

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
MUMBAI BENCH**

TCSP 1 of 2017

In the matter of Companies Act, 1956

And

In the matter of Sections 391 to 394 and other  
applicable provisions of the Companies Act,  
1956

And

In the matter of Rasiklal S. Mardia (M/s  
Amar Dye Chem Ltd.)

Order delivered on: 10.9.2018

**Coram:**

Hon'ble Shri B.SV Prakash Kumar, Member (Judicial)  
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For Petitioner(s): Mr. Devanshu Desai a/w Mr. Neerav B Merchant

For Shareholder: Ms. Kritika Joshi i/b M/s Divekar Bhagwat & Co.

For workmen: Ms. Shalaka P. Gujar

For Regional Director: Mr. S Ramakantha, Joint Director

For Official Liquidator: Mr. Santosh Dalvi

For Registrar of Companies: Mr. Neelambuj

***Per B.S.V Prakash Kumar, Member***

**ORDER**

Order pronounced on 7.9.2018

1. The present Petition has come before this Bench by transfer on 7.1.2017 and was originally filed before the Hon'ble High Court, Bombay (hereinafter referred to as "Court") on 18.11.2011.
  
2. The Petitioner, an ex-chairman and a shareholder of Amar Dye Chem Limited (in Liquidation) (hereinafter referred to as "Company"), has propounded a Scheme of Compromise and/or Arrangements between the Company and its creditors and members and reconstruction of its capital pursuant to Sections 391/394 read with Sections 80, 81 and 100 to 103 of the Companies Act, 1956.

3. The background of the Company is that Company Petition No. 895 of 1998 was filed before the Hon'ble High Court on the recommendation of Board for Industrial and Financial Reconstruction after the company was declared sick and the revival schemes did not materialize. The Court *vide* its order dated 9.12.1998, wound up the Company and appointed the Official liquidator, Bombay High Court as the Liquidator of Company. Subsequently, the petitioner has herein filed the petition for revival of the Company in liquidation.
  
4. The report dated 6.9.2013 filed by the Official Liquidator, Bombay High Court has noted, *inter alia*, following objections:
  - a) that the Company Scheme Petition has been filed only with an intention to delay the process of liquidation and winding up of the Company.
  - b) the petition does not fulfil the criteria of sections 391 to 394 of the Companies Act 1956.
  - c) Petitioner has not disclosed all material facts relating to the Company i.e. latest financial position, latest auditors report on accounts of Company, pendency of investigation proceedings u/s 235 to 252 of the 1956 Act.
  - d) Pursuant to liquidation of the Company, the Petitioner failed for more than 12 years to file Company Scheme Petition for revival of the Company and further delay in moving the Court.
  - e) Scheme does not disclose:
    - 1) details of revival of the Company.
    - 2) whether the promoters will recommence the activity which was carried out before the winding up.
    - 3) how the factory will reorganize its business including the finances.
  - f) The Sponsor by infusing Rs13.38 crores as equity capital will get more than 75% stake in the Company in liquidation and the revival is not bonafide proposal to restart the manufacturing activities but to commercially exploit the immoveable assets of the Company.
  - g) The chairman's report dated 30.9.2011 discloses that it was informed to the members and shareholders that the sponsor of the Scheme is Mr. Rasiklal Mardia, which is contrary to the Scheme, which quotes M/s Panole Intermediate Pvt. Ltd. to be Sponsor of the Scheme.

- h) Payment to statutory creditors is not crystallized and will raise deliberations and negotiations.
  - i) Scheme does not provide for the capacity of funds to be generated over the period of several years.
  - j) *The Company has sufficient assets to provide for the liabilities, however, the ex-directors of the Company and persons with several vested interests are causing hindrance to sale of assets.*
  - k) *The Official Liquidator states that it is unaware of the dealings between Shri Rakesh Mardia and the secured creditors of the Company. Further, the secured creditors have not favoured the scheme.*
5. The Regional Director's affidavit dated 5.12.2013, *inter alia*, brings out the following:
- a) The Scheme cannot be considered without impleading the sponsor named in the Scheme namely "Panoli Intermediates Pvt. Ltd." The Scheme is defective for want of necessary party. *The Hon'ble Court may not like to compel a person who is not a party to the scheme to bring in money by way of share capital and premium as contemplated in clause 7(II) of the scheme.*
  - b) The proposed sponsor namely "Panoli Intermediates Pvt. Ltd." is neither a creditor nor a member of the Company and hence the proposed arrangement does not fall within the purview of S. 391(1) of the Companies Act.
  - c) Pertinent to note that though there is a compromise proposed in Clause 4.3 of the Scheme with respect to statutory creditors, the meeting of said class of creditors has not been called for.
  - d) The dispensation of meeting for preference shareholders has been obtained by suppression of fact and by misleading the Court. Further, though there is no compromise with the preference shareholders, yet the preference shareholders have got a statutory right to participate in the meeting of the company in as much as, the Company has failed to pay the dividend amount due and payable to them for more than 2 years to the preference shareholders, in accordance with Articles of Association of the Company as well as Section 87(2)(b)(1) of the Companies Act, 1956.

