

(2001) 10 AP CK 0121

In the Andhra Pradesh High Court

Case No : Company Petition No"s. 135 and 136 of 2001

In Re: Vishnu Chemicals (P.) Ltd.

Date of Decision : 19-10-2001

Acts Referred:

Companies Act, 1956 — Section 391, 394

Citation : (2002) 1 ALD 108 Supp : (2002) 1 AnWR 141 : (2002) 47 CLA 43 : (2002) 110 CompCas 677

Hon'ble Judges : J. Chelameswar, J

Bench : Single Bench

Advocate : Krishna Murthy, for the Appellant;

Final Decision : Allowed

Judgement

J. Chelameswar, J.—These two company petitions are filed under Sections 391 and 394 of the Companies Act, 1956 (the Act") praying that a scheme of arrangement (which is filed as annexure "F" to each of these two company petitions) be sanctioned by this Court. The applicant in Company Petition No. 135 of 2001 is the transferor-company i.e., Vishnu Chemicals (P.) Ltd. The applicant in Company Petition No. 136 of 2001 is the transferee-company i.e., Vishnu Bariums Chemicals (P.) Ltd.

2. The transferor-company was incorporated on 27-3-1989 with an authorised capital of Rs. 6,50,00,000 divided into 6,50,000 equity shares of Rs. 100 each. The issued, subscribed and paid up capital is Rs. 6,40,22,000 consisting of 6,40,220 equity shares of Rs. 100 each whereas the transferee-company was incorporated on 29-5-2001 with an authorised capital of Rs. 5 lakhs divided into 50,000 equity shares of Rs. 10 each. The issued, subscribed and paid up capital of the transferee-company is Rs. 1 lakh consisting of 10,000 shares of Rs. 10 each fully paid up.

3. The transferor-company is carrying on business of manufacturing and selling of Sodium Dichromate and certain other Barium chemicals. It has two manufacturing units - one at Khajipally, Warangal District and the other at Srikalahasthi, Chittoor District. It is stated in the company petitions that the

transferee-company is incorporated with an object of "transferring the Barium Chemicals Division at Srikalahasthi of the transferor-company to the transferee-company, as it is believed by the managements of both the companies that such an arrangement would be beneficial to all the concerned. In the circumstances, the boards of directors of the above mentioned two companies in their separate meetings held on 1-6-2001 unanimously approved the proposed scheme of arrangement. Thereafter both the companies approached this Court by way of Company Application Nos. 362 and 363 of 2001 praying appropriate directions as required u/s 391.

4. This Court by an order dated 5-7-2001 as modified by the order dated 23-7-2001 dispensed with the requirement of holding of the shareholders' meeting of each of the companies and directed the transferor-company to hold a meeting of the secured creditors under the chairmanship of an advocate of this Court. Accordingly, the advocate-chairman submitted his report dated 31-8-2001, the details of which would be adverted to, at a later point of time in this order. On receipt of the report of the advocate-chairman the abovementioned company applications were closed.

5. The preset company petitions were admitted on 10-9-2001. Appropriate publication as required under Rule 80 of the Companies (Courts) Rules was directed to be made; the same was affected and proof of the same is also filed into the Court. Notice to the Government of India is ordered as required u/s 394.

6. On behalf of the Government of India, the Registrar of Companies, Hyderabad filed an affidavit.

7. In view of the notarised affidavits filed by the shareholders of both the companies whereby they signified their consent for the proposed scheme of arrangement which are filed along with the company petitions, there does not appear to be any objection from the shareholders of both the companies if the proposed scheme of arrangement is sanctioned by this Court.

8. Coming to the employees of the transferor-company, it is provided under the abovementioned scheme under Clause 6(a) that all the permanent employees of the transferor-company engaged in the Barium Chemicals Division would become the employees of the transferee-company with effect from the effective date without any interruption in service, in the following terms :

"VBCPL undertakes to engage, on and from" the Effective Date, all permanent employees of VCPL, engaged in the Barium Chemicals Division at its factory, branch and other offices and also at the Head Office as aforesaid and elsewhere and who are in the employment of VCPL, on the same terms and conditions on which they are engaged as on the Effective Date by VCPL, without any interruption of service as a result of the transfer of Barium Chemicals Division undertakes to continue to abide by any of the Agreement settlement etc., entered into by VCPL in respect of Barium Chemicals Divisions with any union of employees. VBCPL agrees that the service of all such employees with VCPL upto

the Effective Date shall be taken into account for purpose of all retirement benefits to which they may be eligible in VCPL, upto the Effective Date. VBCPL further agrees that for the purpose of payment of any retrenchment compensation, gratuity and other terminal benefits, such past services and agrees and undertakes to pay the same as and when payable."

