In Re: Electronics Ltd. (In Liquidation)

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Court : Delhi

Decided On : Mar-31-2008

Reported in : [2009]149CompCas100(Delhi)

Judge : Vipin Sanghi, J.

Acts : Haryana Municipal Corporation Act - Sections 133; Companies Act, 1956 - Sections 481, 529 and 529A; Income Tax Act; Income Tax Rules - Rule 66; Code of Civil Procedure (CPC) - Sections 151; Companies (Court) Rules, 1959 - Rule 9

Appeal No. : C.A. Nos. 1256 of 2006 and 13 of 2007 in C.P. No. 159 of 1996

Appellant : In Re: Electronics Ltd. (In Liquidation)

Advocate for Pet/Ap. : K.C. Nanda; T.S. Chaudhary; Sanjeev Mahajan; Abinash K. Mishra; Anurag Sain; Prema Priyadarshni an; Manisha Tyagi, Advs

Disposition : Application dismissed

Judgement :

Vipin Sanghi, J.

C.P. No. 159 of 1996:

1. Counsel for the Municipal Corporation of Faridabad states that an application for setting aside the ex parte order in respect of C.A. No. 1256 of 2006 had been filed

by him on July 3, 2007, vide diary No. 140055. I find that the same is not on record though advance copy has been served on the applicant of C.A. No. 1256 of 2006. Learned Counsel for the applicant in C.A. No. 1256 of 2006 submits that she has no objection to the order proceeding ex parte against the Municipal Corporation of Faridabad being recalled. In view of the consent given by the applicant in C.A. No. 1256 of 2006 the order dated September 7, 2007, in so far as it proceeded ex parte against the Municipal Corporation of Faridabad is recalled.

C.A. No. 1256 of 2006:

2. I have heard counsel for the parties on this application for some time. Counsel for the Municipal Corporation of Faridabad submits that various portions of the land purchased by the applicant as an auction purchaser have since been transferred to third parties. This position is accepted by counsel for the applicant also. It would therefore have to be examined whether the application can be maintained by the applicant the auction purchaser or not. For this it is necessary to examine the transfer deeds executed by the auction purchaser in favour of third parties. Learned Counsel for the applicant wishes to place them on record. Let the same be filed along with the supporting affidavit within two weeks.

3. My attention has also been drawn to Section 133 of the Haryana Municipal Corporation Act. It is argued that the property in question admittedly was lying in de-use/vacant and unproductive and for more than 60 days (it is claimed to have been in disuse for five years). Consequently, two-third of the fire tax and general tax assessed on the ratable value ought to have been, in any case, refunded. Learned Counsel for the Municipal Corporation of Faridabad seeks time to place on record the quantification of the tax levied on yearly basis and the refund/remission under Section 133 of the Haryana Municipal Corporation Act that the applicant claims, without prejudice to the rights and contentions of the parties. Let the same be filed by the Municipal Corporation of Faridabad along with the supporting affidavit within four weeks.

4. List on July 15, 2008.

C.A.No. 13 of 2007:

5. This is an application filed by the ex-management under Section 481 of the Companies Act, 1956, read with Rule 9 of the Companies (Court) Rules, 1959 and Section 151 of the CPC. I have heard counsel and as would become clear from the later part of this order, the prayer made in the application does not indicate the real purpose behind the same being filed. The prayer appears to be innocuous inasmuch as, it is projected that the applicant is keen to pay the workmen proportionately on pro rata basis as paid to the two secured creditors, notwithstanding the appointment of the committee by this court, so that workers who are in hard times may be paid on an early date. On the face of it, the applicant exhibits sympathy towards the workers who have not been paid. However, on a deeper scrutiny it transpires that the applicant is really seeking to resile from the undertaking given to this Court on March 24, 2005, which was accepted by the court and by which the applicant is bound.

