

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CO. APPEAL No. 30/2008

Date of Decision : February 26, 2009

IN THE MATTER OF THE COMPANIES ACT, 1956 (1 OF 1956)

AND

IN THE MATTER OF AMALGAMATION OF :

BENTEX EXPORTS PRIVATE LIMITED & ORS.

.....Appellants/Transferor Companies

Through : Mr. Ashish Middha, Advocate

WITH

BENTEX TOWERS PRIVATE LIMITED

.....Appellant/Transferee Company

Through : Mr. A.K. Chaturvedi, Official
Liquidator in person
Mr. S.K. Luthra & Ms. Manisha
Tyagi, Advs. for the Official
Liquidator

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

SANJAY KISHAN KAUL, J. (ORAL)

1. The present appeal raises an interesting and important question of law as to whether the learned Company Judge can impose conditions in the form of mandatory contribution to the General Pool Fund of the Official Liquidator or to anyone else as a condition for entertaining/allowing a petition under Section 391 and 394 of the Companies Act, 1956 (hereinafter referred to as the 'said Act').

2. The appellants had filed a joint petition under the aforesaid provisions for approval of a scheme of amalgamation. Learned Company Judge passed a detailed impugned order dated 12.08.2008 coming to the conclusion that there was no impediment to the grant of sanction to a scheme of amalgamation and approved the same. It was further directed that the transferor company shall stand dissolved without undergoing the process of winding up as a consequence thereof.

3. The grievance of the appellant arises from the direction contained in para 26 of the impugned order in the following terms:

“26. Petitioners are directed to deposit Rs. 50,000/- each in the Common Pool Fund of the Official Liquidator, as costs.”

4. The learned counsel for the appellant pleads that the cost of Rs.50,000/- imposed on each of the six appellants to be deposited in the Common Pool Fund of the Official Liquidator is without any authority of law and that there is no sanction either under the said Act or the Companies (Court) Rules, 1959 (hereinafter referred to as the ‘said Rules’). In fact the plea raised is that similar “costs” have been imposed in other matters also where such schemes have been approved to be paid to either the Official Liquidator or to other entities like the Prime Minister’s Relief Fund, without any of the parties being in default.

5. It is the submission of the learned counsel for the appellant that the paid-up capital of the transferee company is approximately Rs. 5 lacs and the income of the five transferor companies is NIL. The

object of amalgamation is of economy and saving costs. The appellants have, thus, unreasonably been burdened with costs of Rs. 3 lacs. Learned counsel also submits that the job of scrutiny of books and submission of report by the Official Liquidator is in the maximum range of about Rs. 5,000/- to 10,000/-. Learned counsel, along with the written synopsis, has placed on record notice issued by the Official Liquidator calling upon the parties to furnish necessary information in triplicate and submits that even for carrying out photocopying, charges are recovered from the company for which a sample receipt has been filed. Thus, there are really no out of pocket expenses.

6. Learned counsel for the appellant seeks to rely upon certain orders passed by the learned Company Judge in different matters to plead that there is no consistent policy in regard to such imposition of costs. It is his submission that till the year 2007, no such costs were being imposed and that he has been appearing in a number of similar proceedings. As a proof of the same, he has filed the status of cases where orders/judgments had been passed in matters in which the learned counsel had appeared for the petitioners. Learned counsel has referred to an order passed on the same date of 12.08.2008 as the impugned order in Company Petition No. 64/2008 in the matter of amalgamation of M/s. Lakshman Exports Private Limited with M/s Phoenix Contact India Private Limited where no such costs have been imposed. In the said case, the subscribed paid-up capital of the transferor company was Rs.3,40,59,600/-.

7. Learned counsel has also referred to the fact that in Company Petition No. 144/2008, decided on 22.10.2008, M/s. Hillstone Finance

Private Limited and another being amalgamated with M/s. Bhaktawar House Private Limited where the authorized share capital of the transferor companies was Rs. 55 lacs in total, costs to be paid to the Common Pool Fund have been quantified at Rs. 5,000/- each. In Company Petition No. 79/2008, dealing with the scheme of amalgamation of EDM Mall Management Private Limited with CCPL Developers Private limited, decided on 26.09.2008, where the subscribed share capital of the transferor company was Rs. 1,50,000/- while of the transferee company was Rs. 24,89,00,000/-, each of the companies was directed to pay Rs. 1 lac towards costs. The wordings in para 20 of the order is that the counsels for the petitioners submit that they would pay costs but it is pleaded that this is really in the nature of a direction as this amount of Rs. 2 lacs has been bifurcated into Rs.50,000/- for SOS Children's Villages of india, Rs.50,000/- in the Chief Minister's Relief Fund at Patna, Rs. 25,000/- to the Advocate Welfare Fund, Delhi Bar Council, Rs. 25,000/- for the Common Pool Fund and Rs. 50,000/- to the Delhi Bar Association Employees Welfare Fund. Similarly, in Company Petition No. 175/2008 dealing with the scheme of amalgamation of M/s. HPL Protection Technologies Limited with M/s. HPL Socomec Private Limited decided on 22.10.2008, the subscribed capital of the transferor company was approximately Rs. 6.4 crores while of the transferee company was Rs. 3.5 crores, a contribution has to be made of Rs. 5 lacs towards costs to be deposited in the Common Pool Fund.

