

(2005) 09 CAL CK 0037

Calcutta High Court

Case No: ACO No's. 27 of 2004 and 36 of 2005, APO No. 460 of 2003, C.A. No's. 28 of 1990 and 248 of 2003 and C.P. No. 172 of 1990

Williamson Magor and Company
Limited and Associated Concern
Officers' Association

APPELLANT

Vs

Macneill and Magor Limited and
Others

RESPONDENT

Date of Decision: Sept. 21, 2005

Acts Referred:

- Companies Act, 1956 - Section 391(2), 392

Citation: (2006) 3 ACC 444 : (2006) ACJ 1431

Hon'ble Judges: Pinaki Chandra Ghose, J; Narayan Chandra Sil, J

Bench: Division Bench

Advocate: P.N. Chatterjee and K.K. Boral, for the Appellant; S.B. Mukherjee and D. Sharma, for the Respondent

Judgement

Pinaki Chandra Ghose, J.

This appeal is directed against orders dated April 9, 2003 and July 15, 2003,

2. It appears that in the appeal an application has been filed by the Williamson Magor & Co. Limited formerly known as Macneill & Magor Ltd. for recalling of the orders passed by the learned Company Judge on April 9, 2003 and July 15, 2003. It is further prayed that a suitable direction be passed by the Court discharging and/or reliving Williamson Magor & Co. Limited (hereinafter referred to as WML) from any liability of payment of pension to the retired officer of Macneill Engineering Limited.

3. The facts appears in this matter is that in or about February, 1990 a Scheme of Arrangement (hereinafter referred to as the "said scheme of 1990") was filed by the company before this Hon'ble Court in C.P. No. 172 of 1990 connected with C.A. No. 28 of 1990 whereby the Material Handling Division and the Electrical Division of

William Magor & Co. Limited (hereinafter referred to as WML) were transferred to the Macneill Engineering Limited (hereinafter referred to as MEL along with the transfer of all the assets and liabilities and the employees relating thereto. The said scheme of 1990 also provided that MEL shall establish a separate provident fund and superannuation fund. It was also provided that the accumulated balance standing to the credit of the employees and officers of MEL in the existing superannuation fund and provident fund shall be transferred to the said new fund to be established by MEL. On or about April 8, 1999 MEL has established a new fund called "Macneill Engineering Limited Superannuation Fund."

4. On March 4, 1991 the said scheme of 1990 was sanctioned by the Hon"ble Company Court whereby the aforesaid two divisions of WML were transferred to MEL. The said scheme of 1990 was opposed by the appellant. By an agreement dated September 10, 1990 the said WML Officer"s Association agreed to the said scheme of 1990 being sanctioned by this Hon"ble Court. Under the said agreement WML stood as guarantor for contributions on account of provident fund, superannuation and gratuity funds in respect of employees of WML who were to be transferred to MEL till such time MEL established a fund on similar lines. The said guarantee was followed for a period of 3 years from the date of transfer of the said employees to MEL. It was made clear that the said guarantee would not be applicable to the employees who were directly recruited by MEL during the said period of 3 years and also to such employees who would directly join MEL after the date of sanction of the said scheme of 1990. It is further submitted that the said agreement dated September 10, 1990 was not part of the scheme of arrangement which was sanctioned by this Hon"ble Court on March 4, 1991.

5. On or about May 6, 2003 WML along with its wholly owned subsidiaries. Portside Estates Limited (hereinafter referred to as PEL) and DSK Real Estates Limited (hereinafter referred to as DREL) made an application for sanction of the scheme being CP No. 213 of 2003 connected with C.A. No. 182 of 2003 (hereinafter referred to as the scheme of 2003).

6. The said scheme of 2003 was opposed by WML Officers" Association and KIE Employees" Union and KIE Workers" Union. The said scheme of 2003 was sanctioned on May 19, 2004 by this Hon"ble Court, The appeal has been preferred from the said order by the Officers" Association and an order was passed on September 15, 2004 by the Hon"ble Division Bench directing the parties to file their respective affidavits but no stay was granted.