6. The company in liquidation had two secured creditors, namely, the Canara Bank and the Union Bank of India. These two secured creditors chose to remain outside the winding up proceedings and this was permitted by the court vide order dated July 29, 2004. The aforesaid two secured creditors preferred original applications before the Debts Recovery Tribunal which came to be allowed. The amounts owed to these two secured creditors were Rs. 22.13 crores and Rs. 21.32 crores, respectively. Vide order dated September 25, 2003, the Recovery Officer of the Debts Recovery Tribunal was allowed to go ahead with the sale of the property of the company in liquidation which was mortgaged with the secured creditors. The official liquidator and the ex-management were also associated with the sale. The property of the company in liquidation was sold for a consideration of Rs. 9 crores. This amount was deposited with the Canara Bank. At that stage, the ex-management of the company in liquidation and the aforesaid two secured creditors arrived at a settlement. Each of the two secured creditors agreed to accept an amount of Rs. 3.5 crores in full and final settlement of their respective claims. On March 18, 2005, the Recovery Officer recorded the settlement. The relevant extract of the order of the Recovery Officer reads as follows:

It has been mentioned in the application that the same has been filed in view of the compromise entered between CD No. 3 and both the banks, i.e., the Canara

Bank and Union Bank of India who have agreed to receive Rs. 3.5 crores each. Acceptance of compromise letters from both the banks are enclosed with the application.

The Canara Bank as well as Union Bank of India have compromised the matter with regard to their dues for a sum of Rs. 350 lakhs + interest for certain period and Rs. 350 lakhs, respectively, after passing the order dated September 25, 2004, by the hon'ble Delhi High Court. The parties, i.e., Canara Bank and Union Bank of India as well as official liquidator have no objection to the sale of assets of defendants/CDs in terms of compromise under Rule 66 of the Second Schedule to the Income-tax Act. The official liquidator has stated that only mortgaged assets be sold.

After perusing the application of CD No. 3, records of compromise and hearing arguments of all concerned parties, it has become clear, that banks want their fixed share of amount by allowing private sale of the properties under the compromise while as per orders of the hon'ble High Court of Delhi, sale proceeds are to be distributed by the hon'ble Delhi High Court itself. In view of this after considering the compromise between the parties, earlier efforts made by the official liquidator for sale, valuation of properties on record, reply(s) of all concerned parties, i.e., both the banks and official liquidator. CD No. 3's application is allowed to the extent of raising the compromised amount of Rs. 9.00 crores in no lien account with the Canara Bank through the proposed buyer M/s. UCC builders for the assets of CD No. 1 within the period of compromise subject to the distribution of sale proceeds by the hon'ble Delhi High Court after raising the amount of Rs. 9 crores (as per compromise). As per order of the hon'ble High Court, the official liquidator shall submit a report and Canara Bank shall file an affidavit to this effect to the hon'ble High Court of Delhi for disbursement and distribution of their shares. After distribution of proceeds, satisfaction of recovery certificates the issue of sale confirmation and possession shall be decided accordingly.

7. With the aforesaid one-time settlement with the two secured creditors in his hand, the ex-management through the ex-managing director, Shri Rajiv Sarin,

approached the official liquidator by filing an affidavit dated March 22, 2005, so as to secure his consent to the release of the amounts to be paid to the secured creditors from out of the auction sale proceeds. The relevant extract of the said affidavit reads as follows:

2. Whereas in terms of the compromise arrived between the Canara Bank, Union of India, official liquidator and CD-3, respectively, before the learned Recovery Officer, Debts Recovery Tribunal, New Delhi, in R.C. No. 100 of 2002, in the matter of Canara Bank v. Electronics Ltd. An amount of Rs. 3.5 crores (Rupees three crores fifty lakhs only) is to be paid to Canara Bank and Union Bank of India, respectively. While a sum of Rs. 2 crores is to be deposited with official liquidator in order to meet their expenses/payment to the workmen and labourers.

3. By affidavit I undertake that in case the amount payable by official liquidator is over Rs. 2 crores (Rupees two crores only) in that event I shall pay the said additional amount over and above Rs. 2 crores (Rupees two crores only). However, it is also a condition that in case the expenses incurred by the official liquidator is less than Rs. 2 crores (Rupees two crores only) in that event remainder amount shall be refunded to me.

