

(2007) 08 OHC CK 0016

In the Orissa High Court

Rasila Bhupendra Shah and Another and Ajit Nain APPELLANT
Vs

Indian Charge Chrome Limited and Another
 Ajit Nain RESPONDENT
Vs Union of India (UOI) and Others

Date of Decision : 22-08-2007

Acts Referred:

COMPANIES ACT, 1956 — Section 391, 392, 393, 394, 394A
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 3
Sick Industrial Companies (Special Provisions) Repeal Act, 2003 — Section 3

Citation : AIR 2008 Ori 1 : (2007) 104 CLT 665 : (2007) 2 OLR 693 Supp

Hon'ble Judges : I.M. Quddusi, J;A.K. Samantray, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

I.M. Quddusi, J.—Letters Patent Appeal No. 40 of 2006 has been filed by Rasila Bhupendra Shah and Belly Merchandise Ltd. who are the share holders of Indian Charge Chrome Ltd. (in short "ICCL") and Letters Patent Appeal No. 13 of 2007 has been filed by one Ajit Nain, who is not a shareholder of ICCL but holds shares with his wife in the Banks which advanced funds to mortgaged transferor Company, ICCL, against the common Judgment of the Learned Company Judge dated 13th of October, 2006 passed in Company Petition Nos. 15 and 17 of 2006. However, with the consent of the Learned Counsel for the parties, the appeals are treated to have been filed u/s 483 of the Companies Act, 1956 (hereinafter referred to as "Act").

W.P.(C) No. 6889 of 2004 has also been filed by Ajit Nain praying for issuance of writ commanding the Opposite Parties therein to act in accordance with law and to immediately refer the ICCL to BIFR under the Sick Industrial Companies (Special Provisions) Act (in short "SICA") and to direct the Opposite Parties and their servants and agents not to allow waiver of the amount of loan as proposed in the scheme application and to prohibit the Opposite Parties and their servants and agents from granting waiver of loan of nearly Rs. 2300 crores to ICCL.

2. Both the appeals and the Writ Petition being inter-linked, they were heard together and are being disposed of by this common Judgment.

3. Company petition No. 15 of 2006 was filed by the Indian Metals & Ferro Alloys Ltd (in short "IMFA") and Company Petition No. 17 of 2006 was filed by ICCL, the Transferor Company under Sections 391 to 394 of the Act, seeking sanction of the scheme of amalgamation, which was annexed as Annexure-A to the petitions with the case that the ICCL was incorporated on 28.12.1982 under the Act with an authorized capital of Rs. 90.00 crores which was divided into nine crores equity shares of Rs. 10/- each with the object of manufacturing Charge Chrome, Ferro Chrome, other Chromium products and Ferro Alloys and to carry on business of such manufacturing, processing, importing, exporting and being appointed as agents, stockists, brokers, distributors, buyers, sellers of and dealers in Charge Chrome, Ferro Chrome, other Chromium products and Ferro Alloys. The other objects were production/generation of electricity by thermal hydro power or any other process for consumption, sale and distribution thereof and to obtain or to take lease or otherwise acquire chromites and other mines and to carry on mining operation of such minerals in such mines for processing the said extracted minerals for captive use in the company's furnace or for sale and/or export. The other objects mentioned in the Memorandum of Association are not necessary to be mentioned. The ICCL suffered huge losses and thus the liability of the Company came to the tune of Rs. 2949.02 crores as on 31.3.2005 for which several financial institutions approached the Debt Recovery Tribunal for recovery of their respective dues. In view of the circumstances, the ICCL approached the lending financial institutions and banks for settlement of dues by restructuring the debts. The IDBI being the leading institution of the consortium of financial institutions and lenders, agreed to a structured settlement of dues on the terms and conditions mentioned by them in their letter dated 24.7.2006 annexed as Annexure-B to Company Petition No. 17 of 2006. Accordingly a scheme of arrangement was prepared by the financial Banks/Institutions, which was accepted by all financial institutions and financial banks. Consequently an application was filed before this Court for sanction of the scheme on which the Learned Company Judge vide his Order Dated 10.9.2003 directed for holding of the meeting of the secured creditors. Thereafter the requisite majority approved the scheme of arrangement in the meeting and thereafter application under Sections 391 to 394 of the Act was filed by ICCL for sanction of the scheme of arrangement. But subsequently the IDBI vide their letter dated 10.10.2005 introduced certain amendments to the conditions of settlement relating to de-rating of equity share capital from 95% to 50% subject to the payment of compensation/Thereafter the comprehensive composite scheme of arrangement and amalgamation was framed and the earlier application was withdrawn, which was the subject matter of the Company Petition in Hand.

