

(2005) 02 GUJ CK 0020
In the Gujarat High Court
Case No : Company Application No. 1 of 2005
Shree Rama Multitech Ltd.

Date of Decision : 24-02-2005

Acts Referred:

Companies (Court) Rules, 1959 — Rule 67, 68, 69, 71, 9
Companies Act, 1956 — Section 391(1), 391(6), 393, 397, 398

Citation : (2006) 131 CompCas 209 : (2005) 62 SCL 539

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : S.N. Soparkar and Tushar P. Hemani, for the Appellant; Sandeep Singhi, for Singhi and Co., for the Respondent

Judgement

K.A. Puj, J.—The applicant Company has taken out this Judge's Summons seeking following directions from this Court :-

(a) THAT separate meetings be held of the Secured Creditors with First Charge or Class "A" Creditors, Secured Creditors with Second Charge or Class "B" Creditors, Other Creditors or Class "C" Creditors and shareholders of the Applicant Company for the purpose of considering and if thought fit, approving with or without modification the proposed scheme of Arrangement and/or Compromise;

(b) AND THAT directions may be given as to the method of convening, holding and conducting the said meetings and as to the notices and advertisement to be issued;

(c) AND THAT a Chairman may be appointed for the said meetings, who will report the result thereof to this Hon'ble Court.

2. This application was placed for hearing on 04.02.2005. Mr. Tushar P. Hemani, learned advocate appearing for the applicant Company has prayed for time to work out the modality of place and time of convening the meetings. The Court, however, insisted that the applicant should first satisfy the Court with regard to the issuance of directions for convening the meetings. At this stage, Mr. Sandeep

Singhi, learned advocate appearing for UTI Bank in a winding up petition filed against applicant Company, who was present in the Court, has submitted that before passing any order in this application, a copy of the application should be furnished to him and he may be heard in the matter. Accordingly, the applicant was directed to serve the copy of this application to Mr. Sandeep Singhi, the learned advocate for UTI Bank as well as for Bank of Karnataka, another petitioning Creditor and matter was adjourned to 22.02.2005.

3. On receipt of the copy of the application, Mr. Singhi has filed his appearance in this application on behalf of UTI Bank and also placed on record the affidavit-in-reply raising objections against issuance of any direction for convening the meetings.

4. On the basis of this affidavit-in-reply, Mr. Singhi has submitted that the objector Bank had subscribed to the Secured Non-Convertible Debentures issued by the applicant and that the Bank had also sanctioned a short Term Loan of Rs. 15 Crores and Bills Discounting Facility of Rs. 49 Lacs approximately. He has further submitted that the outstanding debts of the Bank are not paid by the applicant till this date. This short term Loan and Bills Discounting Facility provided by the Bank to the applicant is unsecured and the non-convertible Debentures subscribed by the Bank are secured by the assets of the Company. He has further submitted that since the applicant was unable to pay the outstanding amount due and payable by the applicant to the Bank for its short Term Loan and Bills Discounting facility, the Bank preferred a winding up petition before this Court being Company Petition No. 60 of 2003. The said petition was admitted by this Court vide order dated 23.09.2004 and also issued directions for advertisement of the petition. The applicant has filed an appeal being OJ Appeal No. 57 of 2004 against the said order and the same is pending before the Division Bench of this Court.

5. Mr. Singhi has further submitted that in the present summons for directions, the applicant has, inter alia, prayed for convening of a separate meeting of Class-C creditors. The short Term Loan for Rs. 15 Crores and Bills Discounting Facility provided by the Bank is falling under Class-C in the Scheme proposed by the applicant. He has further submitted that in Annexure-B (pertaining to Class-C) to the Scheme, the debts of the Banks are not correctly stated. He has further submitted that on the cut-off date, the outstanding amount due and payable by the applicant to the Bank is about Rs.24.72 Crores.

