

(2012) 08 BOM CK 0035

In the Bombay High Court

Case No : Company Application No's. 611 and 612 of 2011 in Company Scheme Petition No's. 266 and 267 of 2010 Connected With Company Summons for Direction No's. 203 and 204 of 2010

Unique Delta Force Security Private Ltd. 2nd floor, Nana Chambers, Above Bank of Maharashtra Kasarwadi, Pune-411034

APPELLANT

Vs

Sumeet Facilities Pvt. Ltd. Building 1/9 Agrasennagar Dapodi, Pune-411012

RESPONDENT

Date of Decision : 14-08-2012

Acts Referred:

Companies Act, 1956 — Section 391, 392, 433

Citation : (2013) 112 CLA 607 : (2012) 175 CompCas 318

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Advocate : Tejesh Dande, for the Appellant; Shyam Mehta , with Mr. C.J. Joy, for the RoC, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Kathawalla, J.—By the above Company Applications, the Applicants have sought the following relief:

The order dated 25.06.2010 passed by this Court (Coram: S.J. Vazifdar, J.) in above referred Company Scheme Petition No. 266 of 2010 and Company Scheme Petition No. 267 of 2010, thereby allowing the said Company Scheme Petitions, may kindly be recalled and/or set aside and the status of the Resulting Company and the Demerged Company may kindly be restored to its original status as it was prior to the Scheme proposed for approval.

According to the Applicants, the Demerged Company - Sumeet Facilities Pvt. Ltd. and the Resulting Company - Unique Delta Force Security Private Ltd. are under a common management and it was believed that the Scheme would result in the following advantages:

(I) Consolidation of Facility Service Business into a single entity and thereby streamlining business verticals;

(II) Pooling of resources and focussed management attention into separate business verticals.

2. According to the Applicants, the Facility Service Business of the Demerged Entity was to be taken over by the Resulting Company as per the scheme framed. All future tenders and extension of contracts were to be taken in the Resulting Company. The balance of the business will remain with the Demerged Company.

3. After the Scheme was framed and filed in this Court for sanctioning of the same, the said Scheme was sanctioned by this Court on 25th June, 2010. Thereafter the Applicants intimated the said fact to the Registrar of Companies by filing form No. 21 under the Companies Act giving notice about the said order dated 25th June, 2010 to the Registrar of Companies. One of the Applicant Companies viz. Unique Delta Force Security Pvt. Ltd. also filed Form 23 with the Registrar of Companies for changing its name to Sumeet Delta Force Pvt. Ltd. and a Certificate dated 31st August 2010 confirming the change of name was issued by the Registrar of Companies. All other directions passed by this Court such as payment of cost of Rs. 10,000/- to the Regional Director was also complied with. The Applicants contend that they realised "at certain stage" that the Scheme sanctioned is not giving the desired results and advantages to both the Companies and it was realised by the management that the same is prejudicial to the interest of shareholders and creditors.

4. According to the Applicants, the Scheme sanctioned on 25th June, 2010 was not found workable for the following reasons:

(a) The name of Sumeet Facilities Pvt. Ltd. was having a great reputation in the market due to which it was able to fetch business for the Company. However, the said reputation in the market was not attached to Resulting Company. As such for want of reputation in market, the Resulting Company could not fetch business.

(b) The name of Resulting Company created some confusion in the mind of individuals and others as the name of Resulting Company does not include anything about Facility Management Services, which was earlier included in the name of Demerged Company which ultimately resulted into losing valuable business by the Resulting Company.

(c) In view of the Scheme sanctioned on 25th June, 2010, the Net Worth of both the Companies was being divided. Having strong Net Worth was crucial for Sumeet Facilities Pvt. Ltd. to obtain contracts. In view thereof, for want of strong Net Worth, the Demerged Company could not obtain new contracts.

(d) There were several already awarded contracts to the Demerged Company which were based upon the Net Worth which included the assets which were to be demerged as per the Scheme. In such event, there was threat of revocation/

termination/discontinuation of such earlier awarded work contracts.

