

**In Re: Sumani Pvt. Ltd.**

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**Court :** Mumbai

**Decided On :** Mar-27-1979

**Reported in :** [1979]49CompCas547(Bom)

**Judge :** R.L. Aggarwal, J.

**Acts :** [Companies Act, 1956](#) - Sections 294, 391, 394, 394(1), 394A, 448(2), 449 and 450; Companies (Amendment) Act, 1965

**Appeal No. :** Company Petition No. 686 of 1978 (in Company Application No. 131 of 1978)

**Appellant :** In Re: Sumani Pvt. Ltd.

**Advocate for Def. :** F.H.J. Talyarkhan, Adv.

**Advocate for Pet/Ap. :** S.D. Parekh, Adv.

**Judgement :**

**Aggarwal, J.**

1. The petitioner herein, Sumani Private Ltd., is the transferor-company seeking amalgamation with Lalitmani Private Ltd., the transferee-company, as per scheme of amalgamation formulated by them, Ex. A to the petition.

2. When the matter came up for admission and directions on 20th October, 1978, before Mrs. Sujata Manohar J., it was contended on behalf of the petitioners that under s. 394(1), second proviso, of the [Companies Act, 1956](#), the official liquidator is required to make a report to the court only in respect of company which is being wound up and not in respect of company which is a going concern, and in support of this contention, reliance was placed upon the decision of a single judge of the Calcutta High Court in *Marybong & Kyel Tea Estate Ltd., In re* [1977] 47 Com Cas 802 (Cal). In view of this contention, Mrs. Sujata Manohar J. directed that the official liquidator need not make any report under s. 394(1) at this stage. The matter now comes up for consideration on the limited issue as to whether no report is necessary as contended on behalf of the petitioners herein.

3. Mr. S. D. Parekh, learned counsel appearing for the petitioners, submitted that the opinion expressed by the Calcutta High Court is correct. On the other hand, Mr. Talyarkhan, learned counsel appearing for the Regional Director of the Company Law Board, Bombay, submitted that the view taken by the Division Bench of the Karnataka High Court in *Regional Director, Company Law Board v. Mysore Galvanising Co. Pvt. Ltd.* [1976] 46 Com Cas 639 is the correct view.

4. Before proceeding further, let us keep before ourselves the relevant provisions of s. 394 of the [Companies Act, 1956](#) :

'S. 394. (1) Where an application is made to the court under s. 391 for the sanctioning of a compromise or a arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court -

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and

(b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a 'transferor-company') is to be transferred to another company (in this section referred to as 'the transferee-company');

the court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters : .....

(iv) the dissolution, without winding up, of any transferor company; ....

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the court unless the court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest :

Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the court unless the official liquidator has, on scrutiny of the books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.'

5. I have been taken through the relevant portion of the judgment of the Calcutta High Court by Mr. Parekh. The learned single judge of the Calcutta High Court, after having addressed himself to the various principles on which a proviso is to be construed and interpreted, posed a question whether the main provision to which the proviso is added is clear and unambiguous and even then whether the main provision and proviso can be harmoniously construed so as to give effect to the object and purpose of the Act. He then takes note of the different types of companies and the different modes of winding up and also of dissolution of a company and, *entire alia*, of ss. 448(2), 449 and 450 of the Act. According to the learned judge, the second proviso is intended to apply only in cases where there is commencement of winding up either by presentation of a winding-up petition or any resolution of voluntary winding up of a company has been passed. He then observed [1977] 47 Cam Cas 802 :

'That (the winding up of a company is the case only where an official liquidator has been appointed or could be appointed by the court, otherwise there would be inconsistency and absurdity of the courts appointing an official liquidator in the

case of a going concern where no winding-up petition has been presented or resolution for voluntary winding up has been passed. Further, the first provision to section 394(1) contemplates a case of a company which is being wound up and before sanctioning the scheme, the report of the Company Law Board or the Registrar is a condition precedent. The proviso relates to a stage prior to the sanctioning of the scheme by the court, whereas the second proviso to section 394(1) contemplates the stage after sanctioning but before passing an order of dissolution under section 394(1)(iv) of the [Companies Act, 1956](#), and, in my view, the said provision only applies to the company in respect of which an official liquidator has been appointed or could be appointed under the provisions of the Companies Act by the court. It has no application to cases, as in the present application, where the transferor-company is a going concern in respect of which no winding-up petition has been presented or there is no voluntary winding up pending.'

