

(2004) 11 BOM CK 0053

In the Bombay High Court

Case No : Company Application No. 339 of 2004 in Company Application No. 338 of 2004 with Company Application (LDG.) No's. 462, 827, 880 and 942 of 2004

In Re: Sharp Industries Limited

Date of Decision : 05-11-2004

Acts Referred:

Companies (Court) Rules, 1959 — Rule 71
Companies Act, 1956 — Section 391, 391(1), 391(6)
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 40
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 25

Citation : (2005) 123 CompCas 60 : (2005) 3 CompLJ 221 : (2005) 60 SCL 297

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : D.D. Madon, B. Collabawala and K.B. Irani, instructed by Madekar and Co., J.D. Dwarkadas and Jal Andhyarujina, instructed by Vijay Sharma, J.M. Sidhwa and Hina Mehta, M.P. Rao, instructed by Bharat and Shah and Co., R.D. Soni, instructed by Ram and Co, for the Appellant;

Judgement

S.J. Vazifdar, J.—For convenience I will refer to the applicant in Company Application No. 339 of 2004 as the company and to the applicants in the other company applications as the applicants.

2. Company Application No. 338 of 2004 was taken out by the company, seeking directions for holding meetings of equity shareholders and secured creditors to consider and approve a scheme of compromise/arrangement proposed by it. In that company application, an order dated August 27, 2004, in terms of the minutes of the order was passed directing the meetings to be held. Other usual directions regarding holding and convening of the meetings were also passed. The company took out Company Application No. 339 of 2004 in Company Application No. 338 of 2004 seeking a stay of the hearing and final disposal of all the proceedings pending against the applicant-company, its directors, officers, civil/criminal in any court or Tribunal in India or abroad and that the plaintiff/appellant/complainant/ claimants in such proceedings be enjoined from carrying

on with the said proceedings pending the outcome of the aforesaid meetings and in the event of the meetings approving the scheme of the compromise/arrangement, pending the hearing and final disposal of the proceedings for sanction of the said scheme.

3. By an order dated August 27, 2004, an ad interim order in terms of prayer (a) of Company Application No. 339 of 2004 was granted for a period of twelve weeks, i.e., up to November 17, 2004. Prayer (a) reads as under :

"(a) That pending the outcome of the various meetings of the creditors of the applicant-company and if the said meetings approve the scheme of compromise/arrangement by a statutory majority, pending the hearing and final disposal of the proceedings for sanction of the said scheme, hearing and final disposal of all proceedings pending against the applicant, its directors, officers, civil/criminal in any court or Tribunal in India or abroad be stayed and the plaintiff/appellant/complainants/claimants in such proceedings be enjoined from carrying on with the said proceedings."

4. The other company applications referred to above have been filed by various creditors for vacating the said order dated August 27, 2004. There are several criminal and other proceedings taken out by the applicants in these company applications as well as other creditors which are pending before different courts. The recoveries sought in the civil proceedings go into several crores of rupees. The criminal complaints pertain to offences, inter alia, u/s 138 of the Negotiable Instruments Act and Section 420 of the Indian Penal Code. It is not necessary to set out the amounts involved or the number of cases filed.

5. The applicants had made ad interim applications for vacating the stay granted by the order dated August 27, 2004. At the hearing of these applications, it was agreed that the above company applications including Company Application No. 339 of 2004 should be disposed of finally. It is in these circumstances that all the above company applications were, placed on board and taken up for hearing.

6. Section 391(6) of the Companies Act, 1956, which falls for consideration reads as under :

"391. Power to compromise or make arrangements with creditors and members.-... (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."

7. Learned counsel appearing on behalf of the applicants submitted that :

8. (I) Section 391(6) does not apply to criminal proceedings.

9. (II) Protection u/s 391(6) can be offered only to a company and not to sureties who have guaranteed the repayment of the dues of the company.

10. (III) Notices of the hearing of the application for stay in Company Application

No. 339 of 2004 ought to have been given by the company to the applicants under Rule 71 of the Companies (Court) Rules.

11. (IV) The proposed scheme u/s 391 is not maintainable in view of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 and in particular Sections 18, 26 and 32 thereof.

12. (V) In the facts and circumstances of the case, the company is not entitled to an order u/s 391(6).

Re: Submission I

13. Mr. Madon submitted that the ambit of the term "proceeding" in Section 391(6) of the Companies Act, 1956, does not include within its scope criminal proceedings against the company and its directors. The submission is well founded.