- e) The meeting of debenture holders ought to have been called for as they constitute a separate class of creditors, as required u/s 391(2) of the 1956 Act.
  - f) The Hon'ble Court may reject the scheme for want of complete actual position of the creditors due.
  - g) The resolution passed regarding reduction of share capital is against public policy as observed from the minutes of equity shareholders of the meeting held on 9.9.2011 and the said resolution violates various provisions of Companies Act. The reduction of share capital will reduce the investment of a shareholder, namely, M/s Mardia Chemicals Ltd. (in Liquidation) from Rs. 5,37,50,000/- to Rs. 10,75,000/- in the Company, which will correspondingly reflect on the asset side of the shareholder and is not in interest of shareholders of the M/s Mardia Chemicals Ltd.
  - h) The chairman/ scrutinizer have failed to consider the votes of shareholders based on the Register of Members maintained by the Company.
6. Seven workmen filed an application opposing the scheme and have, *inter alia*, raised following objections in the Company Scheme Petition:
- a) The workers are not made party to the petition.
  - b) The Company presently does not have in the object clause of Memorandum of Association a clause to carry on real estate business. The Promoters will manipulate the object clause in the Memorandum of Association on the basis of their 80% shareholding and include real estate business and make huge profits having acquiring the Company for a nominal cost.
  - c) After the winding up order, the workmen are priority creditors u/s 529 of the 1956 Act.
  - d) The workmen had not been paid their wages since June, 1997 and are entitled to wages from June, 1997 to 9.12.1998 and that wages in realistic terms be paid.
  - e) That in case of recall of winding up order, the service of the workmen shall be deemed to be reinstated/ continued in service beyond 9.12.1998 entitling them to benefits of continuous service including wages till their services are thereafter lawfully terminated.
7. A secured debenture holder, M/s Sunstar Estate Developers Private Limited, also filed objections on 1.4.2013:

- a) That the scheme on the face of it is illegal lacking absolute bonafide and seems to have been filed for the oblique purpose of grabbing assets of the company in liquidation.
  - b) Delay in moving court for obtaining directions for publication of the notice and fixating the date of hearing.
  - c) Illegality committed in calling and conducting of meeting itself vitiates the proceedings.
  - d) *Reduction of capital is quite detrimental to the interest of the shareholders and creditors. As much as the actual value of the assets of company is in fact excess of its total liability and thereby making a strong case for return of capital to the contributories.*
  - e) *Proposed scheme is against provisions of law as it contemplates change in the capital structure of the company in liquidation much to the prejudice of the shareholders/ contributories and that too without the leave of the winding up court. The same is also hit by the provisions of Section 536 of the Companies Act, 1956.*
8. Mazdoor Congress Union objected the scheme, *inter alia*, informing that:
- a) *Report of scrutinisers, ballot papers and attendance register not presented alongwith Chairman Report because of large scale bogus voting in name of unsecured creditors and shareholders.*
  - b) *That employees, friends and relatives of proposer were brought in large numbers for bogus voting.*
  - c) Many unsecured creditors/ preferred creditors and others were prevented to attend and vote in the meeting.
9. Amritlal Chemaux Private Limited, shareholder and promoter of the Company filed affidavit objecting the schemes on grounds similar to already discussed.
10. Now the point for consideration is as to **whether or not the promoter directors or some of the shareholders of a company in liquidation can file an application under Section 391 (1) of the Companies Act, 1956/Section 230 (1) of the Companies Act, 2013 seeking arrangement as sought in this application.**
11. In the present case, the Petitioner herein is a promoter director/ shareholder of Respondent No.1 company, wherein a winding up order

was passed on 9.12.1998, in pursuance thereof, Official Liquidator was also appointed to proceed with winding up of the company as per Companies Act, 1956. This Petition has been filed before Hon'ble High Court of Bombay for the revival of the company in Liquidation, since Government of India has issued a circular for transfer of the Scheme matters from High Courts to NCLT, this matter has also been transferred from Hon'ble High Court of Bombay to NCLT, Mumbai to proceed with the matters transferred from High Courts to NCLT.

12. Since this Petitioner/shareholder of this company in liquidation, has filed this Company petition under Section 391(1) of the Companies Act, 1956 seeking revival of the company in liquidation through a compromise with the creditors of the company, now a legal conundrum has come in between to find out as to whether the petition filed by the promoter director having shareholding in the company on his own can file a petition to have some compromise or arrangement with the creditors. To ascertain the same, it is necessary to revisit the section of law to decide whether the shareholder or promoter director has locus to file such petition before this Bench, for which we reproduce the section of law which is as below:

Section 391(1) of Companies Act, 1956.

**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 [Tribunal] 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 [Tribunal] directs."*

13. For this provision under the repealed enactment is para materia with the present provision of Section 230(1) of the Companies Act, 2013, we have not gone into as to whether Section 391 of the Companies Act, 1956 is applicable or Section 230 of the Companies Act, 2013.