7. On July 30, 2002 an application was filed by the appellant being C A No. 448 of 2002 praying for a direction upon WML and MEL to fulfil its obligation in terms of the earlier Scheme of Arrangement of 1990 so far as superannuation fund is concerned.

8. By an order dated April 9, 2003 MEL was directed to continue to make payment of pension to the retired officers of MEL so long as the shortfall of the superannuation fund is not made up. It was further directed that in case any of the cheque for pension was dishonoured for non-payment due to paucity of fund MEL would make payment of the amount equivalent to the value of the cheque within 30 days from the date of communication of notice of dishonour. In case of default of payment by MEL WML was directed to make payment of the said sum upon expiry of 30 days. The said order dated April 9, 2003 was passed without prejudice to the rights and contentions of WML that WML was no more responsible for payment of pension. The appellant thereafter preferred an application for modification of the said order dated April 9, 2003 and by an order dated July 15, 2003 the modification application was disposed of with the observation that the appellant would be entitled to be heard at the time of sanction of the said scheme of 2003. The appellant has preferred the above appeal from the said order dated April 9, 2003 and July 15, 2003 when the Division Bench directed the expeditious hearing of the appeal and if any transfer takes place during the pendency of the appeal such transfer would abide by the result of the appeal,

9. It is submitted that under the agreement dated September 10, 1990 WML was liable as guarantor to pay pension only for 3 years from the date of transfer of the said employees from WML to MEL and after the expiry of the said 3 years, the said guarantee given by WML under the said agreement had lapsed. It is submitted that the said guarantee was not a continued guarantee and time was the essence of the agreement. It is only for 3 years from the date of such transfer. It is submitted that the order dated April 3, 2003 read with order dated July 15, 2003 makes the said guarantee applicable for an unlimited period even though there is no default on the part of the WML and even MEL had established a superannuation fund on or about April 8, 1999. It is further submitted that the said agreement dated September 10, 1990 not being a part of the scheme, obligations cannot be imposed on WML on the basis thereof. It is submitted that as a result of the said order dated April 9, 2003 WML is suffering serious prejudice for no fault on its part. It is further contended that none of the members of the of the appellant as either a employee or shareholder of WML or PEL or DREL. The appellant was not associated or connected in any manner with WML.

10. On November 25, 2003 an agreement was entered into between WML MEL and one Startrack International Ltd. (hereinafter referred to as "SIL") whereby WML agreed to transfer the entire shareholding of WML and its associates in MEL to SIL. The SIL after taking over management of MEL is intentionally defaulting in making payment of pension to the retired officers to create a liability of WML taking an advantage of the order dated April 9, 2003. Hence it is submitted that unless WML is relieved or discharged under obligation imposed under order April 9, 2003 read with order dated July 15, 2003 WML will suffer irreparable loss and prejudice. MEL has not discharged its obligation imposed upon it by the order dated April 9, 2003 by not

making up shortfall in the superannuation fund within 6 months from April 9, 2003. SIL has also not taken any steps in this regard and both MEL and SIL are deliberately defaulting in their obligation seeking to foist liability on WML. It is submitted that MEL and SIL not having discharged its obligation. WML cannot be made liable for payment of pension to officers of MEL.

11. MEL files an application before the Hon"ble Company Court for stay of operation of the order dated April 9, 2003. However, since a prayer was made to serve a copy of the said application on SIL it was directed that notice of the said application to be served upon SIL. Since the matter was for recalling of an order the matter was released from the Hon"ble Company Judge and the matter was placed before His Lordship Ashim Kumar Banerjee, J. for recalling of the said orders and His Lordship was pleased to direct WML to approach the Appeal Court since in the meantime an appeal has been filed from the said order dated April 9, 2003. Hence this application has been filed before the Hon"ble Division Bench for setting aside and/or modification and/or stay of the order dated April 9, 2003 and order dated July 15, 2003 by WML.

