

(1980) 03 DEL CK 0029

In the Delhi High Court

Case No : Company Appeal No. 17 of 1976 against order dated 23-4-76 in C.P.M. No. 86 of 1975 connected with C.A. 166 of 1975 - In C.P. No. 50 of 1971

Indian Hardware Industries Ltd. and others

APPELLANT

Vs

S.K. Gupta and another

RESPONDENT

Date of Decision : 14-03-1980

Acts Referred:

Citation : (1980) 03 DEL CK 0029

Hon'ble Judges : S.B. Wad, J;Rajinder Sachar, J

Bench : Division Bench

Judgement

Sachar, J.—Has the court, which has sanctioned a scheme under s. 391 of the Company's Act, during the working of the scheme, the power to call a general meeting of the shareholders for the purpose of electing the board of directors is the only question which we are to answer in this appeal against the order of the learned single judge dated 28th April, 1976, by which he directed the holding of a meeting of the shareholders for the purpose of electing an interim board, who would hold office till the annual general meeting was held. Before dealing with the question of law it is however, necessary to mention a few facts.

2. Indian Smelting and Refining Co. Ltd., being one of the unsecured creditors of the Indian Hardware Industries Ltd., the appellant, moved C.P. No. 50 of 1971 for winding up of the company. It was admitted for hearing in December, 1971, and citation was also issued in July. During the pendency of those proceedings, an application under s. 391(2) of the Companies Act, 1956 (to be called "the Act"), was moved by the Delhi Flour Mills Co. Ltd. (D.F.M.) being Company Petition No. 86 of 1975. This scheme was sanctioned by the court on 15th October, 1975. Later on, by an order of 26th April, 1976, respondent No. 1 was substituted for the D.F.M. The Jain group took up the matter in appeal and the Division Bench, by its order of 16th July, 1976, set aside the order of substitution. Sri Gupta went in appeal to the Supreme Court, which by its order

of 30th January, 1979, reported in *S. K. Gupta v. K. P. Jain* [1979] 49 Comp Case 342, held that Gupta had sufficient locus standi to maintain an application for modification or substitution of the scheme and, Therefore, allowed Gupta to be substituted as sponsor of the scheme. We may note that earlier the company judge had found that the only way in which the scheme could be supervised was to hold a general meeting of the company to appoint new directors. The reasons was that there was a serious dispute as to who were the directors. He, by the impugned order of 28th April, 1976, directed as extraordinary general meeting to be called to elect an interim board of directors, who would hold office till the annual general meeting was held. Jain group, being aggrieved, filed the present appeal. At the time of admission, the Bench passed an interim order staying the operation of the impugned order. But by then, i.e., 27th May, 1976, the meeting of the shareholders had already been in pursuance of the order of the learned single judge. The Bench thereupon directed that the impugned decision will not be implemented. That interim order is continuing till today because for some reason or the other the appeal could not be heard earlier.

3. In the meanwhile the matters were also being dealt with the learned company judge and by the order of 25th May, 1979, and 24th January, 1980, he had directed the commissioner appointed by the court, to hand over the possession of the factory and the other assets of the company to Gupta group, to enable them to implement the scheme. This, however, was to be done under the supervision of the committee of management, composed of a representative of the Gupta group and a representative of the Jain group, acceptable to the Gupta group, and Shri S. D. Verma, former Chairman, Allahabad Bank, who would act as a chairman of the committee. The company judge has noticed that a reasonably satisfactory course of action would have been to have comparative strength of the two groups in the company determined as also a proper board of directors constituted in a duly convened general meeting of the company, but, as there is a dispute with regard to the validity of the transfer of interest in favor of the Gupta group, that matter had to be decided before the meeting could take any worthwhile position. He has, Therefore, continued the committee of the management so as to effectively implement the scheme and has also directed that none of the groups are entitled to hold themselves out to be the company or as the board of directors until the disputes have been settled. He has also permitted the parties to move the court for further directions.

