

(1993) 02 KAR CK 0011

In the Karnataka High Court

Case No : Original Side Appeals No's. 1, 3 to 5 of 1989

Mysore Electro Chemical Works Ltd.

APPELLANT

Vs

G.K. Parmashiv and others

RESPONDENT

Date of Decision : 10-02-1993

Acts Referred:

Companies Act, 1956 — Section 392

Citation : (1993) 76 CompCas 130 : (1993) ILR (Kar) 1051 : (1993) 1 KarLJ 577

Hon'ble Judges : M.M. Mirdhe, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : A.G. Holla, for the Appellant; M.S. Purushothama Rao and R.J. Babu, for the Respondent

Judgement

K. Shivashankar Bhat, J.—In all these appeals, the appellant-company has questioned the order of the learned company judge directing the appellant to pay interest at 6 per cent. per annum on the amount due by the appellant to its creditors, from the respective dates of the applications filed in the company court.

2. There was a winding-up proceeding against the appellant-company. A scheme was formulated in the said proceedings. The said scheme was sanctioned by this court on April 13, 1973. Under the terms of this scheme, unsecured creditors were to be paid as follows :

"The scheme envisages two alternatives in so far as the unsecured creditors are concerned. They are to be found in annexure "D" of the scheme. An unsecured creditor is given option to accept 50 per cent. of the amount due from the company within three months of the date of commencement of the production in full and final settlement of their dues or to accept payment of the full amount due and payable from the company without interest in four equal instalments of 25 per cent. each payable as under :

- (i) 25 per cent. payable within three months of the commencement of production;
- (ii) 25 per cent. payable within 12 months after the first instalment;

- (iii) 25 per cent. payable within 12 months after the second instalment;
- (iv) 25 per cent. payable within 12 months after the third instalment."

3. The order of this court also stated that these directions were reasonable and they shall form part of the scheme. In view of the order approving the scheme, the winding-up proceedings were permanently stayed and the company was taken out of liquidation proceedings. All contracts entered into by the company prior to the order of winding-up except those dealt with in the order of the court sanctioning the scheme, were discharged. There is no dispute that the respondents in these appeals were the unsecured creditors. They had to be paid 50 per cent. of their debt under the scheme and the said payment had to be made in four instalments as stated above.

4. In O. S. A. No. 1 of 1989, the company has questioned the status of the respondent and denied that the respondent was a creditor. However, during the course of the hearing of these appeals, learned counsel for the appellant-company concentrated on the question of payability of interest only.

5. Since certain payments were not made in terms of the scheme, the creditors approached the company court by filing petitions u/s 392 of the Companies Act, 1956 ("the Act" for short), read with rule 9 of the Companies (Court) Rules, 1959. They sought a direction to the company to make the payment with interest thereon at the rate of 15 per cent. per annum from November 5, 1975, till the date of payment in terms of the scheme referred to above. They further prayed that in the event of the company failing to make payment, this court may hold the said scheme having not worked satisfactorily and, therefore, make an order winding-up the company. The company contended that its liability stood suspended between the period October 7, 1977, to October 6, 1987, in view of the provisions of the Karnataka Relief Undertakings (Special Provisions) Act, 1977 (for short "the Karnataka Act"), and the notifications issued thereunder. Thereafter, there was a notification on July 17, 1989, issued by the Central Government under the Industrial Reconstruction Bank of India Act, 1984 (for short "the Central Act"). Under the said Act, there was a moratorium for two years and subsequently a scheme was approved by the Central Government governing the company on March 5, 1991, and the said scheme was approved by this court on August 14, 1992. In these circumstances, it was contended as follows :

(1) The scheme of reconstruction sanctioned by this court nowhere provides for the payment of interest to the unsecured creditors and, therefore, the company was not liable to pay any interest. In other words, the scheme had denied any interest on the amount payable by the company to the unsecured creditors. The scheme is a judgment and it should be enforced or executed only according to its terms.

(2) During the period of moratorium all liabilities of the company stood suspended and, therefore, no interest could be charged on the unenforceable

liability, because there was no debt at all in existence during the said period.

6. The learned company judge held that the company having failed to make the payment in terms of the scheme, is not entitled to take shelter under the said scheme. The claim now made against the company goes out of the scheme and, therefore, denial of interest under the scheme is not relevant. It was further held that the company was the purchaser of goods from the creditors and, therefore, it was liable to pay interest under the provisions of the Sale of Goods Act. The said principle could be attracted by way of equity and consequently a direction was issued to pay interest from the date of the application. The learned company judge also held that the company failed to point out the scheme approved by the Central Government and as to how under the said scheme the company is not liable to pay any interest.