6. Mr. Singhi has further submitted that before filing this application by the Company, the present Scheme proposal was circulated by ARCIL to the Secured and unsecured Creditors of the applicant Company for their views and the meeting of the Secured and Unsecured lenders was held on 15.09.2004. In the said meeting, besides the Secured Creditors, the unsecured Creditors, namely, Bank of Bahrain and Kuwait, Karnataka Bank Limited, UTI Bank Limited, Exim Bank and BNP Paribas were present. Mr. Singhi has further submitted that in the said meeting UTI and LIC from the said category were not present. UTI Bank

Limited and Bank of Bahrain and Kuwait were not agreeable to the present Scheme. Exim Bank was agreeable provided its unsecured loans are considered for restructuring in the same lines as provided for the secured lenders. UTI has communicated that the Scheme would be acceptable provided there is 100% repayment of principal debt. Mr. Singhi has further submitted that in the category of unsecured lenders more than 25% in value of the unsecured lenders have objected to the present scheme as being proposed by way of the present Company Application. He has further submitted that as the Scheme has already been deliberated and discussed by the lenders and the same being objected by more than 25% value of the unsecured lenders, the scheme is already rejected by the unsecured lenders and that the applicant has no requisite majority in the said category. To provide strength to his submission, Mr. Singhi has pointed out that in number of matters, the Court permits the applicants for dispensation with the meetings either of creditors or shareholders on production of their consent letters. Similarly, when the Company failed to procure the requisite majority of unsecured creditors at the meeting called for by ARCIL, the Court should not issue direction for convening the meeting.

7. In support of his above submission, Mr. Singhi has relied on the decision of Delhi High Court in the case of MAZDA THEATRES PVT. LTD. AND ANR. v. NEW BANK OF INDIA LIMITED AND ORS. ILR 1975 1, wherein the Court held that the consent of the overwhelming majority of the shareholders outside a meeting is sufficient to show that the resolution was supported virtually by all the members of the Company. Mr. Singhi has, therefore, submitted that the converse is equally true as in an informal meeting, if the requisite majority supporting the resolution is not procured, no useful purpose would be served in issuing direction for convening the meeting.

8. Mr. Singhi has lastly submitted that in the Scheme it is stated that the applicant is entitled to make the payment between the cut-off date and the effective date. No details have been provided by the applicant as to which lenders have been paid amount after the cut-off date. He has further submitted that the balance-sheet annexed by the applicant is as of 31.12.2003 and therefore there is no possibility to find out the payments made by the applicant after the cut-off date.

9. Based on the aforesaid submissions, Mr. Singhi has strongly urged before the Court that the reliefs as prayed for in the Summons for directions are required to be rejected.

10. Mr. S.N. Soparkar, learned Senior advocate appearing with Mr. Tushar P. Hemani, the learned advocate for the applicant Company has submitted that none of the objections raised by the UTI Bank, objector has any substance. The objections are thoroughly uncalled for and unwanted at this stage and are absolutely irrelevant. They are not maintainable either at law or on facts. He has further submitted that the objector has no locus to raise these objections as the present proceedings taken out for seeking directions to convene meetings are

basically ex-parte proceedings. For this purpose, he referred to and relied on the provisions contained in Rules 67, 68 and 71 of the Company (Court) Rules, 1959. Mr. Soparkar has further submitted that the Court at this stage cannot and should not consider the objections raised by the objector nor the Court should go into the merits of the scheme at this stage. The objector can raise all these objections at the meeting and if the resolution to support the scheme is failed for want of requisite majority, there will be no question of sanctioning the scheme by this Court. If the resolution is passed by the requisite majority, the Company in the present case or the Sponsor of the Scheme in general will have to file substantive Company Petition for getting sanction to the scheme. The Court applies its mind at that stage and after admission of the petition, issues notices to the interested parties, including Central Government, Official Liquidator etc. depending upon the nature of the Scheme and also passes an order for public advertisement. At the time of final hearing of the petition, the Court considers the objections to the Scheme raised by the objectors and goes into the merits of the Scheme. Since this stage has not yet come, the Court should reject or overrule all these objections and issue the directions for convening the meetings. In support of his submissions, Mr. Soparkar has relied on the decision of this Court in the case of GUJARAT KAMDAR SAHAKARI MANDAL AND ORS. v. RAMKRISHNA MILLS LIMITED (1998) 92 COMP CASES 692 (GUJ) and the decision of the Hon''ble Supreme Court in the case of RAINBOW DENIM LIMITED v. RAMA PETROCHEMICALS LIMITED (2003) 116 COMP CASES 641 (S.C.). Based on these decisions, Mr. Soparkar has urged before the Court that the directions prayed for in convening the meetings be issued and application be allowed.

