
(2013) 11 KL CK 0064
In the High Court Of Kerala
Case No : Com. P. No. 41 of 2009

N. Vijayakumar

APPELLANT

Vs

Business India Builders and Developers Ltd. and Others

RESPONDENT

Date of Decision : 21-11-2013

Acts Referred:

Citation : (2014) 1 KLJ 75

Hon'ble Judges : V. Chitambaresh, J

Bench : Single Bench

Judgement

V. Chitambaresh, J.—A conjoint effort to complete a half constructed multi storied apartment complex in the heart of Ernakulam Town meets opposition from a few disgruntled. Nevertheless the effort backed by a Compromise Scheme is lauded and approved in the larger interest of the public who include depositors.

2. Three Company Petitions were originally filed to wind up three companies by one of its erstwhile Directors under Sections 433(d) and (f) of the Companies Act, 1956 ("the Act 1 for short) and the details are as follows:-

- i) C.P. 41/2009 - M/s. Business India Builders and Developers Ltd.
- ii) C.P. 42/2009 - M/s. Business India Shares and Insurances Pvt. Ltd.
- iii) C.P. 52/2009 - M/s. Business India Commercial Hire Purchase India Ltd.

The three Companies aforesaid had collected money from the public during the years 2002-2005 in the name "Business India Group" and failed to repay the same with interest as promised paying the way for several litigations. The only Company which had assets is M/s. Business India Builders and Developers Ltd. and the main asset is 197 cents of land in Survey Nos. 172/03, 175/10, 172/04, 172/05 C hand 107/2 of Edappally Village. Two towers comprising of residential apartments were proposed to be constructed by M/s. Business India Builders and Developers Ltd. and the structural work of one tower is complete. The construction work lagged due to paucity of funds when another Company by

name M/s. Green City Heritage Pvt. Ltd. came forward to invest in the venture. M/s. Business India Builders and Developers Ltd. and M/s. Green City Heritage Pvt. Ltd. are referred to as "the Builder" and "the Proposer" respectively for the sake of brevity hereinafter.

3. The then Chairman of the Builder Mr. M.G. John initially signed an agreement with the Proposer on 30.10.2007 in his personal capacity and ratified it on behalf of the Company by a supplementary agreement dated 16.02.2009. The salient features of the agreement are as follows:-

- i) 30% of the total super built up area of the apartments along with the undivided portion of the land would be allotted to the Builder and the remaining 70% would be allotted to the Proposer.
- ii) A plot of land (29.5 cents) lying adjacent additionally purchased by the proposer can also be utilised for the venture enabling more apartments to be constructed as per the floor area ratio.

New Board of Directors assumed charge in the Company of the Builder on 4.2.2010 and the proposer filed C.A. No. 914/2010 in C.P. No. 41/2009 proposing a scheme of arrangement in terms of the agreement supra u/s 391 of the Act.

4. Several of the public who deposited money in the name "Business India Group" had by then instituted many civil and criminal proceedings and even obtained orders of attachment of the 197 cents of land afore-described. The proposer felt that not only the creditors of the Builder but also the creditors of the "Business India Group" should be paid their dues to the extent possible before continuing the venture. A compromise agreement was accordingly entered into on 24.5.2011 between (i) the Builder (ii) Business India Commercial Hire Purchase India Ltd. (iii) Business India Shares and Insurance Pvt. Ltd. and (iv) the Proposer. Two other associations of creditors of the Company by name Business India Investors Forum and Business India Settlement Trust also joined the compromise agreement. Accordingly C.A. No. 914/2010 filed on the basis of the agreement dated 16.2.2009 was withdrawn and C.A. No. 340/2011 was filed proposing the new scheme of arrangement. The signatories to the compromise agreement concurred that 30% of the super built up area available to the Builder could be utilised to settle the dues of the creditors of the "Business India Group". This was a conscious move since there was no Company by name "Business India Group" even though deposit receipts had been so issued to the various investors across the Country. Moreover neither the Business India Commercial Hire Purchase India Ltd. nor the Business India Shares and Insurance Pvt. Ltd. had any assets whatsoever to be proceeded against by the depositors.

5. The salient features of the compromise agreement dated 24.5.2011 to which Business India Investors Forum (represented by one Mr. S.R. Kalyanakrisnan) is also a party are as follows:-

- i) The first tower (Tower B) of the Project shall be completed within 8 months of

accepting the scheme of compromise by this Court and on lifting the orders of attachment and injunction in respect of the property. This however would not cover the completion of common facilities for the twin towers such as Club House, Swimming Pool, Landscape Garden, Health Centre etc.

ii) The Proposer on completion of the first tower (Tower B) shall hand over possession of 30% of the total super built up area of 33705 square feet in that tower to the Builder. The additional area if any procured as per the revised floor area ratio would also be apportioned as per the (compromise agreement dated 24.5.2011). The additional area so obtained would also be allotted to the share of the builder in Tower B so that the 30% could be carved out from one tower only and would lie compact.

