

In Re: Modern Denim Ltd.

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Court : Rajasthan

Decided On : Jul-22-2008

Reported in : [2009]148CompCas884(Raj)

Judge : Shiv Kumar Sharma, J.

Appellant : In Re: Modern Denim Ltd.

Disposition : Appeal allowed

Judgement :

Shiv Kumar Sharma, J.

1. Modern Denim Ltd., (in short 'the petitioner-company') has filed this petition under Section 391 of the Companies Act, 1956 (hereinafter shall be referred to as 'the Act of 1956') for sanctioning the scheme of compromise between the petitioner-company and its secured creditors.

2. The petitioner-company was incorporated as Modern Suitings P. Ltd., in November, 1977, as a part of Modern group of companies. As a part of an exercise to restructure its activity the Modern Suitings Ltd. spun off its suiting division to Modern Syntex (India) Ltd. in April, 1993 under the scheme of arrangement approved by this court. The name of Modern Suitings Ltd., thereafter was changed to the present name, i.e., Modern Denim Ltd. (in short 'MDL').

3. The petitioner-company till 1997 was earning profits and its operations were profitable. From the year 1998 the operations of the petitioner-company suffered losses on account of worldwide recession and excess supply scenario in denim industry. This situation remained worst till 2001-2002. On account of accumulated losses the net worth of the petitioner-company was completely eroded as on March 31, 2000 and consequently upon reference to the Board for Industrial and Financial Reconstruction (in short 'BIFR') to get itself registered as a sick industrial company in terms of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The petitioner-company was declared as a sick company. It has been given out in the petition that the revival scheme was under progress. In the petition it was stated that the debt burden of the petitioner-company reached at unserviceable level and in these circumstances it was not possible for it to carry on its business effectively without reducing the debts due to the creditors to a serviceable level and further a necessity was felt for rescheduling and restructuring of the existing debts. For this purpose an elaborate scheme of compromise was prepared in order to enter into compromise with the secured creditors of the petitioner-company. It is averred in the petition that it is imperative in the best interest of the company and also the creditors to settle the debts in terms of the scheme of compromise which would prevent the company from getting insolvent. The creditors would also be benefited through the channel of recovery, if the company remains a running concern, and the same is not put under liquidation. It is submitted that the proposed scheme of compromise with secured creditors would enhance the opportunities of revival of the company by benefiting the company. The petitioner-company in its board meeting approved the proposed scheme of compromise by unanimously passing a resolution in its meeting held on August 10, 2006. Thereafter, the petitioner-company filed Company Application No. 44 of 2006 before this court. This Court on August 18, 2006 directed to convene meeting of the secured creditors of the petitioner-company for the purpose of considering the said scheme of compromise. The meeting of the secured creditors was convened on September 20, 2006. The meeting was attended by 11 secured creditors and the total value of their debts was Rs. 224.86 crores. The proposed scheme was approved by seven secured creditors holding Rs. 181.53 crores of the secured debts representing 80.73 per

cent, in value of the total value of debts as against four secured creditors holding Rs. 43.33 crores of the secured debts representing 19.27 per cent, of the total value of debts present and voted.

4. The Regional Director, Ministry of Company Affairs, New Delhi, in the affidavit stated that out of 11 secured creditors who participated in voting, four secured creditors having their debts aggregating to Rs. 43.33 crores voted against the scheme. It is submitted that the Registrar of Companies, Jaipur, intimated to its office regarding receipt of some complaints in respect of non payment of fixed deposits under Section 58A of the Companies Act, which is subject to Company Law Board orders dated December 29, 1997. The petitioner-company failed to submit no objection certificate to the scheme of arrangement from the Jaipur Stock Exchange. The petitioner-company vide its letter dated November 18, 2006, informed that the scheme of compromise is for the secured creditors and not for the shareholders and hence NoC from the Jaipur Stock Exchange was not obtained. The Regional Director in his affidavit also incorporated the auditor's report. In paragraph (v) of the auditor's report, it was stated:

(v) The directors, other than the nominee directors of the company are restricted from being appointed as director in other companies under Clause (b) of Section 274(1)(g) of the Companies Act, 1956, as the company has defaulted in payment of deposits, term loans, redemption of debentures and interest thereon.