4. Another Company Petition No. 9 of 2006 was filed along with the composite scheme of arrangement and amalgamation under Sections 391 to 394 of the Act in which vide Order Dated 17.2.2006 the Learned Company Judge directed to

hold separate meetings of the equity share holders, secured creditors and unsecured creditors of the said transferor company and also separate meetings of the equity share holders and unsecured creditors of the transferee company. It was also directed to hold meeting of the depositors of the transferee Company i.e. IMFA and the Court appointed different Chairmen for the different meetings to be held. The meetings were held and the respective Chairman of the meetings submitted reports. According to the reports, none of the shareholders of the transferee company (IMFA) who were present and voting at the meeting, voted against the scheme and majority of the share holders of the transferor company (ICCL) who were present and voting approved the scheme including Swap Ratio, except two share holders who held 0.51% shares in ICCL namely Belly Merchandise Limited and, Mr. Umesh Kumar Meheta as a result of which the scheme of arrangement and amalgamation was accepted by the majority of the share holders and by all the secured creditors and unsecured creditors of the transferor company (ICCL) and the transferee company (IMFA). Hence, the Company Petition No. 15 of 2006 and Company Petition No. 17 of 2006 were filed by the transferor and transferee companies for sanction of the scheme of arrangement and amalgamation, as already mentioned above.

5. On both Company Petitions, notices were published in widely circulated English newspapers as well as vernacular newspaper. The Appellants of both the LPAs only filed their objections therein.

6. Shri Ajit Nain, the Appellant in LPA No. 13 of 2007 claims to be holding along with his wife 500 equity share in IDBI, 300 equity shares along with his wife in the Indian Overseas" Bank and 100 equity shares each in Punjab National Bank, Andhra Bank and Canara Bank, which are all financing banks of the transferor Company (ICCL). The bankers are the creditors of ICCL and otherwise Sri Nain had no concern or interest in the ICCL.

7. On the one hand Ajit Nain filed the above mentioned Writ Petition in this Court while on the other hand he filed an application before the BIFR. However, the BIFR had issued a show cause notice to the transferor company which was duly replied by them and during pendency of these appeals, the BIFR on his application disposed of the matter inter alia holding that the reference made by the Appellant herein was not maintainable and also noticed that Learned Company Judge has already sanctioned the Composite Scheme of Amalgamation and as such the company was dissolved without being wound up pursuant to Section 394 of the Company's Act and thus the BIFR came to the conclusion that there was no mala fide intention on the part of the Company (M/s ICCL) in not making a reference to BIFR, which was communicated vide letter dated 19.4.2007.

8. Sri Bijan Ray, Learned Senior Advocate for the objector-shareholders, has submitted that Company Petition Nos. 15, 16 and 17 of 2006 were filed under Sections 391-394 of the Company Act for sanction of composite scheme for amalgamation of two companies i.e. ICCL (Transferor Company) and IMFA

(transferee company) whereas" IMFA was not listed and in such a situation the petition for sanction of composite scheme for amalgamation of two composite company was not maintainable. It was the duty of the Court to see that the mandatory statutory provisions were complied with to the effect that if majority (in number and shareholding) attended the meeting and requisite information relating to both companies were supplied, if the majority had taken an informed decision and the scheme is a bona fide one and in the realm of commercial dispute. On the other hand Sri S.B. Mukherjee, Learned Senior Advocate has submitted that the statutory requirements for amalgamation were complied with and no share-holders of IMFA objected and scheme was prepared under the Chairmanship of retired Justice P.G. Mishra of this Court who prepared the explanatory note, which was also never challenged and the majority (both in number and share-holding) shareholders of ICCL approved the scheme with minor modification. The proxies were in the custody of Chairman and the shareholders who were absent, it should be implied that they have consented with the same. He has further submitted that IMFA is a solvent company and thus majority of shareholders opted for amalgamation of ICCL and IMFA. In the interest of the shareholders of the ICCL Company, the promoters also acted reasonably and fairly. He has further submitted that the Courts jurisdiction was supervisory in nature and was not an Appellate jurisdiction as laid down in Mafatlal Case.

