

(2002) 10 KAR CK 0053
In the Karnataka High Court
Case No : Company Petition No. 121 of 2000

Kashinath Dikshit and Another

APPELLANT

Vs

Surgicals and Pharmaceuticals Company (Mysore) Limited (In Liquidation)

RESPONDENT

Date of Decision : 08-10-2002

Acts Referred:

Companies Act, 1956 — Section 391, 394, 395

Citation : (2002) ILR (Kar) 5191 : (2002) 6 KarLJ 430

Hon'ble Judges : H.L. Dattu, J

Bench : Single Bench

Advocate : Adithya, for Udaya Holla, for the Appellant; Deepak, for Official Liquidator and R. Veerendra Sharma, Additional Central Government Standing Counsel, for the Respondent

Judgement

H.L. Dattu, J.—The company petition is filed under Sections 391 to 394 of the Companies Act, 1956 ("Act" for short), with a request to sanction the scheme of arrangement so as to be binding on all the members, secured creditors and unsecured creditors of the respondent-company as well as the respondent-company in liquidation. The first petitioner is though a member of the company is not the propounder of the scheme. The second petitioner who seems to be the propounder of the scheme is neither the shareholder nor the creditor of the company in liquidation.

2. M/s. Surgical and Pharmaceuticals Company (Mysore) Limited, the company in liquidation was incorporated under the provisions of the Companies Act, 1956 and prior to its winding up by this Court by an order made on 4-8-1980 in Co. P. No. 35 of 1978, was carrying on the business of manufacture and sale of surgical cotton, dressing bandage cloth and gauze cloth, etc. In view of winding up order, the official liquidator attached to this Court has become the liquidator of the company by virtue of the provisions of Section 449 of the Act and has taken over the assets of the company in liquidation.

3. The State Bank of Mysore, the only secured creditor of the company in liquidation, after obtaining the permission of the Court to stand outside the winding up proceedings and after obtaining the leave of the Court to continue to prosecute the suit filed by it against the company in liquidation for recovery of loans advanced by it to the company in liquidation and after obtaining the judgment and decree from the Trial Court, has sold the movable assets of the company in liquidation and it appears, the sale proceeds are deposited in the Court.

4. Petitioners assert in this petition that the company in liquidation was only indebted to State Bank of Mysore, Davangere Branch, Davangere, which was the sole secured creditor in a sum of Rs. 9,53,381/-, approximately an amount of Rs. 3,60,000/- to sundry creditors, and a further sum of Rs. 75,000/- to the ex-employees of the company in terms of the claim submitted by them to the official liquidator. It is further stated that the first petitioner has identified the second petitioner to revive the company in the interest of its shareholders and creditors (both secured and unsecured) by setting the aforesaid claims arid to revive the company. It is also stated that the second petitioner is willing to settle the claims of both secured and unsecured creditors of the company in liquidation with a view to revive the company, in the event, the entire share capital of the company in liquidation is transferred to the second petitioner and his nominees.

5. Petitioners also assert that the only manner of settlement of the claims of the creditors of the company in liquidation, which are now pending with the official liquidator is by selling the assets of the company in liquidation and the sale of the assets by the official liquidator, may not result in the settlement of the entire dues of its creditors as the price that may be received may fall short of the total claim of the creditors. Therefore, since the second petitioner is willing to settle the entire claim of the creditors of the company as provided in the scheme of arrangement, it may not be necessary for the sale of assets of the company in liquidation to settle the dues of its creditors and that may not be in the interest of the shareholders, secured and unsecured creditors of the company in liquidation. Therefore, petitioners" state that by sanctioning the scheme of arrangement as propounded by the second petitioner, the company and its shareholders would be benefited by the revival of the company. A copy of the scheme of arrangement is produced before this Court.

6. This Court by its order dated 12-4-2000, had directed the petitioner-company to convene a meeting of the members and creditors (both secured and unsecured creditors) of the company for considering and if thought fit, for approving with or without modifications the scheme of arrangement propounded by the second petitioner and in the said order, had directed the first petitioner to act as the Chairman of the said meetings and to report the result thereof to this Court.

