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Court : Kolkata

Decided On : Jul-04-1995

Reported in : AIR1996Cal257,[1998]91CompCas333(Cal),100CWN677

Judge : Baboo Lall Jain, J.

Acts : [Companies Act, 1956](#) - Sections 390, 391, 394 397(2) and 433;; Indian Companies Act, 1913 - Section 153;; English Companies Act, 1862;; Joint Stock Companies Arrangement Act, 1870;; English Companies (Amendment) Act, 1907 - Section 58;; English Companies (Consolidation) Act, 1908 - Section 120;; English Companies (Amendment) Act, 1929 - Section 153;; Income Tax Act, 1961 - Sections 2(1A) and 72-A

Appeal No. : Company Petn. No. 372 of 1994 with Company Appln. No. 173 of 1994

Appellant : Rossell Industries Ltd. and Another

Advocate for Def. : A.P. Chatterjee, Sr. Adv., ;Miss. Sadhana Banerjee, Adv.;B. Debnath, Adv.

Advocate for Pet/Ap. : B.B. Mookerjee, Sr. Adv., ;S.M. Mukerjee, ;Ranjan Badwat, ;Debangus Basak, ;Aniket Agarwal and ;Rajat Kumar Sen, Adv.

Judgement :

ORDER

1. This application has been made by Rossell Industries Ltd. and Rossell Tea Ltd., inter alia, for final sanction of the Scheme of Arrangement between Rossell Industries Ltd. and Rossell Tea Ltd. and their respective shareholders being Annexure 'A' to the petition. The said Scheme of Arrangement provides for transfer of the undertakings relating to three Tea gardens viz., Dikom Tea Estate, Nokhrey Tea Estate and Borahi Tea Estate of Rossell Industries Ltd. which taken together are defined in the said Scheme of Arrangement as 'Wilton Tea' and are referred to hereafter also in brief as 'Wilton Tea' to Rossell Tea Ltd. This transfer of the undertakings is to be in exchange of shares of the petitioner No. 2 which are to be allotted to the shareholders of the petitioner No. 1 as specified in the said Scheme.

2. The meeting of the shareholders of the two petitioner-Companies was directed to be held under the Chairman appointed by this Court and it appears that the said meeting was attended by 52.7% of the equity shareholders of Rossell Industries Ltd., i.e., the petitioner No. 1. The total paid up capital of Rossell Industries Ltd. is Rs. 10,11,90,550/- out of which shareholders holding shares of the nominal value of Rs.5,33,19,010/- attended the meeting. Out of the said shareholders attending the meeting the shareholders holding shares of the nominal value of Rupees 5,30,70,110/- voted in favour of the Scheme and shareholders holding shares of the nominal value of Rs. 1,02,550/- voted against the Scheme. The Scheme was, thus, approved by about 99.18% of the shareholders attending and taking part in the meeting.

3. The Scheme of Arrangement was also approved by all the shareholders of Rossell Tea Ltd., the petitioner No. 2. This is to be noted that the only paid up capital of the petitioner No. 2 is Rs. 8,000/- and all of them voted in favour of the Scheme. After the application for final sanction of the Scheme was made and the same was advertised as per directions given and notice was also given to the Central Government, The application for sanction of the Scheme has been sought to be opposed by a number of shareholders whose total shareholding is about 0.1171% (0.17%) of the total value of the shareholding of the petitioner No. 1. It has been submitted on behalf of the petitioners that this is an insignificant minority of the shareholders of the petitioner No. 1. It has been submitted on behalf of the petitioners that in such circumstances their objections ought not to be entertained.

For this purpose they have relied on an unrepealed judgment of Ajoy Nath Ray, J. dated March 3, 1993 in C. P, No. 418 of 1992 connected with C.A. No. 230 of 1992 (In the matter of : Leige Traders and Investments Ltd.).

4. So far as the Central Government is concerned, the learned counsel appearing on behalf of the Central Government submitted that his client has no objection to the sanctioning of the Scheme of Arrangement.

