
(1963) 12 AHC CK 0005
In the Allahabad High Court
Case No : F.A.F.O. No. 204 of 1963

Sulbha Devi Gupta

APPELLANT

Vs

The Benares Cotton and Silk Mills Ltd. (In Liquidation) and
Another

RESPONDENT

Date of Decision : 02-12-1963

Acts Referred:

Companies Act, 1913 — Section 153
Companies Act, 1956 — Section 2(10), 34

Citation : AIR 1964 All 473

Hon'ble Judges : Mahesh Chandra, J; Jagdish Sahai, J

Bench : Division Bench

Advocate : Ambika Prasad and Rajeshwari Pd, for the Appellant; N.K. Varma, R.K. Varma, Yashodanandan and J. Sarup, for the Respondent

Final Decision : Dismissed

Judgement

Jagdish Sahai, J.—This First Appeal From Order u/s 202 of the Indian Companies Act, 1913 (hereinafter referred to as the Act) has been filed, by Srimati Salbha Devi Gupta against the order dated 28th May, 1963, passed by Sri R.N. Misra, District Judge, Varanasi, in Company Case No. 21 of 1954, Messrs Goverdhan Das Badri Prasad v. The Benares Cotton and Silk Mills, (In liquidation) dismissing the appellant's petition filed u/s 153 of the Act read with Sections 173 and 174 of the Act.

2. It would contribute to a clear understanding of the questions raised before us if the following facts are mentioned :

The Benares Cotton and Silk Mills Ltd. (hereinafter referred to as the Company) came under liquidation under circumstances which need not be enumerated here. An Official Liquidator was appointed and so was a Committee of Inspection. Amongst other eight persons the Committee of Inspection included Sri Jagdish Singh Thapar, the Manager of Messrs Karam Chand Thapar and Bros. (Coal Sales) (hereinafter called Coal Sales), a public limited company which was one of

the creditors of the Mills. In connection with the winding-up of the Company, its Mills were leased out to Messrs Ramlal Rajaram. When the lease was due to expire, an attempt was made by M/s. Ramlal Rajaram for the renewal of the lease for a further period of three years on the same terms and conditions on which the Mills had been originally leased out to them. The Committee of Inspection was, however, of the view that it would be in the interest of the shareholders as also all others concerned if instead of the Mills being leased out, the same were sold and resolved accordingly. Under the orders of the District Judge, to whom the case had been, transferred after an order of winding-up was passed by this Court, offers for the purchase of the Mills were invited. On 23rd December, 1960, Messrs. Karam Chand Thapar and Bros. (P) Ltd. (hereinafter called the Thapar Bros.) gave an offer for Rs. 24,00,000/-. Admittedly, The Thapar Bros, were share-holders in the Coal Sales. Some other persons also made offers. On 20th January, 1961, the Committee of Inspection accepted the offer of Thapar Bros, and on the succeeding 23rd the Official Liquidator submitted a report to the District Judge discussing the merits and demerits of each offer received and recommending the acceptance of the offer made by the Thapar Bros. On 28th January, 1961, the District Judge accepted the offer of the Thapar Bros. The operative portion of that order reads as follows:

I, accordingly order that the Liquidators shall go ahead with Messrs Karam Chand Thapar and Bros. Ltd. and complete the transaction without delay on the terms and conditions already settled with them so that the Mills may be taken possession of by them as soon as possible."

