Steel and Alloys Ltd.*, ; *Shyam S.*

Rastogi Vs. Nona Sona Exports P. Ltd., and In Re: Bengal National Textile Mills Ltd., the courts have held that it is incumbent upon the court to satisfy prima facie that the scheme is bona fide and in the interest of the company.

19. On the facts and in the circumstances of the case and the material on record the court is unable to give any such prima facie finding that the scheme is bona fide and in the interest of the company. This application is therefore, rejected.