

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

% *Date of Judgment: 21.03.2013.*
+ **CO. Appeal Nos. 28-29/2006**

LAKSHMIJI SUGAR MILLS
COMPANY & ANR.

...Appellants

Through: Mr. Shariq J. Reyaz, Adv.

versus

UNION OF INDIA & ORS.

..... Respondents

Through Mr. Rajeev Mehra, ASG with
Mr. B. V. Niren, CGS, Mr. Prasook
Jain and Mr. Ashish Virmani,
Adv. for R-1, 3, 4 (UOI).

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICEINDERMEET KAUR

INDERMEET KAUR, J.

1. The appellant is aggrieved by the finding returned by the learned Company Judge in its order dated 31.03.2006. The learned Company Judge while sanctioning the Scheme proposed by the appellants/propounders held that the Sugar Development Fund (SDF), a Government Company shall remain outside the Scheme. This order was challenged by filing an application (C.A. No. 504/2006) under Rules 9 and 6 of the Company (Court) Rules 1959 seeking modification of the order dated 31.03.2006; the submission that the SDF has been

inadvertently kept out of the Scheme was negated; the order dated 26.04.2006 had rejected this argument of the propounders.

2. Relevant would it be to state that this subsequent order dated 26.04.2006 is not the subject matter of challenge in this appeal; order dated 31.03.2006 has alone been challenged. The order dated 31.03.2006 had merged with the order dated 26.04.2006 and the said order not being the subject matter of this appeal, the appeal is liable to be rejected on this ground alone.

3. Record shows that the Company-M/s Lakshmiji Sugar Mills Company Ltd. was incorporated on 27.01.1936. The Company was registered as a sick company before the Board of Industrial Financial Reconstruction (BIFR); winding up of the Company was recommended. During the pendency of the winding up petition, the management/promoters of the Company promulgated a Scheme for its revival.

4. Accordingly C.A. (M) 109/2005 under Section 391 read with Section 394 of the Companies Act, 1956 (hereinafter referred to as the said Act) was filed seeking a sanction of the proposed compromise/arrangement. In this application in para 17, the list of the secured creditors and the amounts due to each of them were described as under:-

Name		Amount		(in Rs. Lacs)
Sl	Secured Creditor	Principle Amount	Interest	Settled

No.				Amount
(a)	Industrial Development Bank of India (IDBI)	455.00	853.57	182.00
(b)	Industrial Investment Bank of India Ltd.	374.00	772.74	149.60
(c)	Ministry of Food, Govt. Of India (Sugar Development Fund)	728.60	722.81	-
(d)	Ministry of Food, Govt. Of India (Custodian Loan)	561.10	0.0	-
(e)	Govt. Of U.P. (Shakkar Vishes Nidhi)	124.00	262.43	-
(f)	State Govt. Loan	7.75	00	-

5. It was pointed out that a one time settlement has been entered into with two of the secured creditors i.e. IDBI and IIBI for a sum of Rs. 182 lacs and 149.60 lacs respectively.

6. A separate application C.A. (M) 109/2005 was filed seeking convening of the meetings of the shareholders, secured creditors and the unsecured creditors of the Company which meetings were ordered to be convened vide order dated 31.05.2005. The Chairperson-K.K. Wadhera, Advocate appointed to convene the meeting of the secured creditors had submitted its report dated 22.07.2005. It was noted that four of the secured creditors were present but IFCI who was the Nodal Agency for SDF did not have the requisite authority to represent SDF in the said meeting; further part of the report however states that SDF had consented to the Scheme. The report of the Chairperson had noted the

approval accorded by the secured creditors in favour of the Scheme. The reports of the Chairpersons who had convened the other two meetings i.e. meeting of the shareholders and the unsecured creditors had also filed their respective reports.

7. At the time of the sanctioning of the Scheme, the learned Company Judge had examined the aforementioned reports. It was noted that the report of K.K. Wadhera, Advocate had not reflected the picture correctly. As a matter of fact, it was noted that the Secretary (Sugar and Cane) and the Cane Commissioner, Government of U.P. who had represented two State Government loans had consented to the Scheme subject to confirmation by the higher authorities. The SDF, Ministry of Consumer Affairs representing a loan of Rs. 678.6 lacs had through A. Ramachandran of the IFCI produced a letter stating that SDF loan should be kept outside the scope of the Scheme/arrangement as it was not possible for the SDF to write off its loan under the extant rules. The learned Single Judge had again, as a matter of fact, noted that the Chairperson in his report had wrongly recorded that the SDF had voted in favour of the Scheme; the actual fact emerging from the report that A. Ramachandran of the IFCI did not have a clear authority letter to cast his vote and as such SDF had not cast its vote. The other two creditors i.e. the IDBI and IIBI had suggested a modification in the Scheme which having been accepted by the promoters, they had voted in favour of the Scheme. The correspondence exchanged between the Central Government and the advocates of the promoters of the Scheme

is relevant. In its letter dated 18.10.2005, IFCI (Nodal Agency for SDF) had expressly written to the advocate of the promoter informing him that as per the extant rules this re-structuring/settlement of dues was not applicable to SDF loans and the said loans should be kept out of the purview of the Scheme and its existing re-payment schedule should not be altered. It was specifically requested that this stand of the SDF should be kept taken on record. This letter dated was admittedly prior in time to the date of the convening of the meeting of the secured creditors which was held on 16.07.2005. For reasons best known, this letter was not brought to the notice of the Court and it was not filed by the promoters although it was admittedly addressed to the advocate of the promoters.

