

(2019) 03 DEL CK 0222

In the Delhi High Court

Case No : Company Petition No. 516 Of 2012

Mascot Engineering Company Ltd

APPELLANT

Vs

Eastern Medikit Ltd

RESPONDENT

Date of Decision : 20-03-2019

Acts Referred:

Company (Court) Rules, 1959 — Rule 9, 69
Companies Act, 1956 — Section 235, 236, 237, 238, 239, 391, 391(1), 391(1)(a),
391(2), 643

Citation : (2019) 03 DEL CK 0222

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Kunal Sharma, Manik Dogra, Santosh Pandey, Rahul Pandey, S.K. Chaturvedi, Vishnu S. Pillai, Darpan Wadhwa, Nishi Ranjan Singh, Dr.Manmohan Sharma, Manish Kumar, Y.Sarat Chandra, Aditya Madan, A.K. Mishra

Judgement

Jayant Nath, J

CA 1948/2017 & 297/2018

1. CA 1948/2017 is filed under section 391 of the Companies Act praying to recall the winding up order and to approve revival of the company M/s. Eastern Medikit Limited (EML) under the revival scheme. This application is filed by Eastern Medikit Ltd. Employees Welfare Munch (Regd.) The application CA 297/2018 is filed by All Eastern Medikit Employees Union under Rule 9 of the Company (Court) Rules, 1959 seeking to permit the applicant and its' members to clear the dues in terms of the application.

2. This court on 10.5.2013 had admitted the present petition and appointed the Official Liquidator as the Provisional Liquidator.

3. It is the claim of the applicant that the respondent was a solvent company and did not loose its substratum hence winding up order should not have been passed. It is pleaded that in the balance sheets of the company for the period

ended on 31.3.2012 the company was sound and robust. As per balance sheets for the period ending on 31.3.2011 the company was having Reserves of Rs.42 crores against paid up capital of Rs.9.54 crores.

4. It is claimed that keeping in view the above, the applicant has thought it fit to revive the company. The application is supported by EML Workers Trade Union (Registered).

5. The application states various steps to be taken for the revival of the company. The first step spelt out is reduction of share capital and fresh issue of equity shares. It is stated that on coming into effect of this Scheme after reduction of capital of the EML the company shall allot to each existing shareholder of EML one fully paid up equity share of Rs.1 each in EML for every 1 fully paid up equity share of Rs.10 each held by such equity shareholders of EML. Balance shares are sought to be cancelled and extinguished by orders of this court. For fresh capital, dues payable to the employees may be used for purchase of equity shares capital of the company. Based on the above, it is pleaded that the present share capital of Rs.9,53,40,000/- would be reduced to Rs.95,34,000/-. There will be fresh allotment of share to employees and creditors of the company of total shares worth Rs.11,04,66,000/-. Hence, the share capital would be as follows:-

a) PRESENT SHARE CAPITAL 9534000 shares of Rs.10/- each

RUPEES 9,53,40,000

b) REVISED SHARE CAPITAL

i) Present Value per share after reduction of capital by this Hon'ble Court to Rs.1 per share

95,34,000

ii) Fresh allotment to Employees & creditors of the Company Total Share Capital- 12000000 equity shares of Rupee 1/- each.

11,04,66,000

12,00,00,000

6. Regarding generation of funds for working capital it is stated that the properties of the company are plant at Plot No.292, Industrial Area, Gurgaon and plant at Plot No.549 B Sector 37 Industrial Area, Gurgaon. It is claimed that by sale of the said plants/property a sum of Rs.30/35 crores may be generated as working capital to restart production to be carried out by the Ex.Employees/workers. Constitution of a Committee is sought to sell the aforesaid assets at the best prices available.

7. Directions are also sought to the bankers of the respondent company to extend its co-operation for revival of the respondent company.

8. It is also stated that the respondent company has sufficient quantity of raw material to immediately restore its production. Authorisation is also sought from this court to recover various time barred debts which have been created by the previous management. This is the sum and substance of the revival scheme filed.

9. In CA 297/2018 it is stated that the respondent company had employed about 1,127 permanent workers at its 5 units located in Gurgaon. Certain disputes it is pleaded arose with the management which were referred to Conciliation. The Conciliation failed and the matter was referred to the Industrial Tribunal/Labour Court by order dated 1.8.2012. It is stated that subsequently the Labour Commissioner, Haryana has issued 3 different recovery certificates. It is claimed that an amount of Rs.90,70,28,009/-including all recoveries till February 2018 is payable. It is hence prayed that the applicants are ready to pay the alleged dues of the petitioner but this court may withdraw the order dated 10.5.2013 while keeping the entire properties/assets of the respondent company as attached. Thereafter the applicant may be permitted to participate in the day to day affairs of the company including the affairs of relating to disposal of the properties of the the respondent company to meet the claims as noted above.