9. In the case of Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., , the Apex Court held as under:

28. A-However, further question remains whether the Court has jurisdiction like an Appellate authority to minutely scrutinize the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391(2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed; decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a Court of appeal and sit in Judgment over the informed-view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties/The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by requisite majority. Consequently, the Company Court's jurisdiction to that extent is peripheral and supervisory and not Appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their games according to the rules and do not overstep in the limit but subject to that how best the game is to be played is left to the players and not to the umpires.

10. Ajit Nain is not a shareholder of either ICCL or IMFA. But he is a shareholder of the promoters. If the promoters wanted to make a proposal in their interest and in the interest of the companies, it was always open to the shareholders to raise their objections before the promoter company of which they are shareholders but instead of raising objections there, they approached this Court raising objection towards the scheme prepared for amalgamation of the ICCL and IMFA. His contention was that the matter should have been referred to the BIFR as it was mandatory to do so in view of Section 15 of SICA. However, in the changed circumstances, the BIFR, after issuing show cause notice to the concerned companies, has held that there was no mala fide intention and the ultimate intention was to rehabilitate the company by way of preparation of a scheme. It has to be noticed here that Shri S.B. Mukherjee has denied that ICCL was a sick company within the meaning of Section 3(O) of SICA.

11. As the contention has been raised that it was mandatory for the Board of Directors of ICCL to refer the matter to BIFR, it is necessary to consider whether provisions of Section 15 of SICA are mandatory. In this regard let us start from its preamble which is to make in public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined.

12. Section 15 of the SICA provides for reference to the Board, which is quoted as under:

15. Reference to Board.

(1) When an industrial company as become a sick industrial" company, the Board of Directors of the company, shall, within sixty days from the date of notification of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the Board for determination of the, measures which shall be adopted with respect to the company:

Provided that if the Board of Directors had sufficient reasons even before such finalization to form the opinion that the company had become a sick industrial company, the Board of Directors shall, within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company.

(2) Without prejudice to the provisions of Sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank may, if it has sufficient reasons to believe that any industrial company has become, for the purpose of this Act, a sick industrial company, make a reference in respect of such company to the Board for determination of the measures which may be adopted with

respect to such company:

Provided that a reference shall not be made under this sub-Section in respect of any industrial company by-

(a) the Government of any State unless or any of the industrial undertakings belonging to such company are situated in such State:

(b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to such company, an interest in such company.

13. A perusal of above quoted provision shows that there are so many options by which the reference can be made to the Board for a sick industrial company. The first is that the Board of Directors within sixty days from the date of finalization of the duly audited accounts of the company for the financial year as at the end of which the company has become sick industrial company may make a reference to the Board. The second option given in the proviso is that the Board of Directors within sixty days after they have formed opinion that the company has become sick industrial company may make the reference and the third option given in Sub-section (2) is that the Central Government or Reserve Bank of India or a public financial institution or the State level institution or scheduled bank concern may also make reference to the Board if any of them has sufficient reason to believe that any industrial company has become sick industrial company. It has not been provided therein "that Sub-section (2) above would be applicable only if the Board of Directors fails to make a reference under Sub-section (1) or proviso thereto. The reference can be made to the Board only in case any of the Central Government or Reserve Bank of India or the State Government or public financial institution or state level institution or scheduled Bank has sufficient reason to believe that the industrial company has become sick and for making such a reference, there is no time limit. In the instant matter, the financial institution and the scheduled Banks are promoters and creditors and had option to make a reference to the Board. Therefore, it cannot be said that the above quoted provision are mandatory. The word "shall" has been used in its proviso. However, the provisions of sub-section-1 and; its proviso are quite different. In sub-Section-1, it has been provided that the Board of Directors of the company shall within sixty days from the date of finalization of the duly audited accounts of the company for the financial year at the end of which the company has become sick industrial company, make a reference whereas in the proviso it has been provided that if the Board of Directors had sufficient reason even before such finalization to form the opinion that the company had become sick industrial company, it shall within sixty days after it has formed such opinion make the reference to the Board. Therefore, when two options have been given by using the word "shall", it cannot be said to be mandatory provision. At the most, it can be considered that the word shall has been used because of the period of sixty days" has been described. Therefore, in the plain and natural way it can be interpreted that the Board of Directors has