In paragraph (vi) of the auditor's report it was stated thus:

(a) Compound interest, penal and liquidation damages in respect of all borrowings have not been provided, amount of which is unascertainable pending confirmation/reconciliation.

(b) Dividend for the year amounting to Rs. 110.75 lakhs on cumulative redeemable preference shares has not been provided. The total amount of dividend not provided till March 31, 2006, amounts to Rs. 1,107.50 lakhs.

(c) Provision for the interest for certain secured and unsecured loans amounting to Rs. 486.69 lakhs has not been made in accounts. The total amount of interest not

provided till March 31, 2006, amounts to Rs. 2737.36 lakhs.

(d) Balances of debtors, creditors, advances and loans, etc., are subject to confirmation and reconciliation, if any.

(e) Pursuant to restructuring of some of the borrowings, the company has taken credit of Rs. 14,212.52 lakhs to the profit and loss account as exceptional items, pending fulfilment of future obligations. Total credit taken by the company up to March 31, 2006, which are subject to fulfillment of future amounts to Rs. 19,994.95 lakhs.

(f) The accounts of the company have been prepared on going concern basis though the BIFR has declared the company as a sick company.

5. Learned Counsel for the petitioner-company filed reply to the affidavit stating that the Regional Director has failed to consider the disclosure made by the company under notes on accounts in Schedule 14 of the balance sheet as on March 31, 2006. It is stated that vide order dated December 21, 2001, passed by the Company Law Board, the company was required to make payment of deposits and the interest thereon in accordance with the revival of the scheme to be approved by the Board for Industrial and Financial Reconstruction under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The petitioner-company is making payment on compassionate ground duly approved by the committee constituted by the Company Law Board. The petitioner-company is also making payment to all depositors who have sent letters directly to them or through the office of Registrar of Companies. The Regional Director merely reproduced the observations from the auditor's report. The balance-sheet as on March 31, 2006, was circulated to all the shareholders and secured creditors in compliance with the provisions of the Companies Act and hence the petitioner-company has not suppressed any material facts which are required to be disclosed under the Companies Act. The accounts have been prepared on the basis of the prevalent accounting practices. The shareholders of the petitioner-company have already approved the accounts in annual general meeting held on September 30, 2006. The show-cause notice issued by the BIFR has been quashed by the AAIFR vide its order dated June 8, 2007. It is not in the interest of

any secured or other creditors that the company should be wound up.

6. One of the secured creditor, viz., M/s. IndusInd Bank Ltd., also filed objections to the proposed scheme of compromise thus:

(i) Since the different creditors have been offered different options, there are different Sub-classes amongst the secured creditors, accordingly as per the mandate of law, different meetings ought to have been convened for different sub-classes of secured creditors.

(ii) The scheme has been opposed by directors of the company as also important public financial institutions. The objectors IFCI Ltd., IndusInd Bank Ltd., LIC and UTI Asset Management Co., voted against the scheme clearly demonstrates that the scheme is not reasonable and reliable. The objectors who were offered option VIII not only lose all interest that has accrued on their lending, but also lose 80 per cent, of the principal amount lent by them. The said sacrifice is wholly oppressive and unjustified. The company cannot be permitted to attempt to revive itself in this manner. The majority of secured creditors who voted in support of the scheme obtained options I to VII through back door negotiations. The scheme is thus not equitable or reasonable and vitiated by fraudulent preference.

(iii) There have been material suppressions and the proposed scheme is also vitiated by inadequate disclosure. It is not possible for the secured creditors to take an informed decision on basis of the information disclosed. The notice to the secured creditors does not disclose the following information:

(a) Copy of the last audited balance-sheet.

(b) The latest audited report on the accounts of the company.

(c) Proposed cash flow and profit projections for future years.

(d) Details regarding pendency of any investigation proceeding in relation to the company under Sections 235 to 251.

(e) Details of various proceedings pending against the company and the various proceedings pending before BIFR/AAIFR/High Court, etc., which are all material

facts relating to the company.

(f) The viability study/report/basis on which MDL is sought to be restructured and the manner in which the options I to VIII have been formulated.