11. Mr. Sandeep Singhi, in rejoinder to the submissions of Mr. Soparkar, has submitted that simply because the present proceedings are ex-parte in nature in view of Rule 67 of the Rules, the same can not take away the inherent power of this Court to hear the interested parties. He has further submitted that Rule 69 does contemplate such hearing. In support of his submission, he has relied on the decision of Allahabad High Court in the case of HIND AUTO INDUSTRIES LIMITED v. PREMIER MOTORS (P.) LTD. AND ORS. (1969) 39 COMP CASES 137 (ALL.) and the decision of the Bombay High Court in the case of VASANT INVESTMENT CORPORATION LTD. v. COLABA LAND AND MILLS CO. LTD. (1977) 47 COMP CASES 662 (BOM.). With regard to the decision of this Court in Ramkrishna Mills Ltd. (Supra) relied on by Mr. Soparkar, Mr. Singhi has submitted that the said decision is distinguishable on facts. Even otherwise, it supports the case of the objector as the discussion, deliberation and consultation envisaged therein, was taken place prior to filing of this application and views of the unsecured creditors are made known to every one. With regard to the decision of Hon''ble Supreme Court in the case of Rainbow Denim Ltd. (Supra), Mr. Singhi has submitted that the Hon''ble Supreme Court has not laid down any law in that decision and observations made therein are based on and are confining to the facts of that case. The facts are found from the decision of the Punjab & Haryana High Court in the case of RAMA PETROCHEMICALS LIMITED, In Re. (2000) 100

COMP CASES 807, which decision was taken to the Hon"ble Supreme Court, wherein the above order was passed. He has, therefore, reiterated his objection against issuance of any direction for convening of meetings and prayer for rejection of this application.

12. After having heard the learned advocates appearing for the respective parties and after having considered their objections and/or submissions and also after having considered the relevant statutory provisions contained in the Act and the Rules framed thereunder as well as the authorities cited before the Court, the Court does not accept the objections raised by Mr. Singhi at this stage and issues the directions for convening the meetings as prayed for, due to the following reasons or on the following grounds.

13. The first issue which arose before the Court for its consideration is as to whether the proceedings for seeking directions to convene the meeting are ex-parte proceedings and whether other parties may have any right of audience in the said proceedings. For this purpose, provisions contained in Rule 67, 68 & 71 are required to be looked into. Rule 67 deals with Summons for directions to convene a meeting. It reads as under :-

67. Summons for directions to convene a meeting :-

An application u/s 391(1) for an order convening a meeting of creditors and/or members or any class of them shall be by a Judge's Summons supported by an affidavit. A copy of the proposed compromise or arrangement shall be annexed to the affidavit as an exhibit thereto. Save as provided in rule 68 hereunder, the summons shall be moved ex parte. The summons shall be in Form No. 33, and the affidavit in support thereof in Form No. 34.

Rule 68 carves out an exception. It deals with Service on Company. It reads as under :-

68. Service on Company :-

Where the company is not the applicant, a copy of the summons and of the affidavit shall be served on the company, or, where the company is being wound up on its liquidator, not less than 14 days before the date fixed for the hearing of the summons.

Combined reading of Rule 67 & 68 makes it clear that an application u/s 391(1) for an order convening the meeting of Creditors or members shall be moved ex parte except where the Company is not the applicant or the Company is being wound up. In this context, Rule 71 is also relevant. It deals with application for stay. It reads as under :-

71. Application for stay :-

An application under sub-section (6) of Section 391 for stay of the commencement or continuation of any suit or proceeding against the Company may be moved by a Judge's Summons ex parte, provided that where a petition

for winding up of the company or a petition u/s 397 or 398 is pending, notice of the application shall be given to the petitioner in such petition.

