

(2018) 10 DEL CK 0457

In the Delhi High Court

Case No : Co.Appl.(M) 115 Of 2016 And Ca 332 Of 2018

Sunil Gandhi & Anr

APPELLANT

Vs

A.N. Buildwell Private Limited

RESPONDENT

Date of Decision : 16-10-2018

Acts Referred:

Companies Act, 1956 — Section 390, 391, 391(2), 392, 393, 433

Citation : (2018) 10 DEL CK 0457

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Bhavit Yadav, Kushal Mangal, Sunil Gandhi, Arvind K.Nigam, Maninder Singh, Smriti Asmita, Mikhil Sharda, Mehtaab Singh Sandhu, Ajit Warriar, Angad Kochhar, Bani Brar, Nanju Ganpathy, Shlok Chandra, Ritesh Kumar Sharma, Santosh Agarwal, K.K.Sharma, Gagandeep Chauhan, Surender Hooda, Vivek Kohli, Sandeep Bhuraria, Yeshi Rinchhen, Nudit Gupta, Nikhil Mathur, Nikita Batra, Amarjit Singh Monga, Sandeep Agarwal, Puja Jain, Kunal Sharma

Judgement

JAYANT NATH, J.

1. This application is filed under Sections 391 to 393 of the Companies Act, 1956 seeking approval of the proposed scheme of compromise and

arrangement between the respondent Company and its members and creditors. Directions are also sought to convene the meeting of the allottees of

various blocks of the two real estate projects of the respondent Company being Spire Edge Project which is located at plot No. CP-4, Sector 8, IMT

Manesar, Tehsil and District Gurgaon, Haryana and Sprie Woods Project located at Sector 103, Gurgaon Haryana and of the secured creditors,

unsecured creditors, shareholders, etc.

2. CA No. 332/2018 has also been filed seeking essentially the same relief.

3. It is the case of the applicants that the respondent Company launched an IT/ Technology Park project being Spire Edge Project in Manesar, District

Gurgaon which project comprises of Blocks A to F. As far as Blocks B, C, and D are concerned, it is pleaded that the respondent company has

handed over possession of an area equivalent to 8,48,000/- sq.feet. It is stated that the occupation certificate has been received for these blocks and

lease deeds have been executed in favour of number of allottees. Lease deeds have not been got registered for some of the allottees and some area is

unsold. As far as Block A is concerned, the scheme envisages shifting of allottees to Blocks B, C and D by allotting them areas which are unsold

subject to the allottees making payment of the outstanding dues. Regarding Blocks E and F, it is pleaded that from the date that may be notified for the

revival scheme, within 24 months the construction will be completed. The allottees will not have any claim on account of any interest/penalty, or for

assured return. etc.

4. Another project of the company is the Spire Woods Project which is a residential scheme located in Sector 103, Gurgaon, Haryana. This has 12

Towers containing 620 dwelling units out of which 517 units are booked. It has been pleaded that within 27 months from the effective date as per the

proposed scheme, the project would be completed. A designated escrow account of the respondent will be opened and the amounts to be collected

from the existing allottees will be deposited in the designated escrow account and utilized for meeting the liabilities, costs and the expenses of the

respondent Company for construction, development and implementation of the said Spire Woods project.

5. It has also been pleaded that upon sanctioning of the scheme, the propounders/original shareholders within 90 days will organize, contribute and

cause to be contributed a sum of Rs. 24 crores to be used for the revival of the respondent Company and its projects. It is pleaded that a bank

guarantee of Rs.6 crores has already been furnished in this court. Certain adjustments are proposed on the part of the flat owners which are spelt out

in the scheme.

6. It has hence been prayed that different meetings be held of allottees/creditors/ shareholders etc. for considering and if thought fit approving with or

without modification, the proposed scheme of compromise and arrangement

between the respondent Company and its members and creditors.