6. The learned judge further says :

'I cannot accept the contention of Mr. Bose that in all cases of dissolution to be ordered by court under section 394(1)(iv), the second proviso applies and the report of the official liquidator is a condition precedent to such an order. That construction would mean and lead to a position of appointment of official liquidator by the court even in cases where no winding-up petition is pending or the company is not in voluntary liquidation, without any specific powers being given to court for such appointment. In my view, the words 'without winding up' in section 394(1)(iv) include all types of companies which I have enumerated before and is a general provision giving the court wide discretion to make an order of dissolution even in cases where the company is a going concern and the second proviso has no application to such companies as no official liquidator can be appointed by the court for the company. If the section and proviso are construed in this manner, there will be no inconsistency and that will lead to harmonious construction of the main provision thereto, that is, section 394(1)(iv) and the second proviso thereto.'

7. Mr. Talyarkhan submitted that the learned single judge of the Calcutta High Court that proceeded on a basic fallacy, namely, that the official liquidator could

come in only in the case of a winding-up of a company, whereas the second proviso provides for a special duty to be performed, namely, scrutiny of the affairs of the transferor-company.

8. The learned single judge's line of reasoning seems to be that unless an official liquidator is appointed by the court for the company, he cannot perform the assigned functions under the second proviso. According to him, in the case of a company which is a going concern and seeks to terminate its existence by dissolution under s. 394(1)(iv), asking the official liquidator by the court. I beg to differ with the opinion expressed by the learned judge. I would say that the official liquidator is on the scene under the scheme of the [Companies Act, 1956](#), and by the second proviso, Parliament has brought him into the picture and assigned him a special duty of gathering information and material on certain points. The learned single judge is right when he considers the official liquidator's role vis-a-vis winding up of a company. But if the official liquidator is directed to do an additional piece of work as expressed in the second proviso, I do not think, nor it was argued before me, that the official liquidator would be doing an unlawful act by reason of it being out side the scope of his duties. As I understand the second provision, I feel that the court is empowered to take his assistance to satisfy itself that the affairs of the company to be dissolved have not been conducted in a manner prejudicial to the interests of its members or to public interest. The second proviso provides a machinery through the agency of the official liquidator. I am strengthened in my view by the fact that Parliament was keen to see that interests of the members of the company to be dissolved or public interest are not prejudiced. This twin objective was sought to be achieved by inserting the first and the second provisos by the Companies (Amendment) Act, 1965. These new dis-provision were inserted with a view to give effect to the recommendations of the Daphtary Sastri Committee based on the report of the Vivian Bose Commission of Inquiry. Parliament had felt about the malpractices prevalent in the process of schemes of compromise or arrangement or reconstruction and amalgamation and wanted to check the same. At the same time, it inserted s. 394A by the Companies (Amendment) Act, 1965, which is in these terms :

'394A. Notice to be given to Central Government for applications under sections 391 and 394. - The court shall give notice of every application made to it under section 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.'

9. The combined reading of the first and second provisos and s. 394A shows that the court is enjoined upon to see that the schemes of amalgamation are not sanctioned or an order for dissolution is not made or an application under s. 391 or s. 294 is not granted, unless the court has considered the report or the representation of the Central Government, as the case may be. The learned single judge's approach, in my humble view, runs contrary to the plain language of the relevant provisions and his construction rather advances the mischief and suppresses the remedy rather than bringing the contrary result.

10. The cardinal rule for the construction of the Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. The court has to determine the intention as expressed by the words used. And in order to understand these words, it is material to inquire what is the subject-matter with respect to which they are used and the object in view. A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered. (Vide *Barnes v. Jarvis* [1953] 1 WLR 649. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense, for in that case the words of the statute speak the intention of the legislature.

11. The learned judges of the Karnataka High Court in the case of *Regional Director, Company Law Board v. Mysore Galvanising Co Pvt. Ltd.* [1976] 46 Com Cas 639 :

'It is plain from the above analysis of the two provisos that the said provisos deal with different situations, in that while the first proviso relates to the sanction of a compromise or arrangement involving a scheme of amalgamation of a company 'which is being wound up', the second relates only to an order for dissolution of a transferor-company without winding up. It is no doubt true that a single scheme of

amalgamation or reconstruction in a given case may involve both types of companies, namely, those under winding up and those which are not, one or more of the latter category coming in for dissolution. In such a situation both the provisos come into operation. On the other hand, there may be cases where, as in the instant case, no company which is under winding up may be involved. In such an event, the first proviso does not come into play at all and only the second proviso will be operative. This is not the same as saying that the second of the provisos would come into operation only when the first proviso operates, as contended for the respondent-companies.'

12. To sum up, dissolution of a transferor-company cannot be ordered without first obtaining a report from the official liquidator under the second proviso.

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