(2009) 11 MAD CK 0109

Madras High Court

Case No: O.S.A. No''s. 301 and 302 of 2009

In Re: Cash and Carry Wholesale Traders Private Ltd.		APPELLANT
	Vs	
		RESPONDENT

Date of Decision: Nov. 5, 2009

Acts Referred:

- Companies (Court) Rules, 1959 - Rule 67, 68
- Companies Act, 1956 - Section 390, 391, 391(1), 391(2), 394

Citation: (2011) 101 CLA 341 : (2010) 1 CTC 300 : (2010) 2 MLJ 370

Hon'ble Judges: Prabha Sridevan, J; M. Sathyanarayan, J

Bench: Division Bench

Advocate: Karthik Seshadri and P.H. Arvindh Pandian, for Hasham Investments, T.V. Ramanujam for M. Vaidyanathan, for the Appellant;

Final Decision: Dismissed

Judgement

Prabha Sridevan, J.

The appellant''s application u/s 391 and 394 of the Companies Act, 1956 for issuance of notice to hold a meeting of the non-lending creditors and the lender creditors of Subhiksha Trading Services Limited (''the company'' in short). The learned Single Judge dismissed the application. The grievance of the appellant is that under Rule 67 of the Company Court Rules, this application must be heard ex-parte. But the learned Judge allowed his decision to be coloured by the objections of the creditors who were in Court and who had neither filed vakalath nor entered appearance and had no right to be heard and therefore, the order is vitiated.

2. The learned Senior counsel referred to Rule 67 of the Company Court Rules, which deals with Summons for directions to convene a meeting according to which the summons shall be moved ex parte. The learned Senior Counsel referred to 2009 (2) SCC 547 where the Supreme Court had held that a application moved in the form of

Judges Summons by a company for directions to convene a meeting of creditors and members to consider the proposed scheme of amalgamation, it must be heard and decided ex parte and if hearing at the threshold stage is required to be given to contributors, creditors and the shareholders then the entire scheme would become unworkable. By this judgment, the Supreme Court set aside the order of the Karnataka High Court which held that a hearing of all parties was necessary before directions to convene a meeting u/s 391(1) of the Companies Act to be passed and that an ex parte order cannot be passed. The learned Senior Counsel submitted that while there is no denying the position that the Company Court while deciding the application is not expected to simply affix its seal without applying its mind regarding the genuineness or the bona fide of the scheme it shall not hear other parties since as per the decision of the Supreme Court such hearing would make it unworkable. Three creditors both non-lending and lender creditors have raised their objections before the learned Single Judge which had given raise to this objection. They supported the decision of the learned Single Judge. Brief written submissions were also submitted on behalf of the appellant.

3. Mr. Karthik Seshadri, learned Counsel appearing for one of the objector said that Rule 67 would apply only when the application is made by the Company itself whereas Rule 68 would apply where the Company is not the applicant and Rule 68 does not mention that it shall be heard ex parte and the language is different. In the present case, the learned Counsel pointed out that the applicant is not ''the company'' but the sponsor of the scheme of arrangement. The learned Counsel also referred to the judgment of the Bombay High Court in Sakamari Steel and Alloys Ltd. In Re 1981 (51) Comp. Cas 266 which has been approved of by the Supreme Court in Chembra Orchard Produce Ltd. and Others Vs. Regional Director of Company Affairs and Another, , where the learned Single Judge had held that Section 391(1) is not a sign-post but a check-post and it is the duty of the Court to examine the scheme and the bona fides for itself and according to the learned Counsel this is what it had done. The learned Counsel also submitted that this scheme of arrangement will work only if the scheme of amalgamation which is pending before this Court goes through and it is for this reason that these matters are kept pending so that the application for scheme of amalgamation is not permitted to be looked into. There are winding up petitions against the Company and therefore, deliberately all these matters are protracted.

