

(1983) 12 GUJ CK 0008
In the Gujarat High Court

Mehta Corporation (Private) Ltd. and Others	APPELLANT
Vs	
Rohit Mills Limited	RESPONDENT

Date of Decision : 30-12-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 3, Order 39 Rule 3

Citation : (1984) 1 GLR 713

Hon'ble Judges : S.L. Talati, J

Bench : Single Bench

Judgement

S.L. Talati, J.—This appeal is directed against the order passed by the City Civil Court Judge on 29-12-1983 below Notice of Motion exh. 5 in Civil Suit No. 4511 of 1983. The short facts which gave rise to this appeal may be stated as under.

2. On 29-12-1983 Extraordinary general meeting of the defendant-Company was called and in that meeting several resolutions were proposed to be passed and one of the resolutions was Resolution No. 3. On 22-12-1983 Civil Suit was filed and on that very day Notice of Motion was presented to the Court and an injunction was sought for by which the Court was asked to restrain the defendant from passing Resolution No. 3. Ad interim injunction was obtained on 22-12-1983 which was served on the defendant-Company on 28-12-1983 and an affidavit-in-reply was filed and the Notice of Motion was opposed. Ultimately after hearing both the sides the learned City Civil Court Judge passed an order and vacated the injunction which was already granted. Thereafter this appeal came to be filed in this Court.

3. In the meantime as the stay was vacated the meeting was held and it is an admitted position that the resolution is passed. What is now being urged is that injunction may be given so that the defendant may not implement the resolution which is passed. I have heard the learned advocate Shri Mehta for the appellants and the learned Advocate-General for the defendant at great length. It appears that Rohit Mills Limited is having a division known as R.M. Engineering Works. There is another private limited company which is known as Rajesh Malleables

Pvt. Ltd. Now it is a subsidiary company fully owned by the defendant. The resolution which is under challenge is for the purpose of transferring the assets of R.M. Engineering Works to this subsidiary private limited company. Now the resolution which was proposed to be passed and which is now adopted reads as under:

RESOLVED THAT pursuant to Section 293(1)(a) and other applicable provisions, if any, of the Companies Act, 1956, the consent of the Company be and is hereby accorded to the Board of Directors transferring and assigning the entire Engineering Undertaking of the Company viz. R.M. Engineering Works to its wholly-owned subsidiary company Rajesh Malleables Pvt. Limited on and with effect from the close of business on 30th December, 1983 at or for a consideration equivalent to the aggregate of the written down value of fixed assets including lands and buildings, plant and machinery, deadstock, vehicles etc. computed in accordance with the method prescribed under the Income Tax Act, 1961, cost of stock-in-trade and the book value of the current assets as reduced by the aggregate of all the loans, current liabilities and provisions relating or attributable to the said R.M. Engineering Works and its business and operations as at the close of business on 30th December, 1983 upon the terms and conditions set out in the "Agreement to Sell" proposed to be entered into with Rajesh Malleables Pvt. Ltd., a draft whereof is placed before the meeting and initialled by the Chairman for the purpose of identification.

RESOLVED FURTHER THAT the Board of Directors be and is hereby authorised to sign and execute the said "Agreement to Sell" and to take and perform all such steps, acts, deeds, matters and things as may be necessary, desirable or expedient to give effect to this Resolution including entering into, signing, executing, delivering all agreements, assignments, contracts, deeds, writings and instruments for and in the name of and on behalf of the Company.

4. Under the Companies Act it is necessary that Explanatory Statement is required to be appended and that Explanatory statement in regard to resolution No. 3 is as under:

There has not been any appreciable capital expenditure either for expansion or for modernisation in the Engineering Division of the Company viz. R.M. Engineering Works during the last 15 years. However, intensely competitive market conditions for the Engineering products on the one hand and continually rising labour cost on the other hand have rendered it imperative that the Engineering Division should not only adequately modernise its equipment but also effect a sizeable expansion in its productive capacity in order to achieve economies of scale. Obtaining of finance both long and short term would be facilitated by having a separate corporate entity. Further, instead of a large capital base for both the textile and engineering undertakings, two separate capital bases would give appreciable flexibility in implementing the expansion. Foreign collaboration negotiations presently underway also indicate that a separate entity may be helpful in finalising collaboration, if ultimately decided

upon. Considering various aspects of the matter it is felt that the project of modernisation and large scale expansion of the R.M. Engineering Works could be better undertaken, and implemented if the Engineering Undertaking is run by a separate Corporate body.