5. Mr. Arun Prakash Chatterjee, learned counsel appearing on behalf of the shareholders-objectors submitted that so far as his clients are concerned they are objecting to the sanctioning of the Scheme in their capacity as shareholders of the company and not otherwise. The first ground raised on behalf of the said objectors was that under Sections 391 to 394 of the [Companies Act, 1956](#), power of Court can be exercised only in respect of companies which are liable to be wound-up and are not meant for companies which are in good financial position. So far as the petitioner No. 1 is concerned, there is no doubt that it is a solvent company and is a profit-making company and does not come within the definition of a company which may be said to be presently liable to be wound-up. It was submitted that since the petitioner No. 1 is admittedly a solvent company in good financial position, this Court has no jurisdiction to sanction any Scheme of Arrangement relating to the said company and the instant Scheme cannot, therefore, be sanctioned by this Court. Mr. Chatterjee relied on the judgment of Tarkunde, J. reported in : AIR1967 Bom341 (Seksaria Cotton Mills Ltd. v. A.E. Naik). In the said case it was, inter alia, held to the effect that Section 391 applies to a Company which is being wound-up as well as to a Company which is not being wound-up. It cannot, however, apply to a Company which is in a sound financial condition. In this connection, a reference may be made to clause (a) of Section 390, which says that the expression 'Company' in Section 391 'means the Company liable to be wound-up under this Act'. A provision corresponding to clause (a) of Section 390 was found in Section 153(g) of the Indian Companies Act, 1913.'

6. Mr. S. B. Mukherjee, the learned counsel appearing on behalf of the petitioners, have relied on a large number of cases including subsequent cases of the Bombay

High Court where the decision in Seksaria's case : AIR1967 Bom341 (supra) was not followed or was rather dissented on the ground that the observations made by the learned Judge were unnecessary and/or in the nature of obiter. The petitioners have relied on the case reported in 20 Com Cas 68 : (AIR 1950 East Punjab 111) (Smt. Bhagwati v. New Bank of India Ltd.). This is a Full Bench judgment of the East Punjab High Court. In the said judgment it has been held as follows (at p. 121 of AIR):

'Now, in the English Companies Act, 1862, there was no sufficient provision corresponding to Section 153 of the Act of 1929, but the defect was in a measure supplied by the Joint Stock Companies Arrangement Act of 1870. As pointed out by Palmer in his celebrated work on Company Law, the Joint Stock Companies Arrangement Act of 1870 was only to operate as part of the winding-up machinery of the Court, and the assistance of the Court could not be invoked except in a winding-up, whether compulsory, voluntary or under supervision which was a serious defect, because the very object of the arrangement or compromise was in many cases to avoid a winding-up. By subsequent legislation this defect was remedied and finally Section 58 of the English Companies Act, 1907, enacted that the Act of 1870 should apply to a company which was not in the course of being wound-up in like manner as it applied to a company which was in the course of being wound-up. In 1908 when the English Companies (Consolidation) Act of 1908 was passed, Section 120 was enacted embodying all the legislation up to that date and was put under Part III of the Act and not under Part IV which provided for winding-up thus making it clear that Section 120 applied to the case of a company which was a going concern and also to the case of a company in liquidation. Section 120 of the English Act was replaced by Section 153 of the English Companies Act of 1929 and Section 153 of the Indian Companies Act, 1913, was amended in 1936 to bring it into line with Section 153 of the English Act of 1929 and on a comparison of both the sections it will be seen that they are word for word the same.'

7. Mr. Mookerjee also relied on a case of the Bombay High Court reported in 42 Com Cas 211 : (1972 Tax LR 2532) (Bank of India Ltd. v. Ahmedabad Manufacturing and Calico Printing Co.) In the said case the Bombay High Court

held as follows (Para 11 of Tax LR):

