

Marvel Agrex Ltd. Vs. O.L. of Marvel Agrex Ltd. and 8 ors.

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Court : Gujarat

Decided On : Mar-04-2008

Reported in : [2008]145CompCas322(Guj)

Judge : K.A. Puj, J.

Acts : [Companies Act, 1956](#); SICA Act - Sections 22; Company Court Rules, 1959

Appeal No. : Misc. Civil application No. 166 of 2007 in Company Petition No. 157 of 2004 in Civil Application No.

Appellant : Marvel Agrex Ltd.

Respondent : O.L. of Marvel Agrex Ltd. and 8 ors.

Advocate for Def. : Official Liquidator for Respondent 1,; Mrugesh Jani, Adv. for Respondent 1 and Notice Served By DS fo

Advocate for Pet/Ap. : Bharat T. Rao, Adv. for Applicant 1

Disposition : Application allowed

Judgement :

K.A. Puj, J.

1. The applicant, namely, M/s. Marvel Agrex Ltd., now in liquidation has filed this application through its Ex-Director -Shri Harsh Maheshwari, for recalling of the

order passed by this Court on 20.2.2006 in Company Petition No. 157 of 2004 and for revival and restoration of the said Company Petition to the file. In view of the fact that Appeal against the order passed by the BIFR has been filed before the AAIFR and registered as Appeal No. 3 of 2005, after the present application was filed and, thereafter, it was decided by AAIFR to quash and set aside the order passed by the BIFR and remanded the matter to BIFR.

2. Mr. B.T. Rao, learned advocate appearing for the applicant has submitted that pursuant to the opinion forwarded by BIFR for winding up of the Company, notice was issued by this Court in Company Petition No. 157 of 2004 and in response to the said notice, Director of the Company has appeared through its advocate and affidavit has been filed before this Court on 01.04.2005 in the nature of an application for staying the winding up proceedings before this Court on the ground that the Company has preferred an appeal before the Appellate Authority of Industrial and Financial Reconstruction, New Delhi (AAIFR) against the order dated 31.05.2004 passed by BIFR. He has further submitted that the Director of the Company was out of India from December 2005 to April 2006 for business purposes and he was of the view that since the appeal was pending before the AAIFR, the winding up proceedings could not be taken up by this Court. Despite this fact, winding up order was passed by this Court on 20.02.2006. He has further submitted that the winding up order was challenged in OJ Appeal filed before the Division Bench of this Court and an application was preferred for staying the winding up proceedings. However, the said appeal as well as application were withdrawn with a liberty to approach the learned Company Judge by way of an appropriate application and accordingly, the Division Bench has granted permission vide its order dated 07.09.2006. He has further submitted that there was some delay in filing Misc. Civil Application for recalling the order. However, the same was beyond the control of the applicant. He has further submitted that AAIFR has passed an order on 14.05.2007 in Appeal No. 03 of 2005 quashing and setting aside the order passed by BIFR and remanding the case to the BIFR with the direction to both Kotak Mahindra Bank as well as the Company to ensure that the proposal be placed before the BIFR. He has, therefore, submitted that pursuant to the said order, the matter is now pending before BIFR. The applicant has preferred the present application alongwith delay condonation application. The

delay was condoned by this Court vide order dated 14.12.2007. Thereafter, the present application is taken up for hearing.

3. This Court has issued notice on 24.12.2007. Mr. Mrugesh Jani, learned advocate appeared for the Official Liquidator and waived service of notice. The respondent Nos. 2 to 9 were served by Registered Post A.D./ Currier. An affidavit to this effect is filed before the Court. Despite service of notice nobody appears on behalf of respondent Nos. 2 to 9.

4. Initially this Court has issued notice in Civil Application No. 259 of 2007 which was for condonation of delay. Thereafter, an order was passed in the said Civil Application on 24.10.2007, wherein the Court has observed that when AAIFR considered the matter, the order of this Court dated 20.2.2006 in Company Petition No. 157 of 2004 was not brought to the notice of AAIFR. The effect thereof shall be considered at a later stage. However, OL, pursuant to the order of this Court, was to take over the possession and, therefore, OL was directed to report to this Court about the possession taken, if any, and the expenses, if any, incurred for preservation of the property or otherwise. This Court has also recorded submission made on behalf of the Company that the possession has not been taken by the Official Liquidator.

5. Pursuant to the aforesaid order passed in Civil Application No. 259 of 2007, the Official Liquidator has filed his report on 1.11.2007 wherein he has stated that in compliance of the winding up order dated 20.2.2006, the Official Liquidator filed OLR No. 151 of 2007 placing the facts of not taking possession of the assets of the Company and praying this Court to direct the secured creditor as well as Ex-Directors of the Company to intimate the Official Liquidator about the books of account and place details of assets of the Company and to handover the same to the Official Liquidator. This report is pending for final adjudication.