4. It is apparent that since the passing of the impugned order of April 28, 1976, much water has flown and very many new developments have taken place which need to be examined by the learned company judge who is seized of the matter. At the time when the impugned order was passed, the learned company judge faced with the problem as to who should function as a board of directors and, in order to resolve the controversy, had directed the calling of an extraordinary general meeting of the company to elect an interim board of directors. As the Division Bench stayed the implementation of the impugned order, the directors never took up office. In the meanwhile the company judge has appointed a

committee of management. It is, Therefore, essential that a second look be given by the company judge to the impugned order and other developments. We say this because the impugned order of 1976 had directed the election of the interim board of directors till the next annual general meeting was held. Even if we were to dismiss the appeal, we would be reluctant to permit the directors elected in 1976 to function as the board. That eventually would seriously strain the implementation of the scheme, by limiting the direction of the company judge who is supervising the scheme. We were, Therefore, inclined to dispose of the appeal with the clarification as above, so as to leave a free hand to the company judge to pass any appropriate order in the light of subsequent developments. But we were pressed by Mr. Mohan, the learned counsel for the respondent to decide the question of law which was vehemently raised by Mr. Roshan, advocate, namely, that there is no power with the company judge to call an extraordinary general meeting of the company for the purpose of electing the board of directors even when as, in the instant case, a scheme is being carried out under the supervision of the court.

5. Mr. Roshan was candid enough to admit that if on a fresh consideration the learned judge were to be inclined to call a general meeting for the purpose of electing a board of directors, he would certainly raise an objection as to the competency of the learned judge to call such a meeting. In these circumstances, we feel that there is justification for Mr. Mohan to urge that this Bench should at least decide this question of law, so that, if in the future the learned judge is inclined to call a general meeting of the shareholders, the competency or otherwise of the court to do so may not again be reagitated. Considering that almost a decade has passed when the application for winding up was first moved and almost five years have elapsed since the scheme was propounded we owe a duty to the public faith in the judicial system to decide at least this question of law and remove one hurdle in the expeditious disposal of the matter. There is one justification for this exercise even when technically the actual impugned order is not to be implemented in any case. The main argument of Mr. Roshan is that after amendment in 1974 the power to call a meeting is only with the Company Law Board, because the court has been substituted by the amendment. No doubt this power under s. 186 of the Act is now to be exercised by the Company Law Board in Normal circumstances. But does it completely denude the court of its power to call a meeting even when it is supervising a scheme under s. 392 of the Act ?

6. We are thus concerned with a very sharp and narrow question, namely, where the company judge is of the opinion that it is necessary to call a meeting of the shareholders to elect directors, is it in law permissible for him to do so ? Now, s. 392 empowers the court sanctioning a scheme or at any time thereafter to give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. We cannot read any limitation in it so as to exclude the power to call a meeting of the company for the purpose of electing

the directors if the court feels that it is necessary for the proper working of the scheme to know who are the real directors of the company. The amplitude of the power under s. 392 is no longer in doubt. Section 392(1) confers powers of the widest amplitude on the High Court to give directions and if necessary to modify the scheme with the only limitation that such directions or modifications must be for the proper working of the compromise or arrangement. In *S.K. Gupta and Another Vs. K.P. Jain and Another*, the court further observed :

"The purpose underlying s. 392 is to provide for effective working of the compromise and/or arrangement once sanctioned and over which the court must exercise continuous supervision [see s. 392(1)], and if over a period there may arise obstacles, difficulties or impediments, to remove them, again, not for any other purpose but for the proper working of the compromise and/or arrangement. This power either to give directions to overcome the difficulties or if the provision of the scheme themselves create an impediment, to modify the provision to the extent necessary, can only be exercised so as to provide for smooth working of the compromise and/or arrangement But the legislature, foreseeing that a complex or complicated scheme of compromise or arrangement spread over a long period may face unforeseen and unanticipated obstacles, has conferred power of the widest amplitude on the court to give directions and, if necessary, to modify the scheme for the proper working of the compromise or arrangement. The only limitation on the power of the court, as already mentioned, is that all such directions that the court may consider appropriate to give or make such modifications in the scheme, must be for the proper working of the compromise and/or arrangement."

7. This vast power cannot be whittled down by the 1974 amendment. This argument of Mr. Roshan is based on a misapprehension of the scope of the 1974 amendment of s. 186 and others. The amendments were brought in pursuance of the recommendation of the Administrative Reforms Commission that the functions which are discharged by the courts under the Companies Act may be reviewed and those which are essentially of an administrative nature may be transferred to the executive. It had also observed that there was a case for relieving the courts of items of merely administrative nature. These could be transferred to the Central Govt. which could delegate them to the Company Law Board. The courts then will be left with such cases as would involve the sifting of the evidence. It was this recommendation which led to the amendment of ss. 17, 18, 19, 79, 141 and 186. It is true that if after the 1974 amendment, any person wishes to call an extraordinary annual general meeting he will have to apply to the Company Law Board. But the present is not a case where a meeting is being called in the normal course. The learned company judge who directed the calling of the meeting did so because he felt that the only way in which the court can supervise the carrying out of the scheme was to order that a general meeting of the company is held in order to appoint the directors of the company. It would be quite anomalous to suggest, as Mr. Roshan seeks to do, that if the court felt the necessity of calling such a meeting. Mr. Roshan accepted the anomaly of the