8. The aforesaid examples have been given by reference to order sheets by learned counsel for the appellant to contend that the

directions passed in matters of such amalgamation cannot be used to generate funds towards the Common Pool Fund for the running of the office of the Official Liquidator nor for charitable purposes like the Prime Minister's Relief Fund or SOS Village. It is submitted that whether an organization wants to make a charitable contribution or not, is for that organization to decide but the same cannot form a part of a condition in an order or otherwise giving an impression that unless such contributions are made, the petitions will not be allowed.

9. At the stage when the aforesaid issue was raised before us on 17th February, 2009, learned counsel for the Official Liquidator had pleaded that there were rules in place for such imposition of costs at the discretion of the learned Company Judge for scrutiny of the records by the Official Liquidator and such practice has been followed in the past. He also submitted that the costs have also in fact been imposed even in other matters payable either to the Common Pool Fund or to other entities.

10. We have heard learned counsel for the parties at length.

11. The principle behind the imposition of costs is the maxim ***in expensarum causa victus victori condemnandus est*** which encapsulated the rule that the loser must pay the expenses of the successful party. In English law, this rule developed from the 13th century onwards (See, Sir William Holdsworth, A History of English Law, Volume IV, Sweet and Maxwell, 3rd Edition 1966, at page 536). Eventually, it appeared that in some actions in which damages were claimed, a successful plaintiff might often, under the name of

'damages', obtain a compensation which would cover the costs of litigation as well as all other harm that he had sustained (See, Pollock and Maitland, the History of English Law, Volume 2, Cambridge University Press, 2nd Edition, 1968, at page 597). Later on, in England, the Statute of Gloucester (1275) allowed damages and costs to the successful plaintiff in certain real actions, and laid down the rule that a plaintiff who recovered damages should always be entitled to costs. Statutes of 1531 and 1565 allowed successful defendants to recover costs in certain specified actions and courts, and in 1607 defendants were allowed to recover costs in all actions in which the plaintiff was entitled to costs [See, Sir William Holdsworth, A History of English Law, Volume IV, Sweet and Maxwell, 3rd Edition, 1966]. Ultimately, the same principles have made their way to India in various Statutes and Rules. In **Black's Law Dictionary**, 8th Edition, costs have been defined as, "the charges or fees taxed by the court, such as filing fees, jury fees, courthouse fees, and reporter fees. – Also termed court costs. The expenses of litigation, prosecution, or other legal transaction, esp. those allowed in favour of one party against the other." Thus traditionally, costs are termed as the pecuniary allowance made to a successful party, to be recovered from the losing party, for expenses incurred by him during the course of litigation. In addition, amounts fixed by Statute or Rule of the Court as payable towards fees and charges to the Courts or to some officers of the Court are also termed as costs. In India also, the same position prevails. An essential feature of costs, which is necessary for the purpose of this case, is that there must be requisite legal sanction for the court to impose costs upon a party appearing before it.

12. Learned counsel for the Official Liquidator has drawn our attention to the provisions of Section 394 of the said Act which contains the following proviso:

“Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the Tribunal unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Tribunal that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.”

13. Learned counsel thus submits that the Official Liquidator is cast with a statutory duty of scrutiny of books and papers of the company and to make a report to the learned Company Judge. It is submitted that money is expended in such scrutiny and thus the learned Company Judge is well within his powers to make an order as to costs.

14. We put the question to the learned counsel that under what authority of law is such a cost imposed, since indisputably such imposition is in the nature of a court fee or a tax as it is not a case where the party is in default and is being penalized by imposition of costs. It is also not a case where a party has lost in some legal proceedings and costs have been imposed to compensate the opposite party. These observations do not suggest that the Court is devoid of powers to impose costs on a defaulting party and direct such cost to be deposited but the pre-condition is that there has to be a defaulting party, failing which, the imposition will take the colour of a court fee/tax even if it is labeled as costs.