7. Pursuant to the directions issued by this Court, the Chairman, who was nominated to hold the meetings, after convening the meetings of the

shareholders, creditors (both secured and unsecured creditors) has filed his report. A perusal of the report shows that there seems to be no opposition or objections by the shareholders and the creditors (both secured and unsecured creditors) for the scheme of arrangement propounded by the second petitioner.

8. Notice of this company petition was ordered to be taken out to the Regional Director, Department of Company Affairs, Chennai, and also to the official liquidator and the petitioners were also directed to take out paper publication in one edition of "Times of India" newspaper fixing the date of hearing as 3-8-2001 inviting objections, if any, to the scheme of arrangement.

9. The Regional Director, Department of Company Affairs, Chennai, has filed an affidavit before this Court stating that he has no serious objection for the sanction of the scheme of arrangement, since the same has been approved unanimously by the members, the secured and unsecured creditors.

10. The Official Liquidator attached to this Court has filed his objections opposing the scheme of arrangement propounded by the petitioners. Apart from others, the primary objection of the official liquidator seems to be that though the first petitioner is a member of the company in liquidation is not the propounder of the scheme and the second petitioner, who seems to be the propounder of the scheme is neither the shareholder nor the creditor of the company in liquidation and therefore the request made in the petition for approval of the scheme of arrangement is not maintainable u/s 391 of the Act, since under that provision, an application/petition can be filed for sanction of the scheme of arrangement either by a creditor or a member of the company in liquidation or by the official liquidator. The second objection seems to be that the first petitioner has not demonstrated before this Court that on his own how he would revive the company in liquidation and therefore, the arrangement is not a real arrangement for revival of the company in liquidation and it is only a ruse to sell the assets of the company to the second petitioner for a price. Therefore, requests this Court not to grant the relief claimed in the petition.

11. Sri Adithya and Sri Deepak, learned Counsels appearing for petitioners and the official liquidator respectively are heard in the matter.

12. Since the objections raised by the official liquidator is with regard to the maintainability of the petition, the same requires to be addressed first. Therefore, the primary question that requires to be considered and decided is whether the petition filed by the petitioners can be accepted by this Court and the request made therein can be granted?

13. The primary ground urged by the learned Counsel for official liquidator is that the petition filed by the petitioners is not maintainable at the instance of second petitioner, he being neither a shareholder nor a creditor, or a member of the company in liquidation. However, Sri Adithya, learned Counsel for the petitioners contends that though the second petitioner is neither a member nor a creditor of the company, he can still maintain the petition under Sections 391 to 395 of the

Act, for sanction of the scheme of arrangement. In order to appreciate the rival contentions canvassed, a look into the provisions of the Act is necessary. The material portion of Section 391 of the Act reads as under:

"Section 391(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".

14. A plain reading of the section clearly indicates that the Legislature intended that if any compromise or arrangement is proposed, the company, or any creditor or any member of the company will be entitled to make the necessary application/petition and in case where the company is being wound up, as the Board of Directors has ceased to function and the company is represented by the liquidator, the liquidator will also be entitled to make the necessary application/petition. The right, which is conferred on the contributories or the creditors, is not intended to be taken away when the company has gone into liquidation and in such a case, an additional right is also conferred on the liquidator.

15. The provisions contained in the Companies (Court) Rules, 1959, in Rules 67 and 68, the forms prescribed under the said rules also clearly go to indicate that even in the case of company in liquidation, the contributories and the creditors of the company are entitled to make an application u/s 391 of the Act.

16. The section is intended to confer rights both on the company and on the creditors and the members of the company when it is a going concern. The object is to avoid the winding up of the company and even after a winding up order is made, an application/petition can be filed to recall the winding up order and to sanction the scheme of arrangement and allow the company to resume its normal business, since it is the creditors and members of the company, who are interested in the life of the company and they are the best judges of their interest. Therefore, to maintain an application/petition u/s 391 read with Section 395 of the Act, the petition must be by a company or by any creditor or a member of the company and where the company is in liquidation, apart from the above person, the liquidator is an additional person to whom the right to frame such a scheme and move the Court for sanction u/s 391 of the Act is provided.