8. Thereafter, the applicant came to this Court for the release of the said amount of Rs. 7 crores in favour of the two secured creditors and on March 24, 2005, the following order was passed:

Vide order dated September 25, 2003, the Recovery Officer of the Debts Recovery Tribunal was allowed to go-ahead with the sale of the property which was mortgaged with the secured creditors, namely, the Union Bank of India and Canara Bank. It was also ordered that the official liquidator as well as the ex-directors shall be associated with the sale. The property in question was thereafter sold to M/s. UCC Builders P. Ltd., for Rs. 9 crores. This amount is deposited with the Canara Bank. The purchaser had earlier deposited, by way of earnest money, a sum of Rs. 10 lakhs with the Union Bank of India which is to be refunded to the purchaser. Out of the aforesaid amount, the Union Bank of India as well as the Canara Bank are to be paid. It has been agreed between the two banks that both shall be given a sum of Rs. 3.5 crores each and the balance amount of Rs. 2

crores shall be handed over to the official liquidator so that the official liquidator is able to make payments to the workers after scrutinising their claims. If the amount to be paid to the workers and the administrative expenses which are incurred/which are to be incurred is more than Rs. 2 crores, the ex-management has given an undertaking to make up the shortfall. This undertaking is recorded and accepted.

Prayer made in these applications, therefore, is to record the aforesaid arrangement and give suitable directions by modifying order dated September 25, 2003. Since this arrangement is reasonable and is accepted to all the parties, it is directed that the Canara Bank shall hand over a sum of Rs. 3.5 crores to the Union Bank of India and Rs. 2 crores to the official liquidator by March 28, 2005. On receipt of Rs. 3.5 crores, the Union Bank of India shall refund the earnest money of Rs. 10 lakhs and interest, if any, which has accrued thereon to the buyer immediately. The Canara Bank shall be entitled to appropriate the balance amount of Rs. 3.5 crores against the outstanding due to it.

These applications are disposed of.

9. From the aforesaid following positions emerges:

(i) The amounts agreed to be paid to the two secured creditors was by way of a compromise arrived with both of them, who had chosen to remain outside the winding up proceedings. They agreed to accept the amount of Rs. 3.5 crores each out of their own free will and accord, and not on pro rata basis under Sections 529 and 529A of the Companies Act. In fact they did not even join the winding up proceedings as noted hereinabove. The amounts received/agreed to be received by these two secured creditors were under one-time settlement agreement with them.

(ii) To be able to pay these amounts from the sale proceeds, the applicant/ex-management first approached the official liquidator with the affidavit dated March 22, 2005, and then came to this Court so that both the secured creditors can be paid Rs. 3.5 crores each out of the sale proceeds on the strength of an assurance and an undertaking given to the court, that as and when the claims of the workmen

are determined the ex-management would make good the short fall, if any, after the appropriation of the balance amount to Rs. 2 crores would be held by the official liquidator.

(iii) It was on the basis of the aforesaid assurance and undertaking given by the ex-management which was accepted by the court, that this Court permitted the two secured creditors to be paid an amount of Rs. 3.5 crores each, even without waiting for the claims of the workmen being determined.

10. What is now sought to be contended by the applicant in this application is that the workmen would also be bound to accept only the pro rata amount, in proportion to the amounts on which the aforesaid two secured creditors have finally settled their respective claims. The applicant also seeks to rely upon affidavit of undertaking filed by Shri Rajiv Sarin dated March 15, 2005, wherein it is stated:

3. That the deponent hereby undertake to pay the dues to the official liquidator, which become remain unpaid after the adjustment/payment of the amount, to creditors as per the requirements of the Section 529 of the Companies Act, 1956, which was received as the sale proceeds from the sale of the assets of the certificate debtor No. 1, i.e., M/s. Electronics Ltd.