12. It is submitted by Mr. P. N. Chatterjee appearing on behalf of the appellant that the appellant opposed the scheme of 1990. An agreement was made on 10th September, 1990. It was specifically provided in the said agreement that Macneill & Magor Limited subsequently became MEL stands as guarantor for meeting and discharging the liability of MEL in respect of the benefit of the past services of such employees being granted to them. Macneill & Magor Limited also assured and stood as guarantor for contributions to the provident fund, superannuation and gratuity fund in respect of all the staffs transferred in MEL until separate funds of similar pattern is created by the said MEL. In the said agreement it is provided in Clause 6 that the association agrees to withdraw its objection submitted in the Company Petition No. 171 of 1990 connected with the Company Application No. 28 of 1990 in the High Court at Calcutta subject to incorporation of the agreement. It is submitted that the said scheme of 1990 should not have been sanctioned by the Hon"ble High Court since there is an illegality on the face of the record, the Court can take notice of such illegality irrespective of the pleadings and can make appropriate orders and reliance was placed on [Smt. Surasaibalini Debi Vs. Phanindra Mohan Majumdar](#), . He further submitted that pension and gratuity are no more a bounty it is security for the superannuated life of the employees and he also relied on [All India Reserve Bank Retired Officers Association and others Vs. Union of India and others](#), .

13. It is further submitted that specific provision was made in the agreement so that WML cannot shirk its responsibility and the said agreement was to be made part of the order of the Hon"ble Court sanctioning the scheme of 1990. He further contended that the then Managing Director of WML informed the Secretary of the appellant that the said agreement dated 10th September, 1990 forms part of the order dated 4th March, 1991 and is effective from April 1, 1991 when the said

scheme of 1990 was sanctioned.

14. It is submitted by Mr. Chatterjee that since the pensionary benefit were being paid the appellant filed an application u/s 391(2) of the Companies Act, 1956 (hereinafter referred to as the said Act) and prayed that the respondent Nos. 1 and 2 be directed to fulfil its obligation in terms of the Scheme of Arrangement of 1990. Accordingly, an order was passed on 9th April, 2003 bringing out the new provision for payment of the pensionary benefit to the members of the appellant. It would be evident from the said order that WML was in fact giving a go-bye to the guarantee given by them. Even after the said order pensionary benefits were not being paid in time. Hence, an application for modification was filed by the appellant before the Hon"ble Company Judge which was disposed of on 15th July, 2003. At that point of time it was contended on behalf of WML and MEL that the said agreement dated 10th September, 1990 was not made part of the scheme of 1990. Hence it is submitted that fraud has been practised upon the Hon"ble Court and the Officers" Association and on the members of the Officers" Association.

15. It would be evident from the order dated 4th March, 1991 that direction was given by the Court that the agreement dated 10th September, 1990 was to be kept on record, which was also informed by the Managing Director of WML.

16. Mr. Chatterjee further relied upon the following decisions:

2004(2) SCC 364 [The State of Andhra Pradesh and Another Vs. T. Suryachandra Rao, Vijay Shekhar and Another Vs. Union of India \(UOI\) and Others](#), and submitted that in view of the illegality it should be held that the scheme was not passed in accordance with law. It is further submitted that the respondent No. 2 has alleged that the scheme has been implemented except the provisions in connection with the opening of the superannuation fund as WML did not pay amount according to their commitment. Therefore the stand taken by WML is incorrect and the steps to be taken against the directors and officers of the said company by way of initiation of appropriate criminal proceedings and he relied upon [Saroj Bandhu Bhaduri Vs. Jnanada Sundari Debya and Another](#), . He further contended that no order was passed for recalling and/or modification of the order. An appeal has been preferred against the order dated July 15, 2002 since the contention of MEL that it was not possible for MEL to arrange for pensionary benefits as WML did not pay more than Rs. 2,00,000/- towards the fund for arranging the pensionary benefits for the members of the appellant.

17. It is further submitted that without going into the further dispute in the matter, this Court would be pleased to direct WML to pay the pensionary benefits to the members of the appellant since such fund cannot be created by MEL. Since the recalling application was filed by WML in respect of the order dated 9th April, 2003, the matter was directed before the Hon"ble Company Judge. The Hon"ble Company Judge was pleased to direct that since appeal has already been preferred from the

said order, leave was granted to WML to move the application for recalling of the said order before the Hon"ble Division Bench.

