

(2000) 12 DEL CK 0025
In the Delhi High Court
Case No : C.A.No. 1712 of 2000

YKM Holdings Private Limited

APPELLANT

Vs

Prayag T-Pac Industries Limited and Others

RESPONDENT

Date of Decision : 20-12-2000

Acts Referred:

Companies Act, 1956 — Section 400, 643

Citation : (2000) 12 DEL CK 0025

Hon'ble Judges : Mukul Mudgal, J;Devinder Gupta, J

Bench : Division Bench

Advocate : Shri Vikas Dhawan, for the Appellant; Shri S.K. Luthras, for the Respondent

Judgement

Devinder Gupta, J. (Oral)

1.The above reference is on the point that whether notice to the Central Government as envisaged in Section 394A of the Companies Act, 1956 (for short "the Act"), is required to be given both of the first application u/s 391(1) of the Act for convening a meeting and of the second application under sub-section (2) of Section 391 of the Act before sanctioning the compromise or arrangement.

2.Necessity to make reference by the Company Judge arose because of conflicting views expressed by two learned Judges of this Court in two separate decisions. Y.K.Sabharwal, J. in re:- Jindal (India) Ltd. reported as 1993 (76) Comp. Cas 443 held that notice to the Central Government is necessary before making any order under sub-section (1) of Section 391 of the Act. P.K.Bahri, J. in Mohan Exports India Ltd. v. Tarun Overseas (P) Ltd. 1994 Cri.L.J. 193 held that no notice was required to be issued to the Central Government at the time the Judges Summons are taken out under sub-section (1) of Section 391 of the Act for holding meetings of the creditors and the share holders. The view expressed by Sabharwal, J. in Jindal (India) Ltd was not placed before P.K.Bahri, J.

3.The applicant company filed application u/s 391(1) and 393 of the Act praying

for issuing necessary direction regarding holding of meeting of equity shareholders and creditors of the applicant companies. A question arose whether at this stage notice of the application should or should not be given to the Central Government in view of Section 394A of the Act. Section 391 and 393 read:-

"391. Power to compromise or make arrangements with creditors and members -

(1) Where a compromise or arrangement is proposed -

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three fourths in value of the creditors, or class of creditors, or members or class of members, as the case may be, present and voting either in person or, where proxies are allowed under the rules made u/s 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or agreement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members or all the members of the class, as the case may be, and also on the company or in the case of a company which is being wound up, on the liquidator and contributories of the company:

Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under Sections 235 to 251, and the like.

(3) An order made by the Court under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument Constituting or defining the constitution of the company.

(5) If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to ten rupees for each copy in respect of which default is made.

(6) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

(7) An appeal shall lie from any order made by a Court exercising original jurisdiction under this section to the Court empowered to hear appeals from the decisions of that Court, or if more than one Court is so empowered, to the Court of inferior jurisdiction.

The provisions of sub-sections (3) to (6) shall apply in relation to the appellate order and the appeal as they apply in relation to the original order and the application.

393. Information as to compromises or arrangements with creditors and members - (1) Where a meeting of creditors or any class of creditors, or of members or any class of members, is called u/s 391 -

(a) with every notice calling the meeting which is sent to a creditor or member, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect, and in particular stating any material interests of the directors, managing director, or manager of the company, whether in their capacity as such or as members or creditors of the company or otherwise, and the effect on those interests, of the compromise or arrangement, if, and in so far as, it is different from the effect on the like interests of other persons, and

(b) in every notice calling the meeting which is given by the advertisement, there shall be included either such a statement as aforesaid or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of such a statement as aforesaid.

(2) Where the compromise or arrangement affects the rights of debenture holders of the company, the said statement shall give the like information and Explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give such respects the company's directors.

(3) Where a notice given by advertisement includes a notification that copies of a statement setting forth the terms of the compromise or arrangement proposed and explaining its effect can be obtained by creditors or members entitled to attend the meeting, every creditor or member so entitled shall, on making an application in the manner indicated by the notice, be furnished by the company, free of charge, with a copy of the statement.

