

(1982) 06 BOM CK 0001
In the Bombay High Court

Kamani Metallic Oxides Limited

APPELLANT

Vs

Kamani Tubes Limited

RESPONDENT

Date of Decision : 29-06-1982

Acts Referred:

Companies Act, 1956 — Section 536(2)

Citation : (1984) 56 CompCas 19

Hon'ble Judges : Sharad Manohar, J;M.S. Jamdar, J

Bench : Division Bench

Judgement

Jamidar, J.—This notice of motion is taken out by the respondent- company, Kamani Tubes Ltd., the winding up application against which is rejected, under s. 536(2) of the companies Act, for permission, to dispose of the assets of the company or, in the alternative, to disposed of 95,117 equity shares of the Kamani Engineering Corporation Ltd. held by the respondents. Obviously there was no urgency so far of the first prayer was concerned, but so far as the alternative prayer was concerned, there was such urgency, because the Kamani Engineering Corporation Ltd. Has issued convertible debentures and the last date for splitting of the right was may 26, 1982, while the last date for applying for the debenture is June 26, 1982. It was contended that the prospective buyer or buyers of the shares may apply for the right debentures in their name or names or may apply in favour or their nominees. It was rightly contended that if the right of splitting is lost, the prospective buyer or buyers would be reluctant to purchase the shares and as respondent no. 1 company cannot itself apply for the debentures for want for funds, the company would be put to loss inasmuch, as after June 26, 1982, the shares would be quoted on ex- right basis, obviously, at proportionately lesser price. We found substance in the contention and hence we heard the matter urgently but as the hearing continued beyond court hours on May 25, 1982, and as some order was necessary before 26th, we passed the operative order reserving the reasons to be given later.

2. Before we consider the merits of the objections raised by the appellants, we

would like to state a few relevant facts. The appellant-company, Kamani Metallic Oxides Ltd. and the respondent- company belong to what is known as Kamani Group of Companies. The members of the Kamani family own about 80% of the up capital of the appellant-company and 92% of the respondent-company. Since disputes between the members of Kamani Family are referred by virtue of several references, to the arbitration of Shri Viren J. Shah. By an interim award dated April 7, 1981, the arbitrator has directed that all the 3,08,354 shares of the Kamani Engineering Corporation Ltd. held by all the parties to the agreement of reference dated June 29, 1979, should be sold by the committee appointed by the arbitrator for that purpose. These shares include the 95,117 shares held by the respondents-company. We were told that there is a firm offer to purchase the entire lot at Rs. 75 per share, on cum-right basis, as against the market price of Rs. 63 per share.

3. This appeal arises out of the order by which the application filed by the appellant-company for the winding up of the respondent-company was dismissed. The application for winding up was filed on the allegation that the respondent-company failed and neglected to repay a loan of Rs. 27,84,242.35, as well as interest thereon, aggregating to Rs. 37,29,653.96, despite a statutory notice. Before filing the application for winding up the appellant-company filed summary suit no. 349 of 1979, for decree against that respondent-company for Rs. 41,20,999.24 and interest. By consent terms dated November 14, 1980, all the disputes in the suit were referred to the sole arbitration of Shri Viren J. Shah. By an interim award no. XII, dated April 9, 1981, the arbitrator has directed the respondent-company to pay sum of Rs. 23,87,000, being the principal amount of the loan to the committee named in the award, certain installments. No doubt some directions in the award including to one about constituting the committee, to whom the amount is directed to be paid, are under challenge in Arbitration Petition no. 109 of 1981, filed by the appellant-company and its chairman. But the appellants have failed to get a partial decree passed in its favour in Summary Suit No. 344 of 1977, in respect of the amount directed to be paid under the terms of the above-referred award.

4. The main ground on which the notice of motion is contested by the appellant-company is that s. 536(2) cannot be invoked unless and until a winding up order is made. Emphasis is placed on the phrase "In the case of a winding up", with which the said sub-section opens. The said provisions reads as follows :

"In the case of a winding-up by or subject to the supervision of the court, any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alternation in the status of its members, made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

5. It is contended that even though all dispositions of property made after the commencement of the winding up which relate back to the date of the application for winding up, are hit by this provision, the court cannot otherwise

direct unless there is an order winding up the company. In support of this proposition reliance is placed by Shri Kapadia, the learned counsel for the appellant-company, on in the decision of the Mysore High Court in *Mandya National Paper Mills Ltd. v. Rai Bahadur Shree Ram Durgaprasad private Ltd.* [1967] 37 Comp Cas 201 and the decision of the Gujarat High Court in *R.C.Mehta & Co. v. Himaabhai Manufacturing Co. Ltd.* [1970] 40 Comp Cas 1230.

