

Sicom Ltd. Vs. Deve Sugars Ltd.

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Court : Chennai

Decided On : Dec-08-1997

Reported in : (1998)4CompLJ269(Mad)

Judge : B. Akbar Basha Khadiri, J.

Acts : [Companies Act, 1956](#) - Sections 391 and 394

Appeal No. : CP No. 170 of 1995 and CA No. 2225 of 1997

Appellant : Sicom Ltd. ;deve Sugars Ltd.

Respondent : Deve Sugars Ltd.;sicom Ltd.

Judgement :

Khadiri, J.

1. This application is filed for giving effect to the memorandum of understanding entered between the applicant-company and Pragosa Ventures (P.) Ltd.

2. The applicant-Deve Sugars Ltd. is a public limited company. The respondent-Sicom Ltd. is also a public limited company. According to the respondent, they have advanced corporate loan of Rs. 3,00,00,000 to Rajadhiraj Industries Ltd., a company incorporated and registered under the [Companies Act, 1956](#) (hereinafter 'the Act'). The applicant-Deve Sugars Ltd. stood as guarantor for the due payment of the debt. The principal debtor and the guarantor did not make payment and,

therefore, Sicom Ltd. filed Company Petition No. 170 of 1995 for winding up of the applicant-company. Sicom Ltd., the respondent herein, also filed an application CA No. 2255 of 1997 to restrain the applicant herein by an ad interim injunction from transacting special business Nos. 8 and 11 or any other business which may tantamount to creation of charge on the properties. In that application, the applicant, herein as respondent, gave an undertaking that before entering into any transaction pursuant to the impugned resolution, the respondent shall approach this court for suitable directions. Now the applicant has come forward with the instant application seeking permission to give effect to the memorandum of understanding entered into between the applicant and Pragosa Ventures (P.) Ltd.

3. The managing director of the applicant has filed an affidavit to the effect that the applicant-company had exhaustive meetings with the Government of Karnataka, conducted by the Minister for Sugar, Government of Karnataka, which was attended by the representatives of the Sugar Directorate, Industries Department, Commercial Taxes Department, Labour Department, District Collector, Labour Unions, cane-growers, bankers and representatives from the management, in which a proposal, as per the memorandum of understanding, was arrived at and the Government of Karnataka directed the mill to be handed over to the new management and, if not, the mill will be taken over by the Government of Karnataka by way of issue of an Ordinance. As per the memorandum of understanding, Deve Sugars Ltd. is the seller and Pragosa Ventures (P.) Ltd. is the buyer. It was agreed that Deve Sugars Ltd. will hand over the management of the mill to Pragosa Ventures (P.) Ltd., retaining 49 per cent. of its capital. It was also agreed that all suits and appeals, of the nature of judicial, quasi-judicial, civil, criminal, consumer, industrial and labour, arbitration pending shall be continued and prosecuted by the buyer and seller-company jointly. The buyer-company had undertaken not to alienate or create any charge or transfer in any manner any of the assets transferred, without the concurrence of the seller. The transferee-company had also agreed to invest about Rs. 10 crore for the reopening of commencement of the production of the factory. The scheme of undertaking would enable the applicant to restart the sugar factory, which would be beneficial to the general public, i.e., cane-growers of the vicinity and also help in more production of sugar. Therefore, the applicant prays for permission to give effect to the

memorandum of understanding entered into between the applicant and Pragosa Ventures (P.) Ltd. The applicant had also filed an affidavit from Mr. M. V. Subramanian, a director of Pragosa Ventures (P.) Ltd. to the effect that Pragosa Ventures (P.) Ltd. agreed for terms of memorandum of understanding.

4. This application is opposed by the respondent-Sicom Ltd. The respondent has stated that the applicant is trying to adopt a scheme without observing the mandatory requirements of sections 391 and 394 of the Act and in the guise of a memorandum of understanding, the applicant is trying to introduce a scheme. According to the respondent, the scheme of arrangement does not mention anything about the pending winding up proceedings.