5. It is, therefore, proposed that Conipany's Engineering Undertaking viz. R.M. Engineering Works be transferred to Rajesh Malleables Pvt. Limited, a wholly-owned subsidiary of the Company, at a price equal to the aggregate written down value of all its fixed assets computed in accordance with the method prescribed under the Income Tax Act, 1961, stock-in-trade at cost and book value of its current assets as reduced by the aggregate of all the loans, current liabilities and provisions relating in any way or attributable to the said Engineering Undertaking its business and operations as on the close of 30th December, 1983. As the transfer of the Undertaking is to take place from the Holding Company to its wholly-owned subsidiary Company the concept of open market value has no relevance. The transfer of the fixed assets is proposed to be made at the I. Tax WDV on account of the reasons that in view of the very scheme of the I. Tax Act the subsidiary Company could claim depreciation on the fixed assets in future only on the I. Tax WDV of the fixed assets as on 30th December, 1983 and not on any higher value of the said assets. Further, the transfer of assets to a wholly-owned subsidiary is not regarded as a transfer attracting capital gains tax at this stage and later if and when the subsidiary transfers these assets the gain would be computed with reference to the cost of the holding company. Thus for tax purposes the original cost and written down value of assets of the holding company are to be adopted as the original cost and written down value of these assets in the hands of the subsidiary. In these circumstances, it is, therefore, appropriate that the transfer of assets be affected at the I.T. Written Down Values.

6. The transfer of the Engineering Undertaking is proposed to be made on and with effect from the close of its business on 30th December 1983. The net value of the said Engineering Undertaking computed in the manner described hereinabove stood at Rs. 118.82 lacs on 31st December, 1982. As the transfer of the said Engineering Undertaking would take place on 30th December, 1983, the net value of the undertaking on the date of transfer will be arrived at after making adjustments to the extent of additions and/or depletions that might have taken/take place during the intervening period between 31st December, 1982 and 30th December, 1983, and the position of assets and liabilities as on that date. The transfer and assignments of the Engineering Undertaking shall be upon and subject to the terms and conditions contained in the "Agreement to Sell" to be entered into between the Company and the subsidiary.

7. The said Agreement provides inter alia that all rights, assets and liabilities of the Engineering Undertaking shall be transferred to the Subsidiary and the amount of consideration shall be treated as a loan by the Company to the Subsidiary or may be paid out of any loan given by the Company to it or out of

other funds. The Subsidiary will take over all the employees of the Company in its Engineering Undertaking on the same terms and conditions without any break of service. The Subsidiary shall bear all costs, charges, expenses of and incidental to the sale. It is also provided that the amounts apportionable in respect of their Provident Fund, Gratuity and Superannuation accumulations or provisions shall also be got transferred as mentioned therein. The transfer of land and buildings is subject to necessary permission from the authorities under the Urban Land Ceiling and Regulations Act. It is also provided that if both the parties so agree instead of executing a Conveyance Deed in respect of the Land and Buildings, a Permanent/Long-term Lease Deed may be executed and got registered in respect of the land and buildings with an option to the purchaser to buy the same at a later date.

8. Proforma statement of Assets and Liabilities of the Engineering Division viz. R.M. Engineering Works as on 30th December, 1983 proposed to be transferred as well as the draft of the "Agreement to Sell" are open for inspection to the members of the Company at its Registered Office between 11 a. m. and 1 p.m. on any working day of the Company prior to the date of the Extraordinary General Meeting.

9. Name of the Directors of the Company are interested in the proposed resolution except that Shri Rohitbhai Chinubhai may be regarded as concerned or interested so far as he is a Director of the Subsidiary Company.