15. Learned counsel thereafter drew our attention to the said Rules. In this behalf, learned counsel referred to Rule 291. The relevant portion of the same is as under:

"291. Fees to be credited to Central Government. – In every winding-up where the Official Liquidator becomes or acts as Liquidator, there shall be paid into the public account of India in the Reserve Bank of India to the credit of the Central Government from out of the assets of the company in liquidation (or by the petitioner as provided in clause (1) below), the fees determined in accordance with the following provisions-

.....

(6) When the Official Liquidator performs any special duties not provided for above"

16. We may note that though we have not quoted the fees provided in the said Rule for different acts, the reason for the same is that the reliance by the learned counsel is on sub-Rule (6) of the said Rules. Learned counsel submits that the task provided for in the second proviso to Section 394 of the said Act is akin to "special duties" and thus under sub-Rule (6) of Rule 291 of the said Rules, imposition can be made.

17. We are unable to accept the aforesaid plea for the reason that Rule 291 refers only to winding up petitions and after setting out the various fees, sub-Rule (6) provides for performance of any special duties. It is applicable only to the winding up petitions.

18. We may also note that the Rules are split up under different parts. Part III deals with winding up. Rule 291 is under Part III of the said Rules. This, thus, leaves no doubt whatsoever.

19. Learned counsel, at this stage, fairly conceded that the relevant provision, which would apply in the present case, would be Rule 79

which deals with petitions for confirming compromise or arrangement. This would fall in Part II of the said Rules, which is under the heading "Proceedings in matters other than winding up". Rule 79 reads as under:

"Petition for confirming compromise or arrangement. – Where the proposed compromise or arrangement is agreed to, with or without modification, as provided by sub-section (2) of section 391, the company, (or its liquidator, as the case may be), shall within 7 days of the filing of the report by the Chairman, present a petition to the Court for confirmation of the compromise or arrangement. The petition shall be in Form No. 40.

Where a compromise or arrangement is proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies, or for the amalgamation of any two or more companies, the petition shall pray for appropriate orders and directions under Section 394.

Where the company fails to present the petition for confirmation of the compromise or arrangement as aforesaid, it shall be open to any creditor or contributory as the case may be, with the leave of the Court, to present the petition and the company shall be liable for the costs thereof.

Where no petition for confirmation of the compromise or arrangement is presented, or where the compromise or arrangement has not been approved by the requisite majority under section 391(2) and consequently no petition for confirmation could be presented, the report of the Chairman as to the result of the meeting made under the preceding rule shall be placed for consideration before the Judge for such orders as may be necessary."

20. Learned counsel for the appellant has also pointed out that in the same Chapter II under the heading, "Restoration of the name of a company to the Register of Companies" a specific provision has been made in Rule 94, which is as under:

"94. Registrar's costs of petition. – Unless for any special reasons the Court shall otherwise order,

the order shall direct that the petitioners do pay to the Registrar of Companies his costs of, and occasioned by, the petition."

21. The aforesaid, thus, makes it clear that where costs have to be compensated, a special provision has been made under the said Rules. In case of change of name of a company, Rule 94 specifically provides for payment to the Registrar of Companies. Similarly, in winding up petitions forming part of Part III, provisions have been made in Rule 291 as discussed aforesaid.

22. Learned counsel for the Official Liquidator sought to emphasize that Rule 307 provides for legal assistance to an Official Liquidator, Rule 308 for employment of additional or special staff and Rule 309 for apportionment of expenses of common staff. Once again, all these Rules form part of Part III, which deals with the winding up of the companies.

23. The result of the aforesaid is that under the said Rules, there is no provision made whatsoever for recovery of costs expended by the Official Liquidator in complying with his statutory obligations under the second proviso to Section 394 of the said Act. This is so, as neither under the specific Part III dealing with the petitions under Section 391 and 394 of the said Act nor under any general Rules under Part IV, has any provision been made in this behalf.

24. We have also scrutinized the Rules relating to special jurisdiction in Delhi High Court forming part of Volume II of the High Court Rules and Orders. Chapter No. 1 is dealing with the duties to be performed under the said Act and the manner thereof has been provided but no

provision had been brought to our notice whereby such an imposition is authorized.

25. We wanted to explore the origination of such Common Pool Fund but learned counsel for the Official Liquidator has only stated that the same was established number of years ago by an administrative order of the learned Company Judge. It is pleaded that the same was so established in furtherance of Rule 309 which reads as under:

“Apportionment of expenses of common staff. – Where any staff is employed to attend to the work of more than one liquidation, or any establishment or other charges are incurred for more than one liquidation, the expenses incurred on such staff and the common establishment and other charges, shall be apportioned by the Official Liquidator between the several liquidations concerned in such proportions as he may think fit, subject to the directions of the Judge, if any.”