6. In the first case, the company which was sought to be wound up. Sought permission of the court under s. 536(2) to mortgage certain assets of the company during the pendency of the application for winding up. the permission was refused holding that the order of court which could save an alienation of a company's asset from becoming void under s. 536 is an order made after winding up because unless an order of winding up is made, the normal powers of the director continue and unless an order of winding up is made, any disposition or alienation made by the director does not become void and hence an application for such order would not ordinarily be granted (emphasis * supplied). now, even, according to the learned judge, there is no absolute prohibition on granting permission for the disposition that the court has no jurisdiction to pass such an order. This is what the learned judge has observed. (Relevant observations are on page 203 of the report):

"It may be that the suggestion that the court has no jurisdiction whatever to deal with situations arising between the date of presentation of the winding-up petition and the order of winding-up is not sound, because on the passing of a winding-up order, the date of commencement of winding-up is related back to the date of presentation of the petition, and, secondly, even before an order for winding up is passed, the court may find it necessary to make appropriate interim orders either for the protection of the company or for the protection of any of the creditor of the company."

7. In *R.C.Mehta's* case [1970] 40 Comp Cas 1230 (Guj), the Gujarat State Textile Corporation, which was appointed as the authorised controller of the mills in question, sought direction of the court under s. 536(2) about the validity of the mortgages which the Corporation proposed to create during the pendency of the application for winding up. the prayer was rejected for want of jurisdiction. It was observed as follows (at p. 1234):

"But before the court would taken upon itself to examine the nature of disposition of property u/s 536(2) it must be a disposition of property which has become void on the making of the winding - up order. The Court would not proceed to examine the validity of a transaction which is valid at its inception and may not become void at the petition for winding up the company is dismissed. The order will be completely otiose. It would be an exercise in futility if the transaction which was valid at its inception will have to be declared valid only to save it from a remote possibility of its becoming void if the company is ordered to be wound up. Therefore, the plain language of the section clearly indicates, the scope of the courts' jurisdiction. The language indicates that, in the event of a

company being wound up, all those dispositions of property made by the company between the date of presentation of the petition for winding up and the date on which an order for winding up is made shall be void. But the nature of the transaction which has become void can be examined by the court at the instance of the party interest in the disposition of property Sections 536(2) would come into play only when a winding-up petition is presented which is ultimately granted and the company is ordered to be wound up and such company having made dispositions of the property during the period between the presentation of the petition the directors of the company do not fritter away the assets of the company, a wholesome provision made that in the event of the company being ordered to be wound up, such disposition of property shall be void, simultaneously providing that the court may examine the nature of such disposition of the property at the instances of the liquidator or at the instance of any other person interest in the disposition of the property and declare that the particular disposition is not void or is valid. But it must be remembered that every petition presented for winding up the company would not necessarily be granted. now, if, after presentation of the petition and till the time it is finally decided, every disposition of the property can be validated by way of anticipatory action, I am afraid it would bind the liquidator who would not be in the picture at the stage. The liquidator steps in only after an order for winding up is made except where the provisional liquidator is appointed. but whether the assets of a company have been frittered away or not is a question which the liquidator must examine and if the permissions are granted in advance before the liquidator steps in in my opinion such an anticipatory action cannot be taken under sub-section (2). The condition precedent to the exercise of jurisdiction under sub-section (2) is an order for winding up of the company having already been made and disposition of the property having become void as having been made between the date of the presentation of the petition and the date on which the company is ordered to be wound up."

8. The learned judge referred to the conflict between the opinion expressed on the interpretation of the analogous provision in the English Companies Act, by Vaisey J. in *In re Miles Aircraft Ltd.* [1948] 1 All ER 225 : 18 Comp Cas 250 (Ch D) and the opinion of Buckley J. in *In re A.I. Levy (Holdings) Ltd.* [1964] 1 Ch. 19 : 34 Comp Cas 720 (Ch D) . He also referred to the above decision of the Mysore High Court and the decision of the Rajasthan High Court in *Ramesh Chandra Vs. Chopasni Ice Aerated Water and Oil Mills Ltd., Jodhpur and Others*, in which the same view of the matter was taken.

9. The decision of the Mysore High Court, however, does not fully support the proposition that s. 536(2) can be invoked only after a winding up order is made. The decision of the Rajasthan High Court stands expressly overruled by a sub-bench special Bench decision in the case *B. Gopal Das. v. Kata Biran Board (P). Ltd.* [1972] Tax LR 2285.