14. On reading this provision, it is made clear in respect to locus for filing a petition, as to the companies which are not in liquidation, it has been said that an application for compromise or arrangement could be filed by the company or by any creditor or by member of any such company, but when it comes to a company in liquidation, it has been clearly said that liquidator alone is authorised to file company petition either for compromise or arrangement in respect to the company in liquidation.
  
15. In the present case, it is a fact that it is a petition for revival of the company in liquidation by way of compromise with the creditors, such being the case, this petition ought to have been filed by the Liquidator, but whereas this Petition is filed by the erstwhile promoter director on the ground that they have shareholding in the company, which is not permissible under Section 391(1) of the Companies Act, 1956. A differentiation has been made in between the companies not in liquidation and the companies in liquidation in filing application u/s 391 of the Act. When the law itself has classified who are the persons entitled to file company petition for revival of the company under Section 391(1), this Bench cannot go against the mandate given by the statute.
  
16. Though it is not required to go for the reason behind making such classification, for the sake of clarity, it is pertinent to remind that when official liquidator has been appointed in winding up order, nobody will have locus to represent the company save and except the Liquidator appointed in that company because the statute has given a mandate as soon as winding up order has been passed, official liquidator is the sole authority and custodian on behalf of such company therefore, either the shareholders or the promoter director will have no right to deal with the affairs of the company, more so in respect to restructuring of the company under a Scheme envisaged under Section 391(1) of the Companies Act, 1956/230(1) of the Companies Act, 2013. When the mandate is clear and the reason behind it is also clear that the Liquidator alone is a competent person for the revival of the company through a scheme, this Bench will not have any jurisdiction to entertain a company petition filed under Section 391(1) for revival of the company in liquidation.

17. However, the Counsel appearing on behalf of the Petitioner, to circumvent the law in existence, relied upon a citation in between *Sunil Gandhi and Ors. vs. A. N. Buildwell Private Limited and Ors (2017) 203 Comp Cas 330* to say that the shareholders can also file the Scheme Petition for revival of the company in liquidation.
18. On perusal of the case supra, the point taken into consideration is ***as to whether the company court has exclusive jurisdiction to adjudicate applications instituted under the provisions of Section 391 of the Companies Act, 1956 in relation to the revival of a Respondent company in provisional liquidation, subsequent upon coming into force of the subject notification, w.e.f. 15.12.2016.***
19. The facts of this case are that a provisional liquidator was appointed in a winding up petition thereafter, a company petition was filed under Section 391 by the Ex-management of the said company for revival of the company by way of compromise with its creditors. In this backdrop, a question arose before this Bench whether this subsequent petition for revival under Section 391 could be filed before High Court or not in the light of Ministry of Corporate Affairs notification in respect to transfer of pending proceedings from High Courts to NCLT in respect to Scheme matters and winding up petitions which were pending with High Courts wherein notice was not given to the parties.
20. The limited issue decided in the case supra is that whether jurisdiction in respect to Scheme matters which was already transferred to NCLT could lie before High Court or not? There, it has been clearly stated that jurisdiction to deal with Scheme Petition for revival of the company will lie with High Courts for the subsequent scheme petition for revival could not be seen as independent proceeding from the winding up proceeding already pending with the respective High Court.
21. But it has not been decided anywhere in the case supra that the promoters will have locus to file a company petition under Section 391 for revival of the company in liquidation, therefore, the point which is not decided by the Hon'ble High Court cannot become a ratio binding upon this Bench just because that company petition has been filed by the Ex-management. As per law, it is evident that the Liquidator alone

is competent to file petition for revival of the company in liquidation, more particularly when winding up order has been passed, the powers of the Liquidator will be different from the provisional liquidator appointed in the case at the time of admission. In the case supra, it is a case where scheme petition was filed for revival of the company wherein a provisional liquidator has been appointed. Since this point that has come for consideration before this Bench not being decided by the Hon'ble High Court, the ratio decided as to whether NCLT will have jurisdiction or the Hon'ble High Court will no way be relevant to the present issue in this case.

22. In the case supra, the Counsel appearing on behalf of the Petitioner relied upon the following para, which is as follows:

*"The scheme of the Companies Act, 1956 empowers the Company Court to consider and approve a scheme of compromise and/or arrangement proposed by way of an application moved by the liquidator under the provisions of Section 391 of the Act, in the case of a company which is being wound up. This manifestly indicates that in case of a company which has been ordered to be wound up by the Company Court, a Scheme proposed for its revival, would be exclusively dealt with by the Company Court itself."*

23. By going through the above para, it appears that it has only decided that in the situation that has come up in the case supra has to be exclusively dealt with by the Company Court, i.e. Hon'ble High Court, but it has not been said anywhere that whether the Petition filed by Ex-management is maintainable or not in the light of Section 391(1) of the Companies Act, 1956. Moreover, that issue has not been raised by anybody in the case supra, henceforth, the ratio decided in the case supra is not applicable to the present case.
24. Accordingly, this Company Petition is hereby dismissed as misconceived.

SDI-

**RAVIKUMAR DURAISAMY**  
**MEMBER (TECHNICAL)**

SDI-

**B. S. V. PRAKASH KUMAR**  
**MEMBER (JUDICIAL)**