14. In the present case, as the applicant has simply moved an application u/s 391(1) seeking direction for convening the meetings of the Creditors and the shareholders. No application u/s 391(6) for stay has been moved by the applicant Company. It is, therefore, contended on behalf of the applicant that the Objector has no right to have any audience while deciding the application by the Court seeking direction to convene the meeting u/s 391(1) of the Act. It is, however, important to note that Rule 69 deals with directions at hearing of Summons and it starts with upon the hearing of the summons or any adjourned hearing thereof, the Court can give such directions as it may think necessary in respect of the matters enumerated therein. The word "hearing" contemplates that the hearing of all the parties interested in the proceedings. This issue arose before the Allahabad High Court in the case of HIND AUTO INDUSTRIES LIMITED v. PREMIER MOTORS (P.) LTD. AND ORS. (1969) 39 COMP CASES 137 (ALL.). The Court takes the view that hearing as contemplated by Rule 69 obviously implies hearing of all sides which are to be heard and each of the questions, in Rule 69 involves the interest or at any rate the convenience of persons whose meetings are to be held. The shareholders are necessary parties before a decision can be taken on the matters specified in Rule 69 and are entitled to be heard at this stage. The Court further takes the view that even if the rule does not specifically provide for such notice to them, Rule 9 of Rules enables the Company Court in the exercise of its inherent powers to issue directions for service of notice upon the persons concerned or interested. The Court, therefore, held that the nature of function exercised in the matter before the Court u/s 391(1) is undoubtedly a judicial function and both the Central Government and the shareholders are entitled to notice.

15. A reference is also invited to the decision of the Bombay High Court in the case of VASANT INVESTMENT CORPN. LTD. v. COLABA LAND AND MILLS CO. LTD. (1977) 47 COMP CASES 662 (BOM.) wherein it is held that merely because a rule makes the provision for ex parte application, it cannot debar the party interested in the action from placing its view point that the proposed order should or should not be made. The interest of justice require that if a party desires to make any submission, even at the ex parte stage, the Court should hear him.

16. Precisely for this reason and keeping these judicial pronouncements in mind, the Court has directed the applicant vide its order dated 04.02.2005 to supply a copy of the application to the learned counsel appearing for the petitioning creditors. Pursuant to this direction, copy was given and the submissions were made by Mr. Singhi, learned advocate appearing for the objector. The Court is, therefore, of the view that though the proceedings as referred to in Rule 67 are ex parte proceedings, the Court while exercising its inherent powers permits the interested parties to make their submissions before the Court in respect of the directions which are sought from the Court.

17. The second issue which arose in the present application is that whether the Court can examine the scheme at the stage of seeking direction to convene the meeting or whether the Court can straightway reject the scheme without issuing direction to convene the meeting. In this connection, this Court in the case of GUJARAT KAMDAR SAHAKARI MANDAL AND ORS. v. RAMKRISHNA MILLS LIMITED (1998) 92 COMP CASES 692 (GUJ.) observed that when in cases where at the threshold serious objections are raised by class of Creditors, the Court may issue directions to convene the meetings of shareholders and Creditors because the discussion and exchange of views, with or without modification may ultimately result in the evolving of some such scheme which may become acceptable to a class of persons who opposed the scheme initially. The Court has further observed that the very purpose of this consultation would be frustrated if the Sponsor of the Scheme is denied opportunity of consulting the affected interests by convening the meeting. The Court has, therefore, taken the view that the application cannot be rejected by the Court at the very threshold.

