

(2012) 08 CAL CK 0085

In the Calcutta High Court

Case No : C.A. No"s. 529 and 532 of 2012 and C.P. No. 179 of 2008

**In Re: Prime Retail India Private Ltd Anr., Pawan Projects Pvt. Ltd. and
Another and Day to Day Vinimoy Pvt. Ltd.**

Date of Decision : 08-08-2012

Acts Referred:

Companies Act, 1956 — Section 391, 392, 392(2)

Citation : (2012) 4 CALLT 193 : (2012) 5 CHN 633

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : P.C. Sen, Mr. Pramit Roy, Ms. Suparna Mukherjee, Mr. Aditya Kanodia in C.A. No. 532 of 2012, Mr. Shyam Prasad Sarkar, Mr. Lopita Banerjee, Mr. Rajib Mullick and Ms. Sonia Dutta in C.A. No. 529 of 2012, for the Appellant; Abhrajit Mitra, Debangsu Basak, Ms. Noelle Banerjee and Mr. D. Dey, for the Respondent

Judgement

Sanjib Banerjee, J.—The applicants in these two matters are defendants in a suit for specific performance filed by the transferor company in a scheme of amalgamation. It appears that notwithstanding the scheme of amalgamation having been allowed and the transferor company therein having been dissolved, the suit has continued in the name of the dissolved transferor company. One set of applicants is the original owner of the immovable property in question; the other set of applicants claims to be the subsequent purchasers of the land. The applicants say that it came to light in course of the cross-examination of the plaintiff's witnesses in the suit pending in the Barasat Court that the plaintiff in that suit had been dissolved and the defendants had thereafter applied for rejection of the plaint or dismissal of the suit. The applicants submit that it was at this stage that the plaintiff in the Barasat suit obtained an adjournment and the erstwhile directors of the transferor company have now applied for recalling the order sanctioning the scheme and, consequently, the order dissolving the transferor company. The applicants suggest that they would be seriously prejudiced if the application for recalling the order of sanction is taken up in their absence. The applicants apprehend that the application for recalling the order of sanction may have been collusively made and an order may have obtained from

this Court without disclosing all relevant material.

2. It does not appear that either set of applicants is entitled to have a look-in in the application for recalling the order sanctioning the scheme.

3. The applicants refer to section 391 of the Companies Act, 1956 and the specified classes of persons who are entitled to apply thereunder. This, the applicants contrast with section 392(2) of the Act where the relevant expression is "any person interested in the affairs of the company." The applicants assert that since an application u/s 392 of the Act, for enforcing a compromise or arrangement or otherwise, may be carried by not only the persons referred to in section 391 of the Act but also by any other person interested in the affairs of the company (it has, however, not been specified on behalf of the applicants which company is referred to in the expression "the company" in the relevant phrase), the applicants here may also be seen to have a right to apply thereunder. In support of such proposition, the applicants refer to a judgment reported at S.K. Gupta and Another Vs. K.P. Jain and Another, and rely on paragraph 14 thereof. Paragraph 14 of the report says no more than the obvious: that the expression "any person interested in the affairs of the company" is wider than the classes of persons who may apply u/s 391 of the Act.

4. A further authority is placed on behalf of the applicants, reported at (1956)1 All ER 273. It is necessary to refer to the facts relating to that case before coming to the passages cited from the report. The plaintiff claimed to be the inventor of an adhesive dispenser and alleged to have negotiated with the defendants for marketing the product. The plaintiff asserted that the defendants were under an obligation to not disclose the confidential material to any other person and claimed to be entitled in damages for the defendants' breach of such obligation. Before filing their defence, the defendants applied for impleading a non-party on the ground that the defendants were contractually bound to engage in the acts complained of by the plaintiff by virtue of the agreement with the person sought to be impleaded.

5. It was in such context that the passage referred to by the applicants at page 281 of the report has to be seen:

If this is the line of authority that is the correct one to apply, then I think the test is: "May the order for which the plaintiff is asking directly affect the intervenor in the enjoyment of his legal rights?". It is not, on this view, enough that the plaintiff's rights and the rights which the intervenor wishes to assert should be connected with the same subject matter. Nor is it enough that the intervenor's commercial interests may be affected by an order made in the action....