(g) Details of repayments already made to various institutions so far under various OTS entered into by them.

(h) Relevant financial details pertaining to debtors, creditors and utilization and repayment of loan (which is material for enabling the secured creditors to form an informed decision):

(i) Companies to whom loans and advances were given and the purposes thereof and resolutions in support thereof;

(ii) List of sundry creditors paid off;

(iii) List of secured creditors year wise with dates of payment and amount paid as also payments made in the form of any other fee to them;

(iv) Dates of settlement with the various secured creditors, complete correspondence relating to the same dates and amounts of payments made and fees, if any, paid to them in any other name;

(v) List of creditors paid off between April 1, 2003 to March 31, 2006, with exact amounts paid, inclusive of interest, if any;

(vi) Details of applications for loan made between April 1, 2003, onwards along with purpose for which the loan was sought, how the loan was utilized and how the loan was required to be utilized under the agreement;

(vii) List of sundry debtors and creditors with details of material supplied and received and their relationship with the company or its directors and documents in support thereof.

(i) Valuation of the company on basis of going concern and on replacement basis;

(j) Details of the present status of the company and factory's working ;

(k) The promoters have not indicated how they propose to bring in Rs. 16 crores in two years.

(l) The fact that in view of serious objections raised by all creditors regarding accounting practices adopted by the company for its audited balance sheet for the year 1999-2000, the various secured creditors sought an independent special investigative audit of the accounts of the company and the further fact that such investigative audit was never carried out, has been conveniently suppressed.

(iv) Even on facts, there is no reasonable possibility of rehabilitating MDL. The BIFR itself formed an opinion that the company should be wound up and issued a show-cause notice to that effect. The matter of rehabilitation of MDL has been pending before the BIFR/AAIFR since 2000 and no concrete rehabilitation proposal could be finalized in all these years. The proposed scheme has been made only with a view to gain further time and delay liquidation of the company with the ulterior motive of denying the creditors their dues. In the proceeding before the BIFR on May 6, 2003, the BIFR held that the company ought to be wound up. On August 1, 2003, the BIFR recorded consent of ICICL IDBI, IFCL UTI, Bank of Baroda, SBI, Indian Overseas Bank, Bank of Maharashtra and Sanwa Bank Ltd., for winding up of the company;

(v) The management is guilty of fraudulent accounting and mismanagement leading to most companies in the group becoming sick or closed and therefore cannot be trusted with rehabilitation of the company. The management of the petitioner-company has been guilty of fraudulent accounting and cannot be trusted to make a bona fide attempt to revive the company. This is shown by the following:

(a) MDL has been operating accounts with non-consortium banks while accounts with all the consortium banks continue to be in NPA category.

(b) MDL has not been submitting QIS data, break-up of balance sheet and break-up of its debtors as is required in the stock statements in contravention of the terms of sanction, thereby making it impossible for the bank to ascertain proper end use of the funds.

(c) At the BIFR hearing on February 23, 2001, ICICI brought to the notice of the BIFR that the company had made payments to ICD holders of Rs. 115 lakhs in six months out of which payment to a single ICD holder was Rs. 50 lakhs. This clearly shows fraudulent accounting as also fraudulent preferences on part of MDL.

(d) At the same hearing the Bank of Baroda, brought to the notice of the BIFR that the company had written off Rs. 5 crores as bad and doubtful debts, invested Rs. 45.35 lakhs in sister concern and that there had been a steep rise in other expenses despite fall in the sales of the company. For these reasons the Bank of Baroda sought a special investigation audit.

(vi) The scheme prepared and proposed by the same manipulative management cannot be trusted and accepted without independent investigation.

(vii) Almost all the group of companies in the Modern group have become sick due to mismanagement. Unless there is a complete change of management there is not even a remote chance of turning around the company.

(viii) Almost all the loans advanced to the company are secured by personal guarantees of its directors/managerial personnel. The loan advanced by IndusInd Bank Ltd. is secured by personal guarantees of Mr. H.R. Ranka and Mr. Sachin Ranka. The scheme specifically envisages that all personal guarantees shall stand discharged on payment being made in accordance with the scheme. Since the directors have given personal guarantees and the scheme envisages discharge of the personal guarantees, it is a gross misstatement that no director or any managerial personnel has any interest in the proposed scheme of compromise.