18. In this context, the decision of the Hon''ble Supreme Court in the case of RAINBOW DENIM LIMITED v. RAMA PETROCHEMICALS LIMITED (2003) 116 COMP CASES 641 (S.C.) is equally important wherein the Hon''ble Supreme Court has observed that the appropriate time for the Company Judge to consider the scheme was subsequent to approval thereof by the shareholders and creditors of the appellant Company. Therefore, the orders of the Company Judge and the Division Bench were to be set aside and liberty given to the appellant Company to move the High Court for calling meetings of its shareholders and creditors for the purpose of considering and approving the Scheme. Once that was done a further application had to be made to the Company Judge and that would be the time for him to consider the scheme. Though in no uncertain terms, the Hon''ble Supreme Court has observed that it is not time for the Company Judge to consider at the stage of issuance of direction to convene the meeting, whether the said observations are confining to the facts of that case only or it lays down any precedent.

19. Mr. Sandeep Singhi, however, has submitted that the detailed facts are found in the judgment of Punjab & Haryana High Court wherein, while deciding the application, the learned Judge has observed that it is patently a device adopted to transfer certain assets including immovable property without due process of law. No consideration was being passed nor any transfer deed executed. This must be taken to be a device thus adopted to defeat the normal provisions of law. Secondly, despite the limited jurisdiction of the Court, when on the face of it the scheme did not appear to be in public interest and was defeating the provisions of law, no useful purpose would be served by giving permission for calling of the meetings of the shareholders and the creditors.

20. Since the learned Company Judge has gone into the merits of the scheme at the stage of issuance of directions, the Hon''ble Supreme Court has observed that at this stage, the Court is not supposed to go into the merits of the matter.

21. Even while considering the provisions contained in Rule 69 of the Company (Court) Rules, it says that upon the hearing of the summons or any adjourned hearing thereof, the Court can give such directions as it may think necessary in respect of the matters enumerated therein. The plain reading of Rule 69 itself makes it clear that the powers are conferred on the Company Judge even to dismiss the Summons at the stage of hearing of Summons. The Court is, therefore, of the view that the observation made by the Hon"ble Supreme Court does not lay down any precedent and the said observations are confining to the facts of the said case. The Court has ample power within the meaning of Rule 69 to dismiss the Summons at the initial stage if prima facie it appears to the Court that the application is not sustainable or is palpably in contravention of the provisions of the Act. In such case, the Court does not show any indulgence for issuance of directions to convene the meeting.

22. The third issue which arose is whether the facts of the present case are such that the Summons for directions deserves dismissal at the very threshold. Mr. Singhi has pointed out certain objections against the scheme. He has also raised the issue that the consultation as contemplated was already taken place and hence, there is no need for any further consultation or calling of the meeting. The Court is not inclined to accept this objection raised by the objector. Even in the alleged meeting called by ARCIL, the Creditors have not unanimously agreed. They have suggested different modifications in the Scheme. Moreover, consultation said to have been taken place at the meeting by ARCIL cannot prevent the Company from approaching this Court to seek direction for convening the meeting. There is a possibility that in the meeting, the members or Creditors may change their views and agree to the Scheme as proposed or modified.

23. The other issues which are raised by Mr. Singhi are in respect of the merits of the Scheme which cannot be gone into at this stage as the members and/or Creditors can discuss all these issues at the meeting and even they can raise the same objections in the meeting. If the meeting rejects the scheme, there is no question of seeking any sanction of this Court. But in any case if the scheme is approved by the requisite majority at the meeting, the petition will have to be filed before this Court and at this stage, the Court would certainly consider these aspects of the Scheme and would also go into the merits of the Scheme. The Court, therefore, inclines to issue directions to convene the meeting and accordingly, the Court hereby issues the following directions :-

[1] That FOUR separate meetings of the Secured Creditors with First Charge or Class "A" Creditors, Secured Creditors with Second Charge or Class "B" Creditors, Other Creditors or Class "C" Creditors of the Applicant Company shall be convened and held at "Hotel Fortune Landmark", Usmanpura, Ashram Road, Ahmedabad, on Tuesday, 22nd March of 2005 at 11.00 a.m., 12.30 p.m., 2.00 p.m. and that of the Shareholders of the applicant Company shall be convened and held at Rajpath Club Limited, Sarkhej-Gandhinagar Road, Ahmedabad on

Monday, the 28th March, 2005 at 11.00 a.m. respectively for the purpose of considering, and if thought fit, approving with or without modifications, the Scheme of Arrangement and compromise of the applicant Company with its Secured Creditors with First Charge, Secured Creditors with Second Charge, Other Creditors and Shareholders.