18. It is further submitted by Mr. Chatterjee that the said order cannot be recalled since an appeal is pending from the said order dated 9th April, 2003. He relied upon decisions reported in [A.R. Antulay Vs. R.S. Nayak and Another](#), ⁹ [Zunjarrao Bhikaji Nagarkar Vs. U.O.I. and Others](#), [The Administrator General of West Bengal Vs. Kumar Purnendu Nath Tagore](#), and [Steel and Allied Products Ltd. Vs. Gerbrueder Bholar and Co.](#), .

19. He further submitted that since the pensionary benefits are not paid to the retired officers, they are facing hardship and hence this application for recalling the order in the appeal should be dismissed by this Hon"ble Court and this Hon"ble Court would be pleased to direct WML to arrange payment of pensionary benefit to the members of the appellant through LIC by purchasing annuity so that the members of the appellant are not deprived of their pensionary benefit.

20. Mr. Mukherjee, learned Senior Advocate appearing on behalf of WML submitted that the dispute between the appellant and the WML and MEL were amicably settled and a memorandum of agreement was arrived at between the said two companies of the said employees and the members of the appellant No. 1 and an agreement was entered into between the parties on September 10, 1990 and on March 4, 1991 at the time of sanctioning the scheme of 1990, the said agreement was directed to be filed on record. He further drew our attention to Clauses 7 and 8 of the said order which are reproduced hereunder :

7. That a copy of the agreement between the petitioner companies and the Officers Association be filed as of records herein, and

8. That the main disputes between the petitioner companies and the Workers Union have also been resolved and a separate agreement with them shall be signed by the parties within a period of seven days from the date hereof and be filed as of records herein and.

21. He further contended that on April 8, 1999 MEL established a new fund called "Macneill Engineering Limited Superannuation Fund". [Reliance is placed on Clause 3(b) of the Scheme appearing at page 103 and 104 of the Paper Book in ACO 36 of 2005], He also drew our attention to Clause (ii) of the Terms of the Agreement of the Memorandum of Agreement dated 17th August, 1999 (appearing at page 28 of Paper Book Vol. 1 in ACO No. 36 of 2005). Under Clause (iii) of the terms of agreement of the said Memorandum WML stood guarantor for meeting and discharging liability of the MEL in respect of the benefit of the past services of the employees being granted to them, in other words, for the services rendered by the employees before their transfer and before this scheme. Therefore, it is submitted that there is no outstanding liabilities on this account and therefore the guarantee given by WML does not subsist. It is further submitted that WML also stood

guarantor for contributions on account of Provident Fund Superannuation and Gratuity Fund in respect of the management staff transferred to MEL being paid to the existing fund till such time MEL established such funds on similar pattern. Therefore this guarantee was also for contributions till April 7, 1999 as the new fund was created by MEL on April 8, 1999. Therefore, this guarantee under the said agreement by MEL also does not subsist.

22. He further drew our attention to Clause (iv) of the said agreement and submitted that the said clause provided for the retrenchment liability. [Paper Book Vol. I Clause (iv) at pages 29 and 30]. The guarantee provide by WML was for three years from the date of transfer of the said management staff to MEL. The said period of 3 years also has come to an end inasmuch as the employees stood transferred pursuant to the order dated March 4, 1991.

23. It transpires that MEL did not put any adequate funds in the newly created superannuation fund on April 8, 1999 and the shortfall in the said fund was not made up by MEL, although it was the liability and obligation of MEL to do so under the scheme and the agreement with the officers of the appellant No. 1.

24. In these circumstances an application was filed on July 30, 2002 by the appellant seeking a direction upon the WML (formerly known as MML) and MWL to fulfil their obligation in terms of the said Scheme so far as superannuation fund is concerned. The said application was taken out u/s 391 of the Companies Act, 1956.

