

(2011) 02 AHC CK 0394

In the Allahabad High Court

Case No : Company Application No. 15 of 2010 in Civil Miscellaneous Recall
Application No. 319680 of 2010

In Re: Triveni Engineering and Industries and Another

Date of Decision : 18-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 148A
Companies (Court) Rules, 1959 — Rule 67
Companies Act, 1956 — Section 391, 394
Constitution of India, 1950 — Article 226, 227
High Court Rules, 1952 — Rule 5, 6

Citation : (2011) 2 CompLJ 228

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Pankaj Mithal, J.—The above application has been filed by Ashok Kumar Sharma, Proprietor, A.K. Builders and Suppliers, Lucknow, together with A.K. Builders and Suppliers, claiming to be the unsecured creditors of the demerged company Triveni Engineering and Industries Ltd.

2. By the above application they have prayed for the recall of the order dated 9.9.2010 passed by me in Company Application No. 15 of 2010 filed u/s 391/394 of the Companies Act, 1956, for accepting the scheme of arrangement annexed thereto between the aforesaid demerged company and the resultant company, Triveni Turbine Limited.

3. The court on the aforesaid application for acceptance of the scheme of arrangement, vide order dated 9.9.2010, had directed for convening meetings of the equity shareholders, secured and unsecured creditors of the demerged company in respect whereof notices were directed to be issued under certificate of posting and by publication in the two newspapers published from New Delhi and the other from Meerut so as to ascertain their wishes regarding the scheme of arrangement.

4. I have heard Sri Prashant Kumar, learned Counsel for the applicants, Sri R.P. Agarwal, learned Counsel for the demerged and resulting companies and the official liquidator as representative of Regional Director, North Region, Ministry of Corporate Affairs, NOIDA.

5. The submission of Sri Prashant Kumar is that the applicants have lodged three consecutive caveats in connection with the filing of the above company application for accepting the scheme of arrangement but none of the above caveats were reported by the office of the court with the result applicants were denied opportunity of hearing before passing of the order dated 9.9.2010. He has further submitted that the demerged company as well as resulting company had the notice of the lodging of the caveats by the applicants but even then they have not chosen to serve notice/ copies of the application before moving the same in the court. The demerged and resulting companies as such have not approached the court with clean hands. Accordingly, the order dated 9.9.2010 is liable to be recalled.

6. Sri R.P. Agarwal learned Counsel for the demerged and resulting company to counter the above submissions has argued that under the scheme of the Companies Act, 1956, and the Companies (Court) Rules, 1959 (hereinafter referred to as an Act and the rules respectively, for short) the applicants have no right to be heard at the time of issuing directions for convening meetings and issuing notices as the initial proceedings u/s 391/394 of the Act are to be taken ex parte. The provisions of lodging a caveat existing u/s 148A CPC and under Chapter 22 Rule 5 of the High Court Rules 1952 are not applicable to proceedings of such a nature under the Act. Therefore, the caveat was not even maintainable. If the office has inadvertently failed to report about the caveats of the applicants, no illegality has been committed. It is for this very reason even the demerged and resulting companies have not cared to serve the copy of the application/ upon the applicants. The order dated 9.9.2010 causes no prejudice to the applicants even if passed, ex parte, and as such it is not liable to be recalled. In support he is relied upon a decision of the Supreme Court reported in Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another,

7. A plain reading of Chapter XXII Rule 5 of the High Court Rules makes it abundantly clear that the same is applicable in connection with filing of writ petitions under Article 226/227 of the Constitution of India except for writs in nature of habeas corpus. The provisions of Chapter XXII of the High Court Rules are not applicable in connection with any other proceedings before the court much less the proceedings of the nature as contemplated under the Act. Therefore, in my opinion, no caveat under Chapter 22 Rule 5 of the rules can be lodged in respect of an application/proceedings u/s 391/394 of the Act.

8. Section 148A CPC also gives a right to a person to lodge caveat where an application is expected to be made or has been made in a suit or proceeding instituted or about to be instituted in a court. This right has been given to a

person who is claiming right to oppose such an application in a suit or any proceeding instituted or about to be instituted.

9. Now Rule 6 of the aforesaid rules clearly provides that the provisions of the code which means Code of Civil Procedure, 1908, shall apply to all proceedings under the Act and these rules. In other words by virtue of Rule 6 of the aforesaid rules provisions of CPC have been made applicable in respect of all proceedings taken by parties under the Act or under the aforesaid rules. There is no dispute that an application for acceptance of the scheme of arrangement u/s 391/394 of the Act is in the nature of proceedings under the Act/rules and as such the applicability of CPC to such proceedings cannot be ruled out. Consequently, the provisions of Section 148A CPC which entitles a party to lodge a caveat gets attracted enabling the party concerned to lodge a caveat in respect of proceedings/applications u/s 391/394 of the Act.