10. The learned advocate Shri Mehta after reading the resolution and the explanatory statement submitted that there would be double taxation. The reason stated by him is that Rajesh Malleables Pvt. Limited would ultimately benefit and will be able to earn profit and, therefore, would be liable to pay corporate tax and thereafter Rohit Mills Ltd. will have also to pay the corporate tax and this fact is not mentioned in the explanatory statement which is circulated to the members. Another fact which according to him is not mentioned in the explanatory statement is that the market value which according to the learned advocate Shri Mehta must not be less than Rs. 5.0 crores, is not mentioned and the next submission was that the real motive for passing this resolution in this extraordinary meeting was to ultimately manage the two concerns and derive profit by controlling two institutions and it is also likely that new Company might issue shares which would be offered to the existing shareholders and ultimately they might go to the friends and relatives of the Managing Director of Rohit Mills Limited. The learned advocate Shri Mehta submitted that though such real motive was attributed to the defendant, in affidavit-in-reply it is not denied and according to him even at this stage no denial of that nature has come forward. He, thereafter, drew my attention to a case decided by this Court (Coram S.B. Majmudar, J.) on 19-11-1981. The judgment was delivered in Company Petition No. 49 of 1978 with Company Application No. 115 of 1981. Some pages of that judgment were read before me in order to show that what is required by the explanatory statement is not stated

at all and, therefore, the shareholders who ultimately were to decide or seek the judgment at the extraordinary general meeting were not posted with full and correct facts. In absence of such explanatory statement the whole meeting and the proceedings would become void and, therefore, resolution even if adopted would be useless as it would be ab initio void in absence of full and correct explanatory statement and, therefore, it would be a decision by the shareholders without material facts. Having considered the arguments I have to consider as to whether such a situation in fact has arisen or not. Before I go to the question as to whether there was any delay in filing the suit or obtaining the ad-interim relief, I would first like to go to the merits. The reason is that this is a suit filed under the provisions of Order 1, Rule 8 of the CPC and, therefore, if the plaintiffs have good case and prima facie they make out what they say they may not be allowed to fail merely because they went to the Court late. With this aim in view I have gone through the resolution and also the explanatory statement attached. Now the resolution which I have quoted above shows that entire Engineering Undertaking of the Company viz. R.M. Engineering Works is to be transferred to the wholly-owned Subsidiary Company viz. Rajesh Malleables Pvt. Ltd. and the consideration is equivalent to the aggregate of the written down value of fixed assets including lands and buildings, plant and machinery, dead-stock, vehicles, etc. computed in accordance with the method prescribed under the Income Tax Act, 1961. Agreement to Sell which is proposed to be entered into, a draft whereof is already prepared and was placed before the meeting. Now the explanatory statement gives reasons for doing this. The first reason that there is intensive competitive market conditions for the engineering products and the machinery was purchased before 15 years and it required modernisation and, therefore, finance was needed and negotiations with foreign collaboration were underway. The net value of the said Engineering Undertaking is computed in the manner described in the resolution at Rs. 118.82 lacs on 31st December, 1982. Now this is the price which is written down value which is computed in accordance with the method prescribed under the Income Tax Act, 1961. In explanatory statement it is also stated that the draft of the Agreement of Sale was open for inspection to the members of the Company at its registered office between 11 a.m. and 1 p.m. on any working day of the Company prior to the date of Extraordinary General Meeting. It was also made clear that none of the Directors of the Company was interested in the proposed resolution except that Shri Rohitbhai Chinubhai may be regarded as concerned or interested in so far as he is a Director of the Subsidiary Company. Now, therefore, if one reads explanatory statement it is abundantly clear as to what is the purpose of this Extraordinary General Meeting and the resolution in question. It is also made clear as to why a particular method is adopted for the purpose of arriving at a particular figure for which R.M. Engineering Works is required to be transferred. The interest of any of the Directors, if any, is also mentioned.

11. Now, therefore, to say that instead of the written down value it should have been sold at a market value or the market value should have been mentioned, I