Two appeals were filed in this Court against this order of the District Judge, Varanasi, one by Joti Bhushan Gupta, the husband of Srimati Sulbha Devi, the appellant in the instant appeal and another by Goverdhan Das. These two appeals, which were numbered as 73 of 1961 and 183 of 1961 came up for hearing before a Bench consisting of Srivastava and Katju, JJ. who dismissed them by means of the order dated 25th April, 1962. Jyoti Bhushan then made an application under Article 133 of the Constitution of India to this Court for a certificate that the case was a fit one for appeal to the Supreme Court. That application was rejected. Thereafter, an application under Article 136 of the Constitution was made by Joti Bhushan Gupta in the Supreme Court where an affidavit was filed by Sri J. S. Thapar and another by Sri C.D. Parekh, the Official Liquidator. The Supreme Court, however, refused to grant leave for appeal and rejected the application on 10th October, 1962. Thereafter an application (No. 2150C) was made by Surajmal Nagarmal and Srimati Sulbha Devi who were share-holders in the Company purporting to be u/s 153 read with Sections 173 and 174 of the Act on 23/26th October, 1962. Several other applications were made including application No. 2288-C dated 16-5-1963 on behalf of Sulbha Devi Gupta and Messrs Surajmal Nagarmal. The necessity for making the application No. 2288C by the same parties was occasioned by the order passed by the District Judge, Varanasi, that the scheme given in the first application, i.e., the one dated 23rd/26th October 1962, was vague, In the application dated 16th

May, 1963, the following three schemes were given:

"Scheme No. 1(a) That the party may pay up to Rs. 21/2 to Rs. 3 lacs per year depending on the inspection of the machinery; which will yield not less than 25 lacs and not more than 30 lacs being the lease amount for a period of ten years. The above lease amount may, however, be paid in equal installments over a period of five years.

(b) The proposed lessee may have the right to renew the lease for a further period of five years on the same terms.

(c) The lessee will also have the right to bring in new machinery in order to improve the efficiency, which will be taken away by the lessee on the termination of the lease or which may be acquired on mutually agreed terms by the company if the Company so wishes.

In this case the responsibility for storage of the machinery not required will be that of the company.

(d) The lessee may have the right to effect improvements to the machinery which may be retained for working and will have the right to take away those additions for improvement at the end of the lease or to leave it with the company on mutually agreed terms if the company so desires.

(e) The lessee may not mind the continuance of the present occupants of the Bungalows till their terms of office in the district is over. But the, bungalows should not be given to new occupants after they are vacated.

The parties cannot assume any responsibility about any claims for damages by third parties, in any case not without knowing the nature and extent of the damages.

Scheme No. 3. The party may pay Rs. 25 lacs in three or four installments with which to pay off all the creditors of the company. No claims of creditors will remain thereafter. The parties may be allowed preference or equity shares of this value in the Company. So far as the existing shareholders are concerned, the Mills may be valued and to the extent of the excess amount of valuation over 25 lacs, the present share-holders may get shares, for example, if the valuation of the assets comes to 40 lacs, then the present share-holders may get shares of the value of Rs. 15 lacs divided pro rata amongst them according to their present holdings. If any share-holder does not want to keep the shares he can exchange the share for cash or alternatively the party may after full inspection, give a valuation for the consideration of the Court or the body of share-holders and creditors.

Scheme No. 3. The party on mutually agreed basis pay off the creditors subject to a maximum of Rs. 25 lacs immediately within six months of the date of agreement and so far as the shareholders are concerned arrangements may be made on the basis of scheme No. 2."

The learned District Judge held that the scheme No. 1 "is vague and not definite", and the second one "appears to me a camouflage". With regard to third he found that it was nothing but a reproduction of scheme No. 2, "with the only modification that a sum of Rs. 25 lacs shall be paid within six months". He also held that Section 153 of the Act was not applicable and the applications could not lie under that provision. With regard to the applicability of Section 174 of the Act, the learned Judge opined that the matter having already been considered by the District Court and the High Court, there was no occasion to reconsider the same. With these findings he dismissed the applications.

3. We have heard Mr. Rajeshwari Prasad for the appellant and Sarvasri Jagdish Swarup and Yashodanandan for the respondents.

4. Sri Rajeshwari Prasad has made the following three submissions before us :

1) That the learned District Judge was wrong in holding that the applications did not lie u/s 153 of the Act.

2) That in any case the decision of the learned District Judge on merits is erroneous. He should have, on the basis of the material on the record, allowed the applications.