7. Sri A. G. Holla, learned counsel for the appellant-company, reiterated the contentions advanced before the learned company judge. In support of the first contention, a decision of the Calcutta High Court in Krishna Nath Sen, Secy. and Treasurer, Dinajpur Arya "Pustakagar" Library Vs. Dinajpur Loan Office Ltd., was cited. A Bench of the Calcutta High Court held that a scheme of arrangement sanctioned by the court has the force of a judicial pronouncement and that the executing court cannot go behind the sanction. Thereafter, it was pointed out that the scheme has statutory force and, therefore, only the terms of the scheme could be enforced and nothing else, by citing J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, . Learned counsel also contended that the scheme is an alternative mode of winding-up, as observed by a learned single judge of this court in Narayandas Ramakrishna Karwa v. V. P. Kittur [1969] 2 Mys LJ 365 at page 372. It was observed therein that a scheme successfully put through, will discharge the company of all its liabilities existing on the date of winding-up.

8. By referring to Harinagar Sugar Mills Ltd. Vs. M.W. Pradhan, , it was pointed out that winding-up proceedings are nothing but an equitable execution. It is a mode of enforcing payment of a just debt; it is a mode of execution which the court gives to a creditor against a company unable to pay its debts. If winding up is nothing but execution, it was contended that the executing court cannot award interest. For this proposition, again learned counsel relied on State of Punjab and others Vs. Krishan Dayal Sharma,

9. There can be no doubt that sanctioning of the scheme is the result of a judicial verdict. But the manner in which the scheme is to be worked out and enforced are governed by the provisions of the Act. Similarly, the powers of the company court in the course of winding-up cannot be limited to the powers of an executing court, executing an ordinary civil decree. The scope of the court's powers while dealing with a winding-up proceeding is quite wide and an element of public interest is involved in the exercise of its powers because the court is not concerned only with the particular persons before the court in winding-up proceedings. The purpose of framing a scheme has been pointed out and the

scope of the court's power also found in the aforesaid decision of this court In Narayandas Ramakrishna Karwa v. V. P. Kittur [1969] 2 Mys LJ 365, the learned judge has observed thus (at page 372) :

"As pointed out by Vaughan Williams J. in London Chartered Bank of Australia, In re [1893] 3 Ch 540, a scheme of arrangement pronounced during the pendency of proceedings to wind up a company is an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for the pending winding up in the same way as the Law of Bankruptcy allows the creditors of an insolvent to substitute for the statutory liquidation of his affairs an arrangement or a composition arrived at on a common understanding or agreement between the insolvent and his creditors. A scheme successfully put through will discharge the company of all its liabilities existing on the date of winding up in the same way as distribution of its assets by the winding up court extinguishes those liabilities. On the presentation of a petition to wind up a company, the court has the power to order stay of all proceedings instituted against the company for the recovery of debts due by it or for the enforcement of its liabilities. When an order to wind up a company is actually made, the order itself operates as stay of all such proceedings and confines the enforcement of all liabilities of the company to the proceedings in the winding up. Because a scheme propounded in the course of winding up is an alternative mode of liquidation which the law allows the creditors to substitute for a winding up under orders of court, one of the necessary consequences of this legal position is that the order sanctioning a scheme operates or must be held to operate as a stay of the winding up proceedings except so far as may be necessary for carrying out the scheme of arrangement. Until therefore, the court which sanctions a scheme in the course of a winding up finds that the scheme sanctioned by it has been successfully and finally carried out and expressly puts an end to the winding up either by declaring that the winding up application do stand dismissed or by setting aside the order of the winding up if one had already been made or until on being satisfied that the scheme cannot be successfully worked out with or without modifications, makes an order winding up the company or directs the working out of an order of winding up if already made, it must be held that the court sanctioning the scheme retains supervision over the working out of the scheme and the power to give necessary and appropriate directions which alone are binding on the company in that situation. In fact such directions are quite essential because in the anomalous situation which the company occupies, it cannot be said that it is governed by the provisions of the statute which apply to a company whose affairs are being managed in the normal way or by the provisions of the statute which apply to a company whose affairs are being wound up. In giving these directions, the court will no doubt have regard to the desirability of conducting affairs in a manner approximating as far as possible to the normal way in which affairs of companies are managed under the statute and so as not to injure or prejudice the rights of persons interested in the reconstitution and the normal working of the company."