6. Mr. M.G. John who was the erstwhile Chairman of the Builder agreed to cooperate with the scheme of arrangement and obtained a stay of all the criminal cases pending against him on that score. But he surreptitiously sold 27.338 cents of land that stood in his name and which formed an integral part of the project to another person by name Mohammed thus blocking the access from the road on the east. There is a suit pending as O.S. No. 344/2009 on the file of the Court of the Subordinate Judge of Ernakulam to cancel the sale which however need not deter any one from pursuing the scheme. This is because the Proposer has made available 29.5 cents of land additionally purchased by it for the project which could be used as an access to the property from the road on the south. It is now conceded by the Proposer and the Builder that the said extent of 27.338 cents of land sold to Mr. Mohammed can be excluded from the project and substituted by 29.5 cents of land additionally purchased. An Advocate Commissioner was accordingly appointed who after the perusal of the available records and paper publication identified about 2555 creditors in total. The Advocate Commissioner as the Chairman convened a meeting of the creditors which included that of the Builder and also that of the "Business India Group" who could at best be termed as beneficiaries of the scheme. The Proposer had initially contended that only the creditors of the Builder could participate or vote in such a meeting as enjoined u/s 391 of the Act. But this contention was vehemently opposed by the two associations of creditors on the premise that the entire debt including that of "Business India Group" has been undertaken to be repaid in the compromise agreement. The Company Court opined that all of them have been recognised as creditors of the Builder and hence entitled to vote in the meeting presided by the Advocate Commissioner as Chairman by order dated 3.8.2012 on his report. This order was also affirmed by judgment dated 17.10.2012 in Company Appeal No. 14/2012 by the Division Bench filed by the said Mr. S.R. Kalyana krishnan and another in their personal capacity. It is intriguing as to how Mr. S.R. Kalyana krishnan said to be representing an association of creditors earlier could file an appeal in an individual capacity without resigning from the association. It is equally baffling as to how Mr. S.R. Kalayana krishnan could adopt a stand in appeal as regards the creditors which is diametrically opposite to the one pursued by him before the Company Court.

7. The Advocate Commissioner chaired the meeting of the shareholders of the Company held at Ernakulam on 18.10.2012 and the meeting of the creditors of the Company held at Chengannur on 20.10.2012. The scheme propounded by the Proposer was styled as "Scheme A" and the scheme propounded by one Mr. N.G. Samuel (a close associate of Mr. M.G. John) was styled as "Scheme B". The following was the voting pattern of the creditors of the Builder.

The following was the voting pattern of the Share holders of the Builder:-

It is discernible from the above that the total value of votes cast in favour of Scheme A amounts to Rs. 4,47,55,181/- which constitutes 82.69% as the percentage of votes and 93.47% as the percentage of the value of votes. Similarly the value of votes cast in favour of Scheme B amounts to Rs. 4,50,000/- which constitutes 1.92% as the percentage of votes and 0.94% as the percentage of the value of votes. There is an overwhelming support for Scheme A in preference to Scheme B even if the number of creditors or the total value of votes of the creditors of the Builder alone is reckoned as per the proceedings.

8. It is beyond any pale of doubt that the scheme propounded by the Proposer has secured requisite majority as contemplated u/s 391 of the Act read with Rule 77 of the Company (Court) Rules, 1959 ("the Rules" for short). Publication was effected in the Malayala Manorama and the Indian Express Dailies inviting objections if any against the sanctioning of the Scheme as contemplated under Rule 80 of the Rules. Notice was also simultaneously taken to the Regional Director, Ministry of Corporate Affairs (Southern Region), Chennai on whose behalf has the Registrar of Companies, Kerala has submitted a report approving the Scheme. The further question is as to whether the Scheme approved by the majority of the creditors and share holders of the Builder could be sanctioned u/s 391 of the Act. It may also be incidentally noticed that the Proposer has filed Company Petition No. 42/2012 in addition to filing C.A. No. 340/2011 in C.P. No. 41/2009 for sanctioning the Scheme. Similarly the Builder has also filed C.P. No. 5/2013 for sanctioning the Scheme wherein separate notice or publication was dispensed with in view of the formalities done in C.A. No. 340/2011. A disposal of C.A. No. 340/2011 in C.P. No. 41/2009 wherein all the procedural formalities have been complied with would effectively dispose of all the other Company Petitions as well. The sole disgruntled objector who put up vociferous arguments against the sanctioning of the Scheme is Mr. S.R. Kalyana krishnan who surprisingly was a signatory to the compromise agreement. It is extremely doubtful as to whether Mr. S.R. Kalyana krishnan still enjoys the support of Business India Investors Forum since a sizable-number of its members now supports the Scheme. This is apparent from the fact that a different counsel appearing for such members concede, to the sanctioning of the Scheme in conflict with the stand of Mr. S.R. Kalyana krishnan.