10. Section 391 of the Companies Act, 1956 reads as follows:-

"391. Power to compromise or make arrangements with creditors and 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 1 under the rules made under section 643], by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be bind- ing 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 a company which is being wound up, on the liquidator and contributories of the company: 2 Provided that no order sanctioning any compromise or arrange- ment shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor' s report on the

accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.]

11. It is quite clear that no order sanctioning any compromise or arrangement shall be made by the court unless the court is satisfied that the applicant has disclosed to the court on affidavit, all materials, latest financial position of the company and the latest audited report from the account of the company. In this context, reference may be had to the judgment of the Allahabad High Court in the case of Premier Motors (P.) Ltd. v. Ashok Tandon & Ors., (1971) 41 Comp. Cases 656, where the court held as follows:

"50. Whatever may be the position under the English law or the law under our own Companies Act before the proviso to Section 391(2) of the Act was added in 1965, it is obvious that, as our law stands today, the initial duty of satisfying the court that all relevant materials, including the latest financial position of the company and the latest auditors' reports and accounts of the company concerned have been placed before the court, so as to enable it to judge where the interests of creditors lie, rests upon the supporters of a scheme. If the court cannot be satisfied that all relevant materials have been placed before the court, it could not be said that such material could be or was actually placed before the unsecured creditors on whose behalf decisions were taken by proxies. It is only after the initial duty laid down by the proviso to Section 391 has been discharged by persons supporting a scheme that the question of considering the effect of decisions of the majority or the weight to be attached to such decisions could arise. The question of onus appears to me, because the material placed before the court actually indicates that a winding-up in each of the two cases is more advantageous to the creditors than the illusory scheme put forward, only to gain time and to prevent further investigation into the way losses have occurred. It follows from this finding that the first two objections of creditors who opposed the scheme in each case are also well founded. It is, however, left to the parties interested to apply for winding-up orders which may be passed after hearing the parties interested specifically on this question in each of the two cases."

12. Similarly, it is also settled law that it is the duty of the court to examine the genuineness and the bona fide of the scheme for itself. The Supreme Court in the case of Chembra Orchard Produce Ltd. & Ors. v. Regional Director of Company Affairs & Anr., (2009) 2 SCC 547, held as follows:

"13. In Sakamari Steel & Alloys Ltd. In (1981) 51 Comp Cas 266 (Bom), the learned Single Judge of the Bombay High Court held that Section 391(1) is not a signpost but a checkpost whereat it is a duty of the Court to examine the genuineness and the bona fides of the scheme for itself. A reading of the above judgment would, therefore, show that at the stage of issuance of summons for directions to convene a meeting, though the Company Judge has to apply his mind, prima facie, on the genuineness of the scheme, basically the entire exercise is to verify whether the numerous conditions prescribed in Rule 69 are satisfied read with Form 33 and Form 34."

13. The Supreme Court in *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1997) 1 SCC 579 held as follows:-

"29.....In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 Sub-Section (2).
3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.
4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391 Sub-section (1).
5. That all the requisite material contemplated by the proviso of Sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.
6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.
7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.
8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.
9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The

Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the courts jurisdiction

14. I may note that this application is filed by an entity whose background is unknown. It is also not clear as to whether it has the support of large number of stated 1127 permanent workers who are working with the respondent company.

15. That apart, it is a mandatory provision spelt out under section 391 of the Companies Act that no order sanctioning any compromise or arrangement shall be made unless the Court is satisfied that the person who has made an application has disclosed to the court all material facts relating to the company such as the latest financial position of the company, the latest auditors report of the accounts of the company, the pendency of any investigations etc. No such relevant information or details or financial statements are forthcoming alongwith the present application.

16. On the bonafide of the petitioner one cannot help noticing that the applicants essentially seek to take over the assets and management of the respondent Company. The scheme envisages reduction of the share capital of the existing shareholders from the value of each share being Rs.10 to Rs.1 per share. It seeks allotment of fresh share capital to the ex. employees and to the creditors to the company so that the said fresh allottees would be the majority shareholders. As noted by the Supreme Court in the above noted judgment of *Miheer H. Mafatlal v. Mafatlal Industries Ltd.(supra)*, for the purpose of ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent purpose underlying the scheme and can judiciously X-ray the same. The Company Court has to satisfy itself that the Members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith.

17. In the present case as noted above, there is nothing to show that the applicant represents the majority of the Ex. workers of the respondent company. He purports to act for and on behalf of a class of creditors, namely, the workers to take over the management of the company. The Scheme seeks to replace the present management by reducing their share capital and allotting shares to the workers/creditors. The scheme can neither be termed to be just, fair or reasonable. The scheme completely lacks bona fide. The applications are dismissed.