
(2004) 03 BOM CK 0004

In the Bombay High Court

Case No : Company Application (LDG.) No"s. 152 and 153 of 2004 in Company Appln No"s. ... of 2004 in Company Petition No. 228 of 1997

Prakash Hassaram Mahtani

APPELLANT

Vs

Official Liquidator of Nielcon Ltd.

RESPONDENT

Date of Decision : 11-03-2004

Acts Referred:

Companies Act, 1956 — Section 391, 391(2), 391(6)

Citation : (2004) 03 BOM CK 0004

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Rahul Chitnis instructed by B. Amin and Co, for the Appellant; S.S. Shetye instructed by M.S. Bodhanwala and Co., For Bank of India, Ms. M.R. Patel, For United Western Bank, J.P. Shah instructed by A.S. Khan and Associates, For India Cement and Finance Ltd., K.K. Shroff instructed by Apte and Co., For Maharashtra Apex Corporation Ltd., P.V. Nelson Rajan, For Wipro Finance Ltd., P.C. Kansara and S.K. Talsania, For Workmen Union, Ms. M.P. Thakur, For successful Bidder, Ms. K.V. Gautam, For Dy. Official Liquidator present, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—In Company Application (Ldg.) No. 152/2004 following reliefs are claimed :-

(a) That pending the consideration of the Scheme of Compromise with or without modification, proposed by Nielcon Limited (In Liquidation) with its creditors (other than sundry creditors) and for a period of 20 weeks after the Chairman's report of the last of such meeting of any class of creditors of Nielcon Limited this Hon"ble Court be pleased to grant stay of the commencement or continuation of any suit or proceeding against the Company and its promoters for recovery of any sums or enforcement of security with respect to claims by the creditors as set out in Exhibit "C to the affidavit in support of this Judge's Summons and the prosecution or continuation of the suits or proceedings, a list whereof is at

Exhibit "C to the affidavit in support of the Judge's Summons;

(b) that pending the hearing and final disposal of this Company Application and the consideration of the Scheme of Compromise with or without modification, proposed by Nielcon Limited with its secured creditors/statutory creditors and unsecured creditors, this Hon"ble Court be pleased to grant stay of the commencement or continuation of any suit or proceeding against the Company and its promoters for the recovery of any sums and enforcement of any security with respect to the claims by any of the creditors as set out in Exhibits "C to the affidavit in support of the Judge's Summons and the prosecution or continuation of the suits and proceedings a list whereof is annexed at Exhibit "C to the affidavit in support of the Judge's Summons;

(c) for ad-interim relief in terms of prayers (b) above;

(d) for costs of this Application; and

(e) for such further and other relief as the nature and circumstances of the case may require.

2. In Company Application (Ldg.) No. 153/2004 following reliefs are claimed :-

(a) That a meeting(s) of the shareholders, secured creditors; statutory creditors and unsecured creditors of Nielcon Limited (in liquidation) be convened as per the provisions of section 391 of the Companies Act, 1956, for the purpose of considering and if thought fit to approve with or without modification the Scheme of Compromise proposed by Nielcon Limited (in liquidation);

(b) That this Hon"ble Court be pleased to give appropriate directions as to the method of convening, holding and conducting the said meeting (s) and as to the notices and advertisements to be issued;

(c) And that a Chairman (or Chairmen) may be appointed by this Hon"ble Court of the said meeting (s) who shall report the result thereof to the Hon"ble Court;

(d) for ad-interim relief in terms of prayers (a), (b) and (c) above;

(e) for costs of this Application; and

(f) for such further and other relief as the nature and circumstances of the case may require.

3. By this common order, both the Applications are being disposed of.

4. Both these applications are resisted by the Bank of India, State of Maharashtra - Sales Tax Department, Wipro Ltd. and India Cement and Finance Limited, (hereinafter referred to as the "first set of secured creditors", for the sake of brevity). All of them claim to be secured creditors of the Company in liquidation. The Bank of India, claims around Rs. 7.30 crores from the (company in liquidation; whereas, the India Cement and Finance Ltd., claims around Rs. 60 lakhs; Govt. of Maharashtra -Sales Tax Department claims around Rs. 35 lakhs;