(ix) The company having been declared a 'sick industrial company' by the BIFR on February 23, 2001 and thereafter on May 6, 2003, the BIFR having taken a prima facie view that it was just, equitable and in public interest that the company be wound up, this Court should not proceed with the present proceedings.

(x) Once a company is declared a sick industrial company, the BIFR which comprises of experts in the field of rehabilitation, should be allowed to determine the proper course of rehabilitation/winding up and this Court should stay its hand

and refrain from passing any orders having bearing on the matter except in exercise of supervisory jurisdiction under article 227 of the Constitution of India. In case of any consistency between the Companies Act and SICA, SICA will prevail.

7. The petitioner-company filed reply to the objections raised by IndusInd Bank. It was stated that in the proposed scheme of compromise from 'the appointed date March 31, 2003' the principal amount due to the secured creditors existing on the books of the petitioner-company has been proposed to be settled or restructured. The principal outstanding as on appointed date due to the objector is Rs. 7.83 crores. It was stated that same set of scheme has been offered to all the secured creditors and similarly the same options were offered to all the secured creditors. The desirability of having different options and limiting such payment options specifically to the extent of available cash flows, is an integral part of the scheme, and has been designed by the creditors themselves and has accordingly been accepted by all the secured creditors who voted in favour of the scheme. The question of convening different meetings arises only if different schemes are offered to different creditors. The scheme has been approved by the secured creditors representing 80.73 per cent, in value of the total value of debts present and voting in the meeting. The sacrifices proposed for the scheme are sacrifices that have been worked out by the experts. The scheme has been prepared after various rounds of negotiations with the secured creditors and examining the feasibility and sustain-ability of the debt burden and repayment burden. Once the scheme is implemented with comprehensive solutions, the financial health of the company will be restored as the scheme is aiming at infusion of fresh equity and loans by the promoters and their associates and reduction/rescheduling of debts so as to align with the expected generation of cash surplus in future. It was stated that the creditors will be benefited through the channel of recovery, as the same shall stand to be on the higher end if the company remains a running concern and the same is not put under liquidation. On the other hand if the liquidation proceedings are initiated the returns would be at lower end for the creditors. The scheme will help in continued existence of the petitioner-company which employs over 1,050 workmen and the staff, it is stated that the scheme is neither oppressive nor unreasonable. The show-cause notice issued by the BIFR was set aside by the appellate authority (AAIFR) vide order dated June 8, 2007. Earlier no

secured creditors agreed to the proposed scheme but after continuous dialogue by the petitioner-company with the secured creditors, the present scheme was proposed and the same has been approved by seven secured creditors representing 80.73 per cent, in value of the total value of debts. This fact is indicative of the fact that the scheme is reasonable and viable option to revive the company. It was stated that it is not in the interest of any secured or other creditors that company should be wound up. The annual accounts for the year ended March 31, 2006, have been approved by the shareholders in their meeting held on September 30, 2006. There is no bar under Section 391 of the Companies Act which prohibits this Court to entertain and sanction the scheme of compromise. It is stated that Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, bars the continuation and maintainability of proceedings against the industrial company with respect to which a inquiry under Section 16 or scheme is under preparation under Section 17 or wherein appeal is pending under Section 25 of the said Act namely:

- (i) winding up proceedings;
- (ii) proceedings for execution, distress or the like;
- (iii) proceedings for the appointment of a receiver;
- (iv) a suit for recovery; or
- (v) proceedings for the enforcement of any security or any guarantee.

8. Clearly enough, proceedings under Section 391 of the Companies Act relating to scheme of compromise/arrangements do not fall under any of the abovementioned proceedings and these are not barred by Section 22 of the SICA. The judgment of NGEF Ltd. v. Chandra Developers P. Ltd. : (2005)8SCC219 has no application in the facts of the present case.