10. In *R.C. Mehta's case* [1970] 40 Comp Cas 1230 (Guj), the judge based his

decision on the following three factors, viz., (1) the plain language of s. 536(2) shows that the order contemplated by the said provisions can be passed only after a winding up order is passed. (2) the order would become otiose if no winding up order is passed ultimately. (3) The liquidator who can challenge the transaction is not in the picture. There were considerations which weighed with Vaisey J. in *In re Miles Aircraft Ltd.* [1948] 1 All ER 225 : 18 Comp Cas 250 (Ch D). With respect we are unable to agree with this view. Firstly, the opening clause of S. 536(2). "In the case of winding up" does not mean "after the winding up order is passed " or "upon passing such order." It means "during winding up proceedings", which admittedly commence on the date on which the petition for winding up is filed. This interpretation which we are putting does not leave bona fide dispositions of assets of the company, open to challenge at the hands of the liquidator, in the event of the winding up order being passed. Sometimes dispositions would be necessary in the interest of the company and thus in the ultimate interest of the creditors of the company. During the pendency of the application for winding up. But the directors would be reluctant to enter into transactions of their own for fear of the transactions being declared invalid on the passing of the winding up order. The company court must have jurisdiction to protect such transactions. We, therefore, feel that rule of harmonious construction supports the view that the court can exercise jurisdiction under s. 536(2), even before the winding up order is made. The fact that the order would become otiose, if the application for winding up is ultimately rejected, does not take away the jurisdiction.

11. In this connection, we would like to quote the following observations of Buckley J. in *In re A.I. Levy, (Holding) Ltd.* [1964] Ch 19: 34 Comp Cas 720 (Ch D) :

"It appears to me that the object of the section is to protect the interests so of the creditors from the possibly unfortunate results which would ensue from the presentation of a petition, and to protect their interest as much during the period while the petition was pending as after an order has been made on it. What the section provides in its present terms is that any disposition of the property of the company made after the commencement of the winding up shall be void in the winding up of the company unless the court otherwise orders; that is to say, if and when the company comes to be put into liquidation that transaction is to be as if it had never taken place."

12. In the case of *b. Gopal Das* [1972] Tax LR 2285, the Special Bench of the Rajasthan High Court overruled the earlier Division Bench decision in *Ramesh Chandra Vs. Chopsani Ice Aerated Water and Oil Mills Ltd., Jodhpur and Others*, and expressed their agreement with the view expressed by Buckley J. in the case of *A.L. Levy (Holding) Ltd.* The learned judge quoted the law on this point stated in *Palmer's Company Law*, twenty-first edition, page 770. The relevant observations are as follows :

"The court has jurisdiction u/s 277 to authorize a disposition of the company's

property for the benefit of creditors, notwithstanding that a winding-up order has not yet been made."

13. We should also like to quote the observations appearing in para. 4 of the judgment in b.Gopal Da's case [1972] TAX LR 2285 :

"As been stated, section 536 finds a place in that portion of the Act which deals with the effect of winding-up on antecedent and other transactions, and there is nothing in subs-section (2) or the scheme of the Act to show that the court cannot authorises a disposition in a case where the winding-up petition is pending but a winding -up order has not been made. On the other hand, it may well be argued that , in the absence of any prohibition in the law, there is not reason why the court should be precluded from examining the properties of a proposed disposition during the pendency of a winding- up petition if the company has a genuine case requiring early consideration."

14. We are respectfully in agreement with this view. We are, therefore, of the view that even before a winding up order is made, the jurisdiction of the court can be invoked under s. 536(2) for permission for disposal of the assets of the company.

15. On merits we find that the objections raised on behalf of the appellant are motivated, perhaps as contended by the respondents, to further stifle the working of the company. The appellant-company is merely a creditor and even assuming that the company is entitled to recover from the respondent the entire amount claimed in the suit, the sale proceeds of of te shares will far exceed that claim, If, therefore, the respondent is directed to deposit the entire sale proceeds in t he court, the interest of the appellant-company will be completely protected. The respondent-company has also no objections to give a preferential right to the appellant company to purchase the shares in question provided the appellant-company purchase the entire lot of 3,08,345 shares, directed to be should by the arbitrator, at the rate of Rs. 75 per shares. No plausible objection to the disposition, therefore, survives, These are our reasons for the following order which was passed on 25th May, 1982 :

"For the reasons to be recorded later, leave under rules 147 and 148 of the Bombay High court Rules granted to the respondents, to take out a n/M in terms of the draft N/M submitted to the court.

N/M returnable on June 14, 1982.

MR. Kapaid waives serives of the N/M. Inn the mean while, ad-interim relief in terms of prayer (b) of the N/M on the following conditions :

(1) Shares mentioned in prayers (a) and (b) are to be sold at the price not less than Rs. 75 per share.

(2) Appellant-company have a preferential right to purchase these shares at the maximum offered price, provided the appellant purchase the entire lot of shares

mentioned in paras. 18 and 20 of the affidavit in support, in case the entire lot is put to sale. If the entire lot is not sold, the appellant-company will be entitled to purchase will be entitled to purchase the shares in question at the above said price.

(3) The entire sale proceeds to the deposited in court.