4. Mr. Arvindh Pandian, learned Counsel who appeared for other creditors that in N.A.P. Alagiri Raja and Company Vs. N. Guruswamy and Others, a Division Bench of this Court had clearly held that the Court is not intended to act as a Post-Office with no discretion or power to refuse to call for a meeting. The learned Counsel, Mr. Arvindh Pandian also referred to 1996 (1) BCLC 428 (Re Polly Peck International plc (in administration) (No. 3) and 1994 (1) BCLC 464 (El Ajou v. Dollar Land Holdings plc and Anr.) where the alter ego doctrine was referred to ascertain who is the directing mind and will behind the cause of actions and also to 1995 (2) BCLC 116(Meridian

Global Funds Management Asia Ltd. v. Securities Commission) where the action of Court referred to the test of directing mind and will.

5. Mr. Rahul Balaji, learned Counsel appearing for yet another creditor submitted that while it is true that the creditors are not to be heard and in that sense it shall be heard ex parte nothing can fetter the right of the Court to hear the parties if the Court feels it is necessary to test the bona fides of the Scheme. The learned Counsel also referred to the Law Lexicon to explain the terms ex parte and ''according to the learned Counsel the application u/s 391(1) must be heard in open Court.''

6. The facts in brief are that the appellant is the sponsor for the scheme of arrangement. The appellant was incorporated on 21-05-2002. It holds a minimum number of shares in the Company. The Scheme formulated by the sponsor contemplates raising a sum of Rs. 250 Crores after amalgamation of the Company with M/s. Blue Green Constructions and Investments Limited, the applications filed for this purpose are pending. It is seen from the order under challenge that the objectors'' counsel had been allowed to make their submissions. But the learned Single Judge had looked into the Scheme of arrangement and found that it was sponsored by the appellant and was solely dependent upon the scheme of amalgamation, provided it is approved by the Court. Therefore, the learned Single Judge wondered whether there was any concrete proposal existing to enable the creditors of the Company to decide about anything, since until the scheme of amalgamation materializes, the basis for the scheme of arrangement did not exist. The learned Single Judge observed that if there was any other source of income for the sponsor to pump in the money, then the genuineness of the proposal could be presumed. But since no such external source, apart from what would result from the scheme of amalgamation was shown before the Court and in view of the financial ability of the appellant, the learned Judge was of the opinion that no purpose was going to be served by placing the scheme of amalgamation before the creditors of the Company. Therefore, the learned Single Judge felt that this was only a method to postpone the winding up. The learned Single Judge also noted that under the Scheme of Amalgamation, which is yet to be approved the transferee company was controlled by the same individual who is the Managing Director of the Company. The learned Single Judge rightly held that in cases where the Court decides the convening of such meeting it serves no purpose, it was within the decision of the Court not to convene any meeting and that the Court has to satisfy itself about the decision in such a direction. The learned Judge held that,

Therefore, on the facts and circumstances of the case, when the sponsor viz., the applicant is not able to explain the independent inflow of money which is proposed to be pumped in and the entire proposal itself is subject to the scheme of amalgamation, which is yet to be confirmed by the Court, as on date, there is absolutely nothing for the creditors to consider the matter of proposal and therefore, the convening of meeting at this point of time is totally without any

justification or reason.

It is in these circumstances that the application has filed this appeal.

7. It is clear from the order that the learned Single Judge had independently come to the conclusion that the request for convening a meeting was not justified and thereafter, also noted the objections of the creditors. From a reading of the judgment we are unable to accept the submissions of the learned Counsel for the appellant that the mind of the Judge was totally biased because of the objections. In 1987 (1) MLJ 333(supra) the Division Bench of this Court had observed that an order u/s 391(1) has to be made only after the Court considers the possibility or otherwise of the proposed scheme of settlement of the bona fides of the applicant and the application. The Court will also have to be satisfied that all the material facts relating to the Company are placed before the Court. In 1981 (51) Comp Cases 266(supra) the learned Judge held,