9. I have heard learned Counsel for the parties and considered the submissions in view of the material on record.

10. Learned Counsel placed before me the copies of judgments rendered in Company Petition No. 21 of 2006, Lords Chloro Alkali Ltd., In re decided on March 15, 2007 and Company Petition No. 22 of 2005, Modern Syntex (India) Ltd., In re decided on December 1, 2006.

11. Before proceeding further it would be relevant to refer the case law on the subject enunciated by the apex court.

A. Hindustan Lever v. State of Maharashtra : AIR 2004 SC326 :

11. While exercising its power in sanctioning a scheme of agreement, the court has to examine as to whether the provisions of the statute have been complied with. Once the court finds that the parameters set out in Section 394 of the Companies Act have been met then the court would have no further jurisdiction to sit in appeal over the commercial wisdom of the class of persons who with their eyes open give their approval, even if, in the view of the court a better scheme could have been framed. This aspect was examined in detail by this Court in Miheer H. Mafatlal v. Mafatlal Industries Ltd. : AIR 1997 SC506 . The court laid down the following broad contours of the jurisdiction of the company court in granting sanction to the scheme as follows: (SCC pp. 597-98 and 601-02, paragraph 29).

1. The sanctioning court has to see to it that all requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by Section 391, Sub-section (2).

3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391, Sub-section (1).

5. That all the requisite material contemplated by the provisions of Sub-section (2) of Section 391 of the Act is placed before the court by the applicant concerned seeking sanction for such a scheme and the court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not unconscionable, nor contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

7. That the company court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirement of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in

view by the court. The court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently, the company court's jurisdiction to that extent is peripheral and supervisory and not appellate. The court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the company court can also be culled out from the provisions of Section 392. Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the court operates. The supervisor cannot ever be treated as the author or a policy-maker. Consequently, the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement.

12. Two broad principles underlying a scheme of amalgamation which have been brought out in this judgment are:

(1) That the order passed by the court amalgamating the company is based on a compromise or arrangement arrived at between the parties; and

(2) That the jurisdiction of the company court while sanctioning the scheme is supervisory only, i.e., to observe that the procedure set out in the Act is met and complied with and that the proposed scheme of compromise or arrangement is not violative of any provision of law, unconscionable or contrary to public policy. The court is not to exercise the appellate jurisdiction and examine the commercial wisdom of the compromise or arrangement arrived at between the parties. The role of the court is that of an umpire in a game, to see that the teams play their role as per rules and do not overstep the limits. Subject to that how best the game is to be played is left to the players and not to the umpire.

Both these principles indicate that there is no adjudication by the court on the merits as such.

13. In *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.* case [1995] 83 Comp Cas 30 (SC) it has been held by this Court that Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to the public interest; the basic principle of such satisfaction is none other than the broad and general principle inherent in any compromise or settlement entered between the parties that it should not be unfair or contrary to public policy or unconscionable or that the scheme should not be a device to evade the law.

B. *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* : AIR 1997 SC506 :

29. However, the further question remains whether the court has jurisdiction like an appellate authority to minutely scrutinize the scheme and to arrive at an independent conclusion whether the scheme should be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391, Sub-section (2). On this aspect, the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the court. The court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently, the company court's jurisdiction to that extent is peripheral and supervisory and not appellate. The court acts like an umpire in the game of cricket who has to see both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire.... It is obvious that the supervisor cannot ever be treated as the author or a policy-maker. Consequently, the propriety and the merits of the compromise or arrangement have to be judged by the parties who as *sui juris* with their eyes open and fully informed about the pros and cons of

the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The court, cannot, therefore, undertake the exercise of scrutinizing the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. The exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial and economic interest by majority agree to give the green signal to such a compromise or arrangement.

In the above mentioned judgment of *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* [1996] 87 Comp Cas 792 : [1997] 1 SCC 597, at pages Nos. 600-601, their Lordship referred to the judgment of hon'ble Supreme Court in the case of *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.* [1995] 83 Comp Cas 30 in the following terms (page 817 of 87 Comp Cas):

Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered into between the parties that it should not be unfair or contrary to public policy or unconscionable....