Meeting are proposed for the following persons:-

- (a) Allotees of Block A of Spire Edge Project.
- (b) Allotees of furnished offices in Spire Edge Project.
- (c) Allotees of Block E of Spire Edge Project.
- (d) Separate meetings of Class A, B and C Equity shareholders.
- (e) Unsecured creditors.
- (f) Secured creditors.
- (g) Allotees of Spire Woods Project.

It is prayed that meeting may be dispensed with of Optionally Convertible Debentures Series A and Optional Convertible Debentures Series B of the respondent Company in view of the fact that they have already given their NOC and also dispense with meeting of allottees of Blocks B, C and D of

Spire Edge Project as the respondent Company has already received Occupation Certificate and Completion certificate for them and possession has

been handed over to the allottees. Dispensation is sought of meeting of allottees of Block F as there is not a single space/unit sold by the respondent

Company.

It has also been prayed that an advertisement may be issued for convening of the meeting as noted above in the newspaper "Business Standard"

in English and "Business Standard" in Hindi, both in Delhi and Haryana editions.

7. The respondent Company had launched the above noted projects in 2008 and 2011-12 respectively. However, it is pleaded that owing to serious

financial crunch, there has been a delay in completion of the project. In the meantime, in Co. Pet. 704/2014 titled "Amarpreet Singh Oberoi & Ors.

vs. M/s. A.N. Buildwell Pvt. Ltd., on 08.03.2016 this court had admitted the petition for winding up and appointed the Official Liquidator (OL)

attached to this court as the Provisional Liquidator for the respondent Company.

8. The applicants herein are the shareholders of the respondent Company. It is pleaded that applicant No. 1 holds 10.5% shares of the respondent

Company and applicant No. 2 holds 21% shares of the respondent Company. It has been pleaded that if the respondent Company is not revived and is

allowed to go into liquidation, it would not be in the interest of the stake holders including creditors, allottees, flat buyers and shareholders. Hence, the present application has been filed.

9. I have learned counsel or the parties.

10. Learned counsels appearing for the applicants has stressed that after holding the necessary meetings, the applicants would get in a sum of Rs.24

crores and to show bona fide, a bank guarantee of Rs.6 cores has already been filed with the Registry of this court. He has relied upon the judgments

of the Supreme Court in the case of Infrastructure Leasing and Financial Services Ltd. vs. B.P.L. Ltd, (2015) 3 SCC 363, Chembra Orchard Produce

Ltd. & Ors. vs. Regional Director of Company Affairs and Anr.; AIR 2009 SC 1278 and Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K.Samiti

& Ors., AIR 2007 SC 3079 to plead his case.

11. Mr.T.K.Ganju, learned senior counsel appearing for some of the flat buyers has vehemently pleaded that the applicant-Mr. Sunil Gandhi cannot be

trusted with. It has been pleaded that he is a proclaimed offender. He also points out that order dated 08.03.2016 passed in CO.PET. No. 704/2014

has not been complied with. He has also stated that more than Rs.73 crores would be required to complete the towers A, B, C and D. There are no

means available with the promoters.

12. Mr. Nannju Ganpathy, learned senior counsel appearing for Alpha Corp. Development Pvt. Ltd. has pointed out that the said company is a

potential investor which has been identified by the promoters. It is stated that the said Company would be willing to invest upto approximately Rs.20

crores subject to certain terms and conditions. It has been stated that the investor should be ring fenced from the dues of the statutory bodies. The

investor would not like to make any advance deposit before this court as the advance deposited would fetch a bare minimum fixed deposit interest of

only 5% -6%. It is further stated that before any investment is made, license from the Directorate of Town and Country Planning, Haryana needs to

be revived.