5. The Applicants have therefore submitted that the Sanctioned Scheme is not workable and is not in the interest of the Companies. In fact, the Scheme is prejudicial to both the parties. It is submitted that no work of whatsoever nature has been undertaken by the Resulting Company since 25th June, 2010 and the effect of the scheme sanctioned by this Court is not given in the books of accounts from 1st April, 2010 and therefore not reflected as on 31st March, 2011. It is submitted that the Board of Directors of the Applicants i.e. Demerged as well as the Resulting Companies have passed a unanimous resolution in their meetings dated 22nd July, 2011 to approach this Court for recalling and/or setting aside the order dated 25th June, 2010 sanctioning the Scheme of Arrangement. It is submitted that the shareholders have also granted their consent to approach this Court for recalling and/or setting aside the order dated 25th June, 2010 sanctioning the scheme of arrangement. It is submitted that the meeting of the secured and unsecured creditors were dispensed with as rights of the creditors are not affected. If the sanction granted to the scheme is rejected/set aside, the rights of the creditors, whether secured or unsecured will remain intact. It is therefore submitted that it is in the interest of justice to recall and/or set aside the order allowing the Scheme Petitions dated 25th June, 2010. In support of his submission that this Court u/s 392 of the Companies Act has the power to revoke/recall the order dated 25th June, 2010, the learned Advocate appearing for the Applicants has relied on the decision of the Hon''ble Supreme Court in S.K. Gupta and Another Vs. K.P. Jain and Another, and decisions of this Court in the matter of Bedrock Ltd. (In the matter of Scheme of Compromise/Arrangement between the Creditors of Bedrock Ltd. and Bedrock Ltd.), and L.A. Chaugule vs New Kaiser-I-Hind Spinning and Weaving Co. Ltd. (1968) 2 Com. UJ 28 (Bom) The learned Advocate appearing for the Applicants also submitted that this Court also has inherent powers to recall an order sanctioning a scheme u/s 391 and/or 394 of the Companies Act. In this connection he relies on an unreported decision of this Court (Dharmadhikari J.) in the case of Topworth Steels and Power Pvt. Ltd. in Company Application No. 389 of 2011 in Company Scheme Petition No. 43 of 2011 in Company Summons for Direction No. 8 of 2011.

6. Mr. Shyam Mehta, learned Senior Advocate appearing for the Regional Director has opposed the above applications. He has submitted that Section 392 (1) (b) of the Companies Act has empowered the Company Court only to modify the Scheme once sanctioned for the proper working thereof. There is not only no power vested in the Court to revoke/recall the scheme but the Court also cannot modify the scheme if it is not necessary for the proper working of the scheme. This is all the more so in a case where the Scheme has become effective.

7. Relying on the decisions of the Hon''ble Supreme Court in the case of Meghal Homes Pvt. Ltd. Vs. Shree Niwas Girni K.K. Samiti and Others, , Mr. Mehta has submitted that if a Company desires to modify a sanctioned scheme, even

though it is not necessary to do so for the proper working thereof, then the Company is required to follow the procedure prescribed u/s 391 etc. of the Companies Act. Mr. Mehta has further submitted that it is well settled that the Court cannot u/s 392 of the Companies Act change the "basic fabric" of the scheme. In support of this contention, he has relied upon the decisions of the Hon"ble Supreme Court in S.K. Gupta vs. K.P. Jain(1979) 3 SCC 34 and Reliance Natural Resources Ltd. Vs. Reliance Industries Ltd., . Mr. Mehta has submitted that by the present Applications the Applicants have in fact gone a step further by seeking recall/cancellation of the entire scheme which this Court does not have the jurisdiction or power to do once the scheme is sanctioned and effected. Mr. Mehta has submitted that in view of the Hon"ble Supreme Court having clearly held that the power of the Courts to even modify a sanctioned scheme u/s 392 (1) (b) is very limited, the Company Court has no inherent power to recall an order sanctioning a scheme u/s 391 and/or 394 of the Companies Act.

8. Mr. Mehta next submitted that on principles analogous to Order 23 of the Code of Civil Procedure, the order sanctioning the scheme cannot be recalled after the scheme has become effective inasmuch as rights are vested under the Scheme. In support of his contention he has relied upon the decision of the Hon"ble Apex Court in R. Rathinavel Chettiar vs. V. Sivaraman⁷.