'It was in that context that Tarkunde, J. proceeded to consider the scope and applicability of Section 391 of the Companies Act, and, in doing so, observed that the said section could not apply to a company which was in a sound financial condition. With respect to the learned Judge, it was sufficient for him to take the view that, in the case of a company which was not in a sound financial condition, a scheme is an alternative made of winding-up and the word 'creditor' in Section 391 should, therefore, have the same wide meaning as in liquidation proceedings. It was not at all necessary for him to go further and state that Section 391 cannot apply to a company which is in a sound financial condition. His observation to that effect is, in my opinion, therefore, nothing more than an obiter dictum and is not binding upon me. Moreover, I do not agree with the same. To accept that contention would mean, as Mr. Advani has rightly submitted, that two prosperous companies could never amalgamate for their mutual benefit, which is contrary to well-established law and practice. In my opinion, the definition in clause (a) of Section 390 merely states that a company which seeks to resort to the provisions of the said chapter must be one which is 'liable' to be wound-up under the Act, and not that it should be one which is in such a financial condition as to be 'capable' of being wound-up under the Act. Mr. Sorabjee's contention based on the definition in Section 390(a) that the provisions of Section 391 cannot apply to a transferee company, since it would be in a sound financial condition must, therefore, also stand rejected.'

In the above noted case the case of Sakseria Cotton Mills v. A. E. Naik : AIR1967 Bom341 was considered, and the relevant observations relied on by Mr. A. P. Chatterjee were held to be obiter dictum of the learned Judge dissented therefrom.

8. Next case relied on by Mr. Mookerjee is the case reported in (1983) 53 Com Cas 926 (In re: Telesound India Ltd.). In the said judgment the Delhi High Court held as follows :--

'The expression 'liable to be wound-up' has nothing to do with the satisfaction of the conditions for a winding-up order or the objective conditions of a company and the expression must be construed to mean a company which, on the conditions for

winding-up being satisfied, could be wound-up under the Act. This is how the Madras High Court looked at the corresponding provisions in the Act of 1913 in the case of Travancore National and Quilon Bank, (1939) 9 Com Cas 14 : AIR 1939 Mad 318. This view did not find favour with the Lahore High Court in the case of Traders' Bank, AIR 1949 Lah 48, and the Bombay High Court in the case of Saksaria Cotton Milts Ltd., : AIR1967 Bom341 . The Bombay High Court, however, dissented from this View in a later decision in the case of Khandelwal Udyog Ltd., (1977) 47 Com Cas 503, in whichon an examination of the scheme of Chap. V and the etymology of the expression 'liable', it was held, and rightly in my view, that the expression was designed to enlarge the scope of Ss. 391 and 393 and was not intended to restrict the provisions to companies which faced financial difficulties. It is significant to point out that the defining the expression 'company' in S. 390(a), there was a deliberate departure from the phraseology of the provisions regarding winding-up, such as, Sections 397(2)(b) and 433 of the Act. Section 397(2)(b) uses the expression 'the facts would justify the making of a winding-up order'. Section 433, which deals with the cases in which the company may be wound-up by a Court, provides that 'a company may be wound-up'. Section 390(a), on the other hand, advisedly uses the expression 'liable to be wound-up'. It is interesting to notice in this context that S. 72-A of the I.-T. Act, 1961 is a legislative recognition of the scope of Ss. 391 and 393 of the Companies Act, when it provides that on amalgamation the amalgamated company would be entitled to take advantage of the accumulated losses of the transferor-Company to reduce its tax liability. If both the companies sought to be amalgamated must be sick, who would take advantage of the accumulated losses? The definition of the expression 'amalgamation' in S. 2(1A) of the I.-T. Act leads one to the same conclusion. The expression 'company' must, therefore, be held to mean a company whether financially sound or otherwise, which, if conditions for winding-up were satisfied, could be wound-up under the Act.'

9. Mr. Mookerjee also relied on the decision reported in (1977) 47 Company Cases 503 (Knandelwal Udyog Ltd. and Acme Mfg. Ltd.) wherein Justice Mridul of Bombay High Court considering the judgment in Saksaria's case' : AIR1967 Bom341 inter alia held that the expression 'any company liable to be wound-up under this Act' in Section 390(a) did not mean companies which are in financial

difficulties and are, therefore, liable to be wound-up under the Act. The expression 'any company liable to be wound-up under this Act' meant all companies to which the provisions relating to winding-up apply. The expression took in its sweep all companies registered under the provisions of the Companies Act as also all companies which came within the purview, of the provisions of the Companies Act and could be wound-up by a Court under the provisions thereof. The expression contained in Sec. 390(a) was advisedly used so as to enable unregistered companies or foreign companies to be in a position to invoke the provisions of Sections 391 and 393 of the Act. This is because the critical factor was not whether a company is being wound-up or not being wound-up, but was whether the company belonged to the category of companies which came within the vertex of the winding-up provisions of the Act.