8. Impugned order had in fact noted that the Scheme propounded by the propounders did not really contain any merit but since there was no express objection to the Scheme either by the Official Liquidator or by the Regional Director and keeping in view the fact that the interest of the workers and other unsecured creditors was involved, the Company Judge, noting as a fact that in case the Scheme is not sanctioned the employees and other unsecured creditors would not get any money and this would in turn lead to a winding up of the Company with no unsecured creditor or employee being able to realize any of its dues; it was in this background that the Company Judge had persuaded itself to accord sanction to the scheme of arrangement.

9. The submission of the learned counsel for the appellant is two-fold:

(i) The secured creditors having approved the Scheme by a 3/4th majority which is evident from the report of the Chairperson dated 22.07.2005, it was not within the domain of the Company Judge to modify the said arrangement; it being not an appellate authority over this arrangement, it had little option but to accord an absolute sanction to the Scheme. To support this argument reliance has been placed upon 1996 (6) Scale 595 titled as Miheer H. Mafatlal vs. Mafatlal Industries Ltd. ; submission being that the Company Judge while dealing with a scheme of arrangement between the Company and its creditors is not acting as a court of appeal; it neither has the expertise and nor the understanding to modify the commercial wisdom exercised by the creditors of the Company who had ratified the scheme by the requisite majority. The company court's jurisdiction being peripheral and supervisory and not appellate, it could only act as an umpire of a cricket match who has to see that both the parties are playing according to the rules and do not over step the rules.

(ii) Second submission being founded on the basis that the impugned order has erroneously delved into facts; where the other two secured creditors i.e. the IDBI and IIBI were getting 40% of their dues in terms of the Scheme, the SDF being offered only 25% of its dues whereas the government company was not

getting anything; it was not for the Company Judge to have examined this issue when this issue was not even raised by the SDF in its objections to the Scheme. On all counts, the impugned order holding the SDF to be excluded from the purview of the sanctioned scheme has committed an illegality. The whole purpose of propounding a scheme would be negated if the SDF was permitted to stay outside the Scheme; the propounders, in these circumstances, may well have allowed the Company to remain in liquidation; no benefit would have accrued to the propounders in case the SDF was not made bound by the Scheme. All these parameters have been ignored in the impugned order.

10. Arguments have been refuted. It is pointed out that the impugned order suffers from no infirmity; the correspondence exchanged between the SDF and the promoters was clear and categorical which was to the effect that the SDF in terms of its extant rules could not restructure its debts; it was legally not permissible; the SDF is also a government company and in fact, a clear and categorical statement had been recorded in the order dated 31.03.2006 which was to the effect that the government companies which included the SDF would not be a part of the Scheme. The further submission being that this order is even otherwise not the subject matter of challenge what has been challenged before this court is only the order dated 31.03.2006

11. Although the arguments of the learned counsel for the appellant, at the first blush appeared to be attractive and we must also appreciate

the labour put in by the learned counsel for the appellant yet in conclusion we are unable to accept his submissions.

12. In the order dated 31.03.2006, the learned Company Judge had noted that the fact finding returned by the Chairperson (of the secured creditors) was incorrect. This is also evident from the record. Record shows that A. Ramachandran who was appearing on behalf of the IFCI (Nodal Agency of SDF) did not have the requisite authority to cast its vote on behalf of the SDF and had thus been precluded from casting its vote. It has wrongly been recorded in the report dated 22.07.2005 that the SDF has voted in favour of the Scheme. The submission of the learned counsel for the appellant that a 3/4th majority of the secured creditors had voted in favour of the Scheme is thus incorrect. Section 392 of the said Act envisages a situation of 3/4th majority of the creditors present and voting. The SDF was neither present and nor did it vote. This is substantiated from the record.

13. Company Application No. 109/2005 in para 11 had enlisted the list of secured creditors (as noted supra) computing their liability. An amount of Rs. 182 lacs had been shown as due to the IDBI. A sum of Rs. 149.60 lacs was due to the IIBI. This is mentioned in the proposed scheme of arrangement itself. The amount due to the SDF comprised of the principal figure of Rs. 728.60 lacs with an interest quotient of Rs.722.81 lacs equivalent to Rs. 1451.41 lacs. The letter dated 18.10.2005 (prior to the date of the convening of the meeting of the secured creditors) addressed by the IFCI to the advocate of the

Co. Appeal 28-29/2006

promoters clearly and categorically stated that SDF has to remain outside the Scheme as the extant rules of the SDF did not permit a re-structure of its debt; it should therefore be kept outside the purview of the scheme. SDF had also not voted in the Scheme. Submission of the appellant that 75% of the secured creditors had voted in favour of the Scheme is thus an incorrect fact.