9. Mr. Mehta submitted that even on facts no case is made out by the applicants for recalling of the order of the sanctioned scheme. The Applicants have sought cancellation of the scheme on the ground that it is not workable and is adversely affecting the interest of the Companies. It can hardly be a ground for seeking cancellation of the scheme at this stage when averments exactly contrary to the submissions now made were made in the Petition while seeking sanctioning of the scheme. Mr. Mehta submitted that if the scheme is not workable then the Company can certainly seek directions/modifications from this Court in order to make it workable. It cannot cancel the scheme on this ground.

10. I have considered the submissions advanced on behalf of the Applicants as well as the Regional Director. I have also perused the case law cited by the learned Advocates appearing for the parties. The order sanctioning of a compromise or an arrangement in respect of a company is made by the Court u/s 391 of the Companies Act, 1956. The power of the Court to enforce the compromise and arrangement which is sanctioned u/s 391 of the Companies Act is prescribed/set out u/s 392 of the Companies Act. Section 392 of the Companies Act is set out hereunder for ready reference.

392. Power of Tribunal to enforce compromise and arrangement.- (1) Where the Tribunal makes an order u/s 391 sanctioning a compromise or an arrangement in respect of a company, it -

(a) shall have power to supervise the carrying out of the compromise or an arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such

directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the Tribunal aforesaid is satisfied that a compromise or an arrangement sanctioned u/s 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the Company, make an order winding up the company, and such an order shall be deemed to be an order made u/s 433 of this Act.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of the Companies (Amendment) Act, 2001 sanctioning a compromise or an arrangement.

11. A reading of the above provision makes it clear that after the Court sanctions a compromise or an arrangement u/s 391 of the Act, it has the power to supervise the carrying out of the compromise or an arrangement; it may give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement and it may make an order winding up the Company if it is satisfied that the compromise or arrangement sanctioned under Section 391 of the Act cannot be worked satisfactorily with or without modifications. Section 392 is clearly a complete code as far as the power of the Court to deal with a Scheme post sanction is concerned. It is thus clear that the Companies Act specifically prescribes the power vested in the Court once the scheme is sanctioned by the Court. It has clearly empowered the Court to give directions and allow modifications in the compromise or arrangement but has not given any powers to the Court to recall/rescind/cancel the order sanctioning the compromise or arrangement. If at all the Court is satisfied that the compromise or arrangement sanctioned u/s 391 cannot be worked satisfactorily with or without modifications, the Court can suo motu or on the Application of any person interested in the affairs of the Company make an order winding up the Petition. In fact, in view of the decision of the Hon"ble Supreme Court in Meghal Homes (supra), it is now well settled that if a Company desires to modify a sanctioned scheme despite the same not being necessary for the proper working thereof, the Company cannot do so under any other provisions except by following the required procedure prescribed u/s 391 of the Companies Act. Paragraphs 54 and 55 of the said decision are relevant and reproduced hereunder:

54.As we read Section 392 of the Act, it only gives power to the Court to make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement. This is only a power that enables the court to provide for proper working of compromise or arrangement, it cannot be understood as a power to make substantial modifications in the scheme approved by the members in a meeting called in

terms of Section 391 of the Act.

55. A modification in the arrangement that may be considered necessary for the proper working of the compromise or arrangement cannot be taken as the same as a modification in the compromise or arrangement itself and any such modification in the scheme or arrangement or an essential term thereof must go back to the General Meeting in terms of Section 391 of the Act and a fresh approval obtained therefor. The fact that no member or creditor opposed it in court cannot be considered as a substitute for following the requirements of Section 391 of the Companies Act for approval of the compromise or arrangement as now modified or proposed to be modified.

12. In view of the decisions of the Hon'ble Supreme Court in S.K. Gupta (supra) and Reliance Natural Resources Ltd. (supra), it is well settled that the Court cannot u/s 392 of the Act change the basic fabric of the scheme. Paragraphs 318, 319 and 320 of the decision in Reliance Natural Resources Ltd. (supra) are relevant and reproduced hereunder.