been given sixty days period only for making reference to the Board. However, the Board has been conferred with the powers to make an enquiry as to whether the industrial company has become, sick. For the purposes, an inquiry shall be deemed to have commenced upon the receipt by the Board of any reference or information or upon its own knowledge.

14. In the case of Sharif-ud-din Vs. Abdul Gani Lone, , the Apex Court has observed as under:

The fact that the statute uses the word "shall" while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question has to sub-serve and its design and the context in which it is enacted, if the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory.

15. In the case of State of U.P. Vs. Manbodhan Lal Srivastava, , the Apex Court has observed that use of word shall in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceedings or the outcome of the proceedings would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. We are, therefore, of the opinion that the provisions of Section 15 of SICA are not mandatory rather directory in nature.

16. The scheme of amalgamation has been approved by the share-holders by majority for their interest and Section 391(2) provides that if a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed under the rules made u/s 643, by proxy at the meeting agree to any compromise Or arrangement, the compromise or arrangement shall, if sanctioned by the Tribunal be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class as the case may be, and also on the company, or in the case of a company which is being wound up, on the liquidator and contributories of the company.

17. The meeting of the share-holders and the creditors of the transferor and transferee companies was duly held on the dates specified in the notice for convening the meeting and the scheme in question was approved by the requisite majority. Out of 176 shareholders of ICCL, who attended the meeting, 174 share-holders holding 3,44,17,964 shares voted in favour of the scheme and two shareholders holding 1,76,300 shares voted against the scheme. The unsecured creditors of ICCL and the secured creditors of the transferor company also approved the same unanimously in their meeting with modifications suggested by IDBI which was a secured creditor of ICCL and one Jitendra Sha

with Bharat Sha, non-promoter- shareholders of ICCL and the Chairperson of the meeting who was a retired Judge of this Court finalized the scheme in favour of IMFA. The share-holders of IMFA, the transferee Company present in the meeting approved the scheme and no share-holder or creditor of it opposed the scheme at the meeting or at the time of final hearing.

18. Therefore, in our opinion the scheme was not contrary to law or public policy and was in public interest. Further we are of the opinion that there was no bar for propounding a scheme u/s 391 of the Companies Act for the company ICCL and the Learned Company Judge had jurisdiction to consider the question of sanction of the scheme u/s 391 of the Act.

19. The Learned Company Judge has categorically considered the contours of jurisdiction of the Company Court under Sections 391 to 394 of the Company Act as laid down by the Hon''ble Apex Court in Miheer H. Mofatlal. In the case of Miheer H. Mofatlal (supra), the Hon''ble Apex Court held that once the broad parameters are found to have been met, the Court has no further jurisdiction to sit in Appeal over the commercial wisdom of the majority of class of person who have with their open eyes given approval to the scheme, even if in the view of the Court there would be a better scheme for the company. The Court cannot refuse to sanction such a scheme, as it would otherwise amount to the Court exercising Appellate jurisdiction over the scheme rather than its supervisory jurisdiction. After scrutinizing the facts of the case, the Learned Company Judge held that the scheme met with all the parameters as laid down in Mafatlal Case, which was in the interest of the ICCL and its shareholders. He also held that as a matter of fact, opportunity for inspection of documents was also given to all the shareholders and creditors. The explanatory statement giving all relevant materials was also open for inspection of the shareholders and he was of the view that nothing has been shown that the said explanatory statement suffers from gross infirmity and as such, no objection can be taken to the same. Learned Company Judge further found that the scheme was neither violative of any law nor contrary to public policy. Rather the scheme which is seeking restructuring of the debt of secured creditors and the merger is in accordance with the terms and conditions of the financial institutions and banks and no objection whatsoever was raised challenging the restructuring of the debts or disclosing that the scheme is violative of any law or contrary to the public interest. He also found that the merger as well as the reduction is only a necessary consequence of the restructuring of the debts. He further found that nothing has been brought before this Court to show that the minority shareholders were coerced to vote in favour of the scheme. It was also found that in accordance with the provision of Sections 394A and 394(1) of the Act notices were issued to the Regional Director as well as the Official Liquidator respectively to give their comments on the scheme in order to examine as to whether the scheme is contrary to public interest and as to whether the affairs of the ICCL have been conducted in any manner prejudicial to the interest of its members and the public and both the Regional Director as well as official Liquidator had conducted an audit by