9. The objections of Mr. S.R. Kalyana krishnan in sanctioning the Scheme are as follows:-

- i) The compromise agreement is vitiated by fraud in as much as the details of assets and liabilities are false and manipulated.
- ii) There is a liability thereunder for the Builder to refund Rs. 3 crores to the Proposer on completion of the project about which details are absent.
- iii) C.P. No. 42/2012 is liable to be dismissed in the absence of an affidavit disclosing the latest financial position, auditor's report etc. as enjoined u/s 391(2) of the Act.
- iv) The bona fides of the Scheme is suspect in as much as the only intention is to terminate the criminal proceedings and defraud the creditors after imposing the Scheme on the unwilling.
- v) There has been no identification of the genuine creditors in as much as even the creditors of "Business India Chits" which is a Partnership Firm have been roped in as creditors of "Business India Group".
- vi) The Scheme is intended to cover, up the misdeeds of the Directors who have illegally collected deposits from the public in violation of Section 58A of the Act and the Directives of the Reserve Bank of India.

10. I am conscious of the fact that the Company Court has not merely to go by the ipse dixit of the majority of the share holders or creditors but has also to consider the pros and cons of the scheme with a view to find, out whether it is fair and just. The Scheme should not also offend any provisions of law or violate any public policy and the fact that it binds even the dissenting minority of creditors or share holders shall be borne in mind by the Company Court while granting sanction. Nevertheless the Company Court cannot sit in judgment over the informed view of the parties and act as a court of appeal and undertake to scrutinise the Scheme with a view to find out whether a better Scheme could have been adopted. It does not however mean that the Company Court has to be act merely as a rubber stamp and give its imprimatur automatically whenever a Scheme is put forth for approval. The broad contours of the jurisdiction of the Company Court to grant sanction to a Scheme in terms of Section 391 of the Act" has been delineated in *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.,* .

They are the following:-

- 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 meetings concerned 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 materials indicated by Section 393(1)(a) is placed before the voters at the meetings concerned 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 applicant concerned 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 the same class whom they purported to represent.

8) That the scheme as a whole is also found 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.

11. I find that the statutory procedure for convening the requisite meetings u/s 391(1)(a) of the Act have been complied with and that the Scheme put up for sanction is backed up by the requisite majority. All the creditors and share holders had the relevant material to arrive at an informed decision for approving the Scheme and that the same is just and fair to the class as a whole. The sanctioning of the Scheme would result in the creditors of the entire "Business India Group" including that of the Builder to get repayment of the money due at least partially. I alertly note that neither the "Business India Group" nor the following companies have any asset to enable the creditors to proceed against the same for realisation of their dues:-

i) Business India Commercial Hire Purchase India Ltd.

ii) Business India Shares and Insurance Pvt. Ltd.

Only the Builder has a property left that too a partially constructed residential apartment complex which can be sold in open market only after the same is completed for which money has necessarily to be pumped in. What is more disquieting is the fact that many decrees of civil court are unable to be executed for want of realisable assets of the company and the right of many of the creditors have become barred by limitation too. Even the creditors of the Builder have with their open eyes supported the Scheme unequivocally for want of any other alternative though aware that the asset of the Builder is to be shared by the creditors of other companies also. No oblique motive has been suggested to push this Scheme through for corporate purpose warranting the piercing of the veil and judicially X-ray the same. The bald allegations of fraud hurled by Mr. S.R. Kalyana krishnan have not been established by evidence and the absence of bona fides alleged against the Builder and the Proposer have also not been substantiated. I may however add that any criminal prosecution launched against the persons at the helm of affairs of the companies for having accepted deposits from the public unauthorisedly would continue unhindered. Only the civil and criminal proceedings initiated by the public who have either deposited amounts or booked apartments paying advance terminate by the sanctioning of the Scheme.