318. The ratio of S.K. Gupta (supra) is that u/s 392 the Courts have the duty of continuous supervision to make the Scheme workable by removing the hitches, obstacles or impediments as necessary to ensure the proper functioning of the Scheme. Further, while the Court does state that the powers of the court are of the widest amplitude, including the power to modify a provision of the scheme, it also does hold that the same can only be exercised so as to ensue the proper working of the Scheme and further, that such powers may not be exercised in a manner that would alter the "basic fabric" of the scheme. The removal of obstacles, impediments or hitches cannot be held to mean wholesale changes in the scheme itself and go beyond the confines of what the shareholders, the stakeholders and the 256 courts that sanctioned the scheme would have understood the provisions of the scheme to mean.

319.. It is true that in paragraph 26 of the said decision in S.K. Gupta case it was stated that " if something can be omitted or something can be added to a scheme of compromise by the Court, on its own motion or on the application of a person interested in the affairs of the company" then there ought not to be any justification for restricting the meaning of the word of modification and whittle down the powers of the court. However, the next paragraph holds the key to the judgment that the "basic fabric " of the scheme ought not to be changed. The limit on the powers of the Court to modify by way of even additions or omissions as contemplated is that the "basic fabric" of the Scheme cannot be changed; and according to the said decision, even before a court could embark upon a mission of suggesting modifications it has to first determine what "modifications are necessary to make the compromise or arrangement workable" Any such determination first has to arrive at a conclusion that the Scheme has become unworkable in its entirety or in a portion thereof. Arrangements, by their very nature are complex processes involving many elements that may or may not work. In fact in S.K. Gupta 257 this court recognized that to be the very reason

why the legislature in India has given such a power to the courts; and such power can be exercised only to order those minimal modifications that would bring the aspect that is not working into a functional zone, with the proviso that at any rate such a modification cannot lead to a change of the "basic fabric" of the Scheme.

320. What does the expression "basic fabric" mean? "Fabric" can imply both the end result, and also equally importantly, the processes, procedures and steps that were taken to weave the "fabric" of the Scheme. During the course of weaving of the "fabric", decisions could be taken to leave out certain aspects as unacceptable to the Board or the shareholders and stakeholders or the Court. Further, those processes necessarily involve certain steps in obtaining shareholders permissions. Such processes are the very essence of the fabric and not just some technicalities that are to be consigned to history and ignored in making modifications. Whatever changes are made can only be minor ones which would not tamper with the essence of the scheme.

13. It is therefore well settled by the above decisions of the Hon"ble Supreme Court, that once a scheme is sanctioned and effected, the changes allowed therein should be minor ones and not "wholesale changes" which would tamper with the essence of the scheme and that if a Company desires to modify a scheme though not necessary to do so for the proper working thereof it is required to follow the procedure prescribed u/s 391 of the Act. In view thereof, allowing the prayers sought by the Applicants to recall/rescind/cancel the scheme in the garb of exercising inherent powers would not only amount to exercising powers not vested in this Court but would also amount to overreaching the law laid down by the Hon"ble Supreme Court. In view thereof I hold that this Court is not only not vested with power to abrogate/rescind/cancel the scheme or to even modify the scheme if it is not necessary for the proper working thereof but this Court cannot exercise inherent powers to abrogate/rescind/cancel the scheme once sanctioned and effective. The decision of the Hon"ble Apex Court in the case of S.K. Gupta (supra) relied upon by the learned Advocate for the applicants is of no assistance to the Applicants and in fact as set out hereinabove supports the submissions made on behalf of the Regional Director. The decisions relied on by the learned Advocate for the Applicants in the case of Bedrock Ltd. (supra) and in the case of L.A. Chougule (supra) are also of no assistance to the Applicants.

14. As stated above the Applicant Companies duly filed Form No. 21 with the Registrar of Companies thereby making the Scheme effective. Thereupon the Scheme became binding not only on the Applicant Companies but on the world at large. One of the Applicant Companies viz. Unique Delta Force Security Pvt. Ltd. also filed Form No. 23 and changed its name. In these circumstances the contention of the Applicants that they did not act on the Order of this Court sanctioning the Scheme is not sustainable.