14. Mr. Madon relied upon the judgment of a learned single judge of this court in Uma Investments Pvt. Ltd., . In that case the applicant, the State of Tamil Nadu, took out a judges summons for vacating the ex parte order obtained by the company u/s 391(6) in an application filed by it u/s 391 for sanction of a scheme of compromise with certain classes of creditors. The company had propounded the scheme in view of the financial difficulties faced by it for a variety of reasons which are not relevant for the present purpose. An ex parte order was passed u/s 391(6) staying the commencement or continuance of all civil and criminal proceedings against the company and its officers pending the hearing and final disposal of the company application for sanctioning the scheme of compromise and arrangement. Upholding the submission that the word "proceeding" in Section 391(6) does not cover criminal proceedings against the company and its officers, it was held at page 245 as under :

"The language of this sub-section is clear and unambiguous. The main controversy is focussed on the word "proceedings". According to Mr. Kambhatta, the word "proceedings" cannot cover criminal proceedings against the company and its officers. It could not have been the intention of the Legislature to stay the commencement or continuation of criminal proceedings. The company and its officers must face the consequences of their illegal acts. There seems to be considerable force in these arguments. If the intention of the Legislature had been to stay the commencement or continuation of criminal proceedings, it would have specifically said so. It is difficult to accept Mr. Mehta's line of interpretation indicated above that the word "proceedings" embraces criminal proceedings."

15. The ratio is clear. The learned judge has held in terms that the word "proceeding" in Section 391(6) does not include in its ambit criminal proceedings.

16. Mr. Dwarkadas submitted that the judgment does not lay down that 16 criminal proceedings which have the flavour of a claim for money would also be excluded from the scope of the expression "proceedings" u/s 391(6). Mr.

Dwarkadas relied upon the following observation in the judgment which according to him made it clear that if criminal proceedings were adopted with a view to recover any pecuniary claim the company court can in exercise of power u/s 391(6) stay the same (page 246) :

"The question then arises as to what meaning is to be given to the word "creditor". "Creditor" would be a person having a pecuniary claim against the company, whether actual or contingent. If the claims of the creditors are of a pecuniary character or founded on money considerations, can it then be said that Sub-section (6) of Section 391 is intended to cover proceedings other than proceedings which involve pecuniary claims or claims based on money considerations?"

17. Firstly, these observations are only additional reasons furnished by the learned judge for arriving at the conclusion that Section 391(6) does not include in its ambit criminal proceedings. These observations do not qualify the ratio contained in the first extract. This is clear from the very first sentence in the paragraph which contains the observation relied upon by Mr. Dwarkadas which reads : "There is another angle from which the provisions of Section 391 can be looked at in order to find out whether it is within the scope and object of the section to cover criminal proceedings".

18. It is true that in that case the scheme itself covered only civil liabilities and not criminal proceedings against the company and its officers. However, the stay was also sought in respect of criminal proceedings. The learned judge, therefore, considered the ambit of the term "proceeding". The learned judge further held as under (page 246) :

"It is impossible to take the view that Section 391 is meant for freezing criminal proceedings which may be instituted either by a creditor or a member of a company or by the State either against the company or its officers. If, the officers of the company are involved in offences like cheating, criminal breach of trust, misappropriation, forgery, using a forged document and falsification of accounts, in connection with the business of the company, can it be said that prosecutions can be stayed by the aid of Sub-section (6) of Section 391 ? Again, if the officers of the company were to be held responsible for contravention and infringement of the Income Tax Act or Foreign Exchange Control Act, can a company by putting a proposal before the court u/s 391 seek the protection of the court under Sub-section (6) of Section 391 and stay the pending prosecutions or prevent the authorities under the Income Tax Act or the Enforcement Directorate from launching prosecutions ? Again, Section 5 of the Companies Act, 1956, provides that for the purpose of any provision of this Act, an "officer who is in default" shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise. Can Sub-section (6) of Section 391 be made use of by a company (who is liable to be wound up) by coming forward with some sort of proposal ? In my opinion, criminal proceedings cannot be held over or avoided or criminal process evaded by resorting to a

scheme of compromise or arrangement u/s 391. Section 391 does not provide an umbrella to a company and its directors and officers for a thing which is an offence or an infringement and violation of any law, rule and regulation punishable by imprisonment or fine or both. Offenders cannot be given refuge in this section, nor can it be a shield for delinquent directors for their misdeeds. This is not the scheme of Section 391 or the policy of law in the manner urged by Mr. Mehta."