11. This argument of the applicant is totally devoid of any merit and in view of the aforesaid facts it needs only to be stated to be rejected. The banks did not join the winding up proceedings and were permitted to continue their recovery proceedings before the Debts Recovery Tribunal. It is clear from the order passed by the recovery officer that the amounts agreed to be paid to the two secured creditors was by way of a compromise/one-time settlement and not under Sections 529 and 529A of the Companies Act. Had that been the case, it would have been the official liquidator and not the recovery officer who would have adjudicated the claims and admitted the amounts due to the two secured creditors. The settlement arrived at between the secured creditors/banks and the ex-management was not a settlement with the workers. In fact the claims of the workmen had not even been crystalised by then. Obviously, no money could have been paid to the two banks unless all other dues, ranking pari passu with the claims of the secured creditors

had been determined. Moreover, there cannot be any dispute that the said banks were not paid on pro rata basis. If that had been the case, the banks would not have been paid Rs. 3.5 crores, each since their respective claims were not identical as stated in the beginning itself.

12. Much emphasis has been laid by the applicant on the language used by Shri Rajiv Sarin in his affidavit of undertaking dated March 15, 2005, filed in this court. To my mind, the same is totally misplaced. Firstly, a perusal of the order dated March 24,2005, shows that the undertaking as recorded by the court is not conditional on the workmen being paid only on a pro rata basis as per the settlement with the two banks. The undertaking was recorded in open court since the order dated March 24, 2005, is an oral order passed in the presence of counsel for the applicant. However, at that stage it was not the stand of the applicant that its undertaking is conditional as now sought to be urged. No review of the said order has been sought and it has not been challenged before any higher forum. It is also important to note that the workmen had filed C.A. No. 705 of 2005 wherein it was contended that the total liability owed to the workmen was to the tune of Rs. 8.1 crores for 250 workmen and Rs. 12 crores for 400 workmen. In the application the workmen sought direction to the ex-management to deposit additional amount of Rs. 6.1 crores to meet the balance amount for disbursement of the claims of the 250 workmen/employees of the company in liquidation who were represented in the said application. This application was disposed of by the court vide order dated July 28, 2006, on the statement of the ex-management that they are bound by their undertaking, and shall pay the short fall, if any. Even at that stage, it was not contended by the ex-management that the workmen are entitled only to settlement of their claims on pro rata basis in the same proportion in which the claims of the secured creditors had been settled, even though the applicants in C. A. No. 705 of 2005 had specifically set out their entire claim and sought a direction for deposit of the amount of over Rs. 6 crores. This also shows that the stand now taken by the ex-management is an after thought and is nothing but an endeavour to get out of the undertaking given to this Court and accepted by this court, after having taking advantage of the same by leading this Court to order the release of Rs. 3.5 crores to each of the secured creditors under the one-time settlement arrived at with them by the ex-management. This undertaking dated

March 15, 2005, is also markedly different from that filed before the official liquidator. It is evident that the court proceeded on the basis of the undertaking as furnished before the official liquidator and not the one relied upon by the applicant. Even otherwise, on a perusal of the above extract from the affidavit of Mr. Rajiv Sarin dated March 15, 2005, relied upon by the applicant it is seen that the language used therein is not clear and does not clearly and categorically convey that the workmen's due would be tied up or linked with the settlement arrived at with the secured creditors, and the workmen would be bound to accept their dues in the same proportion as the banks have accepted under their one-time settlement.

13. Last but not the least, the rights of the workmen, which are statutorily protected under Section 529A of the Companies Act could not have been sacrificed unilaterally by the applicant by purporting to file a self serving affidavit, the terms whereof were neither accepted by the court, nor could they have been so accepted, since it would have been illegal, being in the teeth of Section 529A.

14. Learned Counsel for the applicant places reliance on the decision of the Supreme Court in Allahabad Bank v. Canara Bank [2000] 101 Comp Cas 64. This decision, in my view has no application in the facts of this case since the payments made to the two secured creditors were not under Sections 529 and 529A of the Companies Act. For the aforesaid reasons I dismiss this application with cost quantified at Rs. 25,000. Half of the costs be paid to the workmen and another half be deposited with the common pool fund of the official liquidator.

C. A. No. 334 of 2008:

15. In view of the order passed in C. A. No. 13 of 2007, this application also does not survive.

16. Dismissed.

C. P. No. 159 of 1996:

17. The official liquidator is directed to file the status report of the adjudication of the claims of the workmen. The same be done within two weeks.

18. Advance copy of the reports be provided to the workman as well as the ex-management.

19. List on July 15, 2008.