13. Mr. Sandeep Agarwal, the learned senior counsel has also made his submissions in CA No. 450/2018 in Co. Pet. 704/2014 filed on behalf of the

Spire Edge Maintenance and lease & Facilitation Ltd. The said Company was incorporated under the provisions of the Companies Act, 2013. It is

stated that of the total shares of the said Company, a large number of shares have been allotted to the buyers/allottees of the Blocks B, C, D of Spire

Edge Project of the respondent Company. The object behind the incorporation of the said applicant Company was operation, leasing, management and

maintenance of the said Blocks B, C and D of the Spire Edge project of the respondent Company which was to be handled by the said applicant

Company on behalf of the buyers/allottees. The primary object of the applicant was to undertake leasing efforts with respect to the spaces/units

allotted to the customers of the respondent Company. Mr. Agarwal has stressed their reliefs in CA 450/2018 where it has been pleaded that revival

scheme filed by the propounders is nothing but a ruse and has been filed with a view to defeat the scheme filed by the investors. It has been pleaded

that Blocks B, C and D be bifurcated from the corpus of the respondent Company in their entirety and be handed over to the applicant Company. It

has been pointed out that there are monetary claims of the allottees of the land to the tune of Rs.121.50 crores and liberty be granted to agitate these

claims separately. He has handed over a chart in court to show that bulk of areas in blocks B, C, D have been Registered and some portions are

unregistered in favour of the allottees. It has been stressed that very few areas are left which are unsold. He has also pointed out that the scheme

makes a completely erroneous request that the allottees of Blocks B, C and D be not subjected to any voting in the elections. He has strongly objected

to this plea.

14. Having heard the pleas of the learned counsel for the parties, the question is what would be the best interest of the respondent Company and its

creditors and allottees. Having given any anxious consideration to the entire scheme and keeping in view the promise of the management to infuse

fund and especially the fact that a bank guarantee of Rs.6 cores has already been placed on record and also keeping in view the strong interest

envisaged before court by the proposed investor-Alfa Corp. Development Pvt. Ltd, it appears that the scheme is a plausible mechanism to move

forward and try and complete the project so that the interest of allottees is taken care off. In the absence of any move forward, the investment that

made by the allottees may languish as the project may remain incomplete for a considerable length of time.

15. Regarding the objections of Spire Edge Maintenance & Lease and Facilitation Ltd. the scheme does not deal with their case. In any case, this

court would retain power to supervise the implementation of the arrangement under section 392 of the Companies Act, 1956.

16. I may also refer to the legal position in this regard. In Infrastructure Leasing and Financial Services Ltd. vs. B.P.L. Ltd. (supra), the Supreme

Court held as follows:-

“22. In the said context, the Court in Miheer H. Mafatlal case [Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1997) 1 SCC 579] posed the

question whether it has the jurisdiction of an appellate authority to minutely scrutinise the Scheme and to arrive at an independent conclusion whether

the Scheme should be permitted to go through or not and whether the majority creditors or members, through their respective class, have approved the

Scheme as required under sub-section (2) of Section 391. It observed that the nature of compromise or arrangement between the company and the

creditors and the members has to be kept in view, for 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. Therefore, the Court does not act as a court of appeal

and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and

commercial wisdom of the parties concerned and further the Court has neither the expertise nor the jurisdiction to dig deep into the commercial

wisdom exercised by the creditors and the members of the company who have ratified the Scheme by the requisite majority. The Court eventually

held that it has the supervisory jurisdiction which is also in consonance with the language employed under Section 392 of the Act. In that context, the

Court referred to the observations found in the oft quoted passage in Buckley on the Companies Act, 14th Edn. It is as follows: (Miheer H. Mafatlal

case [Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1997) 1 SCC 579] , SCC p. 598, para 29)

“29. In exercising its power of sanction the court will see, first that the provisions of the statute have been complied with, second, that the

class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority

in order to promote interest adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the scheme.â??