9. On behalf of the Government of India, the Registrar of Companies filed an affidavit wherein it is pointed out that the transferee-company has not submitted its latest financial position as required under proviso to Section 391(2). In response to the submission of the Registrar of Companies, the learned counsel for the petitioners - Sri C. Kodandaram stated that the transferee-company has incorporated only on 29-5-2001, and therefore no financial statement can be produced in this regard. The only relevant information available as regards the subscribed and paid up share capitals is already provided in the company petitions and a further statement is also made at paragraph 14 of the petition of the transferee-company (Company Petition No. 136 of 2001) to the effect that there are no creditors either secured or unsecured.

So far as the secured creditors of the transferor-company are concerned, it appears from the report of the advocate-chairman that, of the four secured creditors viz., APIDC, APSFC, IDBI and SBH, APIDC and APSFC voted in favour of the resolution approving the proposed scheme of arrangement - whereas the other two secured creditors i.e., the IDBI and the SBH abstained from voting and expressed their inability to give their consent for the proposed scheme of arrangement, in the following terms:

" The Indian Development Bank of India.--The operations of Barium Unit is yet to be stabilised. It is yet to reach a level at which it would service its term loan commitments out of its cash generation. IDBI may not be in a position to take a decision on the demerger proposal at this stage."

"The State Bank of Hyderabad.--Agreeable in principle subject to our internal approval from the competent authority and other FLs also falling in line."

It is necessary to mention that, out of the total amount of Rs. 2046.11 lakhs of the secured debts due from the transferor-company, the IDBI and SBH are entitled to receive Rs. 1785.00 lakhs and they did not give their consent for the proposed scheme of arrangement.

10. Section 391 provides that where a compromise or arrangement is proposed between a company and its creditors or any class of them and if a majority in number representing three-fourths in value of the creditors or class of creditors or members present at a meeting as contemplated u/s 391(1) agree for such an arrangement it shall be binding on, all the creditors, or all the creditors of that class, or the members as the case may be and also on the company, if it is sanctioned by the Court.

11. In fact, Section 391 reads as follows :

"Power to compromise or make arrangements with creditors or members.

(1) Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed (under the rules made u/s 643), by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or in the case of company which is being wound up, on the liquidator and contributories of the company;"

12. In the present case the value of the secured debt due to the two secured creditors i.e., APIDC and APSFC is far less than the three-fourths of the amount due to the secured creditors.

13. The learned counsel for the petitioners argued that having regard to the language of Section 391(2) it is the majority in number representing the three-fourths in value of the creditors, who were present and voting that is required to be taken into consideration while applying Section 391(2), but not three-fourths value of the total debt due to the creditors falling under that class. I do not propose to go into the correctness or otherwise of the submission made by the learned counsel for the petitioners in the absence of any contest on that count as none of the secured creditors appeared in the court pursuant to the notification issued under rule 80. But I shall presume for the purpose of the present case the submission made by the learned counsel for the petitioners to be right. Even then the sanction of the proposed scheme of arrangement is still within the discretion of the court. Therefore, it is required to be examined as to the nature and scope of the jurisdiction of this court while sanctioning a scheme of arrangement.

14. This Court in *Nav Chrome Ltd., In re* [1997] 89 C C 285, while dealing with the question of lack of consent on the part of the secured creditors in the context of the approval of the proposed scheme of arrangement under Sections 391 and 394, held that the Act does not require any notice to the creditors of the transferor-company as the creditors of the transferor-company would not be prejudiced in any way, relying on earlier judgments of the Gujarat High Court

and Delhi High Court in *Mafatlal Industries Ltd., In re* [1995] 84 CC 230 and *Telesound India Ltd., In re* 1983 53 C C 926. The objection of the official liquidator that since the consent of the secured creditors was not obtained the scheme could not be sanctioned, was rejected.

15. Apart from the above mentioned judgments, from the scheme of the Act it appears to me that consent of the parties is not the only requirement which the court is required to take into consideration while the granting or refusing the approval for any scheme or arrangement u/s 391, but consent is only one of the considerations. The real purpose of providing for the sanction of the court u/s 391 is that though normally the terms of the contract between the parties can only be altered by the parties to the contract or by the sovereign legislative body, by the device of providing for a sanction of the court, the Legislature provided for the alteration of the terms of the contract between the parties covered u/s 391(2). In cases where a stipulated majority of the parties agree for the variation in the terms of the contract, the Court is authorised to impose such variation even on the remaining members of that class of persons notwithstanding the fact that the remaining members of that class of persons have not so agreed for such a variation. When the entire class of creditors agree for such a variation of the terms of the contract between them and the debtor, it is a voluntary act of the creditors and the court would not normally object for such a variation unless compelled by the grounds of general public interest or the interest of some other class of persons connected with such contracts - like the shareholders etc. But where a set of the class of the creditors does not agree for the proposed scheme of arrangement, it is the duty of the court to examine whether the consent is unreasonably withheld or in the alternative whether the sanction of the scheme would prejudicially affect that set of creditors who have withheld the consent.