situation, but all that he could reply was that if there was a lacuna it was for the legislature to remove it. We do not accept that the legislature intended such a result because it is well-settled law that if an interpretation leads to absurdity and anomaly, the same must be avoided. The argument of Mr. Roshan is totally alien to our jurisprudence which gives finality to the jurisdiction of the court and which cannot be taken away unless the legislature has by express words so directed. There is nothing in s. 186 which lays down that a company court which is supervising the scheme under s. 392 cannot call a meeting of the company if it feels that it is necessary to do so for the proper supervision and implementation of the scheme. We cannot accept an interpretation which puts the court in the position of a supplicant before the Company Law Board. Such an interpretation runs counter to the power of the widest applitude read into this provision by the above decision of the Supreme Court. So long as the meeting is to be called, because the court feels is necessary for the proper working of the scheme, the power must be found to be implicit in the court by virtue of s. 392(1) and it is not necessary to invoke s. 186 for this purpose.

8. According to Palmer's Company Law (21st edn., p. 470) in the exercise of the very wide power contained in s. 210 of the English Companies Act (which is equivalent to s. 397 of the Indian Companies Act) the court has power, if the requirements of that section are satisfied, to convene a general meeting of the members of the company or of any class thereof. Now, s. 392(2) of the Act empowers the court that, if it is satisfied that the arrangement sanctioned under s. 391 cannot be worked satisfactorily, it may make an order winding up the company. As a matter of fact the company judge has a Company Petition No. 50 of 1971 (winding-up petition) by his order of March 29, 1976, specifically directed that, notwithstanding the sanctioning of the scheme, the winding-up petition will remain pending because if the scheme fails, winding-up order may have to be passed. Thus, it must also be remembered that this direction to call a meeting is being exercised during the pendency of the winding-up petition. Now, it is well settled that if the scheme is sanctioned by the court in the course of winding-up proceedings which is pending, the scheme is certainly and truly an alternative mode, a substitute, for the pending winding-up and that the court may stay the winding up for the purpose of giving effect to the scheme. In such a case the court may exercise the powers of a winding-up court in matters arising under or not of the scheme as matters arising in winding-up. See *Smt. Bhagwanti v. New Bank of India Ltd.* [1950] 20 Comp Case 68; AIR 1950 E Punj 111 [FB]. Not even Mr. Roshan contended that the winding-up court would need to apply under s. 186 of the Act if it wanted to call a meeting of the company. In principle we see no justification why, in view of the position of law enunciated above, the court which is supervising the scheme should have lesser power during the pendency of a winding-up petition.

9. One other aspect may be noticed which will indicate the vast powers under s. 391. Sub-section (6) of s. 391 empowers the court, if an application has been made, to stay the commencement or continuation of any suit or proceedings

against the company on such terms as the court thinks fit, until the application is finally disposed of. Recognising the importance of a scheme in re-starting the business of a company, the Legislature aims at removing the normal legal constraints. Surely, it cannot be urged that after the scheme has been sanctioned and the same is being supervised by the court it should be held to be so helpless as not to be in a position even to call a meeting of the company which it feels is necessary to be called for the proper implementation and working of the scheme. To deny this power to the court would be to make s. 391 and the supervision by the court an idle formality.

10. Now, a look at the scheme shows that, apart from Dena Bank, a secured creditor, there are unsecured creditors to the amount of over 2.3 lakhs. The Delhi Flour Mill (which has now been substituted by the Gupta group, respondent) is to dispose of part or whole of the machines in the pressure die casting section and clear the debt of Dena Bank. If the sale amount is not enough, the Gupta group is to dispose of the whole or a part of the machines in the tool room section so as to liquidate the debt. The Gupta group is to run the other section like the building hardware section and is to advance a sum of Rs. 3 lakhs. The company is expected to make a profit up to 4 lakhs and is supposed to pay up all the unsecured creditors within 4 years. The Delhi Flour Mill (Gupta group) is to be paid after all unsecured creditors have been paid. No interest is to be paid to the Gupta group for the advance paid by it. It needs no argument to stress that such a detailed scheme and would obviously require a board of directors which does not impede the scheme and works under the directions of the court. A situation cannot be permitted where, for working the scheme, it is necessary to work a particular unit of the company but the board of directors decided to close down that particular section. Can it be envisaged that the board of directors would be competent to decide that, contrary to the provision in the scheme, the machines in the pressure die casting section will not be sold? For the effective working of the scheme, active co-operation of the board of directors would be necessary. Is the court to be a helpless spectator and see the scheme being wrecked by a non-co-operative board of directors. Surely the court which possesses power under s. 392(2), on the failure of the scheme to work satisfactorily to order the winding-up of the company, cannot be said to be so denuded of the power as not to be able to call a meeting of the company in an effort to have a proper working of the scheme. To deny such a power is to strip the potency of s. 392(1) of the Act and to put the court in the unacceptable position of a helpless spectator. We cannot countenance such an interpretation which would make the supervision of the companies and the scheme sanctioned by the court a mere will o' the wisp. If the remedy is to be effective, it demands that this power of calling a meeting, which the court feels is necessary for the working of the scheme, must be and is read to be implicit in the power of the court under s. 391 of the Act. Section 186 is no hurdle to the exercise of this power by the court. Reference was then made to *A. D. Chaudhary v. Mysore Paper Mills Ltd.* [1976] 46 Comp Case 548; [1976] Tax LR 2051 (Kar). In that case an application was filed under s. 186 of the