(4) Where default is made in complying with any of the requirements of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees, and for the purpose of this sub-section any liquidator of the company and any trustee of a deed for securing the issue of debenture of the company shall be deemed to be

an officer of the company:

Provided that a person shall not be punishable under this sub- section if he shows that the default was due to the refusal of any other person, being a director, managing director, manager or trustee for debenture holders, to supply the necessary particulars as to his material interests.

(5) Every director, managing director, or manager of the company, and every trustee for debenture holders of the company, shall give notice to the company of such matter relating to himself as may be necessary for the purposes of this section, and if he fails to do so, he shall be punished with fine which may extend to five thousand rupees."

4. Section 394A of the Act was introduced by the Companies (Amendment) Act, 1965, which received the assent of the President on 25.9.1965 and was published in Gazette of India on 27.9.1965. It read:-

"Section 394A. Notice to be given to Central Government for application under Sections 391 and 394 - The Court shall give notice of every application made to it u/s 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections."

5. After Section 394A became a part of the Statute, similar question for the first time arose before the Calcutta High Court. Learned Single Judge of that Court in the matter of Bangeshwari Cotton Mills Ltd. 1967 (37) Comp. Cas 195 held that notice to the Central Government is not required to be given of the first application for convening meeting under sub-section (1) of Section 391 of the Act. Notice as envisaged u/s 394A of the Act is meant to be issued only when any final order is passed under sub-section (2) of Section 391 of the Act for sanctioning the compromise or arrangement. This view was followed by learned Single Judge of Madras High Court in W.A. Beardsell & Co. (P) Ltd. and Mettur Industries Ltd. 1968 (38) Comp. Cas 197. It was held that notice to the Central Government need not be given at the initial stage before the Court makes the order on an application under sub-section (1) of Section 391 of the Act calling for a meeting of the creditors or of the members of the company.

6. Learned Single Judge of Allahabad High Court in Hind Auto Industries Ltd. v. Premier Motors (P) Ltd. and others 1969 (39) Comp. Cas 137 took a different view and did not agree with the view expressed in the matter of Bangeshwari Cotton Mills Ltd. and W.A. Beardsell and Co. (P) Ltd. (supra). It was held that both the Central Government as well as shareholders are entitled to a notice at the initial stage of passing any order under sub- section (1) of Section 391 of the act for holding of meeting of creditors and members in connection with the proposed compromise or arrangement.

7. Y.K. Sabharwal, J. of this Court in Jindal (India) Ltd. (supra) followed the view, as expressed in Hind Auto Industries Ltd. and dissented with the view expressed

in Bangeshwari Cotton Mills Ltd. and W.A.Beardsell & Co.(P) Ltd.. As noticed above, the view expressed by Y.K.Sabharwal, J. in Jindal (India) Ltd. was not placed before P.K.Bahri, J. in Mohan Exports India Ltd. case (supra), who followed the view of Madras High Court in W.A.Beardsell & Co.(P) Ltd.

8.In Bangeswari Cotton Mills Ltd. Statement of Objects and Reasons accompanying the Bill when introduced in Parliament to further amend the Companies Act, 1956 were made use of for understanding the background, antecedent state of affairs, surrounding circumstances in relation to the Act and the evil, which the Statute sought to remedy. It was held that Parliament must be presumed to know the provisions of various rules, which the Supreme Court had framed in exercise of its powers u/s 643 in respect of Section 391. Rules 67 and 68 of the Companies (Court) Rules, 1959 clearly laid down that an application u/s 391(1) for an order convening a meeting of creditors or members shall be moved ex parte except where the company is not the applicant or the company is being wound up. Similarly, Rule 71 provides that an application under sub-section (6) of Section 391 of the Act for stay of the commencement or continuation of suits or proceedings may be moved ex parte except where a petition for winding up or a petition u/s 397 or 398 is pending. Learned Judge observed that if, Therefore, notice of every application has to be given to the Central Government to comply with the provisions of Section 394A of the Act, the petitioner's right to move the Court ex parte would be completely taken away. The purpose of notice u/s 394A was only to enable the Central Government to study the proposal for a compromise or arrangement and raise such objection thereto as it thinks fit to the proposal for compromise or arrangement. Such a proposal for compromise or arrangement does not take final shape till it has been passed by the meeting or meetings of creditors and members. Only when final proposal is brought before the Court for its sanction, the Court has to give notice to the Central Government and to hear its representations, if any. Thus the words "any order" used in Section 394A must be construed to mean any final order and not every order and consequently, the words "every application" means application under sub-section (2) of Section 391 or Section 394. It will not include applications under sub-section (1) of Section 391 or sub-section (6) of Section 391.