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25. In this context, we may usefully refer to Palmer's Treatise on Company Law, 25th Edn., wherein delineating with the concept of class, it has been

stated thus:

â??What constitutes a class

The court does not itself consider at this point what classes of creditors or members should be made parties to the Scheme. This is for the company to

decide, in accordance with what the Scheme purports to achieve. The application for an order for meetings is a preliminary step, the applicant taking

the risk that the classes which are fixed by the Judge, usually on the applicant's request, are sufficient for the ultimate purpose of the section, the risk

being that if in the result, and we emphasise the words â??in the resultâ?, they reveal inadequacies, the Scheme will not be approved. If e.g. rights of

ordinary shareholders are to be altered, but those of preference shares are not touched, a meeting of ordinary shareholders will be necessary but not

of preference shareholders. If there are different groups within a class the interests of which are different from the rest of the class, or which are to

be treated differently under the Scheme, such groups must be treated as separate class for the purpose of the Scheme. Moreover, when the company

has decided what classes are necessary parties to the Scheme, it may happen that one class will consist of a small number of persons who will all be

willing to be bound by the Scheme. In that case it is not the practice to hold a meeting of that class, but to make the class a party to the Scheme and to

obtain the consent of all its members to be bound. It is, however, necessary for at least one class meeting to be held in order to give the court

jurisdiction under the section.â??

In this regard, reference to a passage from *Sovereign Life Assurance Co. v. Dodd* [(1892) 2 QB 573 : (1891-94) All ER Rep 246 (CA)] , as stated by

Bowen, L.J., would be apt. It reads as follows: (QB p. 583)

â??â? It seems plain that we must give such a meaning to the term â??classâ? as will prevent the section being so worked as to result in

confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult

together with a view to their common interest.â??

26. The purpose of the classification of creditors has its significance. It is with this object that when a class has to be restricted, the principle has to be

founded on homogeneity and commonality of interest. It is to be seen that dissimilar classes with conflicting interest are not put in one compartment to

avoid any kind of injustice. For example, an unsecured creditor who has filed a suit and obtained a decree would not become a secured creditor. He

has to be put in the same class as other unsecured creditors. (See Halsbury's Laws of India, 2007, Vol. 27.)â??

17. In *Chembra Orchard Produce Ltd. & Ors. vs. Regional Director of Company Affairs and Anr.*, (supra), the Supreme Court held as follows:-

â??12. A reading of the above judgment would, therefore, show that at the stage of issuance of summons for directions to convene a meeting, though

the Company Judge has to apply his mind, prima facie, on the genuineness of the scheme, basically the entire exercise is to verify whether the

numerous conditions prescribed in Rule 69 are satisfied read with Form 33 and Form 34.â??

18. Hence, the Supreme Court took the view that at the stage of issuance of summons for directions to convene a meeting, the Company Judge has to

only apply his mind on the genuineness of the scheme.

19. A scheme of revival may also be filed when a company is pending liquidation. Reference in this context may be had to the judgment of the

Supreme court in *Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K.Samiti & Ors.* (supra) wherein the Court held as follows:-

â??16. Now to recapitulate, the Company was ordered to be wound up on 25-7-1984 and the Official Liquidator was directed to take possession of

the assets of the Company. Once an order of liquidation had been passed on an

application under Section 433 of the Companies Act, the winding up has to be either stayed altogether or for a limited time, on such terms and conditions as the court thinks fit in terms of Section 466 of the Act. If no such stay is granted, the proceedings have to go on and the court has to finally pass an order under Section 481 of the Act dissolving the Company. In other words, when the affairs of the Company had been completely wound up or the court finds that the Official Liquidator cannot proceed with the winding up of the Company for want of funds or for any other reason, the court can make an order dissolving the Company from the date of that order. This puts an end to the winding-up process. Winding up is dealt with in Part VII of the Companies Act and Sections 433 to 483 occur in Chapter II of that Part. Part VI deals with management and administration of a company and Chapter V thereof deals with arbitrations, compromises, arrangements and reconstructions. In that Chapter occur Sections 390 to 396-A of the Act with which we are concerned. While defining a company for the purpose of Sections 391 and 393, Section 390 clarifies that company means any company liable to be wound up under the Companies Act. SCML was a company that was ordered to be wound up on 25-7-1984. Therefore, when the scheme was originally presented on 3-10-1994, it was at a time when the winding-up order was already in existence. The argument that Section 391 would not apply to a company which has already been ordered to be wound up, cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a company liable to be wound up and which is being wound up. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right to the liquidator in the case of a company which is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether

in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application. By and large, the High Courts are seen to have taken the view that the right of the Official Liquidator to make an application under Section 391 of the Act was in addition to the right inhering in the creditors, the contributories or members and the power need not be restricted to a motion only by the liquidator. For the purpose of this case, we do not think that it is necessary to examine this question also in depth. We are inclined to proceed on the basis that the Somanis, as contributories or the members of the Company, are entitled to make an application to the Company Court in terms of Section 391 of the Act for the purpose of acceptance of a compromise or arrangement with the creditors and members.â??

20. Prima facie, in my opinion, it would be in the interest of the respondent Company and its allottees that a meeting be convened.

21. The scheme does not propose any meeting for the allottees of Block B, C and D of Spire Edge Project as according to the applicants, the respondent company has already been issued completion certificate and has handed over possession to the allottees. As the scheme does not deal with rights and liabilities of those who had booked units in Block B, C and D of Spire Edge Project, in my opinion, no meeting of the said persons need to be called. However, a strong plea has been raised by Mr.Sandeep Aggarwal, the learned senior counsel appearing on behalf of Spire Edge Maintenance & Lease & Facilitation Ltd. The said company has filed a CA No.450/2018 in Co.Pet. No.704/2014 pleading that Blocks B, C and D may be bifurcated from the corpus of the respondent company and be handed over to the applicant company. This relief, which is sought in CA No.450/2018, would be heard separately.

22. Accordingly, in my opinion, it would be in the interest of justice, if separate meetings are called for under section 391 of the Companies Act, 1956 for allottees of Block A of Spire Edge Project, allottees of Furnished Offices of Spire Edge Project, allottees of Block E of Spire Edge Project, Equity share holders in Class A, B and C respectively, unsecured/secured creditors, allottees of Spire Wood Project.

23. There are in total 34 allottees of Block A of Spire Edge Project. Accordingly, a meeting of all allottees of Block A of Spire Edge Project shall be

held on 17th November, 2018 at 10:00 a.m. at CP-04, Sector 8, IMT Manesar.

24. There are in total 50 allottees of Furnished Offices. A meeting of all allottees of Furnished Offices of Spire Edge Project shall be held on 17th

November, 2018 at 12:30 p.m. at CP-04, Sector 8, IMT Manesar.

25. There are in total 152 allottees of Block E of Spire Edge Project. A meeting of all allottees of Block E of Spire Edge Project shall be held on 17th

November, 2018 at 02:30 p.m. at CP-04, Sector 8, IMT Manesar. The necessary details qua the above said meetings to be held are as follows:

i) Mr.B.C.Pandey, Advocate (Mobile No.: 9811007851) is appointed as the Chairperson and Mr.Siddharth Gupta, Advocate (Mobile No.: 9810141287)

is appointed as Alternate chairperson to conduct the said meetings.

ii) The Quorum of the above said meetings of Block A allottees, Furnished Offices allottees, Block E allottees shall be 50% in number.

26. There are in total four Equity Shareholders in Class A, B and C. A meeting of all Class A, B and C Equity Shareholder shall

be held on 25th November, 2018 at 10:30 a.m.; 12:00 p.m.; and 2:30 p.m., respectively at CP-04, Sector 8, IMT Manesar. The necessary details qua

the said meetings to be held are as follows:

i) Mr.Sachin Chopra, Advocate (Mobile No.: 9910827777) is appointed as the Chairperson and Mr.Hemant Gupta, Advocate (Mobile No.:

9899009971) is appointed as Alternate chairperson to conduct the said meetings.

ii) The Quorum of the said meeting of Class A, B and C Equity Shareholder shall be 50% in number and more than 50% in value

of the shares.