19. If any doubt still remains it is put at rest by the following paragraph from the judgment (page 247) :

"Mr. Mehta argued that the pending and intended prosecutions under the Madras Chit Funds Act, 1961, are of a coercive character, inasmuch as the fair object of Section 391 to equally distribute the assets of the company among the creditors would be defeated and the scheme would be affected. There is no merit in this argument. The scheme is put forth for compromise and not to save the company or its officers from facing prosecutions for offences committed in the course of the business of the company. The provisions of Section 391(6) do not apply to criminal proceedings against a company. The proceedings referred to in this sub-section are meant to be of a civil nature. The character of the proceedings should be of pecuniary nature involving money considerations between the company and its creditors or members having a nexus or bearing with the proposal for compromise or arrangement, set afoot for consideration of the creditors or members as provided in Sub-section (2) of Section 391. The company and its officers are open to prosecution. Criminal proceedings can be commenced or continued notwithstanding the fact that a scheme for compromise or arrangement has been initiated u/s 391. In my judgment, the provisions of Sub-section (6) of Section 391 are not meant to freeze the commencement or continuation of criminal proceedings against the company and its officers."

20. There is no scope for distinguishing the judgment as contended by Mr. Dwarkadas, viz., that it does not apply to cases where the scheme provides for the termination of criminal proceedings against the company and its officers and directors and civil proceedings against persons other than the company itself.

21. In any event, the question whether proceedings u/s 138 of the Negotiable Instruments Act are covered within the provisions of Section 391(6) is also not res integra. In Criminal Application No. 2517 of 1998- [1999] 1 Learned Judgments 288, it was contended that complaints u/s 138 of the Negotiable Instruments Act are filed by parties with the principal object that the payee must get his money. In that case too, the complaint was filed by the respondents against the applicant for dishonour of the cheque. The applicants in the judgment had prayed that the proceedings u/s 138 ought to be stayed till the disposal of the application filed by the applicants before the Calcutta High Court u/s 391 of the Companies Act. The learned judge first held that in proceedings u/s 482 of the Criminal Procedure Code the question of invocation of inherent jurisdiction u/s 391(6) did not arise at all. With this part of the judgment we are not concerned

presently. However, the learned judge in paragraph 4 considered the alternative case as well and held as under :

"Secondly, even assuming that u/s 482 this court could have considered that proceedings are pending before the company court in Calcutta when the scheme is under consideration could this court stay the proceedings. The expression used is "suit" or "other proceedings". A learned single judge of this court in the State of Tamil Nadu v. Uma Investments Pvt. Ltd. (Supra) has held the provisions of Section 391(6) will not apply in so far as the criminal proceedings are concerned. The said judgment came up for consideration before me in Company Application No. 446 of 1997 in Company Application No. 457 of 1997, Ion Exchange Finance Ltd. v. Firth India Steel Co. Ltd. (In Liquidation) since reported in [2001] 103 Comp Cas 666 , decided on September 4, 1998 and some other matters. I had occasion to consider the expression "suit" or "other legal proceedings". In the context of Sections 442 and 446 of the Companies Act, I have considered Chapter V wherein the expressions "suit" or "other legal proceedings" have been included including the expression "legal proceedings" in Section 391(6). I have therein considered a judgment of the learned single judge of the Gujarat High Court which has taken a different view than the view taken by this court in State of Tamil Nadu v. Uma Investments Pvt. Ltd. (Supra). After considering the various judgments, I have reiterated that the view taken by this court in Uma Investments Pvt. Ltd.'s case (Supra) requires no reconsideration and is in conformity with the provision of Chapter V of the Companies Act. The only limitation is that in a case where a fine is imposed on the company, at the stage of the recovery of the fine, the company court can invoke its jurisdiction. The said matter had come up before me at the instance of applicants against whom complaints had been filed u/s 138 of the Negotiable Instruments Act. I am therefore, clearly of the opinion that the expression "suit" and/or "other legal proceedings" does not include criminal proceedings."

22. The above judgments are binding on me. Mr. Dwarkadas submission is therefore rejected.

Re: Submission II

23. Mr. Madon submitted that directors and guarantors of the company are not entitled to the benefit of the provisions of Section 391(6) of the Companies Act. This submission too is well founded.

