

(1999) 03 BOM CK 0063

In the Bombay High Court

Case No : Company Application (Lodg.) No. 214 of 1999 in Company Application No. 51 of 1999

Wipro Finance Ltd.

APPELLANT

Vs

Suman Motels Limited

RESPONDENT

Date of Decision : 12-03-1999

Acts Referred:

Companies (Court) Rules, 1959 — Rule 19(3)
Companies Act, 1956 — Section 391

Citation : (1999) 4 BomCR 1 : (2002) 108 CompCas 549

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Virendra V. Tulzapurkar, instructed by Dhru and Co, for the Appellant; P.K. Samdani and Janak Dwarkadas, instructed by y M/s. Dave Girish and Co., for the Respondent

Judgement

F.I. Rebello, J.—Leave under Rule 19(3) of the Company Court Rules, 1959 granted to the petitioners to take out a Judge's Summons in terms of draft Judge's Summons handed in. Learned Counsel for the respondents waive service. By consent, Judge's Summons made returnable and heard forthwith.

2. By order dated 11th February, 1999 this Court directed meeting to be held of the secured and unsecured creditors separately. By the present application, the applicant who is an unsecured creditor has prayed for convening separate meeting of two classes of unsecured creditors of the respondent Company as classified in the Schedule to the company application. An affidavit has been filed in support of the application. The Company has appeared and has filed a list of documents.

With the consent of both the parties, the application has been heard and disposed of.

3. The bare facts necessary for disposal of the application may now be set out.

The applicant is a Non-Banking Finance Company. It has given on lease to the Company machineries/equipment. On 25th February, 1999 the applicant received a notice dated 17th February, 1999 from the respondent Company, intimating to the applicant, the convening of a meeting of the unsecured creditors, for obtaining sanction for the scheme of Amalgamation. The applicant on receipt of the notice by letter dated 25th February, 1999 requested for xerox copies of the documents enumerated in the letter and which were agreed to be furnished in the explanatory statement issued by the Company. The Company according to the applicant failed to provide the said copies. The applicant was constrained to put this on record by letter of 26th February, 1999. A further request made has also not been acceded to. It is then averred that by letter of 1st March, 1999 the applicant called on the Company to clarify the criteria, based on which the classification of the different creditors had been made. The applicant also called on the Company to furnish the list of Non Banking Finance Companies from whom the Company had taken equipments/machineries either on lease or hire basis. The Company has failed and neglected to furnish the said information. It is also pointed out that the explanatory statement as also valuation report are vague, incorrect and misleading. The applicant by letter of 5th March, 1999 called on the Company to furnish clarification in respect of the valuation report. Though the Company has received the said letter the contents are neither denied nor is there compliance with the requisition as set out in the said letter. The notice period for calling the meeting is short of the period required under the rules. Non Banking Financial Companies are a separate and distinct class of unsecured creditors.

The Company has appeared. Their learned Counsel points out that as they had short notice and as such no affidavit is being filed. The Company, however, relies on documents which includes agreements between the applicant and the Company. The Company seeks to rely on the said document to make good their submission that the applicant does not constitute a distinct class from the other unsecured creditors. It is then pointed out that in so far as the notice period is concerned the Company had moved an application for dispensing with the notice period, and this Court by order has allowed the application and has abridged the time in terms of Rule 7 of the Company Court Rules in holding the meeting. It is pointed out that if tripartite agreement dated 30th April, 1998, is considered, it would be clear that the earlier agreement has been determined. The only agreement now is for payment as contemplated by agreement dated 13th February, 1998 and if this be so, the interest of the applicant cannot be considered distinct from that of the other unsecured creditors. It is pointed out that apart from the applicant, there are no other unsecured creditors of the class mentioned by the applicant. At any rate it is pointed out that the interest of the applicant are in no way distinct and different from that of the other unsecured creditors. The mere fact that they are a Non Banking Financial Company by itself cannot constitute a class unless the applicant is able to point out that there are different characteristic between the applicant and the other unsecured creditors;

that by the very nature of the debt they are distinct and different from that of the other unsecured creditors which would enable this Court to come to conclusion that the applicant is a homogenous class by itself and as such a sub-class amongst the unsecured creditors for which a separate meeting is required. It is also pointed out that the applicant is guilty of suppression of material particulars and in that context this Court should not interfere with the meeting called for. At any rate it is pointed out that meeting is yet to be held. In the scheme itself there are no distinct provisions for making payment to the applicant and the unsecured creditors and in that light of the matter also the application ought to be rejected.