15. The submission advanced on behalf of the Regional Director that the order

sanctioning the scheme cannot be recalled on principles analogous to order 23 of the CPC since the scheme has already become effective and certain rights are vested under the scheme, in my view is also correct. In this context, paragraphs 12 and 22 of the decision of the Hon'ble Supreme Court in R. Rathinavel Chettiar (supra) are relevant and reproduced hereunder:

12. What is essential is that the matter must have been finally decided so that it becomes conclusive as between the parties to the suit in respect of the subject matter of the suit with reference to which relief is sought. It is at this stage that the rights of the parties are crystallised and unless the decree is reversed, recalled, modified or set aside, the parties cannot be divested of their rights under the decree. Now, the decree can be recalled, reversed or set aside either by the court which had passed it as in review, or by the appellate or revisional court. Some withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out. It is for this reason that the proceedings either in appeal or in revision have to be allowed to have a full trial on merits.

22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained.

It is well settled that the order sanctioning a Scheme u/s 391 of the Act operates in rem. It affects the rights of several persons including creditors, investors etc. It also creates liabilities in favour of persons like the Income Tax Authorities, etc. These rights and liabilities become vested once the scheme becomes effective. Admittedly, in this case pursuant to the scheme, the net worth of the Demerged Company was reduced whereas that of the Resulting Company was increased. Undoubtedly, this creates rights in favour of the creditors of the Resulting Company. In the circumstances the submission advanced on behalf of the Regional Director that once the scheme has become effective, it is not permissible for the Company to rescind/abrogate/cancel the same without following the prescribed procedure is correct.

16. The Learned Advocate on behalf of the Applicants has also relied on the unreported decision of another Learned Single Judge of this Court viz. Dharmadhikari J. in the case of Topworth Steel and Power Pvt. Ltd. referred to above. In that case this Court had recalled the order approving and sanctioning the Scheme of amalgamation of the two companies. I find that the facts of the said case are materially different from those in the present case. From the

aforesaid order of Dharmadhikari J. it is apparent that in that case the companies concerned had not filed Form 21 with the Registrar of Companies. It is also apparent that nothing had been done in pursuance of the order sanctioning the Scheme. As such the Scheme had not come into effect. It was in the light of these facts and as observed by the Learned Judge in paragraph 7 of the decision "in facts peculiar to this case" that this Court allowed the application for recall of the order sanctioning the Scheme. As observed by me, the facts of this case are very different. In the circumstances the aforesaid decision in Topworth Steel and Power Pvt. Ltd. is of no assistance to the Applicants.

17. As submitted on behalf of the Regional Director, even on facts no case is made out for recalling of the order sanctioning the scheme. The reason cited by the Company for seeking to recall the order sanctioning the scheme is essentially that the Scheme is not workable and is adversely affecting the interests of the Companies. Apart from the fact that this can hardly be a ground for seeking cancellation of the scheme at this stage, not a single piece of evidence is produced before this Court to show that the contracts already entered into by the Demerged Company with their clients have been cancelled by the said clients or that they have refused to allow the Resulting Company to execute and complete the said contracts. There is nothing produced on record to even show that any of the proposed clients have refused to deal with the Resulting Company because the name of the Resulting Company does not include anything about the Facility Management Services or because the proposed clients are revaluating the entire process of the Resulting Company in terms of net worth, technical know how, qualification, ability to perform such contracts etc. In any event, all these factors were surely considered by the applicants before proposing the scheme of arrangement and inter alia stating therein on oath that the said scheme is in the interest of the Company and its shareholders. Again, in any event if the scheme is not workable then the Company can certainly seek directions or modifications to the scheme in order to make it workable. It cannot cancel the scheme on this ground. However, if the Applicants are determined to have the scheme rescinded/ cancelled, in view of the facts and law set out hereinabove, they will have to follow the procedure prescribed u/s 391 of the Companies Act and revert back to status quo ante. Under the circumstances, both the Applications are dismissed. However, there shall be no order as to costs.