and Wipro Ltd., claims around Rs. 68 lakhs. These secured creditors have opposed the proposal of the applicant. Besides the aforesaid secured creditors, the United Western Bank also claims to be the secured creditor in the amount of around Rs. 7.89 crores, for which a decree has already been passed by the Court of competent jurisdiction. However, they are neither supporting the proposed scheme nor opposing the same, but would prefer to submit to the orders of the Court. Whereas, the Maharashtra Apex Corporation Ltd., is another secured creditor in the amount of about Rs. 4 crores along with the interest accrued thereon, in the aggregate, a sum of about Rs. 7.6 crores, is supporting the proposed schemes. It is relevant to note that counsel appearing for the workers' Union whose claim is in the amount of about Rs. 2 crores, has also supported the proposed scheme.

5. Insofar as Maharashtra Apex Corporation Ltd. is concerned, it is agreed that it is having only second charge over the property of the company in liquidation.

6. It is not in dispute that certain proceedings have been filed before the Debt Recovery Tribunal, Mumbai, against the company in liquidation and the same are stated to be pending. In the said proceedings, the Debt Recovery Tribunal has directed that the property of the company in liquidation be sold so as to secure the dues of the petitioners therein. That order has not been challenged so far, which was passed on 11th December, 2003. Pursuant to that order, procedure for sale of the said property has already been concluded and it is agreed between the parties that the Debt Recovery Tribunal has confirmed that sale on 10-03-2004. And, consequent to that, the entire consideration has since been deposited by the third party, who has purchased the said property. Obviously, even the later order has not been challenged so far.

7. Be that as it may, the first set of secured creditors are opposing both these applications on the ground that no fruitful purpose would be served by exploring the possibility of ascertaining the support of the class of secured creditors to the proposed scheme as propounded by the applicant. It is contended that the first set of secured creditors, namely, Bank of India, Govt. of Maharashtra - Sales Tax Department, Wipro Ltd., India Cement and Finance Ltd., constitute share of much more than 50% of value in the class of secured creditors. As they have taken a categorical stand that they are not in favour of the proposed scheme as propounded by the applicant for diverse reasons, no fruitful purpose would be served by convening a meeting to explore the possibility of ascertaining the support of the class of secured creditors for the proposed scheme of the applicant. Reliance is placed on the decision of Delhi High Court reported in Vol. 72, 1991 Company Cases page 61 between Komal Plastic Industries vs. Roxy Enterprises Pvt. Ltd., to buttress this contention. This decision was however, attempted to be distinguished by the learned counsel for the applicant on the argument that, it dealt with the case where meeting was already convened, in the context of provisions of section 391(2) of the Companies Act. To my mind, the submission canvassed on behalf of the applicant is unacceptable. Whereas, I

have no hesitation in accepting the argument advanced on behalf of the first set of secured creditors that, as they constitute much more than 50% muchless 1/4th% of the total strength of the class of secured creditors and, they have taken a categorical stand that they are opposed to the proposed scheme, as propounded by the applicant for diverse reasons, no fruitful purpose would be served by exploring the possibility of convening a meeting of the secured creditors. In as much as, the proposal is bound to be defeated in the meeting, even if convened. Therefore, there is no other option but to reject the applications of the applicant.

8. The second objection raised on behalf of the first set of secured creditors is that the scheme as propounded by the applicant is defective and lacks material details. Moreover, no provision has been made regarding statutory liability of the company in the proposed scheme. This argument was controverted by the counsel for the applicant by relying on the averments made in the affidavit in support of the company application Ldg. No. 152/2004. However, to my mind, such averment in the affidavit is of no consequence because, it is common ground that no clear statement has been made in the proposed scheme as propounded by the applicant and placed on record before this Court, regarding the statutory liability. As mentioned earlier, the Government of Maharashtra has appeared before this Court placing on record that it has a claim of over Rs. 35 lakhs due and payable by the company in liquidation towards sales tax dues, which is obviously a statutory liability. So understood, there is substance in the grievance made on behalf of the first set of secured creditors that the scheme as propounded by the applicant is not bona fide and lacks material details.

