

(2002) 04 DEL CK 0178

In the Delhi High Court

Case No : CA 396 of 2002 in CA 797 of 2000

ModiLuft Ltd.

Date of Decision : 17-04-2002

Acts Referred:

Companies Act, 1956 — Section 391(1), 391(6)

Citation : (2002) 04 DEL CK 0178

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : A.N. Haksar and S.S. Mahmood, for the Appellant; Rajiv Sawhney and Neeraj Sharma, for the Respondent

Judgement

Mukul Mudgal, J.—This is an application u/s 391(6) of the Companies Act (hereinafter referred to as the Act) seeking an order similar to that passed by Madan Lokur, J. of this Court on 31st December 2001. By the said order it was directed as under:

"..... Under the circumstances, in exercise of powers granted by Section 391(6) of the Companies Act, 1956, I stay further proceedings in Suit No 1221/2001 pending before the learned Civil Judge, Ghaziabad until further orders in this application.

Consequently, the order dated 26th December, 2001 passed by the learned Civil Judge, Ghaziabad is also stayed.

It is made clear that the respondent (M/s Modiluft Ltd.) is entitled notwithstanding nay order passed by any court subordinate to any High Court in the country....."

2. Dr. A.M. Singhvi and thereafter Mr. A.N. Haksar, learned senior counsel appearing on behalf of the applicant have contended the following grounds in support of the protective order sought for the Annual General Meeting summoned for 18th April 2002:

a) there is an earlier instance where the meeting called for on 31st December

2001 was sought to be impeded by the injunction granted by the Civil Judge, Ghaziabad by a share holder holding only 2,600 shares.

b) The meeting seeks the approval of the shareholders of the Annual Accounts prepared by the statutory auditors which details the steps taken by the Company towards complying with the conditions of the No Objection Certificate given by the Ministry of Civil Aviation and settlement of dues of Government creditors;

c) the auditor's report is critical in determining the liability of the Company towards its various creditors and is thus of vital importance for the sanction of the scheme.

3. This application also seeks the appointment of a retired Judge of this Court to preside as Chairman for the meeting convened for 18th April 2002.

4. Mr. Rajiv Sawhney, the learned Senior Counsel appearing on behalf of the non applicant has raised a preliminary plea that an application u/s 391(6) of the Act is not maintainable as the original application u/s 391(1) i.e. CA 797/2000 was filed in the year 2000 and no orders having been passed u/s 391(1) the recourse to Section 391(1) in the year 2002 was without jurisdiction. He submitted that one could not merely file an application u/s 391(1) of the Act and without obtaining any substantive order thereon, use such an application as a springboard for applications u/s 391(6). He placed reliance on a judgment of the learned Single Judge of Bombay High Court in Sakamari Steel & Alloys Ltd. reported as 1981(51) Comp Cas 266 to contend that the present application was not maintainable. In particular reliance was placed on the following two passages from the above judgment:

"..... The willingness on the part of a majority in number representing three-fourths in value does not affect the jurisdiction of the court to grant sanction simply because three fourths in value have accepted the scheme. The court has still to consider the circumstances before giving its approval, though the fact that three fourths in value have agreed to accept the scheme would be a strong circumstance in favor of sanctioning the scheme by the court. The scope of inquiry by the court cannot be laid down by any rigid principles or formulate or on the basis of judicial decisions. The circumstances to be taken into account would vary from case to case. Some of the outstanding circumstances are:

(a) the proposal for the scheme was made in good faith,

(b) the scheme is fair and reasonable,

(c) the scheme will yield to a smooth and satisfactory working.

(d) the scheme does not offend public or commercial morality.

(e) the scheme is not detrimental to the interests of the creditors or members or public interest;

(f) the scheme does not violate the Companies (Acceptance of Deposits Rules

1975, of nullifies the protection afforded under these Rules.

Thus the trend of the judicial decisions shows that the court must examine the scheme on its own merits and it not bound to treat the scheme as a fait accompli. In doing so, the court would not be substituting its judgment for the commercial judgment, as it is often argued."

"..... Turning to the other judge's summons u/s 391(6) for stay of the sale by SICOM and Bank of Maharashtra and the commencement or continuation of any suit or proceeding against the company, these summons are bound to fail as I have refused to grant directions u/s 391(1). Order u/s 391(1) is a condition precedent to the making of the completion of the sale by SICOM and Bank of Maharashtra. Now, what is done by them is realisation of their securities under their respective mortgage and/or hypothecation. They have not brought any suit or adopted any proceedings nor any proceedings are pending which could be stayed. This could be done only by way of injunction against them. I think that there is no power under. 391(6) to issue an injunction....."

