(1970) 08 MAD CK 0017

In the Madras High Court

Case No : C.P. No. 30 of 1970

In Re: W.J. Bush Products Ltd. and another

Date of Decision : 12-08-1970

Acts Referred:
Companies Act, 1956 — Section 175, 176, 194, 34, 391

Citation : (1970) 08 MAD CK 0017

Hon'ble Judges : Palaniswamy, J

Bench : Single Bench

Advocate : Uthama Reddi, for the Appellant;

Judgement

Palaniswamy, J.—This petition is filed under Ss.391 (2) and 394 of the Companies Act 1956 (hereinafter referred to as the Act), to accord sanction for the scheme of amalgamation of the petitioner companies, W.J. Bush Products, Ltd. and A Boaks, Roberts and Co. (India) Ltd. and for dissolution of Bush Products, Ltd. without winding up. Both the companies were carrying on the business of manufacture of flavours, essences and perfumery compounds from the time of their respective incorporation. Both the companies are solvent and except ordinary trade debts, they do not owe any other debt. A scheme of amalgamation was proposed and the orders of this court were sought under S. 391(1) of the Act. In the meetings which were held as per the orders of this court, the scheme of amalgamation was unanimously approved. It is to accord sanction for the scheme and for other reliefs that this petition has been filed. The Central Government, to whom notice was issued, as required under S. 394-A, represented through their standing counsel that there was no objection to accord sanction. Mr. Utama Reddi appearing for the petitioners, submitted that no notice to the Official Liquidator was required, as none of the amalgamating companies is being wound up. His submission was that inasmuch as none of the two companies is being wound up, the Official Liquidator has no locus standi, and no notice to him was necessary. This matter required consideration. Therefore, I directed notice to be issued to the Official Liquidator and reserved consideration of the question of issue of notice and accord sanction to the scheme The Official Liquid for is being wound up. The material portion of S. 394 reads that:

394(1) Where an application is made to the court under S. 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that Section, and it is shown to the court:-

(a) that the compromise or arrangement has been proposed for the purpose of, or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this Section referred to as a ''transferor company'') is to be transferred to another company (in this Section referred to as ''the transferee company''), the court may, either by the other sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:?

(i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company.

(iv) the dissolution, without winding up, of any transferor company;

(v) the provision to be made for any persons, who, Within such time and in such manner as the court directs, dissent from the compromise or arrangement; and

(vi) such incidental consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no compromise or arrangement proposed for the purpose of, or in connection, a scheme for the amalgamation of a company, which is being wound up. With any other company or companies, shall be sanctioned by the court unless the court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest;

Provided further that no order of the dissolution of any transferor company under Cl. (iv) shall be made by the court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to a public interest.

(2)......(3)......(4)......

(Omitted as they are not relevant for the purpose of this case).

2. It would be seen that sub-Sec (1) of S. 194, broadly speaking, deals with two aspects (1) compromise or arrangement in connection with a scheme for the reconstruction of company; and (2) compromise or arrangement in connection with a scheme for the amalgamation of any two or more companies. So far as the scheme for reconstruction of any company is concerned, none of the two provisions is attracted. The first proviso, dealing with the scheme of amalgamation of a company which is being wound up, requires a report to be called for from the Company law Board or Registrar for the purpose indicated therein, namely, that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest. On a plain reading of this proviso, it would follow that it would apply only to a case where any one of the amalgamating companies is being wound up. The company that is in the process of being wound up may be either the transferor company or the transferee company. That is obvious from the expression ''a scheme for the amalgamation of a company'', without making any distinction between the transfer or and transferee company. But the second proviso expressly refers only to the transferor company. According to this proviso, no order for the dissolution of any transferor company shall be made unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest. This requirement of calling for a report is enjoined in case of ordering dissolution of the transferor company without winding up, as required under sub-S. (1) (b) (iv).

3. Mr. Uttama Reddi contended that inasmuch as the first proviso speaks of a company being wound up and inasmuch as the second proviso starts with the expression ''provided further'', it is implicit that the requirement of a report being called for from the Official Liquidator would arise only when the transferor company is also in the process of being wound up He sought to derive support for this argument by referring to S. 448 of the Act, which deals with appointment of Official Liquidator. This Section reads thus:

For the purposes of this Act, so far as it relates to the winding up of companies by the court?

(a) there shall be attached to each High Court, an Official Liquidator appointed by the Central Government, who shall be a whole-time officer, unless the Central Government considers that there will not be sufficient work for a whole time officer in which case a part time officer may be appointed; and

(b) the Official Receiver attached to a District Court for insolvency purposes, or if there is no such Official Receiver then, such person as the Central Government may, by notification in the Official Gazette appoint for the purpose, shall be The Official Liquidator attached to the District Court;

(1-A) The Central Government may appoint one or more Deputy or Assistant Official Liquidators to assist the Official Liquidator in the discharge of his functions.