4. At the hearing of the application learned Counsel for the applicant has principally raised two contentions which can be formulated as under :---

(1) That the applicants are a distinct class by themselves amongst unsecured creditors and as such a separate meeting of this class ought to be held;

(2) That the explanatory statement and other matters is not satisfactory and in that light of the matter also the scheme of Amalgamation should not be approved.

However, while arguing the contentions, learned Counsel points out that at this stage he is not pressing contention No. 2 as more material would be required to be placed on record. However, he seeks liberty to raise this point at the hearing of the Scheme of Amalgamation itself.

5. In view of the above the second contention is not being dealt with. Liberty to the applicant to raise the matter at the hearing of the Scheme of Amalgamation if in law they are so entitled.

6. That leaves us with the first contention namely that the applicants is a sub-class in the class of unsecured creditors. Section 391 of the Companies Act provides that where a compromise or arrangement is proposed between the Company and the class of creditors or members as set out in sub-section (1) of section 391, the Court may on the application of the Company or creditors or members, ordinarily call a meeting of the creditors or class of creditors as the case may be. The meeting is to be called, held and conducted in such manner as the Court may direct, In the instant case it is the Company which has moved the Court for calling of a meeting of two classes of creditors which are secured creditors and unsecured creditors. The objections by the applicant is to the holding of the meeting of unsecured creditors as according to them they along with similarly situated creditors are a distinct sub-class amongst unsecured creditors. From the facts placed before me at the oral hearing on behalf of the Company it is contended that in terms of value, the amounts due to Creditors is Rs. 85.15 crores and in so far as the applicant is concerned it is Rs. 1.80 crores in terms of the claim of the applicant itself. From the arguments advanced at the bar there are no other unsecured creditors similarly situated like the applicant. The applicant, therefore, is the only Non-Banking Financial Institution.

That would however not detract from calling a separate meeting of Non Banking Financial Institution as even one person can constitute a distinct class by itself subject of course to satisfying other requirement most importantly that their interests are distinct from that of the other unsecured creditors.

Arguments have been advanced also as to what is the correct position of the agreement between the applicant and the Company in view of the tripartite agreement dated 13th February, 1998. It is contended on behalf of the Company that in view of the agreement dated 13th February, 1998 the Lease Agreement dated 19th November, 1994 and Hire Purchase Agreement dated 27th November, 1995 stand determined. It is, however, the contention of the Company that in view of non-compliance of the terms of the agreement dated 13th February, 1998 more specifically Clauses 4 and 8 of the Agreement the said agreement has been determined by the applicant and consequently it is the Lease Agreement dated 19th April, 1994 which is in force. I do not propose to deal with the legalities thereto as in my opinion, the matter can be disposed of by proceeding on the footing that the interest of the applicant are the interest of a Non-Banking Financial Institution.

7. The question, however, remains is whether the applicant can be treated as a distinct class by themselves. A class as understood must be homogenous in character. It must have special characteristic which distinguishes them from the others. In so far as "class" for the purpose of the Company Act is concerned, the interest of the class must be different from the interest of the others. In other words, in matters of application of mind and consequent judgment, it must be apparent that the interest would be different. Once the applicants are so able to point out then they can be treated as a class. If there is nothing to distinguish them from the others then it cannot be said that they would be a sub-class by themselves. Another distinguishing, characteristic is that in so far as the scheme is concerned, they should be dealt with differently as a class than the other unsecured creditors. If the applicant is able to point out from the material these different characteristic then only it could be said that they would be a sub-class by themselves and as such in terms of section 391 the Court should direct a meeting of this subclass. Before proceeding to consider whether the applicant satisfy this test, the judgments cited at the bar need to be dealt with. Counsel for the applicants had relied on the judgment of the Court of Appeal 2 Q.B. 573 in Sovereign Life Assurance Company v. Dodd. In that case a meeting was called of the policy holders for the purpose of the arrangement that was sought to be approved. The applicant before the Court was a person whose policy had matured. The question was whether calling of a meeting both of the policy holders whose claims had matured and those whose claims had not matured would be legal and proper. After considering the material the Court came to the conclusion that unsecured creditor who had a policy which had matured formed a distinct class of creditors from those whose policy had not matured and as such a separate meeting of such class ought to have been held under the Act in order to make the arrangement binding upon the members of that class. Next reliance is