9.In W.A.Beardsell & Co.(P) Ltd. question of issuance of notice at the initial stage arose because of the objection taken on behalf of the Central Government to whom notice had been issued after final proposal had come to the Court as a result of the meeting of the petitioner companies. Objection raised by the Central Government was that notice ought to have been given to the Central Government prior to the request for holding of meeting u/s 391 of the Act. Turning down the objection, learned Single Judge of Madras High Court held that Section 394A of the Act, which appears after Section 394, makes it very clear that it is only the scheme that if approved by the body of shareholders in the manner contemplated u/s 391 that should go to the Central government for their remarks. The role played by the Central Government in such cases is that of an

impartial observer who acts in public interest and advises the Court that it is or it is not feasible for the two companies to amalgamate. Even amalgamation is one limb of indoor management. Therefore, notice contemplated u/s 394A of the Act is required to be given only at the stage when application u/s 394, of the Act is made to the Court for sanctioning the scheme and not any time prior thereto. Learned Single Judge agreed with the view expressed in Bangeswari Cotton Mills Ltd. case (supra).

10. In Hind Auto Industries Ltd. preliminary question had arisen whether any notice either to the Central Government u/s 394A or to the shareholders of the company was necessary at the stage of considering the application by a company u/s 391(1) of the Act. Because of the rule of construction that a statute cannot be interpreted in such a way as to limit the ambit of the words used by reading words into it unless there is some overriding deed to reconcile a conflict with a statutory provision, on a plain reading of the provisions of Section 394A of the Act, it was held that no distinction can be made out between an order, which is to be passed under sub-section (6) of Section 391 of sub-section (2) of Section 391. Both the Central Government as well as shareholders of the company who are distinct legal entities, apart from the company are entitled to be heard before a decision is taken under sub-section (1) of Section 391, which is implied from the nature of the functions to be performed by the Court under sub-section (1) of Section 391. The function is undoubtedly a judicial function in a proceeding, which begins with the filing of an application before the Court and terminates in an order under sub-section (1) of Section 391 before another stage or proceeding under sub-section (2) of Section 391 is commenced and is terminated. Central Government may be interested in drawing the attention of the Court to certain matters, which may make the holding of the proposed meeting or meetings necessary or unnecessary. Central Government may point out that there is no need for holding of meeting of the shareholders or creditors for deciding whether amalgamation should take place or not or whether it is essential in public interest that an amalgamation should take place.

11. Y.K. Sabharwal, J. in Jindal (India) Ltd. followed the vigorously interpretation as adopted in Hind Auto Industries Ltd. holding that the provisions of Section 394A of the Act are unambiguous and clear. Its plain reading requires a notice of every application, which would include an application under sub-section (1) of Section 391 also.

12. We have given our considered thought to the various decisions and we are inclined to agree with the view expressed in Bangeswari Cotton Mills Ltd. and in W.A. Beardsell & Co. (P) Ltd..

13. No doubt that the Statement of Objects and Reasons accompanying a Bill when introduced in Parliament cannot be used to determine the true meaning and effect of the substantive provision of the Statute. Statement of Objects and Reasons cannot be used except for a limited purpose of understanding the background and antecedent state of affairs leading up to the legislation.