[2] That at least 21 clear days before the meetings be held as aforesaid, Notice convening the said meetings, indicating the day, the date, the place and the time as aforesaid, together with a copy of the Scheme of Arrangement and Compromise, copy of the Explanatory Statement required to be sent u/s 393 of the Companies Act, 1956 and the prescribed Form of Proxy shall be sent by a pre-paid letter posted under Certificate of Posting, addressed to each of the Secured Creditors with First Charge, Secured Creditors with Second Charge and Other Creditors and Shareholders of the applicant Company at their last known address.

[3] That at least 21 clear days before the meetings be held as aforesaid, Notice convening the said meetings, indicating the day, the date, the place and the time as aforesaid be published, stating that copies of the Scheme of Arrangement, the Explanatory Statement required to be furnished pursuant to Section 393 of the Companies Act, 1956 and Form of Proxy can be obtained free of charge at the Registered Office of the applicant Company and/or at its advocates office i.e. 204, Aakanksha, Mithakhali, Navrangpura, Ahmedabad 380 009, once each in "Indian Express" (Ahmedabad edition) and "Jansatta" (Ahmedabad edition) (Vernacular daily).

[4] Mr. S. Khasnobis, President and Chief Operating Officer, ARCIL or in his absence Mr. R.S. Patel, practicing Chartered Accountant shall be the Chairman of the aforesaid meetings to be held on 22nd March, 2005 and 28th March, 2005 respectively and in respect of any adjournment or adjournments thereof. It is, however, made clear that the Chairman will not adjourn the meeting in any case beyond 30.06.2005 without prior permission of this Court and will put the Scheme to vote either in the first meeting or in such adjourned meeting.

[5] That the Chairman appointed for the aforesaid meetings will issue advertisements and send out notices of the said meeting referred to above. It is further directed that the Chairman of the meetings shall have all powers under the Articles of Association of the applicant Company and under the Companies (Court) Rules, 1959 in relation to conduct of meetings including an amendment to the Scheme or resolution, if any, proposed at the meeting by any person(s) and to ascertain the decision of the meeting on a poll.

[6] That quorum for the meetings of Secured Creditors with First Charge, Secured Creditors with Second Charge, Other Creditors and Shareholders shall be 3 (three), each creditor and shareholders present in person.

[7] That voting by proxy is permitted provided that the proxy in the prescribed form and duly signed by the person entitled to attend and vote at the aforesaid meeting or by his authorised representative, is filed with the applicant Company

at its registered office at Ram Nivas-1, Khanpur, Ahmedabad - 380 001, not later than 48 hours before the said meeting.

[8] That the value of the vote of each Secured Creditors with First Charge, Secured Creditors with Second Charge, Other Creditors and Shareholders of the Company shall be equal to the amount of debt advanced by such creditor to the Company or amount of the capital subscribed by the such shareholders to the Company as the case may be, and this shall be in accordance with the records or registers of the applicant Company (subject to reconciliation of accounts) as on the cut off date as per the scheme and where the entries in the records or registers are disputed, the Chairman of the meeting shall determine the value or number for the purposes of the meeting and his decision in that behalf is subject to final determination by this Court.

[9] That the Chairman do report to this Court, the result of the said meeting within 14 days of the conclusion of the meeting and the said Report shall be verified by his affidavit.

24. This Judge's Summons is disposed of accordingly.

25. At this stage, Mr. Sandeep Singhi, learned advocate appearing for the objector UTI Bank Ltd. has asked for stay against the implementation, operation and execution of this order. However, looking to the facts of the case and since the meeting is scheduled to be held on 22.03.2005, there is no need to stay this order. The request is, therefore, rejected.