would not enter into the area whether that would have been advantageous to R.M. Engineering Works or it would have been required to pay the capital gains in such a situation and the defendant-Company and the shareholders would have been the losers. This is a question which I am not called upon to answer. But one thing is clear that when the assets are transferred at a written down value to a wholly-owned subsidiary company neither Rohit Mills Ltd. nor Rajesh Malleables Pvt. Ltd. are gainers or losers. It is just transfer of the assets by a Company to a wholly-owned Subsidiary Co. putting no one at advantage or disadvantage and if this is done in accordance with the Income Tax Act it cannot be suggested that this is not in the interest of the Shareholders. Now to say that an Engineering concern requires modernisation and more finance and foreign collaboration is not a new thing which is stated for the first time in this resolution. It is required to be mentioned that there appears to be some family dispute and that is clear from the fact that Civil Suit No. 1474 of 1983 was already filed in City Civil Court some time in the month of April, 1983. Now the very resolution which is yesterday passed by the general meeting was to be passed by the Managing Board or the Board of Directors of the Company and that meeting was to be held on 22nd November, 1983. In the suit Notice of Motion was taken out on 21st November, 1983 and injunction could not be got as a result the Board of Directors passed the resolution. Now in that meeting plaintiff No. 2 was present. He was the only person who voted against. Therefore, plaintiff No. 2 did know about this resolution on 22nd November, 1983. The other papers show that this matter was informally discussed in the meeting of the Board of Directors on 7-9-1983. Therefore, plaintiff No. 2 of this suit as far as back knew about this resolution on that date. Thereafter ultimately Extraordinary general meeting was decided to be called and for that purpose a notice was issued and that notice is dated 30-11-1983. It must have been reached within 2-3 days to the shareholders. However, the suit was filed on 22nd December, 1983 and seven days" time was left when the meeting was called. In such a situation if an injunction is granted a difficult situation was likely to be created and that was created in fact. At the time of passing the order on Notice of Motion the learned City Civil Court Judges omitted to follow Order 39 Rule 3 and in particular proviso which was added in 1976 which runs as under:

Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant-

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

12. Apart from the fact that the learned City Civil Court Judge did not follow the proviso contained in Order 39, Rule 3, the plaintiffs also as required by that very proviso - Clause (b) did not file affidavit stating that the copies aforesaid were delivered or sent to the defendant. Now these are the considerations which weighed with the learned City Civil Court Judge because he thought that when the plaintiffs came to the Court for discretionary relief they were not entitled to discretionary relief in a situation of this nature. Such an approach cannot be considered to be an approach which is not legal or proper. But on that count alone I would not have thrown out the prayer of injunction, if I had come to the conclusion that on merits the plaintiffs had a good case. But apart from the fact that plaintiff No. 2 knew about it all the plaintiffs knew about the fact that such resolution is going to be passed atleast by 30th December, 1983 and yet they chose to file the suit on 22nd December, 1983. Apart from that fact reading the resolution it cannot be suggested that the resolution is not beneficial to the defendant-Company. It also cannot be suggested that it is not in the interest of Rajesh Malleables Pvt. Ltd. and as Rajesh Malleables Pvt. Ltd. is a wholly-owned subsidiary it cannot be suggested that the effect of the resolution or the effect of this transfer would be detrimental to the shareholders of Rohit Mills Ltd. The further fact which is required to be noted is that if this resolution which is already adopted is not allowed to be implemented now the apprehensions of the defendant may turn out to be true and they may not be able to get investment allowance. Therefore, the balance of convenience is in favour of the defendant.

13. Now, so far as the motive part is concerned though it is not denied it is to be stated that in affidavit-in-reply in general terms there is denial of all facts stated in the application. It may be that the denial is required to be specific. It could be suggested that there was not much time but even if there was time the motive is a thing which cannot be judged at this stage. It may be an idea to do a particular thing on the basis that the textile unit may not be run with good profit and an engineering works may be run with profit. This may be so looking to the present market conditions. Ultimately, when the Company decides at all to issue new share capital no one knows as to what the correct situation in regard to different industries would be. Therefore, it is only an apprehension and the share capital cannot be increased suddenly or by whims of any person. It requires again a resolution. Again it requires so many formalities which are required to be undergone and ultimately the consent of the Controller, Capital Issues also would become necessary and there would" be ample opportunity for all concerned to rethink on the subject. Therefore, on mere apprehension or motive which are only alleged one cannot come to the conclusion that the apprehension will come true and the shareholders would be put to disadvantage. The taxation problem

which is being highlighted is also a variable factor and no one can predict about the loss of profit. In a situation of this nature if the discretionary relief is not granted by the learned City Civil Court Judge, I do not think that any good case is made out for interference.

In the result this appeal is dismissed. There will be no order as to costs.