The court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved.... It has to be borne in mind that this proposal of amalgamation arose out of a sharp decline in the business of TOMCO. Dr. Dhawan has argued that TOMCO is not yet a sick company. That may be right, but TOMCO at this rate will become a sick company, unless something can be done to improve its performance. In the last two years, it has sold its investments and other properties. If this proposal of amalgamation is not sanctioned, the consequence for TOMCO may be very serious. The shareholders, the employees, the creditors will all suffer.

After referring to the above paragraph, the hon'ble Supreme Court laid down broad contours of such jurisdiction of the company court. The said contours have already been referred in the judgment of *Hindustan Lever v. State of Maharashtra* : AIR 2004 SC326

C. Administrator of the Specified Undertaking of the Unit Trust of India v. Garware Polyester Ltd. : AIR 2005 SC2520 :

30. The parties to the agreement are commercial concerns. Each party would indisputably try to protect its interest when advancing loans or making investment but it must also be conceded that they were aware of the risk factor involved therein. The factors which are responsible for sufferance of loss by the respondent herein to the extent of Rs. 228.58 crores was as a result of market situation then prevailing, i.e., steep devaluation of currencies of Korea and Indonesia who were the major suppliers of film in the international market as a result whereof they started dumping the materials at cheap prices in Europe, and the levy of anti-dumping/anti-subsidy duties by the European Union as a result whereof sales to European countries came down drastically.

31. The restructuring package was evolved at the instance of the Industrial Development Bank of India, which was the largest lender and the trustee upon obtaining a report in that behalf from KPMG, a reputed concern. A scheme envisaged under Section 391 of the Companies Act, it is well-settled, is a commercial document.

33. The scope and jurisdiction of the company court has been examined at some length by a Division Bench of this Court in Miheer H. Mafatlal v. Mafatlal Industries Ltd. : AIR 1997 SC506 wherein the broad contours of such jurisdiction have been enumerated indicating:

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.³⁵ It is not the case of the appellants that the learned company judge exceeded his jurisdiction and acted in violation of the said guidelines. Once it is held that the normal rule, namely, the principle of majority in corporate democracy or in other words, governance of the company by majority, is accepted, the appellants could not be heard to say that they had an absolute right to exercise veto power and thereby scuttle a bona fide attempt to revive a company. Efforts to keep a company from becoming insolvent and even to revive an insolvent corporate have

been receiving legislative and executive support, as would be evident from several Parliamentary Acts, as for example the Sick Industrial Companies (Special Provisions) Act, 1985 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

38. In view of our findings aforementioned, we are of the opinion that the appellants herein having failed to establish that they could hold the entire scheme to ransom so as to stall the proceedings as a result whereof the majority of debenture-holders would be deprived, the purpose or object motivating the appellants to advance such a huge amount to the respondent against issue of debentures is a matter of little or of no concern to the respondent-company or other debenture-holders. A special or a new right cannot be found in favour of the appellants in the agreement when it creates none. The scheme applies equally to all debenture-holders and as such the appellants cannot be treated as a separate class. Once the respondent-company prima facie showed that the scheme is fair and reasonable and also that the requisite majority of the debenture-holders recorded their decision in its favour, the court in the absence of any unforeseen, unjustness or unreasonableness therein ought not to reject the same.

12. The following principles of law clearly emerge from the extracts of the aforestated judgments of the hon'ble Supreme Court:

A. The scheme is a commercial document and once a finding is arrived at that the legal requirements have been met, the company court has no jurisdiction to sit in appeal over the commercial wisdom of the class of persons who approve the scheme.

B. The jurisdiction of the company court in this matter is not appellate, but restricted to that of the over-seeing that the meetings are properly held and the voting is properly exercised therein. The company court neither has the expertise nor the jurisdiction to delve into the commercial freedom exercised by the creditors. The company court merely acts like an umpire in the game of cricket and sees that both the teams play the game according to rules.

C. Propriety or the merits of the compromise have to be judged by the parties who have, *sui juris*, with their open eyes and fully informed about the pros and cons of the scheme, arrived at their own reasoned judgment. The exercise is in the realm of commercial democracy permeating the activities of concerned creditors and members of the company, who, in their best commercial and economic interests by majority, agree to give a green signal to such a compromise or arrangement.