3) That the purchaser of the Mills Messrs Thapar Bros, being the creditors were precluded from making the purchases and on that ground alone the Mills cannot be sold to them,

5. We will take the submissions seriatim.

6. Section 153 of the "Act, so far as relevant for our purposes, reads as follows :

"153. Power to compromise with creditors and members (i) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.....

6. In this section the expression "company" means any company liable to be wound up under this Act and the expression "arrangement" includes a re-organisation of the share capital of the company by the consolidation of shares of different classes or by both these methods, and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors."

The learned District Judge held that inasmuch as the company is being wound up, a compromise or arrangement contemplated by Section 153 of the Act could be proposed only by the Liquidator. The learned counsel for the respondent has conceded that in recording that finding the learned District Judge has erred. It is,

however, contended that even though the view that the Liquidator alone could move u/s 153 of the Act, may be wrong the applications giving rise to this appeal could not have been made under that section. Learned counsel urges that in order to be an arrangement or a compromise contemplated by Section 153 of the Act it must be one between the company on the one hand and the creditors or the members on the other. There is no difficulty in holding that an arrangement or a compromise can be proposed even by share-holders.

We are not impressed with the submission of the learned counsel and in our opinion the legal distinction between a share-holder and the company has no applicability in the present case, and as we see *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, and *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, are clearly distinguishable. It is true, a company is not like a joint Hindu family which is an association of individuals. It is a distinct juristic person, completely separate from its members or share-holders but Section 153 of the Act itself provides that the Court may order a meeting of the creditors or class of creditors of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as "the Court directs for deciding whether a proposed arrangement or compromise should be concluded on behalf of the company or not. If the members have a right to be present in the meeting and decide whether or not a compromise or an arrangement should be accepted, they certainly, either collectively or individually, have a right to make a proposal.

Consequently, we are of the opinion that Srimati Sulbha Devi and Surajmal Nagarmal could have validly made the applications. We also see no substance in the submission of the learned counsel for the respondents that the scheme mentioned in the applications of Srimati Sulbha Devi and Surajmal Nagarmal cannot be treated to be an arrangement or a compromise between the company and the creditors. Though, those schemes cannot be treated to be an arrangement or a compromise between the company and its members, they can certainly be treated as compromise or arrangement between the company and the creditors.

It is true that in the schemes proposed, the creditors are not a party but if the District Judge had not dismissed the application under an erroneous belief that the Liquidators alone were competent to make the same, he would have, and was required to have, convened a meeting of the creditors as required by Section 153 of the Act. The scheme would have been put before the creditors and if they accepted the same and were agreeable to accept a sum of Rs. 25 lacs, it would have been an arrangement between the company and the creditors, subject of course to the Court's approval. That stage, however, did not arrive and the applications were dismissed before the meeting was held. Whenever an arrangement Or a compromise is made, somebody has to propose and somebody has to accept it. That is why Section 153 of the Act provides for a meeting being called by the Court so that both the parties could meet and after they had

decided that the proposed arrangement or the compromise should be accepted, to embody the same in a formal document with the approval of the Court.

Mr. Jagdish Swarup contends that in the schemes given in the applications, the Liquidators would get only Rs. 25 lacs out of which, after deducting necessary expenses the creditors would be paid, with the result that the payment to the creditors would be less than the amount outstanding in their favour against the company. " We are unable to see how this circumstance can be determinative of the question whether or not the application could He u/s 153 of the Act. Nothing prevents the creditors from accepting a lesser amount and if they accepted to do so, the arrangement or the compromise would not fHindusthan anything less than a compromise u/s 153 of the Act. It is again submitted that the scheme only suggests lease instead of sale with the result that the company would still continue to exist. Even this circumstance, in our opinion, has no relevancy on the question whether or not the proposed scheme can be an arrangement or a compromise between the company and the creditors. If the proposed arrangement in the scheme does not suit the creditors, they could have rejected it in the meeting, if one was held as it should have been held by the District Judge under the provisions of Section 153 of the Act.