(2) All references to the ''Official Liquidator'' in this Act shall be construed as references to the Official Liquidator referred to in Cl. (a) or Cl. (b) as the case, may be, of sub-Sec. (1), and as including references to Deputy or Assistant Official Liquidators appointed under sub-S. (1A)-

It is contended by Mr. Uttama Reddi that unless a company is in the process of being wound up by the court, the Official Liquidator has no locus standi and cannot be in a position to say anything about the affairs of the transferor company which is not being wound up. Therefore, he argues that no notice to the Official Liquidator is called for under the second proviso to S. 394 (1) in a case where none of the amalgamating companies is in the process of being wound up.

4. Though on the first impression this argument appears plausible, I am of the view that, on a close and careful examination of the relevant provisions, keeping in view the object of the Legislature in enacting the two provisos, it would be seen that even though none of the amalgamating companies is being wound up, notice to the Official Liquidator under the second proviso is essential and that no order for the dissolution of the transferor company without winding up can be passed unless the court gets the report from the Official Liquidator in respect of the matter indicated therein. The two provisos were added by S.49 of the Companies (Amendment) Act, 1965 (Central Act 31 of 1965). This amendment was made with a view to give effect to the recommendations of the Daphthary Sastri Committee based on the report of the Vivian Bose Commission. The enquiry came to be instituted in connection with a sanction accorded by the court to a scheme of amalgamation with respect to a company in voluntary liquidation. The scheme was presented to the court and sanction was obtained without disclosing material facts to the court such as improper transfer of assets, existence of an order for an investigation into the affairs of the company, and the latest financial position of the transferor company and that of the transferee company. In order that the court may not proceed to sanction arrangement of the amalgamation with too little materials on record and without information as to the important facts which, if they were presented before the court, would weigh heavily against the sanction of the scheme, the Committee made certain proposals. One of the proposals was that the court should have power to call for a report of an auditor on the state of affairs of the company as on the date of the application for the sanction of the scheme and such matters as it considers necessary for the purposes of sanctioning the scheme. It is with a view to give effect to this proposal of the Committee that the Legislature amended S 394 and incorporated the two provisos.

5. A plain reading of the two provisos would indicate that they apply to entirely different sets of facts and become applicable at different times. So far as the fiat proviso is concerned, its applicability arises if any one of the amalgamating companies is being wound up. In such a case, the court shall not sanction the compromise, or arrangement without calling for a report from the Company Law

Board or Registrar. If on receipt of such a report the Court finds that there is no objection to accord sanction to the compromise or arrangement, it can straightaway accord sanction. But so far as the matter covered by the second proviso is concerned, it is entirely different. It relates to the dissolution of the transferor company without winding up. This order of dissolution without winding up may be passed either while sanctioning the compromise or arrangement or even subsequently. As already pointed out, whereas the first proviso would become applicable in a case where anyone of the amalgamating companies is being wound up, the second proviso expressly refers only to the transferor company. It is contended by Mr. Uttama Reddi that even though the first proviso does not distinguish between a transferor company and a transferee company, still, from the use of the expression ''provided further'' occurring at the commencement of the second proviso, it should mean that the transferor company, which is referred to in the second proviso must be in the process of being wound up. Special emphasis was sought to be laid on the word "further" as supporting this view. I am unable to accept this view. The word ''further'' has no special significance. It is the usual mode of drafting when two provisos are incorporated even though the two provisos may not be inter-connected. It is the usual draftsmanship to start the second proviso by the expression ''provided further''. If there is a third proviso, it is usual to start the third proviso with the expression ''provided also''. The word ''further'' occurring in the second proviso is often used to indicate that it is the beginning of a new clause. It has almost the meaning as the word ''also''. The word ''further'' is defined thus in Stroud''s Judicial Dictionary, Volume II:

''further'' like ''also'' is often used as the beginning of a new clause and as writing in brief ''and it is further provided''.

In construing the scope of the word ''further'' occurring in a will, Fletcher Moulton L.J. in Boden v. Boden (1907) 1 Ch. D. 132 said at page 142:

There was a strenuous attempt on the part of, the counsel for the appellant to establish that the word ''further'' in the latter provisions has some occult reference to what has gone before. In my opinion this is unsustainable. The word ''further'' essentially conveys the idea of something beyond or additional. It cannot, therefore, refer to what has gone before......