It is not compulsory upon the court to grant sanction simply because three-fourths in value have accepted the scheme. The court has still to consider the circumstances before giving its approval, though the fact that three-fourths in value have agreed to accept the scheme would be a strong circumstance in favour of sanctioning the scheme by the court. The scope of inquiry by the court cannot be laid down by any rigid principles or formulae or on the basis of judicial decisions. The circumstances to be taken into account would vary from case to case. Some of the outstanding taken into account would vary from case to case. Some of the outstanding circumstances are:

(a) the proposal for the scheme was made in good faith,

(b) the scheme is fair and reasonable,

(c) the scheme will yield to a smooth and satisfactory working,

(d) the scheme does not offend public or commercial morality,

(e) the scheme is not detrimental to the interests of the creditors or members or public interest;

(f) the scheme does not violate the Companies (Acceptance of Deposits)Rules, 1975, or nullifies the protection afforded under these Rules.

Thus the trend of the judicial decisions shows that the court must examine the scheme on its own merits and is not bound to treat the scheme as a fait accompli. In doing so, the court would not be substituting its judgment for the commercial judgment, as it is often argued. .. Section 391(1) is not a sign-post but a check-post whereas it is the duty of the court to examine the scheme for itself. _ It think that a studied slowness and caution on the part of the court is necessary. Various factors can be examined at the threshold, for example, (i) whether the company is qualified to sponsor a scheme, that is, if it is liable to be wound up as defined in Section

390(a), (ii) the motive of the company or creditors in sponsoring a scheme, (iii) whether the company is really intending to save itself from liquidation or it wants to call up a part or whole of the principal amount or interest of a particular class of its creditors, (iv) whether all creditors who are similar in that class are covered under the proposed scheme.

A very special role is entrusted to the court under Sections 391 - 394-more particularly after the amendment of these provisions in 1965. Section 392 enjoins the court to supervise the scheme and, therefore, it is all the more necessary to examine the bolts and nuts of the scheme at the stage it is launched. At the threshold, the court can satisfy itself of the viability of the scheme and if it has any doubt, it should not hesitate either to reject the scheme as proposed or ask for additional material to safeguard the interests of all concerned or even make necessary observations while giving directions, so that the creditors, members and the company can take note of the pit-falls, loop-holes and defects of the scheme. There cannot be a casual or mechanical approach at the time of giving directions for convening a meeting u/s 391(2). The court''s role u/s 391(1) is equally useful, vital and pragmatic as u/s 391(1) or Section 391 in a scheme of compromise or arrangement.

8. This was approved in 2009 (2) SCC 547(supra) which was strongly relied on by the appellant. In Chembra Orchard Produce Limited and Ors. case, the Supreme Court was dealing with an application under Rule 67. Paragraph No. 7 of the judgment makes this clear. Rule 68 deals with a case where the Company is not the applicant as in the case on hand. So cases arising out of Rule 67 may not apply. Further, in Paragraph No. 9, the Supreme Court only held that it is not necessary for the company to give the notice of hearing to the creditors, members and shareholders.

9. Therefore, it means the creditors do not have a right to be heard. At the same time ''not necessary to give a hearing'' does not mean ''it is forbidden to hear them''. Further the language of Rule 68 is clearly different from the language of Rule 67. Above all, in this case, the submissions of the creditor were only additional material, which bolstered the opinion already formed by the learned Single Judge. He has given reasons for his conclusions, which are not dependent on the claims of the creditors. He found that the basis for the scheme of arrangement is the funds that might flow if the scheme of amalgamation is approved by the Court and that is not a certainty. So the flow of funds become even less of a certainty and the appellant did not demonstrate to the satisfaction of the learned Single Judge, that they had a source for funds other than what would come in if the scheme of amalgamation is approved. Therefore, this meeting was called in the opinion of the learned Single Judge, without any basis. The learned Senior Counsel submitted that if we hold against him on the question of ''hearing the application ex parte'', then the matter may be sent back to the learned Single Judge so that the creditors can file their vakalat and the matter can be heard again on merits. We do not think so. Such an

order would be a redundant exercise. We do not think the order is in any way contrary to the judgment of the Supreme Court.

10. Accordingly, the appeal is dismissed. No costs.