7. Mr. Jagdish Swarup then contended that the question that the property should not be leased but be sold had already been decided by the Court. But that is an argument on the merits of the arrangement or compromise and not with regard to the competence of the application for arrangement or compromise. There is a difference between, the proposed arrangement being accepted or rejected and the proposed arrangement not being competent. Mr. Jagdish Swarup's argument was that the applications were not competent because there was no arrangement between the company and the creditors firstly on the ground that the creditors were not parties to it and secondly on the ground that they were not to benefit by it but as we have said earlier the stage for that had not reached and it is only in order to thrash out such matters that the law provides that a meeting should be held.

8. For the reasons mentioned above, we are of the opinion that there is no substance in the contention of the learned counsel for the respondents that the applications were not maintainable. We find support for our view from AIR 1929 256 (Privy Council) .

9. In AIR 1929 256 (Privy Council) a question was raised before the Judicial Committee as to whether the scheme proposed by the creditors in that case, was within the scope of Section 153 of the Act or not Kamlapat, one of the creditors along with several others had made offers suggesting schemes for the payment to the share-holders. Ultimately Kamlapat's scheme was accepted. Under the scheme the properties of the mills were to be mortgaged in favour of Kamlapat who was to pay a sum of Rs. 10,62,000 for payment to the creditors. The Privy Council observed as follows :

"Faced with this difficulty counsel for the liquidators argued before the Board that the scheme was not within Section 153 at all ; and that it was a mere scheme for financing the company's affairs which the Court could in the liquidation approve without the necessity of having it approved by the share-holders. Their Lordships find it unnecessary to determine whether this was a scheme u/s 153. It is plain that the Court thought that it was; and as it appears in any case that the action of the Court has throughout been taken on the basis that the particular scheme they were approving had in fact been accepted by the share-holders" meeting, the case must be dealt with on that footing. The result is that as the share-holders have not assented to the scheme as approved by the orders of the Court dated..... must be set aside."

After saying the above their Lordships directed that a meeting of the share-holders should be held in order to decide whether the scheme proposed by Kamlapat should be accepted or not.

10. In the matter of In Re: Patiala Starch and Chemical Works Ltd., Rajpura, the point whether such an application was u/s 153 of the Act was not specifically raised and decided but certain observations made in that judgment were relied upon by Shri Rajeshwari Prasad.

11. In In In Re: Hindusthan General Electric Corporation Ltd., the question raised and decided was whether the proposed scheme was unreasonable and not whether it could be proposed by means of application u/s 153 of the Indian Companies Act.

12. In re. Southern Automotive Corporation Private Ltd AIR 1960 Mad 223 also the point with regard to the scheme being u/s 153 of the Act was neither specifically raised nor decided.

13. Consequently, even though except the Privy Council's case none of the cases on which Mr. Rajeshwari Prasad has placed reliance are applicable to the facts before us, on first principles we are in agreement with him that it is not possible to say that the applications made by Srimati Sulbha Devi Gupta and Messrs Surajmal Nagarmal were such which could not fall within the provisions of Section 153 of the Act, We, therefore, overrule this submission of the learned counsel for the respondents.

14. Whether or not the scheme proposed by Srimati Sulbha Devi and Surajmal Nagarmal was a meritorious one has not really been considered by the learned District Judge. If a way could be found out by which the debts of the creditors could be paid off in a manner most beneficial to the share-holders, it should have been accepted. The difficulty, however, is that the Court has already sanctioned the sale in favour of Thapar Bros. We are unable to agree with Sri Rajeshwari Prasad that the Thapar Bros, were the creditors. As we have already pointed out earlier the creditors were a Public limited liability company (Coal Sales Ltd). It may be that in that concern the Thapar Bros, are share-holders but that will not convert them into a creditor and it is in a case like this where the distinction