27. A perusal of the application shows that there are 146 Unsecured Creditors and only one Secured Creditor. A direction is sought to convene and

hold meetings to seek its approval to the proposed scheme. Considering the fact and circumstances as aforesaid, the meetings of the Unsecured

Creditor and the Secured Creditor shall be held on 02nd December, 2018 at 10:30 a.m. and 2:30 p.m. respectively at CP-04, Sector 8, IMT Manesar.

The necessary details qua the meeting to be held are as follows:

i) Mr.S.P.Kamarh, Advocate (Mobile No.: 9810610466) is appointed as the

Chairperson and Ms.Sharmishtha Shukla, Advocate (Mobile No.:

9873991285) is appointed as Alternate chairperson to conduct the said meetings.

ii) The Quorum of the said meetings of Unsecured Creditor and Secured Creditor shall be 50% in number and more than 50% in value of the total debt/secured debt.

28. There are in total 517 allottees of Spire Woods Project. A meeting of all the allottees of Spire Woods Project shall be held on 09th December,

2018 at 11:00 a.m. at CP-04, Sector 8, IMT Manesar. The necessary details qua the meeting to be held are elaborated as follows:

i) Mr.Upender Thakur, Advocate (Mobile No.: 9711984890) is appointed as the Chairperson and Ms.Lavanya Kalia, Advocate (Mobile No.:

8802229793) is appointed as Alternate chairperson to conduct the said meeting.

ii) The Quorum of the said meeting of allottees of Spire Woods shall be 50% in number.

29. The meeting of the following is dispensed with:

a) Optional Convertible Debentures Series A of the Respondent Company, as they have already given No Objection Certificate;

b) Optional Convertible Debentures Series B of the Respondent Company, as they have already given No Objection Certificate;

c) Block F of the Spire Edge Project, as the respondent company has not told even a single space/unit in the Block F.

30. In case the quorum as noted above for the above meetings is not present at the meetings, then the meetings shall be adjourned by half an hour, and

thereafter, the person(s) present and voting shall be deemed to constitute the quorum. For the purpose of computing the quorum, the valid proxies

received from the total applicants herein shall also be considered, if the proxy in the prescribed form duly signed by the person entitled to attend and

vote at the respective meetings is filed. The Chairpersons and Alternate Chairpersons shall ensure that the proxy registers are properly maintained.

31. The Chairpersons and Alternate Chairpersons shall ensure that notices for convening the aforesaid meetings, along with copies of the proposed

Scheme and the statement under Section 393 of the Act along with the proxy form, shall be sent to all the applicants herein by speed post at their

registered or last known addresses at least 21 (twenty one) days before the date appointed for the respective meetings, in their presence or in the

presence of their authorized representatives.

32. Notice of the meetings shall also be published in Delhi and Haryana editions of the newspaper, namely, "Business Standard", (both in English

and Hindi) in terms of the Companies (Court) Rules, 1959, at least 21 (twenty one) days before the date appointed for the respective meetings.

33. The Chairpersons and Alternate Chairpersons will be at liberty to issue suitable directions to the applicant in order to ensure that the aforesaid

respective meetings are conducted in a just, free and fair manner.

34. The fee of the Chairpersons and the Alternate Chairpersons for all the meetings shall be Rs.1,00,000/- each, in addition to meeting their incidental

expenses, to be borne by the applicants in advance. The Chairpersons shall file their reports within 2 (two) weeks from the date of holding of the

aforesaid respective meetings.

35. This applications stand disposed of.

CA No.450/2018 in Co.Pet. 704/2014

List on 03.12.2018