9. It is argued on behalf of the Bank of India, that the Bank of India and the United Western Bank are the secured creditors and the United Western Bank has already got a decree in relation to its claim. The said decree, however, recognises the fact that the Bank of India has a first charge on the property of the company in respect of its claim of Rs. 7.30 crores. This submission was advanced in the context of the argument pressed into service on behalf of the applicant, disputing the claim of Bank of India that it is a secured creditor to the extent of more than 50% of the share in the class of secured creditors. It is brought to my notice that the Bank of India has also instituted the suit for recovery of amount of Rs. 7.30 crores along with the interest, which fact is not in dispute.

10. Be that as it may, there is substance in the argument advanced on behalf of the first set of secured creditors that no fruitful purpose will be served by permitting the applicant to convene the meeting of the class of secured creditors. My attention is also invited to the fact that there are large number of criminal cases already registered against the applicant, who has propounded the proposed scheme. The argument, therefore, on behalf of the first set of secured creditors is that, it will be unsafe to experiment on the proposal given by the applicant. To overcome this objection, learned counsel for the applicant placed reliance on the decision reported in 1989 65 Comp Cas 163 in Harish C.

Raskapoor and ors. vs. Jaferbhai Mohmedbhai Chhatpar, to contend that this Court has ample power to stay all the criminal proceedings in exercise of its power u/s 391(6) of the Companies Act. This submission is devoid of merits. The dictum of the said decision is of no avail to the applicant. What is however, relevant to note in the present proceedings is that, large number of criminal cases are pending against the applicant under the provisions of the Indian Penal Code or Negotiable Instruments Act. If this is so, the sweep of section 391(6) cannot be extended to the said criminal proceedings. So understood, to my mind, it is appropriate to accept the objection taken on behalf of the first set of secured creditors that it will be unsafe to experiment at the instance of the applicant because of his antecedents.

11. It is next contended on behalf of the first set of secured creditors that the scheme is also defective because of non-disclosure of the latest financial position of the company in liquidation. It is not in dispute that, the order to wind up the company was passed by the Court in November, 1998, whereas the scheme as presented before this Court does not disclose the latest financial position of the company. The audited accounts of the company produced are for the Assessment Year 1997-98. With regard to the latter period the applicant has referred to unaudited accounts (i.e. after April, 1998 till November, 1998. Reliance was placed by the counsel for the first set of secured creditors on the reported decision in Vol. 47, 1997 Company Cases page 257, In re Auto Steering India Pvt. Ltd., to buttress the argument that disclosure of the latest financial position of the company and all other material facts is essential, for grant of reliefs u/s 391(2) of the Companies Act. Indeed, the stage of sanction of the scheme has not arisen in the present case, but the fact remains that material details are not disclosed in the proposed scheme as propounded at the instance of the applicant, which finding is already arrived at earlier.

12. It is lastly argued on behalf of the first set of secured creditors that the Debts Recovery Tribunal has exclusive jurisdiction to adjudicate liability of debtor. Reliance is placed on the recent decision of the Apex Court in the case of Allahabad Bank Vs. Canara Bank and Another, , to buttress this proposition. In para 39 and 40 of this decision, the Apex Court has found that the Companies Act, is a general Statute - whereas the Debt Recovery Act is a special statute. For which reason, the latter will have overriding effect over the Companies Act. The Apex Court has alternatively noted that even though the Companies Act and the RBD Act can both be treated as special laws, but section 34 of the latter Act, would prevail over the former, which gives overriding effect to the provisions of the Companies Act. On the above premise, it is contended that, the order of the Debt Recovery Tribunal for sale of the property of the company in liquidation, having not been challenged so far, nor the recent order passed by the Tribunal, confirming the sale is challenged, the position which emerges is that, in view of the orders passed by the Debt Recovery Tribunal, allowing the sale of the property of the company in liquidation, the sub-stratum of the Company in liquidation has gone. If it is so, the question of considering the revival of the

company under the scheme propounded by the applicant will not arise so long as the orders of the DRT are not set aside before the appropriate forum. There is substance in this contention. Viewed in this perspective and taking over all view of the matter, both company applications deserve to be rejected. It is, however, made clear that in the event, the orders passed by the Debt Recovery Tribunal are set aside and the assets of the Company in liquidation are restored, this Court may consider any other appropriate proposal to be brought before this Court by the competent person.

13. In the result, both these applications are rejected in the above terms with no order as to costs.