6. While disposing of the said Civil Application, vide its order dated 14.12.2007, this Court has observed that considering the entire facts and circumstances of the case and the averments made in the application as well as the report filed by the Official Liquidator and the orders passed by AAIFR, this Court is of the view that there is a reasonable cause which prevented the applicant from filing the said

application in time for recalling of the winding up order. The applicant has properly explained the delay and no motive was attributed for late filing of the said application and accordingly delay was condoned.

7. So far as present application for recalling of the order and restoration of the Company Petition No. 157 of 2004 is concerned, Mr. B.T. Rao, learned advocate appearing for the applicant has submitted that as per the decision rendered by this Court in Company Petition No. 84 of 2001 dated 7.8.2001, the opinion of the BIFR is not binding to this Court and before passing of the winding order, certain procedure as prescribed under the [Companies Act, 1956](#) read with the Company Court (Rules), 1959 are required to be followed. He has further submitted that as per the provisions of the Companies Act before passing the order of winding up, the same is required to be published in two newspapers and thereafter only the matter is required to be fixed for final disposal. He has further submitted that the same view has been taken by this Court in the matter of Hathising ., in Company Petition No. 106 of 1999. He has, therefore, submitted that the order passed by this Court on 20.2.2006 is required to be recalled as there was no prior publication in the said matter.

8. Mr. Rao has further submitted that the financial institutions have shown their willingness to accept the proposal of the applicant and the applicant is now having the recourse to settle the matter with the financial institutions and, therefore, in the larger interest of the Company, the order passed by this Court on 20.2.2006 is required to be recalled and the matter is required to be restored to the file.

9. Mr. Rao further submitted that the applicant is a genuine investor and wants to revive the plant and the scheme submitted by the applicant for revival is under the consideration of the AAIFR. He has further submitted that the applicant has invested huge amount and the applicant wants to restart the unit and, therefore, the order of winding up is required to be recalled.

10. Mr. Hiren Modi, learned advocate appearing for the Official Liquidator, on the other hand has submitted that it is true that pursuant to the winding up order the Official Liquidator has not taken possession of the assets of the Company. However, he has incurred the expenses for the same and hence while recalling

the winding up order the applicant be directed to deposit expenses incurred by the Official Liquidator.

11. Despite service of notice, nobody appears on behalf of respondent Nos. 2 to 9, who are secured creditors and other statutory authorities. It, therefore, appears that they do not have any objection if the winding up order is recalled and Company Petition is restored to the file.

12. Having heard learned advocates for the respective parties and having gone through the memo of application as well as documents attached, the Court is of the view that the applicant has not filed any appeal before AAIFR till the winding up order was passed. Even before passing of the winding up order the Court has not directed the Official Liquidator to publish advertisement in the newspapers and straightway the winding up order is passed. Even otherwise, when the matters are pending before BIFR and AAIFR this Court can recall the winding up order in view of the provisions contained under Section 22 of SICA Act. Now the present applicant has come forward and pointed out all these relevant facts and since the applicant wants to revive the Company and proposal is under consideration of the BIFR, there would not be any objection from any one against recalling of the winding up order and restoration of the Company Petition to the file. Normally, before recalling the winding up order, the Court issues direction to give public notice inviting objections from any one against recalling of the winding up order. When winding up order is passed, it becomes the order in rem. However, in the present case before passing of winding up order no advertisement was issued hence the Court departs from its normal procedure and is of the view that there is no need to issue any public advertisement before recalling of the winding up order.

13. Having regard to the facts and circumstances of the case and considering the entire evidence on record, the Court hereby thinks that this is a fit and proper case wherein the winding up order passed by this Court is required to be recalled. It is, accordingly recalled and Company Petition No. 157 of 2004 is restored to the file.

14. The registry is directed to place Company Petition No. 157 of 2004 for hearing on 12.3.2008. On that day, the Company would place on record the development in the proceedings, which are pending before BIFR.

15. Mr. Rao under instructions of the applicant has submitted that whatever expenses incurred by the Official Liquidator, the applicant will pay the same to the Official Liquidator. Mr. Hiren Modi will inform the applicant about the expenses which are to be recovered from the applicant and within one week from the date of receipt of such information th applicant shall pay the said amount to the Official Liquidator. Mr. Rao submitted that the facts stated in the application are as on 14.5.2007 when the order was passed by the AAIFR.

16. Subject to the aforesaid direction and observation, this application is accordingly allowed.

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