24. As stated above there are various civil proceedings adopted by different creditors including the applicants before me against the company as well as its guarantors. The question is whether the guarantors are either themselves or on an application by the company on their behalf, entitled to invoke the provisions of Section 391(6).

25. Mr. Madon relied upon the judgment of the Supreme Court in Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, . Ranjit Singh and Sons Ltd. acted as the managing agent of the respondents. The petitioner had advanced

certain facilities to the respondents in respect whereof the usual documents were executed. Ranjit Singh, a director of Ranjit Singh and Sons Ltd., executed a deed which was construed by the Supreme Court in paragraph No. 11 to constitute him a surety for the dues of the respondent. Some of the creditors had filed a petition in the Allahabad High Court for winding up. A scheme of composition was settled among the creditors of the respondent. That scheme was sanctioned by the Allahabad High Court u/s 391. The petitioner filed a suit against the respondent and Ranjit Singh to recover an amount of Rs. 2,56,877-12-6. It was contended that Ranjit Singh was only a guarantor and not a co-debtor and that he therefore could be made liable only in the case of default by the company and since the company had made no default the suit against him was not maintainable. This contention was dealt with by the Supreme Court in paragraph No. 13 which reads as under (page 934) :

"We deem it necessary to observe that a binding obligation created under a composition u/s 391 of the Companies Act, 1956, between the company and its creditors does not affect the liability of the surety unless the contract of suretyship otherwise provides. As observed in Halsbury's Laws of England, volume 6, third edition, Article 1555 at page 771 : "A scheme need not expressly reserve the rights of any creditors against sureties for debts of the company, as such rights are unaffected by a scheme". It was held in *Garner Motors Ltd., In re* [1937] 1 All ER 671: [1937] Ch 594 that the scheme when sanctioned by the court has a statutory operation and the scheme does not release other persons not parties to the scheme from their obligations."

26. The judgment is clear. It categorically holds that an obligation created u/s 391 under a composition between the company and its creditors does not affect the liability of the surety unless the contract of suretyship otherwise provides. Admittedly in the present case, the contract of suretyship does not provide otherwise. There is no scope for distinguishing this judgment in view of the facts of this case as contended by Mr. Dwarkadas. The reliance upon the judgment by Mr. Madon is well founded.

27. It is pertinent to note further that the second part emphasized by me in the above extract also supports Mr. Madon's contention that the scheme u/s 391 does not release persons who are not parties to the scheme. The directors in the present case are not parties to the scheme which is only between the company and its creditors.

28. The language of Section 391(6) itself does not include within its scope any other party or person. The scheme propounded in the present case also is one between the company and its creditors. The officers, directors and guarantors of the company are not parties to the scheme. Indeed they could not be parties to the scheme.

29. Mr. Madon's submission is also supported by the judgment of a learned single judge of the Madras High Court in *B.K. Muthukrishna Sakthivel*

Vanavarayar v. Somasundaram Mills (P.) Ltd. [1976] 46 Comp Cas 274 where the learned judge has held:

"As u/s 391 of the Companies Act, what was sanctioned by the High Court would be binding on all the creditors including the decree holder in this case. The decree holder could not, after the sanction by the court of the scheme of compromise, pursue execution proceedings against the first defendant-company in the ordinary court of law. But, so far as the second judgment-debtor is concerned, he is certainly not a company entitled to invoke the benefit of Section 391 or Section 392 of the Companies Act. He is independently liable to pay the decretal amount because the decree granted against him is a joint and several decree. It was observed by the Supreme Court in Punjab National Bank Ltd. v. Shri Vikram Cotton Mills Ltd. (Supra) as follows : "We deem it necessary to observe that a binding obligation created under a composition u/s 391 of the Companies Act, 1956, between the company and its creditors does not affect the liability of the surety unless the contract of suretyship otherwise provides. As observed in Halsbury's Laws of England, Volume 6, third edition, Article 1555, at page 771, "A scheme need not expressly reserve the rights of any creditors against the sureties for debts of the company, as such rights are unaffected by a scheme".