26. The perusal of the aforesaid shows that Rule 309 is under Part III dealing with the winding up of companies and only refers to expenses incurred on such staff and common establishment when the work is carried out for more than one company in liquidation and apportionment of expenses has to take place between the several liquidations. We need not go further into this except to state that indisputably it has nothing to do with any scheme of amalgamation or expenses for the same.

27. We do appreciate the contention of the learned counsel for the Official Liquidator that over a period of time the duties to be performed by the Official Liquidator and its office have grown by leaps and bounds. Special jurisdiction has been created in different Forums. The Official Liquidator is required to attend to proceedings before such

Forums apart from the High Court and the courts subordinate to it. This would naturally require proper infrastructure and manpower. It is, however, necessary that such provisions are either made by the Department of Company Affairs which deals with the appointment of the Official Liquidator and setting up of its office and/or there is any provision made in accordance with law for contribution to the Common Pool Fund to defray the expenses. The task to be performed of scrutiny under the second proviso to Section 394 of the said Act is a specific one. It would, thus, be feasible if a special provision can be considered to be made for defraying of such expenses. Unfortunately, the said Rules, as framed and existing (stated to have been made under the directions of the Hon'ble Supreme Court) do not make any such provision nor the Delhi High Court Rules and Orders provide so.

28. We find that no origination of this Common Pool Fund of the Official Liquidator is available. At best it can be said to be a fund created by the administrative orders of the learned Company Judge in furtherance of the objects of Rule 309 of the said Rules and nothing more. In the absence of any legal authority, no direction can be passed to deposit, as costs or otherwise, amounts for entertaining/allowing petitions under Sections 391 and 394 of the said Act. The written synopsis filed by the appellant appears to show that there has been no such past practice of directing deposits and the practice seems to have developed in the year 2008. In any case, this practice is without any authority of law. We also find from the orders referred to by the learned counsel for the appellant that even while directing such amount to be deposited, there has been no consistent

policy. The appellant had shown before us that normally, the costs for such scrutiny is in the range of Rs. 5,000/- to 10,000/-. In fact in CP No. 144/2008, only Rs. 5,000/- each was directed to be so deposited. The out of pocket expenses are taken separately by the office of the Official Liquidator. The funds required for running the office cannot be generated through this process of forced contribution to the Common Pool Fund by making directions to deposit amounts which have no sanction in law. We fail to appreciate how even if this amount was towards meeting the expenses of scrutiny, the amount would vary from Rs. 5,000/- to Rs. 3 lacs! Even if the said Rules are amended or practice directions passed under the High Court Rules and Orders, it would be only towards the expense of such scrutiny as and when they come into being.

29. The Supreme Court had occasion to examine a similar question in the case of **Hindustan Times Vs. State of Uttar Pradesh** (2003) (1) SCC 591, whilst examining the legality of a government order directing newspapers of a certain class to deposit a percentage of their advertising revenue to a social security scheme for full-time journalists in the absence of any Statute compelling such payment. There, it was held that the State cannot make any compulsory exaction from any citizen unless there exists a specific provision of law operating in that field. When viewed from the point of view of a citizen who is compelled to pay, any order passed by a Court under similar circumstances, i.e. without statutory basis, would be judged similarly. In **Gupta Modern Breweries Vs. State of J&K and Others** (2007) 6 SCC 317, the Supreme Court was examining the validity of a Rule

empowering the Department to levy charges on the management on account of salary of the Excise Department staff and the nature of such a levy. There, the Supreme Court held that in the absence of statutory authorization, such a Rule was *ultra vires* the Act and that the same was manifestly unjust, unfair, impermissible, arbitrary and unjustifiable. Significantly, in paragraph 28 thereof, the Supreme Court held that the imposition of administrative charges is a tax and that such imposition without backing of Statute is unreasonable and unfair. We have considered it necessary to advert to this authority in view of the submissions of learned counsel for the respondent that the office of the Official Liquidator is in need of funds to defray administrative expenses and salaries of staff and therefore, for that reason, any orders directing deposit of money to the Common Pool Fund, be upheld. It may be noticed that in **Gupta Modern Breweries (supra)**, even a rule permitting levy of charges towards salary of the excise department staff on the Management was struck down because the requirements of Article 265 of the Constitution of India were not followed; here in this case, there is not even a semblance of any Rule or bye-law for this appropriation. In the decision of the Supreme Court in **Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and Others** AIR 1992 SC 2038, it was argued that the imposition of development fee was incidental and/or ancillary to the purpose for which the Development Authority had been constituted under the Town Planning Act and, therefore, the power to impose that fee ought to be implied. There, it was held that, such power of imposition of tax and/or fee must be very specific and there is no scope for implied authority in such matters. In