12. Mr. S.R. Kalyanakrishnan relied on the following decisions to contend that no sanction could be accorded to a Scheme which offends public policy in terms of Section 391(2) of the Act:-

i) Hindustan Lever Employees' Union Vs. Hindustan Lever Limited and others,

ii) Sesa Industries Ltd. Vs. Krishna H. Bajaj and Others,

But I fail to understand as to how the Scheme proposed in the instant case offends public policy when the alleged illegal acts in accepting deposits from the public do not stand condoned and are open to be prosecuted as per law. The majority of such depositors on the other hand would loose their money in entirety if the Scheme is not sanctioned and hence the attempt to have their grievances redressed at least to a certain extent.

13. The latest financial position of the Builder is discernible from the report of the auditor and balance sheet produced in C.A. No. 340/2011 and also C.P. No. 42/2012 thus satisfying the proviso to Section 391(2) of the Act. There is a faint plea that the assets and liabilities of the Builder are false and manipulated and that even the creditors of another partnership firm - Business India Chits - are roped in. It is not the duty of the Company Court to meticulously scrutinise the accounts and act as a super auditor before according sanction to a Scheme u/s 391 of the Act. The Supreme Court in Integrated Finance Company Ltd. Vs. Reserve Bank of India etc. etc., has observed as follows:-

It is true that whilst sanctioning the Scheme, the Company Court is not required

to act as a Super-Auditor. No doubt whilst considering the proposal for approval, the Company Judge is not required to examine the Scheme in the way of a carping critic, a hair splitting expert, a meticulous accountant or a fastidious counsel. However at the same time, the Court is not bound to superficially add its seal of approval to the Scheme merely because it received the approval of the requisite majority at the meeting held for the purpose.

It has not been shown that the entire accounts are bogus or that the balance sheet of the Builder is replete with mistakes even though minor inaccuracies in the same cannot altogether be ruled out. That by itself is not a reason enough to overthrow the Company Petitions on the ground that the particulars fall short of the requisites under the proviso to Section 391(2) of the Act as is alleged by Mr. S.R. Kalyanakrishnan. Suffice it to say that the affairs of the Builder are not fraudulent or the Compromise Scheme opposed to public policy as to warrant refusal of sanction in terms of Section 391 of the Act. A compromise agreement is proposed generally as an alternative to liquidation and a feasible or workable Scheme should always be preferred to an order of winding up of the Company.

14. The rights and liabilities of the Builder and the Proposer including the sale of two acres of property owned by the Builder at Chengannur and the payment of Rs. 3 Crores by the Builder to the Proposer need not be reiterated. The rights and liabilities of the Builder and the Proposer flowing out of the compromise agreement are governed by its terms and are left open to be enforced as per law. I however clarify that no encumbrance of any sort shall be brought on the 30% of the super built up area along with the undivided share of the land and its sale proceeds is meant to pay off the creditors only. Such 30% of the total super built up area has to be allocated first from the first tower (Tower B) before appropriating the balance 70% of the same by the Proposer. The Proposer is free to move the Company Court for any direction or clarification as regards the remaining 70% after the Chairman of the Core Committee being appointed hereinafter certifies the handing over the 30% to the Builder. The compromise agreement itself provides for the constitution of a Core Committee to be in direct control and management of all the affairs relating to the implementation of the Scheme. The composition of 12 members as representatives of the various signatories to the compromise agreement would be unwieldy and may not be conducive for a smooth implementation of the Scheme. It would be sufficient if one representative from each of the signatories to the compromise agreement are inducted in the Core Committee who can function under an independent Chairman. I appoint Mr. Justice P.S. Gopinathan (Retired) as, the Chairman of the Core Committee who as an impartial head can oversee the implementation of the Scheme. Every transaction of the Core Committee shall be with the prior approval of the Chairman whose decision shall be final subject to the right of any one to move the Company Court for any direction or clarification. Mr. Justice P.S. Gopinathan shall function as the Chairman of the Core committee initially for a period of 12 months and shall be paid a remuneration of Rs. 1 lakh per month for his services. The Core Committee shall meet periodically and make every

endeavour to complete the project in implementation of the Scheme for which the building permits or statutory licences shall be renewed by the authorities at the earliest. I make slight modifications to the Scheme as above to ensure its proper working by virtue of the powers u/s 392(1)(b) of the Act. The above are not substantial modifications to the Scheme necessitating it to be approved in the general meeting of the members again as in the case of Meghal Homes Pvt. Ltd. Vs. Shree Niwas Girni K.K. Samiti and Others, .

I accord sanction for Scheme A proposed in C.A. No. 340/2011 in C.P. No. 41/2009 subject to the slight modifications mentioned in the preceding paragraph in terms of Section 391(2) of the Act. C.P. Nos. 41/2009, 42/2009, 52/2009, 42/2012 & 5/2013 are also disposed of accordingly. The Registry shall issue the order in Form No. 41 as enjoined in Rule 81 of the Rules promptly.