It was held in Garner Motors Ltd., In re [1937] 1 All ER 671 : [1937] Ch 594 that "the scheme when sanctioned by the court has a statutory operation and the scheme does not release other persons not parties to the scheme from their obligations." As the second judgment-debtor had entered into a contract of guarantee with the plaintiff, and a decree has been obtained by the plaintiff against him and the company jointly and severally, there is no legal embargo against the decree holder executing the decree against the second judgment debtor. The scheme, which was sanctioned by the company court, does not release the second judgment-debtor, who is a co-debtor of the company from his obligation under the decree to pay the decretal amount."

30. Mr. Dwarkadas relied upon various orders including those of this court which granted a stay of all civil and criminal proceedings against the directors and guarantors of the company. He relied upon an order dated July 16, 2004 in Company Application No. 231 of 2004, in Company Petition No. 1017 of 2002, and an order dated December 13, 2002 in Company Application (L) No. 972 of 2002 in Company Application No. 546 of 2002. However, each of these orders is without reasons. The point that was argued before me was neither argued before nor considered by the learned judges. Mr. Dwarkadas also relied upon the judgment of a learned single judge of the Gujarat High Court in Harish C. Raskapoor v. Jaferbhai Mohamedbhai Chhatpar [1989] 65 Comp Cas 163. It is true that this judgment supports Mr. Dwarkadas contentions to the effect that the court has power to stay criminal proceedings u/s 391(6) of the Companies Act. However that judgment expressly dissented from the judgment of this court in the case of Uma Investments Pvt. Ltd.'s case (Supra). The judgment of this

court is binding on me and, therefore, the judgment of the Gujarat High Court is of no assistance to Mr. Dwarkadas.

31. In the circumstances Mr. Madon's submission is upheld.

Re: Submission III

32. A grievance was made on behalf of the applicants that the company applied for the order ex parte and without notice to them. The grievance is justified. Rule 71 of the Companies (Court) Rules, 1959, reads as under:

"71. Application for stay.-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."

33. It is admitted that petitions for the winding up of the company were filed by some of the applicants which had not been finally disposed of when Company Application No. 339 of 2004 was filed. These petitions were filed prior to Company Application No. 339 of 2004. For instance the applicant in Company Application (L) No. 827 of 2004 had filed Company Petition No. 768 of 2003 on March 3, 2003.

34. Mr. Dwarkadas however submitted that these company petitions cannot be said to have been "pending" within the meaning of that expression in Rule 71 on the date on which Company Application No. 339 of 2004 was taken out and on the date on which the order dated August 27, 2004, was passed. He based this submission on the fact that an appeal was pending before the AAIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 and in view of Section 22(1) thereof which reads as under :

"22. Suspension of legal proceedings, contracts, etc.-(1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

35. It is true that the said company petitions for winding up cannot be proceeded with further in view of the appeal before the AAIFR except with the consent of

the Appellate Authority. However that would not justify the contention that the company petitions were not pending in this court within the meaning of that expression in Rule 71. Because the petitions cannot be temporarily proceeded with it does not follow that they are not pending in this court. Mr. Dwarkadas relied upon the definition of the term "pending" in Black's Law Dictionary and Stroud's Judicial Dictionary, edition 3, volume 3, page 2141 which read as under :

36. Black's Law Dictionary, 8th Edition :

"Pending, adj. 1. Remaining undecided ; awaiting decision (a pending case) 2. Parliamentary law. (Of a motion) under consideration : moved by a member and stated by the chair as a question for the meeting's consideration. See Consideration (2); On the Floor. A motion may be immediately pending, meaning that it is directly under consideration, being the last motion stated by the chair and next in line for a vote ; or it may be pending subject to other motions of higher rank that have taken precedence over it. See immediately pending motion under motion (2).

Pending, prep. 1. Throughout the continuance of; during (in escrow pending arbitrations) 2. While awaiting; until (the injunction was in force pending trial)."

37. Stroud's Judicial Dictionary, Edition 3, Volume 3, page 2141 :

"Pending : (1) A legal proceeding is "pending" as soon as commenced and until it is concluded, i.e., so long as the court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein."

38. Similar are the observations of Jassel, M. R. in *In re Clagett's Estate; Fordham v. Clagett* [1882] 20 Ch. D 637 (CA).

"What is the meaning of the word "pending" ? In my opinion, it includes every insolvency in which any proceeding can by any possibility be taken. That I think is the meaning of the word "pending" ... A clause is said to be pending in a court of justice when any proceeding can be taken in it. That is the test."

39. The definition in Stroud's Judicial Dictionary was cited with approval by the Supreme Court in *Asgarali Nazarali Singaporawalla Vs. The State of Bombay*, .