Companies Act before the court (this application was filed before the 1974 amendment) praying for the appointment of a chairman by the court for a meeting of the company which was proposed to be held. It appears that earlier a Munsif had passed an order of temporary injunction restraining the company from holding a meeting and hence the board had refused to call a meeting while the requisitionists had been insisting on holding a meeting. The High Court held that in the circumstances it cannot order the calling of a meeting which would violate the injunction issued by the Munsif and that the proper thing for the applicant would be to request the court for calling a meeting of the company which he had not done and, Therefore, no relief could be given to him. Dealing with the aspect that the applicant should be allowed to amend the prayer for calling a meeting it was observed by way of obiter that now the power under s. 186 was exercisable after February 1, 1975, by the Company Law Board and not by the court and also that no application or prayer had been filed before the High Court and, Therefore, the relief cannot be given. It will be seen that the case has laid down that in normal circumstances an application for calling a meeting would have to be made to the Company Law Board in view of the amendment of the 1974. That case is clearly distinguishable because in the present case the calling of a meeting is being done by virtue of the powers under s. 391 of the Act. In *Radford & Bright Ltd., In re* [1901] 1 Ch 272 (Ch D), a meeting of the creditors and contributories of the company had nominated a committee of inspection. Later on a foreign company being one of the large creditors represented that it should also be represented on the committee. Wright J. felt the justification of the plea. The question, however, arose, in what manner this was to be done. The court found that there was no provision expressly enabling the court to interfere directly with the constitution of the committee of inspection when once it was validly appointed but, as the court found the plea of the committee to be justified, it used its power to remove one or more members of the committee to direct a general meeting of the creditors to be summoned to consider these questions. Thus, it will be seen that the court evolved a procedure to make the effective functioning of the committee. In the present case also, when the court is to supervise the scheme, the inherent power of the court to direct the calling of the meeting cannot be faulted.

11. We are, thus, of the view that the learned judge had the necessary power under the Act to call a general meeting to elect the board. Therefore, no objection can be raised on the ground of want of power of summoning a meeting. This objection of Mr. Roshan, Therefore, fails.

12. Though, Therefore, we held that the meeting was properly called by the learned judge we do not think that it will be proper to let the implementation of that order be carried out without the learned company judge having again looked into the matter in the light of the various events that have since taken place. The matter, Therefore, will now go back to the learned judge. It will be open to the learned judge, if he is of the opinion that for the proper implementation of the scheme a meeting of the shareholders is necessary to call the same. It will also

be open to the learned judge if he is not inclined to call a meeting not to do so. We wish to make it clear that there is no mechanical implementation of the proceedings of the general meeting which takes place in pursuance of the impugned order. It will, thus, be open to the learned judge either to implement these proceedings or to make any other direction that he considers necessary for the proper implementation of the scheme. We have in this appeal only decided a question of law, namely, that it is open to a learned judge to call a meeting of the company, if he feels it necessary for the proper implementation of the scheme. But that is not to be understood as in any way compelling the learned judge to accept the proceedings which take place in pursuance of the impugned order because we would want the learned judge to pass an order after taking into account the various events since then. We may mention that Mr. Mohan, counsel for the respondent has offered that the committee of inspection which has been appointed by the learned judge may be deemed to be the board of directors so long as the scheme is being implemented and that it may not be necessary in that circumstance to elect a board of directors separately. Mr. Roshan was unable to subscribe to this. We are only making note of it for consideration by the learned judge.

13. With these observations the appeal is disposed of. Parties through their counsel have been directed to appear before the learned judge on March 20, 1980.