14. The Central Government had given two loans to the Company. The first loan was of Rs. 561.10 lacs which was notified as a custodian loan. The second loan of Rs. 728.60 lacs was given by the SDF. Under the proposed Scheme, the promoters had proposed to reduce the loan of Rs. 561.10 lacs to nil and the loan of Rs 728.60 lacs to 25%. Admittedly, the settlement with the other two secured creditors i.e. the IDBI and the IIBI was a settlement of 40% of their total dues. In this context, the submission of the learned counsel for the respondent that there was no justification or reason as to why the SDF would have accorded consent to a reduced figure of 25% is a submission not without force. Even otherwise within the same class all creditors had to be treated at parity and within the said class, there could not be any discrimination. All the secured creditors have been classified as a single class. Payment of 40% of the dues to IDBI and IIBI with a reduced payment of 25% to the SDF and a nil payment for the custodian loan to government was prima facie an unfair proposal.

15. In Maheer H. Mafatlala (supra), the Apex Court had an occasion to consider this aspect. In that case one branch of the equity

shareholders of the Company had sought separate rights qua the Company because of a special interest created in their favour because of a family arrangement; submission being that they represented a class within a class of equity shareholders. This submission was negated. The question was answered as follows:-

“On the express language of Section [391\(1\)](#) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly presupposes that if the Scheme of Arrangement or Compromise is offered to the members as a class and no separate Scheme is offered to any subclass of members which has a separate interest and a separate Scheme to consider, no question of holding a separate meeting of such a Sub-class would at all survive.”

16. The majority decision of the same class of voters should be just and fair to the class as a whole in order to bind the dissenting members of that class. This was clearly not so in the instant case.

17. The language of Sections 391 and 393 of the said Act makes it abundantly clear that when the company court is called upon to sanction a Scheme it has not merely to go by the *ipse dixit* of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is

implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a court of law. No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. It is trite to say that once the scheme gets sanctioned by the court it would bind even the dissenting minority shareholders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the concerned scheme. The court has to satisfy itself that:

- (i) the meeting was duly held and conducted;
- (ii) that the compromise was a real compromise;
- (iii) that it was accepted by a competent majority;
- (iv) that the majority was acting in good faith and for common advantage of the whole class;

18. It is in fact the duty of the court to go through the proposed Scheme carefully and find out whether all the provisions of law and directions of the court as to the conduct of meetings have been complied with and whether Scheme is in the interest of the Company as well that of its creditors and only then it should be given effect to. The court is not a mere rubber stamp or a post office. It is incumbent upon the Court to be satisfied *prima facie* that the Scheme is genuine, bona

fide and in the interests of the creditors and the Company. The Court may refuse to put its seal of approval if the purpose of the Scheme is not bona fide.

19. The order dated 31.03.2006 had noted that the promoters of the Scheme had in fact pointed out that the loans of the Central Government should be kept outside the scope of the Scheme and their claim could be apportioned. While expressing its reservation to the proposed Scheme, the Single Judge had however noted that it could in no manner be presumed that the Central Government had agreed to entirely waive off its custodian loan of Rs.561.10 lacs to nil or to reduce SDF loan (also a government loan) from Rs.728.60 lacs to Rs. 182.15 lacs. Both these loans being central government loans were permitted to be treated as outside the Scheme. The different parameters for settlement with the IDBI and IIBI by paying of 40% of their total dues whereas the government dues of which the custodian loan was sought to be reduced to nil and the SDF loan being reduced to 25% of its principal was also noted. These distinct parameters applied qua different secured creditors was against fairness. Accordingly, on the specific request of the learned counsel for the promoters, a concession was granted and the government loans which included not only the custodian loan but also the SDF loan were kept outside the Scheme.

20. The scheme of arrangement, as noted supra, was in fact sanctioned only to benefit the class of unsecured creditors and the employees as apart from the OTS settlement with the IDBI and IIBI, the

Scheme envisaged payment to the said persons. The Company Judge had noted that in the eventuality that the Scheme is not sanctioned there could be no other alternate but to wind up the company because the dues of the Company were enormous.

21. In this background, the submission of the learned counsel for the appellant that it was an inadvertent mistake and error which had crept in the order the Company Judge while excluding SDF from the Scheme is mis-understood. It was deliberately and intentionally noted and for the reasons as discussed (supra) that the SDF loan also being a government loan, both the custodian loan and the SDF were to be excluded from the purview of the Scheme. The Company Judge has ample power to pass such an order.

22. Impugned order does not suffer from any infirmity.

23. Appeal is without any merit. It is dismissed. Parties to bear their own costs.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

MARCH 21, 2013
rb