16. Applying the abovementioned test, the nature of the interest which these two creditors viz., the IDBI and SBH have interest in the transferor-company, is described at page 24 of the annexure "B" i.e., the 12th annual report pertaining to the 2000-2001 of the transferor-company. Certain term loans from the IDBI are obtained by joint equitable mortgage on fixed assets at the Barium Chemicals Division and guaranteed by two directors of the company. It is stated insofar as the State Bank of Hyderabad is concerned, that a working capital loan is obtained from the said Bank, which is secured by way of hypothecation of "inventory and book debts", coupled with guarantee by two directors of the company.

17. It is also stated in the additional affidavit filed by one Sri T. Subba Rao, Chief Accounts Officer of the transferor-company at paragraph 6 that a second charge has been created in favour of the State Bank of Hyderabad, on the land admeasuring Ac. 3.00 situated at Zinnaram Mandal at which the Chemicals Division of the transferor-company is situated and also in a piece of land admeasuring Ac. 63.20 cents in Survey No. 27/1 of Urandum village over which

the chemical plant is situated. The relevant portion of the affidavit reads as follows :

"...Apart from the above, a second charge has been created in favour of M/s. SBH on the land admeasuring 3 acres situated in Jinnarani Mandal Medak District over which the Chemicals Division is situated and land admeasuring 63.20 acres situated at Sy. No. 27/1 Urandum village, Srikalahasthi Mandal, Chittoor District over which the Barium Chemicals Unit is situated together with all the buildings, erections, structures and godowns constructed thereon including the fixed tangible plant and machinery boiler, electrical and other installation, furnitures, fixtures, fittings etc....."

18. The scheme at paragraph IV provides insofar as it is relevant for the purpose of the present case reads as follows :

"Part IV

Term loans

1. VCPL has obtained certain term loans from Financial Institutions in respect of both the units against security of the assets of such units created.

Pursuant to the scheme, VBCPL agree to pay the said term loans with interest, cost, charges and expenses pertaining to the respective units vested in them under the scheme and shall comply with all the terms and conditions on which such loans have been granted with such modifications as the said Financial Institutions may stipulate.

2. The securities created by VCPL in favour of any of the Financial Institutions, mentioned in para 1 above for the amounts of their outstanding loans mentioned in para 1 above on the movables and or immovable properties of a unit, allocated to the successor-company, as per clause 3 mentioned below, will continue to be in full force and effect and shall remain binding on the said successor-company for the amount of the loan liabilities and obligations mentioned in para 1 above towards the respective institution(s). Provided, if for any reason, VCPL has not been able to create security either of movables or immovable properties or of both, in favour of the institution(s) on or before the effective date, the successor-company shall create the security of the movable or immovable or both movable and immovable assets of the unit in favour of the institution(s) to secure the debt or liabilities allocated to that unit, in terms of para 1 above of the scheme, and the loans allocated unitwise, and the creation of security therefore shall continue to be the obligation of the successor-company."

19. Paragraph 2 of the abovementioned Part IV purports to say that the securities created by the transferor-company will continue to be in full force and effect and shall remain binding on the successor-company for the amount of the loan liabilities and obligations mentioned in para 1 above towards the respective institution. Para I of the above only deals with term loan and does not deal with the working capital loans. Therefore the proposed scheme of arrangement, in my

view, does not in any way affect the interests of the IDBI, which has a mortgage of certain assets of the transferor-company and the mortgage will continue with the assets even in the hands of the transferee-company. However, insofar as the SBH is concerned, though the abovementioned clause does not provide any specific safeguard, the fact that a second charge is created on the assets of the transferor-company as explained earlier and the fact that the State Bank of Hyderabad had no objection in principle though they did not vote in favour of the proposed scheme of arrangement when they participated in the meeting of the secured creditors makes me to draw the conclusion that the interests of both the abovementioned secured creditors would not be prejudicially affected if the scheme is sanctioned.

20. Apart from that, I must also make it clear that inspite of the publication under rule 80, neither the IDBI nor the SBH thought it fit to appear and oppose the matter or raise any objection whatsoever for the proposed scheme of arrangement.

21. In the circumstances, the company petitions are allowed as indicated above in this order.