SUPREME COURT OF INDIA

Konark Investments Ltd.

Vs.

Union of India (Uoi)

(S Bharucha and V Khare JJ.)

17.10.1997

ORDER

1. Leave granted.

2. On 11-6-1984 a company application (Company Application No. 99 of 1984) was presented before the High Court at Calcutta under Sections 391 and 393 of the Companies Act, 1956, for convening meetings to approve a Scheme of Arrangement between the appellant and Hari Brothers Pvt. Ltd., as also three subsidiaries of the appellant. The High Court directed meetings to be called and, based on the result thereof approving the proposed Scheme, a company petition (Company Petition No. 344 of 1984) was filed by the appellant in the High Court on 3-8-1984 for obtaining its sanction thereto. On 14-2-1985 the learned Company Judge sanctioned the Scheme. The order passed by him does not indicate that there was any argument on behalf of the respondent opposing the sanction of the proposed Scheme on the ground that it was fraudulently devised to enable the evasion of taxes.

3. On 3-5-1985 the respondent filed an appeal against the order sanctioning the Scheme. An application for stay thereof was refused. There being no stay, the High Court, on 13-8-1985, passed an order dissolving, without winding up, the transferor-Company, Hari Brothers Pvt. Ltd. A copy of the order of dissolution was filed with the Registrar of Companies on 8-9-1985. Pursuant to the dissolution, shares of the appellant were allotted to the erstwhile shareholders of the transferor-

Company, the income tax returns were merged, the transferor-Company's property was sold, and so on.

4. On 5-5-1989 the impugned order was passed by a Division Bench of the High Court, It refers to the affidavit in opposition to the Scheme filed by the respondent before the learned Company Judge wherein it was stated that the whole purpose of obtaining the sanction of the Scheme was "to avoid the relevant taxes payable under the various provisions of law". The Division Bench observed that the learned Company Judge "should not have disposed of the matter in a summary manner and without considering the contentions raised by the respondent authorities in their affidavits". The Division Bench said that "where the whole purpose of the petitioner was to avoid taxes that should have been taken into consideration by the learned court below and taking into consideration such fact and considering that the application was not bona fide the learned court below should not have accorded the sanction as proposed by the petitioner. Under these circumstances, the impugned order is set aside and the appeal is allowed".

5. The contention of the respondent in its affidavit in opposition to the Scheme was to use the words of the Division Bench "to avoid the relevant taxes payable under the various provisions of law". It is very difficult to appreciate how the learned Company Judge could have considered such a contention if such contention was not canvassed at the Bar on behalf of the respondent and no factual material in support thereof was laid before him. That this contention was not canvassed is quite clear from the fact that the learned Company Judge's order makes no mention of it; nor, indeed, does the Division Bench order suggest that there was an argument before him which the learned Company Judge ignored.

6. It is remarkable that the Division Bench came to the conclusion that the whole purpose of the appellant was to avoid taxes when there is no material discussed or even referred to in its order based whereon such a conclusion could be reached.

7. We think that the least that should have been done by the Division Bench was to remand the matter to the learned Company Judge for fresh consideration. It is not as if the Division Bench was not made aware of the fact that the order that it had passed would cause "great hardship to the shareholders and others". The Division Bench recorded this, but brushed it aside on the basis that it was not a ground for not setting aside the order of the learned Company Judge which was passed without proper application of mind. The Division Bench, sitting in appeal over that order, could not but have been mindful of the fact that erstwhile shareholders of the transferor-Company had been allotted shares of the appellant pursuant to the sanction of the Scheme and that they would have sold those shares in the ordinary course to third parties, who would be the sufferers.

8. Learned counsel for the respondent submitted that we should send the matter back to the learned Company Judge for being heard afresh. We are disinclined to do so for the amalgamation has taken

effect long back and third-party rights have been created. The respondent should have pressed the case it made out in the affidavit before the learned Company Judge; that was the appropriate time to do so.

9. The appeal is allowed. The judgment and order under appeal is set aside. The order of the learned Company Judge sanctioning the Scheme is restored.

10. No order as to costs.