5. The other opposing creditors, namely, Videocon International Ltd. and Tapti Machines (P.) Ltd. have filed counter affidavit through their Chennai Branch Manager, wherein they have contended that the applicant has availed two loans from Videocon International Ltd. and Tapti Machines (P.) Ltd., which have now accrued to Rs. 7,00,00,000 which are due and payable to them. The memorandum of understanding does not give any particulars of Pragosa Ventures (P.) Ltd. The main object of Pragosa Ventures (P.) Ltd. is shrimp farming and dealing in sea foods and Pragosa Ventures (P.) Ltd. has no expertise in the sugar business. That the records in the Registrar of Companies show that no balance-sheet has been filed since the incorporation of Pragosa Ventures and it is merely a bogus company and if the memorandum of understanding is given effect, the creditors will be put to great loss and they may even be cheated.

6. The opposing creditor, Bank of India Finance Ltd., has also filed an affidavit of its senior Vice-President in which it has contended that the promoters, Mr. Rajarathnam and his associates, are trying to sell their shares and/or the company-Deve Sugars Ltd. to some third party, and that the opposing creditors have filed CP Nos. 72 of 1996, 197 of 1996 and 198 of 1996 for winding up of the company. The opposing creditor has advanced Rs. 10,00,000 to the Deve Sugars Ltd. and, if the permission is granted, it may not be possible for it to recover the amount.

7. I have heard arguments of all the parties. The learned counsel for the applicant submits that the applicant is running a sugar mill and that because of winding up proceedings, the affairs of the company have come to a standstill and the sugar mill could not be operated. According to the learned counsel, the crushing season has started and if the company is not permitted to run, the mill would result in heavy loss not only to the shareholders, but also to the workers of the company and also to the cane-growers of the vicinity, and the Government of Karnataka has categorically stated that the sugar mill would be taken over by them if no steps are taken to run the mill. To avoid all these difficulties, Deve Sugars Ltd. has entered into a memorandum of understanding with Pragosa Ventures (P.) Ltd., another company, for the running of the mill. As per the memorandum of understanding, Pragosa Ventures (P.) Ltd. has agreed to invest Rs. 10,00,000 towards the share capital on the security of the mill and a portion of the land covered by the mill. The company is possessed of more than 200 acres of land apart from the mill and its premises and, in the event of any failure in the venture, the land would be available to the creditors to satisfy the debts and the creditors may not lose anything.

8. A perusal of the memorandum of understanding would go to show that the company has agreed to transfer its shares to Pragosa Ventures (P.) Ltd., retaining 49 per cent. of the available shares.

9. Learned counsel for the applicant submits that the applicant is trying to introduce a scheme without following the procedure laid down under sections 391 and 394 of the Act. The learned counsel cited an authority in *Bank of India Ltd. v. Ahmedabad Mfg. & Calico Printing Co.* [1972] 42 Comp Cas 211, in which the Bombay High Court has held as under :

'In the case of the transfer of its undertaking, property and liabilities by one company to another, the transaction may or may not affect the rights of its members or creditors. If it does affect the rights of its members or creditors, either because it involved a reorganisation of its share capital or otherwise, it would certainly fall within the term 'arrangement', and, in that event, proceedings by the transferee-company in the appropriate court under sections 391 and 394 would be

necessary. It must follow that if a scheme by way of transfer of an undertaking does not affect the rights of the members or creditors of the transferee-company, as between themselves and the company or does not involve a reorganisation of the share capital of the transferee-company, no application by the transferee-company under sections 391 and 394 would be necessary.

In the instant case, the understanding is to transfer Deve Sugars Ltd. to Pragosa Ventures (P.) Ltd. Deve Sugars Ltd. is the 'seller' and Pragosa Ventures (P.) Ltd. is the 'buyer' as per the memorandum of understanding. Though it is mentioned that the buyer-company agreed to purchase the sugar manufacturing unit of the seller-company and that the buyer undertakes to pay the main creditors of the seller-company and infuse funds not less than Rs. 10,00,000 for starting the mill, still such understanding between the buyer and the seller de hors the creditors concerned, cannot be said to be not affecting the interest of the creditors. Though in the affidavit filed by the managing director of the applicant-company, it is stated that there had been exhaustive meetings between the various authorities, there is nothing to show that the meeting was attended by the creditors much less the opposing creditors herein. I consider that any understanding entered into between the applicant-company with a third party-company without the consent of the creditors, however beneficial it might be to the applicant-company, would certainly cause hardship to the creditors, especially when winding up proceedings are pending. I do not find any merit in this application. This application is, therefore, dismissed.

10. No costs.