10. In view of the above, I am of the opinion that a caveat can always be lodged in proceedings connected with the matters under the Companies Act/rules u/s 148A CPC read with Rule 6 of the rules but not under chapter XXII Rule 5 of the rules. Accordingly, caveat was maintainable and was rightly lodged by the applicants.

11. Now let me consider the question of entitlement of the applicants to get the order dated 9.9.2010 recalled.

12. In this connection Rule 67 of the rules is relevant. It provides that an application u/s 391 of the Act for convening meetings shall be by a judges summons and the summons shall be moved ex parte provided certain conditions laid down in the rule are fulfilled. It also provides the format of the summons. It means the motion for convening meetings by an application for acceptance of scheme of arrangement is to be moved ex parte. There happens to be no adversaries so as to oppose the motion. Any opposition to such a claim for acceptance of the scheme of arrangement is to be taken care of in the meetings itself. The issuance of notice and direction to convene meetings of the equity shareholders and secured and unsecured creditors as such happens to be an uncontested matter. The court in directing for convening meetings and in issuing notices on such an application does not either adjudicate any rights of the parties or decides any controversy intersee which may cause prejudice to any of them. It is for this reason only that Rule 67 of the rules contemplates that ex parte motion at the preliminary stage.

13. In *Chembra Orchard Produce Ltd. and Ors. v. Regional Director of Company Affairs and Anr.* (2009) 1 Comp LJ 1 (SC), the apex court has clearly laid down that if hearing is required to be given to contributors, creditors and shareholders at the initial stage in considering application u/s 391/394 of the Act the entire scheme would become unworkable and further that when Rule 67 of the company court rules categorically states that summons for directions shall be moved ex parte the question of prejudice or rule of natural justice does not come

into play. The moving of an application u/s 391/394 of the Companies Act is only a preliminary step and at that stage it is not necessary for the company to give notice of hearing to the creditors or the shareholders.

14. In view of the aforesaid ratio laid down by the Supreme Court interpreting the purpose and object of Rule 67 of the Companies (Court) Rules, when this Court after due application of mind and on being prima facie satisfied about the genuineness of the two companies in submitting the scheme of arrangement directs for the issuance of notices and for holding of the meetings of the equity shareholders, secured and unsecured creditors, no caveatable interest accrues to anyone including the applicants in the present case.

15. In short the applicants have a right to lodge a caveat in connection with an application u/s 391 of the Act but have no caveatable interest entitling them to be heard at the above described preliminary stage.

16. The object of entering a caveat is to avoid ex parte orders and to afford opportunity of hearing to a person who is vigilant and wants to protect his rights by contesting the proceedings provided he has right to be heard. However, as discussed earlier the applicants have no right of hearing at the preliminary stage of issuing notice and directing for holding of meetings of the shareholders or the creditors for ascertaining their wishes regarding the proposed scheme of arrangement.

17. It is well settled that giving of opportunity of hearing or observance of principles of natural justice is not an empty formality and where despite affording opportunity the result is to remain the same, there is no purpose in giving notice or opportunity of hearing. An order passed in such a situation without notice to the other party as such causes no prejudice. It may be remembered that to sustain an allegation that the party concerned has been denied opportunity of hearing one has to establish that prejudice was caused to him on account of non-observance of the principles of natural justice. However, no such prejudice has been established by the applicants.

18. In view of the above, I do not consider it to be a fit case for recalling order dated 9.9.2010.

19. In the application no other ground for recalling the order dated 9.9.2010 has been made out.

20. The application is accordingly rejected with no order as to costs.

21. The court is noticing that in several cases lawyers are time and again complaining that the office has failed to report caveats. This reflects upon the working of the office of the stamp reporter. Once the office of the stamp reporter has accepted a caveat and has entered the same in the register maintained for the purpose, it becomes a bounden duty of the office to submit a clear report in this connection on any cause which may be initiated in connection thereto. The non-reporting of the filing of the caveat by the office is a serious thing which in

some cases may affect the valuable right of a party and at least tends to caste a stigma on the working of the counsel. The court is, thus, constrained to sound a note of caution to the stamp reporter to be careful in future while making reports with regard to the caveats.

22. The registrar general is directed to call for an explanation of the office of the stamp reporter as to why the caveat lodged by the applicants in this case were not reported and to fix responsibility of the person concerned.

23. The court has also noticed tendency on part of the lawyers in receiving notice of the caveat and still not supplying copy of the applications/petitions to the counsel/person lodging the caveat and further in concealing the fact of knowledge of caveat. It undermines the nobility of the profession. Therefore, it needs to be tackled appropriately.

24. Let a note be made and placed by the registry in this connection on the administrative side for taking necessary appropriate steps to check the growth of such a menace.