25. The said Section 392 of the Companies Act, 1956 empowers the Court to supervise the carrying out of the compromise or arrangement and to give directions with regard to any matter or to make such modification in the compromise or arrangement. It is submitted that the scheme of 1990 did not impose any obligation on MML (formerly WML) to make any payment or contribution to superannuation fund and the said Memorandum of Agreement does not form part of the Scheme. It was the obligation of MEL under Clause 3(b) of the said scheme to establish a separate Provident Fund and Superannuation Fund.

26. Therefore the prayers made by the appellant does not come within the scope of Section 392 of the Companies Act and the said prayer is in the nature of an order or decree for specific performance of the Memorandum of Agreement between the panics which cannot be prayed or can come within the purview of the said Section 392 of the Companies Act.

27. The said order dated April 9, 2003 records the bona fide shown by WML in seeking to solve the problems faced by the employees of MEL. MEL was directed to continue to make payment of the pension to the retired officers of MEL so long as the shortfall in the superannuation fund is not made up, MEL was directed to make payment equivalent to the value of the cheque within 30 days from the date of communication of the factum of dishonour.

28. Mr. Mukherjee submitted that there is no obligation on the part of WML under the said scheme to make such payment. The order passed directing the WML to make payment of the said amount is outside the scope of the scheme of 1990. WML is not responsible for payment of pension. However only to show bona fide and good gesture WML has continued to make payment in respect of the pension to the retired officers. WML cannot be made liable in perpetuity for the liabilities of MEL. It is also submitted that the fund was created on April 8, 1999 and there being a shortfall in the said fund by the order dated April 9, 2003 MEL was directed to make up the shortfall. Therefore, the Court recognized the fact that it was the obligation of the MEL and not of WML to meet the shortfall. Unfortunately MEL has not yet made up the shortfall for which WML cannot be made responsible or put under any liability for the same nor is it under any obligation under the scheme or the Memorandum of Agreement between the parties to make the contribution. Therefore, it cannot be contended that the guarantee of WML still subsists.

29. It is submitted that the appellant at this stage cannot contend that any guarantee subsists in their favour as their appeal is not from the order dated April 9, 2003. The appeal has been preferred by the appellant from the order dated July 15, 2003 and is limited in scope. It is further submitted that MEL has not challenged the order dated April 9, 2003. On the contrary they filed an application for modification of the said order. The Hon'ble First Court by an order dated July 15, 2003 disposed of the said application holding that there was no case made out for modification.

30. It is submitted that WML has no obligation to make any. payment on the failure of MEL particularly after the superannuation fund have been created by MEL on April 8, 1999. It is also to be noted that the order so passed is without prejudice to the rights and contentions of the WML that they have no liability and as a good gesture made contribution towards the pension of the retired officers.

31. It is also submitted that the said orders dated April 9, 2003 and July 15, 2003 passed by the Hon'ble Company Judge are beyond the scope of Section 392 and cannot be sustained and are liable to be vacated to the extent specified in ACO 36 of 2005.

32. It is further submitted that WML has sold its entire share in MEL to Startrack International Limited (SIL), The application has been filed by WML only to this extent which directed WML to pay off the liability arising and/or resulting out of non-payment of pension to retired officers of MEL by MEL and/or any superannuation fund set up by it and for suitable direction for discharging and/or relieving WML from any liability of payment of pension to retired officers of MEL.

33. It is further submitted that the agreement which was entered into between the Officers Association and the MEL cannot be enforced u/s 392 of the Companies Act, 1956. Accordingly, it is submitted that the appeal has no merit and should be rejected and appropriate order should be made relieving WML from discharging the

liability of MEL as directed by the said order dated April 9, 2003 and July 15, 2003. It has been further submitted that there has been no fraud on the part of WML.

34. After considering the facts and circumstances of the case the only question arose in this application is whether WML which was known as Macneill & Magor Limited (MML) has any obligation under the Scheme to make any payment on the failure of MEL to contribute to superannuation fund after creation of such fund by MEL on April 18, 1999.