appointing Auditors to look into the financial affairs including the balancesheet dated 31.6.2006 of the ICCL and had categorically reported that the audit did not reveal any information or indication that the affairs of the company has been conducted in a manner prejudicial to the interest of its members or the public. Even the swap ratio of 14:1 was found after auditing of the accounts, to be fair and reasonable. The Regional Director also did not find any violation of any law or that the scheme is contrary to the public interest and/or interest of any shareholder. However, the Regional Director raised objection regarding the Stamp Duty to be payable after merge/of the two companies due to increase in the share capital.

20. In the case of Hindustan Lever and Another Vs. State of Maharashtra and Another, , the Apex Court has again considered the broad contours of the jurisdiction of the Company Court in granting sanction to the scheme as laid down in the case *Miheer H Mafatlal (supra)* as under:

1. The sanctioning Court has to see 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 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 material 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 that 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 of and scheme compromise arrangement is not found to be violative of any provision of law and is not unconscionable, nor 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 to 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.

The Apex Court further held that 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 opinion 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.

In the case of AIR 1995 70 (SC) , the Apex Court, inter alia, held that Section 394 casts an obligation on the Court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. Relevant part of the Judgment is quoted below:

In view of the aforesaid discussion, we hold that the order passed by the Court u/s 394 of the Companies Act is based upon the compromise between two or more companies. Function of the Court while sanctioning the compromise or arrangement is limited to oversee that the compromise or arrangement arrived at is lawful and that the affairs of the Company were not conducted in a manner prejudicial to the interest of its members or to public interest that is to say it should not be unfair or contrary to public policy or unconscionable. Once these things are satisfied the scheme has to be sanctioned as per the compromise arrived at between the parties. It is an instrument which transfers the properties and would fall within the definition of Section 2(1) of the Bombay Stamp Act which includes every document by which any right or liability is transferred. The State Legislature would have the jurisdiction to levy stamp duty under Entry 44. List III of the Seventh Schedule of the Constitution of India and prescribe rates of stamp duty under Entry 63. List II.

21. As stated above, Ajit Nain had sent an information to the Board as already mentioned above on 9.8.2004 that Mis. ICCL is a sick industrial company within the meaning of Section- 3(O) of SICA and requested that an enquiry, be initiated by the BIFR in which, the Board has already vide its order published on 19.4.2007 held that this Court vide its Order Dated 13.10.2006 has sanctioned the composite scheme of arrangement and amalgamation of ICCL and IMFA and as such the company ICCL was dissolved without being wound up pursuant to Section 394 of the Act. The BIFR was accordingly of the opinion that there was no mala fide intention on the part of the company", (ICCL) in not making a reference to it and the reference made by Ajit Nain was not maintainable.

22. It is also to be noted that before the BIFR, the representative of IDBI had given information that after amalgamation, the Company is regular in making

payment of all its dues and has made certain accelerated payments based on the improvement in cash flow and, therefore, there were no defaults by the company as on date and taking into consideration the operational problems of the company since inception, efforts on the part of all the involved agencies in bringing about the restructuring of the liabilities of M/s ICCL and the fact that the restructuring resulted in a performing asset being reinstated in the books of accounts of institutions/banks in addition to the economic and social benefits, action of IDBI was in good faith.

23. Therefore, in our opinion, the Learned Company Judge in sanctioning the scheme of amalgamation has committed no illegality or impropriety. The impugned Judgment and order in appeal is, therefore, affirmed. Considering the facts and circumstances of the case as discussed above, the appeals as well as the writ Petition are devoid of merit and are, therefore, dismissed. The interim order stands vacated. There would be no order as to cost.

A.K. Samantray, J.

24. I agree.