However, reference to the Statement of Objects and Reasons is permissible for understanding not only the background, the antecedent state of affairs, the surrounding circumstances in relation to the Statue but also the evil, which the Statute sought to remedy. Reference in this regard be made to Sanghvi Jeevraj Ghewar Chand and Others Vs. Secretary, Madras Chillies, Grains and Kirana Merchants Workers Union and Another, ; Virjiram Sutaria Vs. Nathalal Premji Bhavadia and Others, ; Shri Shiv Kirpal Singh Vs. Shri V.V. Giri, ; Dantuluri Ram Raju and Others Vs. State of Andhra Pradesh and Another, ; Committee for Protection of Rights of ONGC Employees and others v. Oil and Natural Gas Commission, Dehradun and another AIR 1889 S.c. 167 and State of Himachal Pradesh and another Vs. Kailash Chand Mahajan and others, .

14. In Bangeswari Cotton Mills Ltd. case (supra) only to this limited extent reference was made to the Statement of Objects and Reasons and Notes on Clauses relating to Bill No.64 of 1964, which was moved in Parliament to further amend the Companies Act, 1956. The Note on Clause 50 reads:-

"Based on the recommendation in paragraph 46 of the Commission's Report, the proposed section 394A makes it obligatory on the court to give notice to the Central Government of every application made to it u/s 391 or 394 and to take into consideration the representation made by that Government, before any order on the proposed compromise or arrangement or scheme of amalgamation. This would enable the Government to study the proposal and raise such objections thereto as it thinks fit in the light of the facts and information available with it, and also place the court in possession of certain facts which might not have been disclosed by those who appear before it so that the interests of the investing public at large may be fully taken into account by the court before passing its order."

15. Learned Single Judge in Bangeshwari Cotton Mills Ltd. (supra) after quoting note on Clause 50 only for the limited purpose of ascertaining the conditions prevailing at the time, which actuated the sponsor of the Bill to introduce the same and the extent of the evil, which was sought to remedied also made reference to para 4 of the Report of the Commission on In the Administration of Dalmia-Jain Company relevant portion of which reads:-

"Section 400 of the Companies Act should be suitably amended to provide for issue of notice to, and consideration of the representations, if any, submitted by the Central Government, by the court before it passes the final orders on an application made to it under Sections 391 to 394."

16. After quoting the aforementioned portion of paragraph 47 of the Report on Commission of inquiry it was observed that Section 400 of the Companies provides for notice to the Central Government of applications under Sections 397 and 398. Instead of amending this Section to include applications u/s 391 or 394, Parliament, it appears, has enacted new Section 394A. It was further observed that as this provision is based on para 46 of the Commission's Report,

the intention obviously was that before passing any final order u/s 391 or 394, the Court would give notice to the Central Government.

17. May be that a plain reading of Section 394 would suggest that notice shall be given of every application made to the Court u/s 391 or 394 to the Central Government but the same provision also makes it clear that Court shall take into consideration representations, if any, made to it by the Central Government before passing any order under those provisions. The orders to be passed under those provisions obviously would mean the final order, as contemplated under those provisions and not any other interim order of ancillary nature. Whether a meeting of the creditors or members is to be held or not or the manner in which it should be held to consider a compromise or proposed arrangement cannot be of any concern to the Central Government since ultimately the result of the meeting will have to be placed before the Court for final orders to be passed thereon and obviously the Court before passing any final order on the proposals, if any, is required to consider suggestions, if any, of the Central Government. With due respect, we do not agree with the view expressed in Hind Auto Industries Ltd. and Jindal India Ltd. cases (supra) and would approve the view expressed in Bangeswari Cotton Mills Ltd. and W.A. Beardsell & Co. (P) Ltd. cases (supra).

18. Consequently, we are of the view that notice, which is required to be served on the Central Government would be of an application under sub-section (2) of Section 391 or of Section 394 and not at initial stage of an application under sub-section (1) of Section 391 for calling of meetings of the creditors and members of the company.

19. The reference is answered accordingly.