17. Petitioners have produced a copy of the scheme of arrangement, which they want it to be sanctioned by this Court. In that, it is stated that one of the shareholders of the company as on the date of winding up order, namely, one Sri Kashinath Dikshit has identified Sri N.J. Patel with a view to revive the company, and the said person is willing to settle the claims of the creditors of the company

with a view to revive the company provided the entire share capital of the company is transferred to him and to his nominees in consideration of his settling the claims of the creditors of the company.

18. One of the shareholders of the company in liquidation is the first petitioner in this company petition. He has identified the second petitioner to revive the company in liquidation. This clearly shows that he is not the propounder of the scheme of arrangement for revival of the company. The second petitioner is neither a member nor a creditor of the company. He is willing to settle the claims of the creditors of the company with a view to revive the company in liquidation, provided the entire share capital of the company is transferred in his favour and his nominees. In order to attract Section 391 of the Act, it is necessary that a compromise or arrangement between a company and its creditors or any class of them, or between the company or its members or class of them, should propose a compromise or arrangement. When such a scheme is proposed, and the sanction is requested, the Court will have to be satisfied as to the prima facie, that the scheme of arrangement is genuine, bona fide and would be in the interest of the company and its creditors and the application is filed by a person, who is authorised under the provisions of Section 391 of the Act. The Apex Court in the case of S.K. Gupta and Anr. v. K.P. Jain and Anr., while considering the scope of Section 391(1) of the Act and who can move the application under that section was pleased to observe:

"Section 391 enables a member or a creditor of the company or a company which is being wound up, its liquidator, to make an application to the Court proposing a compromise or arrangement between the company and its creditors or any class of them or between the company and its members or any class of them and seeking directions of the Court to convene a meeting of each class of creditors and/or each class of members to whom the compromise or arrangement is offered. On the Court's giving the directions, the meeting would be convened in which the proposed scheme of compromise and/or arrangement would be submitted for consideration and each class will have to vote upon it and if the scheme is accepted by a majority in number representing three-fourths in value of the creditors or members or class of members, as the case may be, present and voting either in person or where proxy is allowed, by proxy, such approved scheme has to be placed before the Court for sanction of the Court as envisaged in Section 391(2)".

19. The Court was further pleased to observe:

"Section 391(1) itself by a specific and positive provision prescribes, who can move an application under it. Only the creditor or member of that company or a liquidator in the case of company being wound up is entitled to move an application proposing a compromise or arrangement. By necessary implication any one other than those specified in the section would not be entitled to move such an application".

20. The second petitioner, who is the propounder for the sanction of scheme of arrangement is neither a member nor a creditor of the company. He has no interest in the affairs of the company. He has only come forward to purchase the assets and liabilities of the company in liquidation by filing an application styled as one u/s 391 of the Act. The first petitioner though a member of the company in liquidation, is not the propounder under the scheme. He is only an intermediary in assisting the second petitioner to purchase the assets of the company in liquidation. Therefore, in my opinion, the petition filed for sanction of scheme of arrangement is not maintainable u/s 391 of the Act.

21. Secondly, before a scheme of arrangement is sanctioned, the Court has to satisfy itself whether the compromise or the scheme of arrangement is real compromise or arrangement for revival of the company in liquidation in the interest of the members and its creditors. In the instant case, as I have already noticed, the secured creditor namely, the State Bank of Mysore, pursuant to a decree obtained by it has sold the plant and machinery of the company in liquidation and the scheme of arrangement nowhere provides how the petitioners are going to revive the company in the absence of plant and machinery and the employees. In fact, the scheme provides for discharge of employees and workmen. It looks to me that the scheme of arrangement is not genuine and bona fide and not in the best interest of the company in liquidation. As I have already observed, the first petitioner, who is a member of the company in liquidation by this petition is only facilitating the second petitioner, who is neither a member nor a creditor of the company to purchase land and building of the company in liquidation for a price. The sanction of the scheme of arrangement sought for by the petitioners is not in the best interest of the company in liquidation and its members and creditors.

22. Therefore, for the reasons stated supra, the request made by the petitioners requires to be rejected. Accordingly, it is rejected. No order as to costs. Ordered accordingly.