

(2011) 09 CAL CK 0105

In the Calcutta High Court

Case No : C.P. No. 298 of 2002 and C.A. No. 167 of 2002; C.A. No. 592 of 2009;
A.C.O. No. 99 of 2010 and A.P.O. No. 17 of 2011

Suresh Kumar Rungta and Others

APPELLANT

Vs

Roadco (India) P. Ltd. and Others

RESPONDENT

Date of Decision : 22-09-2011

Acts Referred:

Citation : (2012) 2 CALLT 251 : (2011) 168 CompCas 406

Hon'ble Judges : Syamal Kanti Chakrabarti, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, J.—This is an appeal against the judgment and order of the learned trial judge of the company court dated June 9, 2010 (Suresh Kumar Rungta v. Roadco (India) P. Ltd. [2011] 165 Comp Cas 1 (Cal)) by which the appellants' application for recalling the order dated January 16, 2003, sanctioning the scheme of amalgamation between the respondents and also for cancellation of the scheme of amalgamation between the respondents and for reversal of the respondent-companies to their original position as prevailing prior to the sanction of the scheme and consequential direction upon the Registrar of Companies and the official liquidators has been rejected. While rejecting the said application the learned trial judge recorded certain findings which had gone against the respondents-companies and as such cross-objection has been filed against the said portion of the judgment. Accordingly, both the appeal and cross-objection are heard together and being disposed of by the following common judgment and order.

2. The short fact leading to filing the application before the learned trial judge and consequently preferring appeal to this court are follows :

The aforesaid appellants were the applicants numbering 11 (eleven) before the learned trial judge. Out of these five appellants Nos. 1 to 6 are person

individuals, and the rests are private limited companies. It appears that the said individual applicants by virtue of majority shareholding are really controlling the appellant-companies. It also appears that these appellants are also really majority shareholders of respondent-companies Nos. 2 to 7. The detail of the shareholding patterns of all the appellants in respondents Nos. 2 to 7 are stated in the application. The learned trial judge has recorded this fact accurately and this fact of extent of shareholding are not denied and disputed by the respondent-companies. In the application grounds for aforesaid reliefs are stated in the affidavit in support of the judge's summons. Sum and substance of the same which are relevant for the purpose of deciding the appeal is as follows :

(a) Applicants Nos. 1, 2, 8 and 10, shareholders of respondent No. 1 did not attend the meeting dated May 18, 2002, nor they received any notice of the meeting.

(b) One Dr. Narendra Rungta and Dr. Mrs. Neena Rungta shareholders of respondent No. 1 have affirmed the affidavit before the Company Law Board, New Delhi in Petition No. 37 of 2004 that they have not received any notice nor they attended the meeting.

It is therefore clear that there were fifteen total shareholders against thirteen total shareholders of respondent No. 1 at the relevant time and out of which at least six shareholders did not attend the meeting out of the alleged thirteen shareholders.

(c) Subsequent to the amalgamation, no notice was given to the applicants herein with regard to the amalgamation or otherwise. The applicants were never asked by the transferee company to make over their shares scrips of the transferor company and collect share certificates of the transferee company in lieu thereof.

(d) The scheme as sanctioned has not been accepted by a majority of the shareholder. The shareholders purporting to accept the scheme of amalgamation do not form a requisite majority. No individual notice was served upon the shareholders. Notices were said to have been received by the alleged proxy-holder of the shareholders. There is no justification to issue notices to the alleged proxies. For the companies, i.e., respondents Nos. 2 to 7 no evidence has been adduced to prove service of notice under certificate of posting.

(e) No notice of the said meetings has been received by the applicants, although applicant No. 1 was a director in respondent No. 1, i.e., Rungta Chemical Ltd., now Roadco (India) P. Ltd., and applicant No. 4 was director in respondent No. 1 and respondent No. 5, i.e., Hadoti Cements Ltd., at the relevant time.

(f) Applicants Nos. 1 and 4 did not receive any notice nor attended any board meeting of any of the respondents held for the purpose of considering the scheme of amalgamation.

(g) Therefore, in the above manner a fraud has been practised on the

shareholders and upon the court reporting that directions have been complied with on the strength of which sanction has been obtained for the amalgamation of the companies.

3. So far as the other grounds taken in the said application are concerned we are of the view the same are not required to be considered at the moment, as if it is held that in spite of having received notice or knowledge no action was taken within the time as permitted by the law, challenge to the subsequent action is not entertainable at all.

4. The said application has been opposed by filing affidavit affirmed by one Suresh Kumar Rungta who has claimed to be constituted attorney of the first respondent. Bereft of all details which purport to deal with the allegations contained in the petition, relevant objections are summarised hereunder :

(a) The instant application has been filed against six non-existent companies. The application is barred by limitation and also hit by the principle of res judicata or at least constructive res judicata.