It is next contended by Mr. Uttama Reddi that although it is not stated in Cl. (iv) of sub-S. (1) (b) that the transferor company should be a company in the process of being wound up, such a meaning should necessarily be given, having regard to the language employed in the first proviso which speaks of a company being wound up and also having regard to the fact that the Official Liquidator is called upon to submit a report he being an officer who comes into the picture only in a case where a company is wound up. In other words, the argument was that even though the operative portion of sub-S. (1)(b)(iv) does not say that the transferor company should be a company in the process of being wound up we should so interpret the expression ''dissolution without winding up of any transferor company''. It is in the light of this argument that Mr. Uttama Reddy contended that only if the transferor company is being wound up, a report from the Official Liquidator is essential before the court could pass an order for dissolution without winding up. This does not appear to be a correct wav of construing the proviso. In dealing with the construction of provisos it is observed thus in Craies on Statute Law at pages 201 and 202:

The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect.

It is not an invariable rule of construction of a statute that a proviso should be read as a qualification or limitation upon the effect of the main enactment. A substantive provision may also appear in the form of a proviso, and if the clear meaning of the proviso establishes that it is not a qualifying clause of the main provision, the court is bound to give effect to it without straining to attribute to it the character of a segment of that main enactment. The function of the proviso is very often to deal with an excepted class of cases. If the main provision is unambiguously clear, it cannot be controlled or overridden by mere implication from the existence of a proviso, unless the words of the proviso necessarily lead to that inference. In West Derby Union v. Metropolitan Life Assurance Society 1897 A.C. 547 the scope of a proviso in S.2 of the Poor Law Loans Act, 1871, arose for consideration before the House of Lords. The question was whether the plain meaning of the proviso should be given effect to or whether a meaning which will import into the operative part of the Section a meaning which is net apparent from the words used in the main proviso should be given. In dealing with this, aspect, Lord Halsbury L.C. observed at page 651:

What gives a meaning to the proviso, and as I have more than once said in the course of the argument, I cannot find any other meaning. It satisfies the words, whilst, the other view gives to the proviso a meaning which I think would be most formidable, not merely with reference to the question which now is under debate before your Lordships, but also as a matter of construction, that a proviso could be so read as to suggest that the previous part of the Section of which it is a proviso should imply by law the existence of words there of which there is not a trace in the previous words of the Section itself. My Lords, that certainly would be a very serious invasion upon any rule of construction by which any document, whether an Act of Parliament, or anything also, has ever been construed and I should be very much averse indeed to lend any countenance to such a mode of construing a proviso.

In the same case, Lord Watson observed at page 652:

I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of statutory words.

Lord Herschell observed at page 655:?

I decline to read into any enactment words which are not to be found there, and which would alter its operative effect because of provisions to be found in any proviso. Of course, a proviso may be used to guide you in the selection of one or other of two possible construction of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonable admit of doubt as to its having this scope of that which is the proper view to take of it; but to find in it an enacting provision which enables something to be done which is not to be found in the enactment itself on any reasonable construction of it, simply because otherwise the proviso would be meaningless and senseless, would as I have said, be in the highest degree dangerous.

6. Applying the principles enunciated in the above observations, it would be clear that the argument advanced by Mr. Uttama Reddi, by which he wanted to read into the main operative portion of S. 391 (1) (b) (iv) as containing the words "any transferor company in the process of being wound up" is untenable and cannot be countenanced. The plain meaning of the expression "dissolution without winding up of any transferor company" should be given effect to and there is no room to import the notion that such expression means a transferor company which is being wound up In my opinion, the second proviso stands by itself and it is not in addition to the first proviso which deals with an entirely different subject matter.

7. Mr. Uttama Reddi, next contended that if a transferor company is not being wound up, the Official Liquidator has no locus standi and is in the position of any third party not knowing any thing about the affairs of the company, and cannot, therefore, make a report to the court touching the affairs of the company. He placed considerable reliance upon S. 448 dealing with the appointment of Official Liquidator, already extracted in paragraph 3 supra. That Section no doubt speaks of the Official Liquidator relating to the winding up of companies by the court. This would mean as if the Official Liquidator would have no function under the Act in regard to matters which do not relate to the winding up of the companies by the court. That S. 448 is a defective provision and that the Legislature has not intended to convey the aforesaid meaning would be obvious from a perusal of the scheme of the Act. This provision regarding appointment of Official Liquidator is new. This Section and Ss. 449, 450 and 451 deal with appointment and position of an Official Liquidator and contain new provisions in the place of Ss. 175 and 176 of the Companies Act, 1913. Under the 1913 Act, the court has to