between the company and the share-holder is relevant. As said earlier, a company is a juristic person with a right to sue and with a liability to being sued. It can act in its own name and is not a mere association of the share-holders in the sense in which a joint Hindu family is. Consequently, we are of the opinion that in the present case the purchasers (Thapar Bros.) are not the creditors. Once it is held that the purchasers are not the creditors it is difficult to see how the sanction of the Court for sale being made in their favour can be nullified in these proceedings. It would have been much better if the learned District Judge had gone into all these questions but as pointed out earlier no occasion for going into these questions arose because the learned District Judge erroneously thought that the applications not having been made by the Liquidator were not competent. We might have considered the course of remanding this case to the District Judge after allowing the appeal before us so that he could go into these questions but since the sale has already been sanctioned by the Court, in our opinion, no useful or practical purpose would be served by adopting this procedure. This Court in its judgment dated 25th April, 1962, while dealing with the question as to whether or not the offer of the Thapar Bros. should have been accepted, observed as follows:

"We have ourselves considered the comparative merits of the two offers and are distinctly of the opinion that the decision of the learned District Judge was quite justified. It is true that at one stage the Committee of Inspection had recorded a resolution that the properties of the Mills were worth about Rs. 30 lacs, but in spite of best attempts made by the Liquidators including advertisements and negotiations with prospective purchasers, no offers anywhere near that amount were received. The Mills had been leased out but the terms of the lease had come to an end. The lessees were insisting that the lease should be renewed on the same terms for three years and were not prepared to accept renewal of the lease for a shorter period. If the Mills were closed, the labourers were likely to get unemployed and a labour problem was likely to arise. It was in these circumstances that the Liquidators as well as the Committee of Inspection decided that the properties of the Mills should be sold as early as possible. Though ultimately the lessees agreed to continue for six months more, that could not obviate the necessity of selling the Mills at an early date because after the sale had been sanctioned, it would have taken several months to be completed.

The offer of Messrs Karam Chand Thapar and Brothers was first oral. It was considered by the Committee of Inspection in its meeting dated 22nd December, 1960

The Liquidators submitted a report to the District Judge about the comparative merits of these offers.

A detailed report put forward on these lines was submitted by the Liquidators to the District Judge and was before him when he passed the order in appeal. Learned counsel for the appellant tried to make out that the report was one sided and could mislead the Judge. The report was, however, at the most a report and

was not binding on the Judge. He had to apply his own mind to the facts and to come to his own conclusion. It does not appear from the order of the learned Judge that he was in any way misled by the report. It is not shown that the report contained any wrong facts. The District Judge considered the matter from all aspects and found on a comparison of the two offers that in the circumstances of the case it would be better if the Liquidators proceeded with the offer of Messrs Karam Chand Thapar and Brothers in preference to the other offer of Messrs Goverdhan Das Shiva Pd., The conclusion at which the learned Judge arrived appears to us to be a correct one.

On the whole, therefore, after taking into consideration all the possible aspects of the matter, we think, the discretion of the learned District Judge was properly exercised in the present case and no case has been made out for interference with the decision of the learned Judge."

15. In view of the above findings it is not correct to say that the offer made by the Thapar Bros, was not accepted by the Liquidator and sanction to it was not granted by the Court. In fact, it appears that not only the offer was accepted and sanctioned to by the learned District Judge, it was also accepted and affirmed in appeal by this Court, and as we have already pointed out earlier, an attempt to file an appeal in the Supreme Court also failed no special leave having been granted by that Court. In our view, this circumstance concludes the matter against the appellant.

16. The result, therefore, is that even though we have held that the learned District Judge was not justified in rejecting the applications outright on the ground that they were not competent, he reached to a correct conclusion in dismissing the same on the ground that the offer having been made and accepted and a sanction accorded by the Court and the appeal against that having failed in the High Court, the matter had become final.

17. For the reasons mentioned above, we dismiss the appeal but direct the parties to bear their own costs. The stay orders are vacated.