10. The expression 'liable to be wound-up' would only mean that, on factual ingredients being satisfied, a particular company would come within the coverage of winding-up provisions and would be liable to be wound-up. In other words, if a company is within the reach of the provisions of the Act pertaining to winding-up, such a company must be held to be a company 'liable to be wound-up under this Act'. Such a company would, therefore, be entitled to invoke the provisions of Section 391 of the Act. The scheme of amalgamation could be sanctioned even though the transferee-Company was not in embarrassed circumstances.

11. Reliance was also placed - by Mr. Mookerjee on the case reported in (1985) 2 Comp LJ 409 : (1986 Tax LR 1753) (Malayalam Plantations (India) Ltd. and Harrisons and Crosfield (India) Ltd. (In Re), wherein the Kerala High Court held to the effect that :

'The provisions for amalgamation of companies are intended to be applied in respect of unregistered companies as well. As in case, the expression 'company' used in Section 390 is to apply only to companies registered under the [Companies Act, 1956](#), this purpose would not be served. In order that such companies i.e., unregistered companies are also covered by the expression 'company' a special definition has been provided in Section 390(a). Therefore, the contention that only companies which are liable to be wound-up immediately are taken in by Section

390(a) is not correct, and hence unacceptable'.

12. In view of the various later judgments even of the Bombay High Court, I respectfully agree with later judgments that the said observation in the judgment in Saksaria's case : AIR1967 Bom341 (supra) was merely an obiter dictum. In my opinion, the expression 'company' used in Section 390 of the Act applies to all companies which can be wound up under the Companies Act and is not confined only to companies which are presently in a position to be wound-up i.e. as on the date of making of the application under Sections 391 to 394 of the Companies Act. In my opinion as on the date of the making of the application for merger or amalgamation the company may be quite prosperous and a profit-making company. All that is meant to be included by the words 'liable to be wound up' is that it must be a company which is subject to the laws of winding-up as provided in the Companies Act, i.e., it must be liable to be wound-up as and when the circumstances so arise.

13. The next submission of Mr. A. P. Chatterjee appearing on behalf of the objectors, was that the role of the Court is not only inquisitorial but also pragmatic which requires forming of an independent and informal judgment as regards the feasibility of proper working of the Scheme and making suitable modification in the Scheme and issuing appropriate direction with that end in view. His submission is that the Scheme should be in accordance with the principles of public and commercial morality and that the same should be reasonable which can be supported by sensible people and should be for the benefit of the class which they represent. He submitted that a Scheme must be fair and reasonable and must be made in good faith and it could be supported by sensible people and should be for the benefit of each class of members or creditors.

14. It has been submitted by Mr. Chatterjee that Wilton Division constitutes of three of the best Tea gardens of Rossell Industries, all earning profits. He also submitted that most of the left out Tea gardens are hypothecated to IDBI, IRBI or IFCI from which the company has taken loans. According to him, if these three gardens go out to the transferee-Company then the position of the transferor-Company will become worse and it will be ruined. He also submitted that it is not

reasonable to transfer the Wilton Division without any consideration or as a gift. According to him it is virtually a gift of the Wilton Division to the transferee, if the Scheme is to be given effect to.