D. A minority cannot be allowed to exercise veto power and thereby scuttle a bona fide attempt to revive a company as the revival is the pre-dominant intention as is reflected in a series of Parliamentary legislation.

E. The court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved, (emphasis Here printed in italics supplied)

13. In *Lords Chloro Alkali Ltd., In re*, Company Petition No. 21 of 2006, decided by this Court on March 15, 2007, [2009] 148 Comp Cas 873, the company was in the process of entering into negotiation with its secured creditors for settlement of their dues, the BIFR vide an ex parte order dated June 2, 2004, formed prima facie opinion to wind up the company under Section 20(1) of the SICA and accordingly directed issuance of show-cause notice for winding up of the company. The company filed appeal before the Appellate Authority for Industrial and Financial Reconstruction, in the interregnum the dues of PNB and SBI were settled at 26.5 per cent, of the principal by effecting payments to the tune of Rs. 61.75 lakhs and Rs. 55 lakhs, respectively, in full and final settlement of their dues. The IDBI assigned its debts to D and DARC, and ICICI had assigned its debts to Sopan Securities Pvt. Ltd. The Indian Bank had also assigned its debt to D and DARC while Syndicate Bank had assigned its debts to M/s. First Alert Fire Systems Private Limited. All the assignees were prepared to settle their dues at 26.5 per cent, of the principal. The AAIFR vide its order dated December 20, 2005, allowed the appeal and set aside the order dated June 2, 2004 and remanded back the matter to the BIFR, where the matter was pending. The company was interested in settling the liabilities of its secured creditors. The IFCI, Sopan Securities Pvt. Ltd. and D and DARC, who compositely constitute 86.94 per cent, of the total secured creditors vide their letters dated March 10, 2006, July 26, 2006 and June 26, 2006,

expressed their willingness for the settlement of their dues at 26.5 per cent, of the principal amount towards the full and final settlement of their dues, in these circumstances the board of directors of the company vide board's resolution dated July 31, 2006, approved the scheme of arrangement and the payments to be made thereunder. The company before this Court expressly contended that more than 93.22 per cent, of the secured creditors agreed for scheme of arrangement and voted in favour of the scheme in the meeting that was more than three-fourth of the total secured creditors. The Regional Director in the affidavit averred that except IDBI, all other secured creditors attended the meeting held on October 7, 2006. RIICO submitted a letter objecting that the scheme of arrangement at 26.5 per cent, of the outstanding principal is not agreeable to them. UTI also raised objection that they are taking a hit not only on interest dues but also the principal amount given to the company. In this matter this Court while exercising its power in sanctioning the scheme of arrangement was to satisfy itself that the provisions of statute have been complied with, the class was fairly represented by those who attended the meeting, the statutory majority was acting bona fide and not in an oppressive manner and the arrangement is such as which a prudent, intelligent or honest man or a member of the class concerned and acting in respect of the interest might reasonably take. This Court was also satisfied that the affairs of the company were not being conducted in a manner prejudicial to the interest of its members or to public interest and in such a situation in this matter where the secured creditors voted in their meeting in favour of the scheme of arrangement, it was not for this Court to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme and approved the scheme.

14. In *Modern Syntex (India) Ltd., In re*, Company Petition No. 22 of 2005, decided on December 1, 2006, [2009] 148 Comp Cas 843 (Raj), five company petitions for winding up of the company were pending and the BIFR had declared the company as a sick industrial company under Section 3(1)(o) of the SICA and appointed IFCI as the operating agency to devise a scheme for rehabilitation of the company. On the basis of the principles laid down by their Lordships of the Supreme Court in *NGEF Ltd.* (supra) indicated (paragraphs 39 to 46 and 49) that the SICA is a complete code in itself and being a later enactment, it would prevail over the