(b) The applicants who purport to be parties interested in the scheme of amalgamation sanctioned by this hon''ble court by order dated January 16, 2003, and by the hon''ble court in Rajasthan on October 17, 2003, were at all material times since the sanctioning of the scheme, aware of the same. Some of the petitioners had unsuccessfully challenged the scheme before the hon''ble High Court at Rajasthan, and had thereafter again unsuccessfully challenged the same sanctioned by this court through one Ambika Prasad Modi before this hon''ble court. Despite the fact that some of the petitioners actively supported Ambika's challenge by filing affidavit, they have also joined with other petitioners in the present action.

(c) Inasmuch as the issue raised in the instant application was directly and substantially was the issue in the application filed by the said Ambika Prasad Modi before this hon''ble court, and that filed by some of the petitioners before the hon''ble High Court at Rajasthan, all of them were heard, finally and decided previously by both the hon''ble High Court, hence the instant application is clearly hit by the principles of res judicata and/or constructive res judicata.

(d) The applicants suppressed material fact that applicants Nos. 1 to 4 are the brothers of Rajendra Prasad Rungta, a director of respondent No. 1. Their other brothers are Budhi Prakash Rungta and Dr. Narendra Kumar Rungta.

(e) The principal shares in respondents Nos. 2 to 7 and eight other companies, namely, RMC Med Ltd., petitioner No. 9 Active Traders P. Ltd., petitioner No. 10 Choon Moon Trading and Finance P. Ltd., Amber Commercial P. Ltd., petitioner No. 7 Camaro Marketing P. Ltd., Camaro Projects P. Ltd., petitioner No. 8 Raja Trade and Credit P. Ltd., and Dharni Pharma P. Ltd., were at all material times held by petitioner No. 4 Vinod Kumar Rungta, Rajendra Prasad Rungta and petitioner No. 1 Suresh Kumar Rungta and by their respective family members,

friends and associates.

(f) In terms of the scheme, the shares of Roadco (India) Ltd., were also allotted to the shareholders of respondents Nos. 2 to 7. In essence the scheme which was framed in terms of the order of the court has not only been sanctioned but the same has been acted upon.

Thus despite being well and fully aware of the sanctioning of the scheme of amalgamation by the hon'ble High Court at Calcutta on January 16, 2003, through out the entire course of 2003 no challenge whatsoever to the sanctioning of the scheme of amalgamation of respondents Nos. 2 to 7 by the petitioners or by any one else was made. In fact, with the sanctioning of the scheme of amalgamation by the hon'ble High Court at Jodhpur on October 17, 2003, Suresh Kumar Rungta accepted the same by entering into the understanding and/or arrangement on October 18, 2003, on the basis thereof from the beginning of 2011, and agreeing that he would leave the company in the event of being paid a sum of Rs. 1.5 crores.

(g) In the annual returns of these companies signed by the said Suresh Kumar Rungta himself and/or his associates for the year ended March 31, 2002, reflected the actual shareholding of Rajendra Prasad Rungta, his family members, friends and nominees in the said companies. The annual return filed by the same set of persons as on March 31, 2004, showed that their shareholding in the companies had been completely either done away with and/or drastically reduced. This could not have been done in view of the expressed object of the understanding and/or arrangement of January 4, 2001, sanctioning of the scheme of amalgamation to give effect to the same and understanding and arrangement of October 18, 2003, inter alia, recording the intention of Suresh Kumar Rungta to part with the entire interest in RMC Med Ltd., against payment of sum of Rs. 1.5 crores.

5. After hearing and considering the contention and rival contention the learned trial judge dismissed the application principally on the question of res judicata and/or constructive res judicata. The learned trial judge on earlier occasion found that the similar "action" was taken by one Ambika Prasad Modi a shareholder of respondent No. 4 with the support of some of the applicants herein. Therefore the alleged fraud and non-service of notice were within the knowledge of some of the applicants. Moreover, some of the applicants also filed an application before the Jaipur High Court for recalling of the order sanctioning the scheme of amalgamation and the same was dismissed. The earlier action of Ambika Prasad Modi supported by some of the applicants herein was also dismissed by the learned trial judge with detailed findings, and thereafter the appeal court affirmed the same and the SLP was filed against the said Division Bench judgment and order affirming the judgment and order of the learned trial judge of the company court. The said SLP was dismissed.