6. The other passage from page 287 of the report placed by the applicants is also of some relevance:

On the wider construction of the rule, I do not understand where the line is to be drawn between a commercial interest in the question involved in the case and a

legal one. It is conceded that the line must be drawn somewhere. It is not enough that the intervenor should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally - that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested.....

7. The answer to the legal question that the applicants raise may be found in the second passage quoted above but it needs amplification in the light of the nature of rights canvassed by the applicants and the context of the proceedings in which they seek to intervene.

8. To begin with, section 392(2) of the Act may not strictly apply. The applicants do not seek any order u/s 392 of the Act and have not applied as such. What the applicants seek to do is to intervene in an application for recalling an order sanctioning a scheme of amalgamation. Even if the distinction between the right to apply u/s 392 of the Act and the right to intervene in an application for recalling the order sanctioning a scheme is disregarded for the moment, it would appear that the applicants may not be persons who may be interested in the affairs of the company. Again, it is not necessary to assess whether the expression "the company" used in the section 392(2) of the Act indicates only the transferee company in the context of a scheme of amalgamation. If the expression "the company" in section 392(2) of the Act implies the transferee company, the applicants have no right at all since the applicants do not claim to have anything to do with the transferee company.

9. The more appropriate test, it seems, would be to assess whether the presence of the applicants in the application for recalling the order sanctioning the scheme may affect the outcome of the recalling application. In other words, the relevant question is whether anything that the applicants here may bring or submit in course of the application for recalling the order sanctioning the scheme may have a bearing on the order that may be passed on such other application. With respect, it appears that nothing that the applicants may bring to light or offer by way of legal or factual submission, can have any impact on the outcome of the application for recalling the order sanctioning the scheme.

10. The legal issue may be assessed with reference to a slightly different genre of suit that may have been instituted by the transferor company. If the transferor company had made a money claim and if the defendant in the money claim had obtained the same answers from the plaintiffs witness as the applicants here have extracted, it would not have made any difference. All that the applicants are able to show is that in the event the application for recalling the order sanctioning the scheme is successful, the applicants are indirectly affected in the suit pending against them in the Barasat Court. This is too remote an interest to allow the applicants to have a say in the application for recalling the order sanctioning the scheme. Such interest would also not amount to an interest in

the affairs of the transferor company if the applicants" reference to section 392(2) of the Act is otherwise apposite.

11. The expression "any person interested in the affairs of the company" is of widest amplitude both in its first limb and in the other. "Any person" will include a person of any description provided such person has an interest in the affairs of the company. The interest in the affairs of the company contemplated in section 392(2) has to be in the context of the proceedings. A defendant in a suit filed by a company involved in a scheme under Chapter V of Part-VI of the Companies Act may not necessarily be a person interested in the affairs of a company. That the applicants in the present case are defendants in a suit for specific performance relating to an agreement for transfer of an immovable property is of no significance.

12. The applicants, undoubtedly, have an interest in the land which is the subject matter of the Barasat suit. The plaintiff in the Barasat suit has claimed that there is an agreement that it holds for the sale of the property. It can not be immediately appreciated as to how the merger of the plaintiff in the Barasat suit with the transferee company will have any material bearing in the suit since the transferee company will be entitled to step in to the shoes of the transferor company by operation of law. Even if the order sanctioning the scheme is recalled, the alleged agreement on which the suit is founded will neither be proved nor resurrected, if such alleged agreement has otherwise lost force. The applicants' commercial interest in the subject-matter of the suit does not give them any legal interest in the application for recalling the order sanctioning the scheme.

13. C.A. No. 529 of 2012 and C.A. No. 532 of 2012 stand dismissed on the ground that the applicants have no locus standi to intervene in the application for recalling the order sanctioning the scheme. Nothing in this order should affect the applicants in any other proceedings that may be pending, including the Barasat suit. There will be no order as to costs.

Urgent certified photocopies of this order, if applied for, be given to the parties subject to compliance with all requisite formalities.