Companies Act in case of any inconsistency in view of Section 32 of the SICA. This Court refused to interfere where the matter of rehabilitation of a sick company is pending before the BIFR under the SICA. Another reason for refusal of the required relief was that this Court was of the opinion that the proposed scheme was not just and fair and equitable to all the secured creditors, in that case from the record it was found by this Court that the outstanding principal and interest of the objector IndusInd Bank were more than Rs. 1,508.14 lakhs. If objector opts for option two, it would receive Rs. 1104 lakhs over a seven year period, i.e., a present value of only Rs. 743.27 lakhs. In such a situation the sacrifices of objector would be Rs. 764.87 lakhs, i.e., 50.71 per cent, of the present outstanding. In that case this Court further found that if the objector opts for option four, it would receive Rs. 276 lakhs in 2006-07, i.e., a present value of Rs. 237.63 lakhs. The sacrifice would be Rs. 1,270.51 lakhs which comes to 84.24 per cent, of the present outstanding. In such circumstances it was found by this Court that such a high sacrifice is oppressive to the objector and is unconscionable and unreasonable even from the point of view of prudent man. This Court refused to give the required relief to the company.

15. The facts of the case of Modern Syntex (India) Ltd., In re [2009] 148 Comp Cas 843 (Raj) are distinguishable with that of the facts of the instant matter. In the facts and circumstances as noticed earlier the scheme cannot be termed unreasonable even from the point of view of prudent man, in the proposed scheme of compromise from 'the appointed date March 31, 2003' the principal amount due to the secured creditors existing on the books of the petitioner-company has been proposed to be settled or restructured. The principal outstanding as on the appointed date due to the objector is Rs. 7.83 crores. The same set of scheme has been offered to all the secured creditors and similarly the same options were offered to all the secured creditors. The desirability of having different options and limiting such payment options specifically to the extent of available cash flows, is an integral part of the scheme, and has been designed by the creditors themselves and has accordingly been accepted by all the secured creditors who voted in favour of the scheme. The question of convening different meetings arises only if different schemes are offered to different creditors. The scheme has been approved by the secured creditors representing 80.73 per cent, in value of the total

value of debts present and voting in the meeting. The sacrifices proposed for the scheme are sacrifices that have been worked out by the experts. The scheme has been prepared after various rounds of negotiations with the secured creditors and examining the feasibility and sustainability of the debts burden and repayment burden. Once the scheme is implemented with comprehensive solutions, the financial health of the company will be restored as the scheme is aiming at infusion of fresh equity and loans by the promoters and their associates and reduction/rescheduling of debts so as to align with the expected generation of cash surplus in future. The creditors will be benefited through the channel of recovery, as the same shall stand to be on the higher end if the company remains a running concern and the same is not put under liquidation. On the other hand if the liquidation proceedings are initiated the returns would be at lower end for the creditors. The scheme will help in continued existence of the petitioner-company which employs over 1,050 workmen and the staff. The scheme is neither oppressive nor unreasonable. The show-cause notice issued by the BIFR was set aside by the Appellate Authority (AAIFR) vide order dated June 8, 2007. Earlier, no secured creditors agreed to the proposed scheme but after continuous dialogue by the petitioner-company with the secured creditors, the present scheme was proposed and the same has been approved by seven secured creditors representing 80.73 per cent, in value of the total value of debts. This fact is indicative of the fact that the scheme is reasonable and viable option to revive the company. It is not in the interest of any secured or other creditors that company should be wound up. The annual accounts for the year ended March 31, 2006, have been approved by the shareholders in their meeting held on September 30, 2006. There is no bar under Section 391 of the Companies Act which prohibits this Court to entertain and sanction the scheme of compromise.

16. Applying the principles enunciated by the apex court enumerated above and the ratio laid down in *Lords Chloro Alkali Ltd., In re, Company Petition No. 21 of 2006*, decided by this Court on March 15, 2007, [2009] 148 Comp Cas 873, coupled with the fact that only one objector filed objections against the scheme, out of the four objectors who voted against the scheme in the meeting convened by the order of this Court out of total 11 secured creditors, I deem it appropriate to hold that the scheme is not unjust and unfair to the secured creditors. The scheme

appears to be reasonable, according to law and in the interest of the secured creditors.

17. For these reasons the petition stands allowed and the scheme of compromise is sanctioned in terms of prayer Clause (a). Costs of Rs. 2,500 (two thousand five hundred only) to the official liquidator to be paid by the petitioner within two weeks from today. The copy of the order be sent to the Registrar of Companies as per the Rules.

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