5. On merits of this application he contended that no order as sought be passed as the very summoning of the meeting was the subject matter of the challenge in suit No. 820 of 2002 wherein on 15th April 2002 the learned single Judge of this Court while declining to grant the injunction restraining the holding of the meeting on 18th April 2002 had directed that the meeting if held will be subject to orders in the said suit. He further relied on the pendency of suit No. 1961/2001 filed by the respondent wherein a Declaration about the legality of the constitution of the body of shareholders and the Board of Directors was sought. In the said suit by an is an earlier meeting dated 31st December 2001 was sought to be injuncted and orders similar to those passed on 15th April 2002 had been passed i.e. the meeting being made subject to orders in the suit. He contended that since the legality of the meeting itself was under challenge in a suit on the original side before this Court no orders may be passed which and affect the aforesaid two suits. He further submitted that there was no co-relation between CA 797/2000 i.e. the original application u/s 391 and the present application.

6. In reply Mr. Haksar the learned counsel for the applicant submitted that the precondition for the application u/s 391(1) to be maintainable was the pendency of an application u/s 391(1) and not necessarily an order u/s 391(1) sanctioning the scheme as contended by Shri Sawhney. He further submitted that in any event the order of the Company Judge dated 23rd November 2001 clearly demonstrated that a substantive order had been passed u/s 391(1) after application of mind by the learned Judge and the application u/s 391(1) was not a mock application. He further submitted that the approval of the statutory report sought in the meeting on 18th April 2002 had a direct connection with the scheme propounded u/s 391(1) as the liability to the creditors was to be determined.

7. In so far as the preliminary plea of the counsel for the non applicant Shri Sawhney is concerned, Section 391(1) of the Act reads as under:

391. Power to compromise or make arrangements with creditors and member -

(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 any 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 or members, as the case may be to be called, held and conducted in such manner as the court directs....."

8. The above provisions make it clear that a sine qua non for the maintainability of an application u/s 391(6) of the Act is the pendency of an application u/s 391(1) of the Act. In the present case it is not in dispute that the application u/s 391(1) of the Act is pending and thus application u/s 391(6) is, Therefore, maintainable. The judgment of the Bombay High Court in Sakamari Steel (supra), cited by Mr. Sawhney, is inapplicable as in the case before the Bombay High Court relief u/s 391(6) was declined on the ground that the prayer u/s 391(1) of the Act stood rejected. There is no rejection of the reliefs claimed in the application u/s 391(1) in the present case and on the contrary the order dated 23rd November 2001 of this Court shows that the scheme is receiving active consideration. Consequently, Mr. Sawhney's plea about the application u/s 391(1) of the Act being dormant and ineffective cannot be accepted.

9. Furthermore, insofar as the plea of the effect of the civil suit pending in this Court, where reliefs such as constitution of the Board of Directors and shareholders and the efficacy and legality of the meetings dated 31st December 2001 and the proposed meeting dated 18th April 2002 is concerned, the validity of such pleas is under determination in those suits pending in this Court. I am, Therefore neither required to nor propose to express any views on the legality of the meeting dated 18th April 2002. However, an order u/s 391(6), similar to that passed on 31st December, 2001, cannot be said to be impeding such suits and the orders passed in such suits. Furthermore, the order u/s 391(6) qua the meeting of 31st December 2001 was not challenged in appeal and a similar order cannot cause any prejudice to the non applicant. There is also a past history in this case of injunction obtained at the eleventh hour against holding of the meeting dated 31st December 2001. I consequently hold this application u/s 391(1) of the Act to be maintainable and reject the preliminary objection of Mr. Sawhney.

10. However, insofar as the plea about appointment of an independent Chairman of the proposed meeting on 18th April 2002 such as a retired Judge of this Court, there is substance in the plea of Mr. Sawhney that this may put an imprimatur of

this Court dated 18th April 2002 which is the subject matter of civil suit No. 820 of 2002 on the original side is concerned.

11. I am, Therefore, not accepted the prayer of the applicant so far as the appointment of an independent Chairman is concerned.

12. In view of the foregoing discussions and taking into account the previous order of this Court dated 31st December 2001, I am of the view that the order u/s 391(6) of the Act would meet with the ends of justice. Accordingly, it is directed that the applicant is entitled to go ahead with its meeting notwithstanding any order passed by any court subordinate to any High Court in the Country.

13. A copy of the order be given dusty under the signatures of the court master to both the parties.