(1978) 10 BOM CK 0012

Bombay High Court

Case No: Company Application No. 178 of 1978

In Re: Vasant Investment Corporation Ltd. — APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 16, 1978

Acts Referred:

- Companies (Court) Rules, 1959 - Rule 279, 67, 68, 69
- Companies Act, 1913 - Section 150(1), 153(1), 391, 41, 41(2)

Citation: (1982) 52 CompCas 139

Hon'ble Judges: Sujata V Manohar, J

Bench: Single Bench

Judgement

Manohar, J.

This is a summons for directions taken out by the applicants under s. 391 of the Companies Act for calling a meeting of the members to consider an arrangement to re-start the Colaba Land and Mill Company Ltd. (In liquidation). The official liquidator of the company in liquidation has opposed this application mainly on three grounds at this stage. In the first place, it has been urged by him that under s. 391 of the Companies Act when a company is being wound up the only person who can frame an arrangement in respect of the company is the liquidator and not anybody else. In this connection, he has relied on the language of s. 391, sub-s. (1) which is as follows :

"391. Power to compromise or make arrangements with creditors and members - (1) Where a compromise or arrangement is proposed -

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the court may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the court directs."

2. According to the liquidator, an application may be made by the company or a creditor or a member of the company before the company is being wound up, but once the company is wound up, then only the liquidator can me such an application. This does not appear to be a correct interpretation of the provisions of s. 391. When a company is being wound up a liquidator is an additional person who enjoys a right to make an application under this section. The rights of the creditors or the members of the company to make an application are not taken away when a company goes in to liquidation. The section does not say that when a company is being wound up the liquidator alone will have a right to apply. In this connection, a reference may be made to rr. 67 to 69 framed under the Companies (Court) Rules, 1959. Rule 68 provides for service of the summons on the liquidator in cases where the company is being wound up. This can take place only in a case where a liquidator is not an applicant. The rule, therefore, contemplates a case where a person other than the liquidator is an applicant under s. 391 in respect of a company under winding-up. A reference may also be made in this connection to Rajendra Prosad Agarwalla and Others Vs. Official Liquidator, and Muhammed Abdulla Tharaganar v. Official Liquidator, Cape Comorin General Traffic Co. Ltd [1953] 23 Comp Cas 161; AIR 1952 TC. 243 . In the latter case, the court came to the conclusion that under the old s. 153(1) of the Indian Companies Act, 1913, which is in pari materia with the present s. 391 of the Companies Act, the introduction of the words "in the case of a company being wound up of the liquidator" is intended to provide an additional and not an exclusive person who could make the application. In Rajendra Prosad Agarwalla and Others Vs. Official Liquidator, , also a similar statement is made. Hence, the applicants are entitled to make the present application. The applicants are some of the shareholders of the original company and their name continues to be on the register of members of the company.

3. The next objection urged by the official liquidator is that the applicants are not members of the company in liquidation and hence they cannot maintain this application. In this connection, the official liquidator has relied upon the definition of the word "member" under s. 41 of the Companies Act and the commentary on it in Ramaiya''s Company Law, 8th Edn. p. 120 where it is stated that a member ceases to be a member, inter alia on surrendering his share. Now, under r. 279 of the Companies (Court) Rules, 1959, read with Form No. 141, it is stated that before a return is made to a contributory the share certificate should be handed over to the official liquidator. From this the official liquidator concludes that a person who hands over his share certificates ceases to be a member of the company in liquidation. The applicants have surrendered their share certificates on receiving a

return of capital. Hence, they have ceased to be members. This argument does not appear to be correct. This handing over of those share certificate does not constitute a surrender of shares by a member. A surrender of shares can be made by a member to the company if the company''s articles give the directors the power to accept a surrender of shares. Such a power is recognised as valid if it is used merely to avoid the formalities of forfeiture but not otherwise. (Vide Palmer''s Company Law, 21st Edn p. 328). A handing over of share certificates as mentioned in Form No. 141 can never constitute such a surrender; under s. 41(2) every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company. Hence, every person who has agreed to be a member and whose name appears in the register of members is a member. Section 150(1)(a) to (d) reads as follows :

"150. Register of members. - (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars :-

(a) the name and address, and the occupation, if any, of each member;

(b) in the case of a company having a share capital, the shares held by each member, distinguishing each share by its number, and the amount paid or agreed to be considered as paid on those shares;

(c) the date at which each person was entered in the register as a member; and

(d) the date at which any person ceased to be a member ....."

4. The applicants have not ceased to be members by surrendering their shares or in any other way. Their names continue on the register of members. Under s. 536(2) any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding-up, requires the sanction of the court. This section goes to show that members do not cease to be members on a company being wound up nor do they cease to be members on receiving a return of capital. In the present case, the applicants were the shareholders of the company, now in liquidation, and they are in the list of contributories. They are members of the company as defined under s. 41 of the Companies Act and they have not ceased to be such members by virtue of any surrender of shares, because handing over of the share certificate to the official liquidator does not amount to surrender of shares to the company. In fact, even after the share certificates are handed over to the liquidator, transfers have taken place with the permission of the court. This could never have happened if the contributory had ceased to be a member of the company in liquidation. There is, therefore, no substance in the second contention of the official liquidator either.

5. It has further been argued by the official liquidator that the proposed scheme is not a scheme or an arrangement contemplated under s. 391 of the Companies Act because the scheme does not propose any arrangement or re-arrangement

regarding the rights of the creditors or shareholders of the company. It is, however, not necessary that an arrangement under s. 391 should be an arrangement with the creditors of the company or should involve any changes in the rights of the shareholders of the company. In the present case, all the creditors of the company have been paid off. There are, therefore, no creditors of the company at present. Some of the members of the company now propose to take the company out of the winding-up and for that purpose they have proposed a scheme which is at Ex. C to their affidavit in support of this summons for directions. There is no other provision under the Companies Act apart from s. 391 under which a proposal for taking a company out of the winding-up can be framed. The words used in s. 391 are very wide. They cover all arrangements which may be made between the company and its members, including an arrangement for re-starting the company which is in winding-up. It has been argued that under s. 391 of the Companies Act, the expression "company" means any company liable to be wound up under this Act (see s. 390 of the Companies Act). It does not include a company which is liable to be taken out of the winding-up. This argument also does not appear to be correct. It is a company which is being wound up that can be taken out of the winding-up. Section 391 in terms applies to a company which is being wound up, and the section provides that in the case of a company which is being wound up, an application under s. 391 can be made by a liquidator also, in addition to a creditor or a member of the company. Therefore, s. 391 would apply to a company which is being wound up. There is no reason why an arrangement under s. 391 should not cover an arrangement to take such a company out of the winding-up. The present application, therefore, is maintainable under s. 391 of the Companies Act. I do not see any reason why the scheme set out in Ex. C should not be considered as a scheme under s. 391 of the Companies Act.

6. I also do not see any reason why the scheme as proposed should not be put before the members of the company to ascertain their wishes. It has been stated by the applicants that in the explanatory statement they will put forth for the consideration of members proposals regarding the business to be carried on by the company on its being re-started. If the proposals are approved it would be open to the court thereafter to examine whether in the light of all circumstances relating to the present company it would be in the interest of the members to sanction such scheme or not.

7. There will, therefore, be an order in terms of the minutes which have been handed in.

8. No order as to costs.