10. In S.K. Gupta and Another Vs. K.P. Jain and Another, the Supreme Court pointed out that the winding up of a company is an extreme step because it results in the civil death of the company and, therefore, a living workable scheme infusing life into a sick unit is generally to be preferred to the civil death of the company. As to the power of the court u/s 392 which is a supplement to the power of the court in respect of the scheme framed u/s 391, the Supreme Court has observed as follows :

"Parliament has, in its wisdom, conferred a power of wide amplitude on the High Court in India to provide for its continuous supervision of the carrying out of compromise and/or arrangement and also the consequential power to make the supervision effective by removing the hitches, obstacles or impediments in the working of compromise or arrangement by conferring power to give such directions in regard to any matter or for making such modification in the compromise or arrangement as it may consider necessary for the proper working of the compromise and/or arrangement."

11. In Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others, the Supreme Court has pointed out that any default on the part of the company in carrying out its obligation under the scheme by itself without anything more would revive the winding up order. Therefore, the winding up order was effectively subsisting but inoperative for the time being, having all the potentiality of being rejuvenated or being brought back to life. The proceedings before us commenced with an application u/s 392 of the Act. The relevant part of the said provision reads thus :

"392. (1) Where a High Court makes an order u/s 391 sanctioning a compromise or an arrangement in respect of a company, it -

(a) shall have power to supervise the carrying out of the compromise or arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such direction in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement."

12. Learned counsel for the creditors pointed out that under clause (b) referred to above, the court has always the power to give such directions in regard to any matter or make such modifications in the compromise or arrangement as the court may consider necessary for the proper working of the compromise or arrangement. In other words, if there is any difficulty in the working of the scheme in question, the same can be solved by resort to the court u/s 392 of the Act and the court may issue an appropriate direction in that regard. In view of this specific provision found in the Act, the submission of learned counsel for the appellant that the scheme is a judicial pronouncement which could be enforced only according to the language employed in the scheme does not survive. The purpose of the scheme is to save the company from its civil death. When a scheme has been sanctioned by the court and the company survives

because of the scheme, the persons who are entitled to certain benefits or entitled to certain rights under the scheme certainly could approach the court u/s 392 of the Act to seek appropriate direction from the court when the scheme has not been worked out satisfactorily in the manner envisaged touching their rights. In the instant case, the company did not make the payments as provided for in the scheme. This has affected the rights of the creditors. The scheme is silent as to how the payments could be enforced. No doubt, winding-up is one of the modes provided for in the Act. In fact, winding-up also is contemplated u/s 392(2) of the Act. The creditors have invoked the said jurisdiction. In such a situation, it cannot be held that the court is without any competence to grant any equitable relief to the creditors who were earlier denied an immediate payment from the company.

13. It is also not possible to accept the contention that the interest is not payable for the period when there was a moratorium under the Karnataka Act. Section 5 of the said Act states that the liabilities of the sick industry are suspended during the period in question. However, when the notification ceases to have any effect, any right, privilege, obligation or liability so suspended or modified shall revive and be enforceable as if the notification had never been issued. Full effect should be given to the words used in section 5(a) of the Karnataka Act. When the notification applying the Act ceases to have any effect, the liability of the sick industry is enforceable as if the notification had never been issued. In other words, the eclipse is removed and liability with all its vigour be fully operative. If the notification had never been issued, the liability of the company would have been there from the very beginning. That fact cannot be ignored by the court while interpreting section 5 of the Karnataka Act. If so, when the liability is sought to be enforced, it will have to be held that the liability existed all along, but its enforcement only was postponed.

14. The only question that survives, therefore, is whether the company court could have directed the payment of interest. The language of section 392(1)(b) of the Act looks to us to be quite wide and vests an equitable power in the court to be exercised appropriately depending upon the circumstances of the case. When a creditor has been deprived of the possession of the money due to him, it is equitable that he should be compensated by an appropriate interest for the said period. The learned company judge had relied upon the decision of the Supreme Court in *National Insurance Co. Ltd., Calcutta Vs. Life Insurance Corporation of India*, , and held that the court had such a power in equity. We are in full agreement with the said view taken by the learned company judge.

15. The court has awarded interest only from the date of the application and that too at the rate of 6 per cent. per annum. No principle of equity would deny such an interest payable to the creditor. Consequently, we find no merit in these appeals. They are, accordingly, dismissed.