40. The definitions are of no assistance to Mr. Dwarkadas. Nor is the judgment of the Supreme Court of any assistance to him. In fact the judgment of the Supreme Court is against the proposition canvassed by Mr. Dwarkadas.

41. In *Asgarali Nazarali Singaporewalla v. State of Bombay*, (Supra) the appellant was accused No. 3 before the court of the learned Presidency Magistrate. Accused No. 1 was the Mehta, in the employment of the firm of which accused No. 2 was the manager. Accused Nos. 4 and 5 were receivers of the firm. The accused were charged with offences u/s 161 read with Section 116 and further read either with Section 109 or 114 of the Indian Penal Code for offering a sub-inspector of police a bribe. The trial commenced on July 14, 1951. During the

course of the trial, the Criminal Law Amendment Act, 1952, was enacted by Parliament on July 28, 1952, being an Act further to amend the Indian Penal Code and the Criminal Procedure Code. On September 23, 1952, the Government of Bombay appointed a Special Judge to try, inter alia, the aforesaid offences and this appointment was notified in the Official Gazette on September 26, 1952. Section 10 of that Act provided that all cases triable by the Special Judge u/s 7 which immediately before the commencement of the Act were pending before any Magistrate shall on such commencement be forwarded for trial to the Special Judge having jurisdiction over such cases.

42. The defence concluded its address on September 26, 1952, and the learned Presidency Magistrate delivered his judgment on September 29, 1952, whereby he convicted accused Nos. 1 and 2 of the offences with which they were charged and acquitted the appellant and accused Nos. 4 and 5 of the offences. This court in the criminal appeal held that the provisions of the impugned Act was intra vires and the Presidency Magistrate had no jurisdiction to try the case after the commencement thereof. This court accordingly set aside the order of acquittal of the appellant and accused Nos. 4 and 5 and ordered a re-trial. For the present purpose, it is important to note, as held by the Supreme Court that the learned Presidency Magistrate was divested of jurisdiction to try the said case in view of the provisions of Section 7 thereof.

43. It is in this context that the Supreme Court considered the meaning of the expression "pending" in Section 10 of the impugned Act. The Supreme Court came to the conclusion that on the date of commencement of the Act, the said case was pending before the learned Presidency Magistrate and that he was therefore divested of jurisdiction to try it.

44. It is important to note therefore that even in a case where there was an absolute ouster of jurisdiction in a court to try a case filed before it, it was held that the case was nevertheless deemed to be pending before it. On the impugned Act coming into force the Presidency Magistrate had no interest jurisdiction to try the case. On a parity of reasoning, it must be held that though the winding up petitions cannot be proceeded with further they are nevertheless pending before this court.

45. The winding up petitions have not been disposed of. The definitions in Black's Law Dictionary and Stroud's Judicial Dictionary in fact indicate that a legal proceeding is pending as soon as it is commenced and until it is concluded.

46. Moreover, the ambit of the expression "pending" in Rule 71 ought to be given a liberal interpretation even assuming that another view is possible. Any order or application u/s 391(6) would adversely affect the rights of the petitioners who have filed petitions for winding up of the company. That is too obvious to require any elaboration. It is also obvious from the provisions of and recognised in Rule 71 itself. Further the service on a petitioning creditor with an application u/s 391(6) can never prejudice the interests of the company for all that it would

entail is such petitioning creditors being heard before an order u/s 391(6) is passed.

47. In the circumstances, it must be held that even if a winding up petition is stayed for any reason, so long as it is not finally disposed of, a company is bound to give notice to the petitioner of such petition of an application it proposes to make u/s 391(6).

Re: Submissions IV and V

48. Considering the view that I have taken above, it is not necessary to decide these submissions.

ORDER

49. In the circumstances, Company Application No. 339 of 2004 is dismissed. Company Application (L) No. 827 of 2004, Company Application (L) No. 462 of 2004, Company Application (L) No. 880 of 2004 and Company Application (L) No. 942 of 2004 all in Company Application No. 338 of 2004 are made absolute in terms of prayer Clause (a). The order dated August 27, 2004, shall operate till January 17, 2005, to enable the company to carry the matters higher. There shall be no order as to costs.

50. All the concerned parties to act on an ordinary copy of this order duly authenticated by the Company Registrar/Court Stenographer of this court.