35. It is admitted that on March 4, 1991 the Scheme of Arrangement was sanctioned and pursuant and in terms of the said sanction all the liabilities were transferred to, and vested in, MEL. Under the said Scheme all the employees of the Material Handling Division and Electrical Division of MML in service on the date immediately preceding the completion of procedures date became the employees of MEL without interruption in service and on terms no less favourable to them as those in service.

36. Under the Scheme MEL was required to establish a separate provident and superannuation fund and the accumulated balances standing to the credit of the employees and officers of MML (now WML) was directed to be transferred to such new funds to be established by MEL.

37. There was some dispute arose between the W M Officers' Association and WML and MEL. It was amicably settled and a memorandum of agreement was arrived at between the said two companies and the said employees on September 10, 1990 which was directed to be kept on record by the Court which would be evident from the order dated March 4, 1991. Therefore it is clear from this fact that the said agreement was not part and parcel of the scheme of 1990. It is also evident from the facts that MML and/or WML stood guarantor for meeting and discharging liabilities of MEL in respect of the benefits of the past services of the employees being granted to them before their transfer and before the scheme came into operative. MML (WML) stood guarantor for contributions on account of provident, superannuation and gratuity fund in respect of management staff transferred to MEL. Until such time MEL established such funds on similar pattern. It is admitted that new fund was created by MEL on April 8, 1999.

38. Therefore, we do not have any doubt in our mind to hold that the obligation of WML as a guarantor was subsisting till such time and in fact after creation of the fund by MEL the guarantee does not subsist. Therefore the guarantee of WML expired on the date the said funds were created by the MEL, i.e. April 18, 1999.

39. We have also considered Section 392 of the Companies Act. It also appears to us that filing of the application by the appellant is nothing but to have a decree u/s 392 without filing a suit for specific performance in their favour. It further appears that Section 392 empowers the Court only to supervise the carrying out of the compromise and arrangement and to give direction in respect thereof. The prayer

made by the appellant, in our opinion, cannot come within the purview of Section 392 of the Companies Act, 1956. It is also apparent from the order dated April 9, 2003 that the Court passed such order after considering the suggestion and counter-suggestion made by the parties that Macneill Engineer Limited would continue to make payment of pension to the retired officers of the company so long the shortfall in the superannuation fund is not made up. In case the amount is not paid by Mel within the stipulated period, MEL was directed to make payment of the said sum upon expiry of 30 days. In our opinion, we beg to differ with the said order passed by the Hon"ble First Court since, in our opinion, the scope of Section 392 is limited and further the guarantee given by the WML has been specifically mentioned for 3 years. By the said order it cannot be made for an unlimited period. The said fact was escaped the attention of the Hon"ble First Court. Furthermore, WML was no more responsible for payment of the pension of the members of the appellant. After sanction of the scheme we do not find that there is any reason to direct WML to go on making payment in perpetuities for the liabilities of the MEL and from the facts and from the order passed by the Court we do not get any support in respect thereof. Hence, in our opinion, the said order has to be set aside since it would be clear from the said order that the order was passed without prejudice to the contention of WML that the said Company is no more responsible for payment of pension to the members of the appellant.

40. We have also considered the submissions made by the Id. Senior Advocate on behalf of the appellant that the scheme of 1990 was sanctioned by the Court which was obtained by WML fraudulently. We have failed to find out that any case has been properly made out by the appellant in respect thereof and furthermore, from the facts it appears that the agreement of 10th September, 1990 was not a part and parcel of the said scheme or arrangement sanctioned by the Court.

41. Accordingly, we hold that the respondent No. 1 has no liability to pay pension in respect of the members of the appellant No, 1. The orders dated April 9, 2005 and July 15, 2003 so passed by the Hon"ble First Court is set aside. We specifically make it clear that the respondent No. 1 had no liability to make payment to the members of the appellant No. 1 in respect of their pension. It is the duty of the MEL to do so and they will take steps in the matter accordingly.

42. On the above terms this appeal is disposed of.

43. All parties are to act on a Xerox signed copy of the operative part of this judgment and order on the usual undertaking.

Narayan Chandra Sil, J.:

44. I agree.