placed on the judgment of the Division Bench of the Madras High Court in the case of D.A. Swamy & others v. India Meters Ltd., 1994 (79) Comp Cas 27. The facts therein were that the meeting of the unsecured creditors of the Company was called for the purpose of scheme of revival of the Company. The scheme was approved by a learned Single Judge of the Madras High Court considering the interest of the employees and rejecting the objections of certain unsecured creditors. The objection was that the scheme proposed differential treatment to fixed depositors and other unsecured creditors such as loan and Hundi and suppliers. It was contended that in these circumstances it could not be said that all unsecured creditors would constitute one class as there were different sub-classes amongst unsecured creditors. The Division Bench upheld the contention that on the facts of that case amongst the unsecured creditors there were sub-classes and accordingly set aside the order of the learned Single Judge and remanded the matter for rehearing. However, what is important in the said judgment are observations therein. The Division Bench referred to the judgment of the Gujarat High Court in the case of (Maneckchowk and Ahmedabad Mfg. Co. Ltd. In re), 1970 (49) Comp. Cas 819 (Guj.) The Gujarat High Court in Maneckchowk and Ahmedabad Mfg. Co. Ltd. (supra) had relied on the commentary by Buckley on the Companies Act, 13th Edition, page 406, wherein it has been set out that the creditors composing different classes must have different interests. The test laid down was could the different state of facts existing among different creditors affect their minds and their judgment. In such a situation they could constitute a separate class by themselves. Another test was that members belonging to the class must form a homogeneous group with commonality of interest. The next test would be is whether the nature of compromise offered to different group of classes are different. If a different compromise is offered to different creditors those would constitute a class by themselves. It was set out that the group styled as a class should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical. The learned Division Bench of the Madras High Court approved the observations as culled out by them, from the judgment in Maneckchowk and Ahmedabad Mfg. Co. Ltd. (supra). Reference was also made to the judgment of the Gujarat High Court in (Mafatlal Industries Limited in re), 1995 (84) Comp Cas 230. I need not deal with the said judgment as in my view the very matter came up before the Apex Court in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., . It will be worthwhile to consider some observations in the said judgment. The points to be decided have been set out in paragraph 26 of the said judgment. As far as we are concerned, what is relevant is point No. 4 which has been dealt with in paragraph 38 of the judgment of the Apex Court. The Apex Court after considering various aspects observed as under :--

"On the express language of section 391(1) it becomes clear that where a compromise or arrangement is proposed between a Company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly presupposes that if the Scheme of Arrangement or

Compromise is offered to the members as a class and no separate scheme is offered to any sub-class of members which has a separate interest and a separate scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive."

Considering what has been set out above and the law as laid down can it be said that the applicants are a class by themselves. The applicants have hired certain machineries to the Company. The applicants continue to be the owner of the machinery. All that they are entitled to is the rental of the machinery in terms of the said agreement. In other words their claim is like the claim of any other unsecured creditors. Even assuming for a moment that by the very nomenclature of being Non Banking Financial Companies they can be said to be a sub-class themselves the test as applied by the Gujarat High Court and followed by the Division Bench of the Madras High Court is not attracted in this case. In other words, if a meeting of the secured creditors is held there would be no different interest of the unsecured creditors which on application of mind would affect their judgment in approving or rejecting the Scheme of Amalgamation. Therefore, apart from the nomenclature there is nothing distinct between the applicant and the other unsecured creditors to treat them as a class by themselves. Proceeding further even in the scheme of Arrangement/Compromise it is not provided for dealing differently or distinctly between the applicant and the other unsecured creditors. Therefore, none of the tests which would make the applicant a distinct and different class by themselves which would require a separate meeting of persons like the applicants herein has been satisfied. If that be the case, the matter would be covered in my opinion with the observations of the Apex Court quoted above in the case of *Miheer H. Mafatlal (supra)*. Calling of a separate meeting of such group of Non Banking Financial Companies is not called for. Considering the above, the contention raised by the applicant to call a separate meeting of the applicants is rejected.

8. In the light of that the Company application rejected.

9. No order as to costs.

10. Application rejected.