Sellappa Gounder Vs. State of Tamil Nadu (2004) 4 M.L.J. 726, the impugned order had dismissed an interlocutory application for the appointment of a Commissioner to ascertain the age of coconut trees and imposed costs of Rs. 2,000/- payable to a temple. The High Court set aside that order while observing that;

“4.The courts have no unfettered power to impose costs; that power to impose costs cannot be used whimsically.....”

30. We may also notice that the directions to deposit these amounts are not only to the Common Pool Fund but even to other entities like the SOS Children’s Village, Chief Minister’s Relief Fund, Advocate’s Welfare Fund, Delhi Bar Association Employees Welfare Fund etc. Such directions, in any case, could never have been passed. In the instant case, looking to the circumstances thereof, and in the light of the foregoing discussions, we feel that the expression ‘costs’ employed by the learned Single Judge in the impugned order is used rather loosely. The payments directed cannot be termed as, “costs” at all.

31. We may notice that these are not cases where a defaulting party is penalized by costs to be deposited to the other party. These cases are also not one where the Court finds it necessary to penalize a party for violating directions/schedules laid down by the Court but does not deem it appropriate to award the same to the opposite party but direct such deposit to welfare funds, the object being to send a signal that directions of the Court should be adhered to. In the present case, the party for no fault of his, gets burdened with such costs. Even if the direction to deposit the costs is with entities doing voluntary and

charitable work, in such cases, it is not sustainable. Such charity cannot be done at the cost of the litigant who approaches the Court and has not violated any directions. Even if the order seeks to give a colour as if it is a voluntary act, the fact remains that the order suggests that such deposits are really being made as a pre-condition for passing the orders. It is always open to anyone to make contributions towards a charitable cause of his own, but that cannot form part of an order, as a pre-condition or otherwise.

32. In view of the fact that these directions to deposit costs, passed in different matters, have been brought to our notice, it becomes necessary for us to issue the following general directions. It is not within domain of the judiciary or the executive to levy a fee or a tax. As has been held by the Supreme Court in **Gupta Modern Breweries** and **Ahmedabad Urban Development Authority** (supra) no such fee or tax can thus be collected without authority of law. This was also observed in **Mafatlal Industries Limited and others vs. Union of India and others** (1997) 5 SCC 536. In **State of Karnataka and others v. V.S. Narayana Swamy** (1991) 4 SCC 268 also it was held that for imposition of a license fee, authority of a Statute or a Rule is mandatory, failing which it would be ultravires the Constitution of India. In the present case, there is, in fact, neither any Act nor any Rule enabling such impositions. There has been not even a past practice which in any case would not give it a cloak of legality. In other words, nothing has been brought to our notice that might demonstrate the availability of any power available to the company court to direct the appellants to pay the impugned amounts.

33. We, thus, conclude as under:

(i) There cannot be any imposition in furtherance of the second proviso of Section 394 of the said Act for defraying the expenses till such authority is vested by law.

(ii) There cannot be any direction to make deposit in the Common Pool Fund or to any other entity whether by way of charity or otherwise, either at the stage of entertaining, or at the stage of passing of final order on a petition under Section 391 and 394 of the said Act.

(iii) The aforesaid observations are made in the context that no party is in default and does not take away the power of the learned Company judge to impose appropriate costs on the defaulting party as per law.

(iv) The directions contained in para 26 of the impugned order is consequently set aside.

(v) In order to avoid any multiplicity of litigations, we direct and make it clear that if in other matters, such an imposition has been made, the non-compliance of that direction will not visit the concerned parties with any adverse consequences, whether directions are made with consent or otherwise. If any party seeks to deposit any amount

in the Common Pool Fund in pursuance to such a direction, it shall be the duty of the Official Liquidator to bring this order to the notice of such a party.

(vi) In view of our aforesaid observations regarding the absence of legal authority and the need of the Official Liquidator, it is open for the Official Liquidator to approach the concerned authorities in that behalf to take appropriate steps.

34. The appeal is allowed in the aforesaid terms leaving the parties to bear their own costs.

Sanjay Kishan Kaul, J.

Sudershan Kumar Misra, J.

February 26, 2009
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