6. Now it is contended by learned counsel for the appellants before us that the

learned trial judge completely ignored that the meeting to approve the scheme was held without proper notice to the shareholders which includes publication of advertisement of the meeting in the obscure newspapers. The meeting was said to have been attended by persons not authorised to attend it or also two shareholders who had died. It was not appreciated by learned trial judge as argued by learned counsel for the appellants that resolution adopted in the meeting and order sanctioning the scheme are not lawful. The court cannot allow any defeat of mandatory provision of the law as regards service of notice. Learned counsel for the appellant also urges that case of fraud made out in the application was not properly adverted to by the learned trial judge. The notice of meeting had to be advertised in the newspaper or notified in the gazette as ordered by the court. Moreover the notice had to be served upon each and every shareholders under certificate of posting quoting therein the date of such meeting. These are the fundamental requirements under the Companies Act, 1956 and also rules framed thereunder.

7. It is submitted that service of notice is not recorded in the report of the chairperson. The learned trial judge ignored the fact that the meeting has been attended by the alleged proxies who had no authority to attend such meeting. In the report of the chairperson it is said that meeting is said to have been attended by one Dinesh Rungta and Purusottam Lai Rungta both died long ago. The aforesaid infirmity and illegality go to the very root of the matter, as such the said order of learned trial judge is liable to be set aside.

8. Learned counsel for the respondents submits that the learned trial judge is justified in dismissing the application for setting aside the scheme in 2005. This very scheme was supported by these self-same applicants or their privies by filing affidavits. The self-same issue was before the court earlier and was adjudicated on filing of the affidavits not only before the learned first court but also before the appellate court in company jurisdiction. Against the Division Bench judgment SLP was preferred before the Supreme Court and the same was dismissed as withdrawn. Thus it is not a question of res judicata alone but question of extraordinary delay and acquiescence. Moreover the scheme has already been implemented long back and it cannot be reverted under any circumstances.

9. Learned counsel for the respondent contends while placing cross-objection that though the application was dismissed findings of the learned trial judge with regard to some of the issues regarding publication of notice in obscure newspapers are not tenable and the same was contradictory to and inconsistent with the decision on fundamental issue. When the application was dismissed on the ground of res judicata there is no reason to come to any other finding.

10. Having heard learned counsel for the parties and having gone through the impugned judgment and order of the learned trial judge we are of the view that the learned trial judge has rightly dismissed the applications of the appellants. It appears that some of the applicants/appellants before us filed affidavit in support

of the earlier action of Ambika Prasad Modi. According to us while supporting the same they were sailing in the same boat with Ambika. Even on that occasion they could not only have opposed the earlier application but could have made counter-claim to ask for the same relief. Even if it was not done the legal position is not changed at all.

11. While dismissing the application of Ambika Prasad Modi the learned trial judge, Banerjee J., came to the specific findings that the present appellants/applicants had knowledge about the passing of order of winding up. They had knowledge or have had occasion to come before this court earlier, and did not come because they have accepted the legality and validity of amalgamation. In the finding of Banerjee J., it would appear that there were at least five general meetings of two financial years namely April 1, 2003 to March 31, 2004 and April 1, 2004 to March 31, 2005. There is no explanation in the application as to why it did not occur to the applicant for not receiving notices convening the annual general meetings of Roadco for these two financial years that something was amiss. It was absolutely silent as to whether the annual accounts for the two financial years have been forwarded to the applicant or whether the applicant had made any attempt to receive the same. Banerjee J., found further as follows;

There appears to be some basis to such charge for the apparent supporters have not applied for setting aside the order of sanction, but have merely chosen to support the applicant.

12. The aforesaid judgment with finding have been affirmed by the Division Bench with identical details.

13. In our considered view obtaining of order of withdrawal of the SLP does not change the position of law nor does it create any greater or better right. In view of the dismissal of the special leave petition, the order sanctioning the scheme and follow up action pursuant thereto, has become final in the proceedings wherein some of the present applicants were not only present but participated by filing affidavits. We fail to understand how the same could be agitated once again after having found unsuccessful both in Jaipur by their direct action, and in Calcutta by their indirect action through Ambika Prasad Modi. Therefore we think the learned trial judge has rightly concluded that this action is not only hit by the principle of res judicata and/or constructive res judicata but also barred by the principle of acquiescence. We do not find any infirmity in the judgment of the learned trial judge as his Lordship has correctly recorded based on high authorities recorded in his Lordship's judgment.

14. We however cannot uphold as rightly argued by learned counsel for the cross objector, decision on the question of service of notice and other points after deciding the issue of res judicata and acquiescence in favour of the respondent. We think this exercise of the learned trial judge was uncalled for as bar of res judicata is bar to entertain other questions.

15. It appears to us all the appellants have accepted the scheme of

amalgamation and now these companies against whom relief is sought for are no longer in existence and they cannot be reverted back to their earlier position as by this time third parties' rights have been created by reallocation or reallocation of shareholding for there may be fresh subscribing. In true sense there has been a sea of change in the shareholding pattern of these companies. Therefore we dismiss the appeal, allow the cross-objection, and findings with regard to the notice point is also set aside. There will be no order as to costs.

Syamal Kanti Chakrabarti, J.

16. I agree.