15. The transfer being made as a gift is not correct because in consideration of the transfer the transferee is to issue shares in favour of the shareholders of the transferor-Company. Whether the consideration comes to the company or its shareholders the fact remains that the transfer is for consideration and the consideration is going to a body of persons who own the transferor-Company. There is no challenge so far as the exchange ratio of the shares is concerned. It is also submitted that the authorised capital of the transferee-Company has already been increased sufficiently pursuant to the provisions as contained in the Scheme. So far as the allegations of fraud and/or improper conduct made in the affidavit-in-opposition are concerned, no particulars have been given with regard to such alleged fraud and/ or improper conduct and such allegation are liable to be ignored. Reliance has been placed on behalf, of the petitioners on the case reported in : (1961)111LLJ427SC (Union of India v. P. K. More) as also on the case reported in (1880) 5 AC 685 (Wallingford v. Director, Mutual Society and the Official Liquidator) wherein it has been held that a general allegation of fraud however strong the word used, where there is no statement of the circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which a Court ought to take notice. Though various grounds have been mentioned in the affidavit-in-opposition to suggest that the Scheme is unfair or is unreasonable, however, such allegations are mostly devoid of material particular and no reliance can be placed thereon. Full particulars of the alleged improper conduct have not been given. Once a Scheme has been passed by the statutory majority and the requirements of the statute have been carried out, the onus to show unfairness or unreasonableness is very heavy on the objectors.

16. In the case reported in : AIR1959 Cal679 , Justice H. K. Bose, as his Lordship then was, held that the onus of proving unreasonableness or of unfairness about the Scheme or of want of good faith is on those who object to the sanction of the Scheme. This onus is not discharged by vague and general assertions devoid of any particular.

17. In the case reported in 1961 (1) Chancery Division 289, it was held as follows :

'A scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies to the extent of 100 percent, with the highest possible standards of fairness, equity and reason. After all, a man may have an offer made to him and, although he would prefer something better, would be quite prepared to accept it because it was good enough in all the circumstances. It may be that the grounds for criticising the present scheme are not grounds of such a nature as to render the whole thing unfair in the sense in which Maugham, J. used the words in the case which I have cited.

A good deal of light is thrown in the consideration of this section in re : Press Caps Ltd., where the test laid down by Maugham, J. in In re : Hoare and Co. that where the statutory majority has accepted the offer, the onus must rest on the applicant to satisfy the Court that the price offered is unfair, was approved.'

18. The shareholders of the transferor-Company will get benefit by the shares allotted to them and it is virtually the same set of shareholders as that of the petitioner No. 1 who will control the petitioner No. 2 because the shareholding of the petitioner No. 2 is very small, that is Rs. 80,000/- only. As the entire undertaking of the three Tea gardens including the assets and liabilities are being transferred to the transferee there is no question of any difficulty in the management or nursing of the Tea gardens which are transferred. After all, it is a decision of the vast majority of the shareholders of the petitioner No. 1 who considered it fit and proper to attend the said meeting that the Scheme should be given effect to. It is only about 0.17% of the shareholders who are objecting to the sanction of the Scheme. The Government of India has also submitted that they are not objecting to the sanction of the Scheme. So far as the employees are concerned, the rights of the employees have been preserved to the best possible extent and none has come to oppose this application in the capacity of an employee of the transferor and/or of the transferee. The reasons and the advantage which will be drawn by giving effect to the said Scheme are mentioned in the petition of the petitioners and I do not think that there is any serious

challenge to the same. Such grounds for the Scheme of Arrangement are given in paragraph 4 of the petition and I do not find that there are any good ground to hold that the decision of the vast majority of the shareholders was mala fide or with any wrongful objective or unfair or unreasonable as alleged or otherwise. I am also not satisfied that the Scheme is oppressive to the minority shareholders as alleged or otherwise. .

19. It has also been stated on behalf of the objectors that the Scheme of Arrangement is not beneficial to the company and is for purposes unknown to the objectors. It was submitted that as the company is not getting anything in consideration for transfer of the undertaking of its three Tea estates, the Scheme ought not to be sanctioned. Such contention is not correct, inasmuch as the Scheme of Arrangement in the instant case provides that the shareholders of the transferor-Company should directly receive the consideration. The shareholders are also parties to the Scheme. Allotment of shares is one of the modes of payment of consideration. At least, nothing has been shown to me that the consideration cannot pass to the shareholders of the transferor-Company who are the real owners of the company.

20. Under the circumstances, I am of the view that this Scheme as proposed, should be and is hereby sanctioned. There will be an order in terms of prayers (a) to (g) of the petition.

21. All parties to act on a signed xeroxcopy of the judgment on the usual undertaking.

22. Order accordingly.