appoint a person or persons to be called Official Liquidator or Official Liquidators for the purpose of conducting the proceedings in the winding up of a company and performing such duties in reference thereto as the court may impose. But under S. 448 of the present Act, the Official Liquidator is an Officer attached to each High Court and has to be appointed by the Central Government. He shall be a whole time officer unless otherwise directed by the Central Government. The Act has made, provisions for winding up of a company not only by order of the court but also otherwise. Chapter III of Part VII of the Act deals with voluntary winding up. Ss. 490 to 498 both inclusive, apply to a member''s voluntary winding up. Ss. 500 to 509 both inclusive, apply to a creditor''s winding up. With regard to these two kinds of winding up, the legislature has made self contained provisions with regard to the appointment of a liquidator. Such power can be exercised by the company in relation to a member''s voluntary winding up and by the creditors in relation to a creditor''s voluntary winding up. The Legislature has laid down the duties of the liquidator who may be appointed in a members voluntary winding up and in creditor''s voluntary winding up. But even in regard to these voluntary windings up, the Official Liquidator is assigned a function. S. 497 deals with final meeting and dissolution of the company in the case of a member''s voluntary winding up. S. 509 deals with final meeting and dissolution in the case of a creditor''s voluntary winding up. Under these two Sections a duty is cast upon the liquidator to send the Official Liquidator a copy of the account contemplated therein. A duty is cast upon the Official Liquidator on receipt of the account, to make a scrutiny of the books and papers of the company and to make a report that the affairs of the company have no been conducted in a manner prejudicial to the interest of its members or to public interest. If the Official Liquidator submits a report, then from the date of the submission of the report, the company shall be deemed to be dissolved. It would be seen that in regard to these voluntary winding up, even though the Official Liquidator has nothing to do with the winding up of these companies, the Legislature has enjoined a duty upon him to submit the report contemplated in Ss. 497 and 509. It cannot be contended that inasmuch as these winding up have not been made by the court, the Official Liquidator has no locus standi and cannot go into the books and accounts of the company and submit the report contemplated in those two sections. Mr. Uttama Reddi finding that these two sections to not support his argument went to the extent of saying that these sections are inconsistent with S. 448 which deals with appointment of Official Liquidator and cannot be given effect to. This argument is without substance. The language of S. 448 cannot cut down the mandatory provisions contained in Ss. 497 and 509 merely because the matters dealt with by those sections do not relate to winding up of companies by the court, Reading Ss. 448, 497 and 509, it would appear that the intention of the legislature was that the Official Liquidator should discharge certain functions as an officer of the court even though the winding up of the company may not have been ordered by the court. It is with the same idea that the Legislature has enacted in the second proviso to S.394 (1) that the report of the Official Liquidator should be called for before ordering dissolution of the transferor company without winding up. If a dissolution takes place as a result of winding up by the order of the court, there is ample opportunity for the court to know in what way the affairs of the company were conducted and the Official Liquidator, as an officer of the court, and being in charge of a winding up of the company, submits reports periodically to the court and solicits directions. But if dissolution takes place without winding up, the court has no opportunity to know the affairs of the company unless an officer of the court goes into the books and other papers of the company to find out how the affairs of the company were conducted. It is precisely for that purpose that the legislature has enjoined a duty upon the Official Liquidator to go into books and papers of the company and to submit a report that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest. It is the identical question that is contemplated in the second proviso to S. 394 (1) and also in S. 497 and Therefore, the fact that a transferor company is not being wound up does not mean that Official Liquidator has no function. The express language found in the second provision to S. 394(1)(b) shall be given its natural meaning.

8. Mr. Uttama Reddi placed before me a copy of the judgment of Govinda Bhatt, J. or the Mysore High Court in C. P. 8 of 1969 on the file of that court, in which the learned Judge considered the identical question which I am considering in this case. There, the learned Judge, placing reliance upon the word ''further'' occurring in the second proviso to S. 394 (1) and upon S. 448 of the Act, which deals with the appointment of Official Liquidator took the view that if the company is not being wound up, the second proviso to Sub-S. (1) of S. 394 would not be attracted and that in such a case, the Official Liquidator is not required to make a (sic) as envisaged therein. For the reasons (sic) I have already pointed out, I am unable to share this view of the learned Judge. In the view which I take about the scope of the second proviso to S. 34 (sic) direct notice to issue to the Official Liquidator for submission of the report envisaged therein. The Official Liquidator is authorised to (sic) an auditor of his choice to go into the book of Bush Products Ltd and obtain a report from him and he shall submit his report along with the auditor''s report. The cost of such appointment of auditor shall be borne by the petitioner companies. The report of the Official Liquidator to be filed in four weeks.