

(1996) 01 AP CK 0018

In the Andhra Pradesh High Court

Case No : Company Petition No. 17 of 1995

Asian Bearings and Tools Corporation

APPELLANT

Vs

Coastal Chemicals Limited

RESPONDENT

Date of Decision : 23-01-1996

Acts Referred:

Companies Act, 1956 — Section 433, 434, 439, 439(1)

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 22, 22(1), 22(3)

Citation : (1996) 86 CompCas 590

Hon'ble Judges : G. Bikshapathy, J

Bench : Single Bench

Advocate : Eranki Subba Rao, for the Appellant; V. Jogayya Sarma, for the Respondent

Judgement

G. Bikshapathy, J.—This company petition is filed u/s 433(e) and (f) read with section 439(1)(b) of the Companies Act, 1956. As per the averments made in the petition, the respondent is a public limited company having its registered office at Visakhapatnam, with an authorised share capital of Rs. 50 lakhs, divided into 40,000 equity shares of Rs. 100 each and 10,000, 12 per cent. redeemable/cumulative/preference shares of Rs. 100 each. The main objects of the company are to take over, promote, establish, etc., any business of preparation and sale of alum and its products and other by-products as contained in the memorandum of association. The petitioner supplied bearings as per the requirement of the respondent-company and the last order was on May 14, 1993. There is a running account in respect of the transactions between the petitioner and the respondent-company. As on March 31, 1993, the respondent-company confirmed the balance of Rs. 1,82,856.61. However, still the balance has to be paid. Since the balance was not paid by the respondent-company, statutory notice under sections 433, 434 and 439 of the Companies Act was issued and there was no response from the respondent-company. As there was no response, having admitted the liability, the petitioner was compelled to file the present company application

seeking winding up of the company.

2. During the course of the inquiry, it was admitted by learned counsel for the respondent that a sum of Rs. 54,069.02 was paid to the petitioner, as, according to their books of account, that was the amount, which is liable to be paid to them. However, the petitioner insisted that some more amount is due and, therefore, it intends to proceed with the company application for winding up of the respondent-company.

3. A counter-affidavit was filed on behalf of the respondent stating that as per their records only a sum of Rs. 54,069.62 was liable to be paid and since the same has been paid, the petition is liable to be dismissed. It is further stated that the petition for winding up of the company is not maintainable in view of the provisions contained u/s 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. By an order dated August 27, 1991, the Board for Industrial and Financial Reconstruction (BIFR), New Delhi, declared the respondent-company a sick industry and the matter is still pending before the BIFR. It is further submitted that hearing was held on September 6, 1995, and a revised draft rehabilitation scheme was issued. Therefore, the application is liable to be dismissed.

4. Before considering the merits of the case, it is now to be decided, whether the application has to be entertained in view of the provisions of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short "the Act"). For the purpose of appreciation of the case, it is necessary to refer to section 22 of the Act, which is extracted below :

"22. Suspension of legal proceedings, contracts, etc. - (1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority....

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded."

5. A reading of the aforesaid provision - "shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority", connotes that an application shall not lie in certain cases and cannot be proceeded with in certain other circumstances. The words "shall not be

proceeded with" apply only when an application for winding-up is already pending. This limb of the section has been interpreted by the Supreme Court in *The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others*, . In the said case, the Gram Panchayat sought to recover property tax u/s 129 of the Bombay Village Panchayats Act. The company took an objection that in view of section 22(1) of the Act, the recovery is without jurisdiction and the application shall not lie, except with the consent of the Board (BIFR) established under the Act. The Supreme Court observed that in the light of the steps taken by the Board under sections 16 and 17 of the Act no proceedings for execution, distress or the like proceedings against any of the properties of the company shall lie or be proceeded further, except with the consent of the Board. Indeed, there would be automatic suspension of such proceedings against the company's properties. As soon as inquiry u/s 16 is ordered by the Board, various proceedings set out under sub-section (1) of section 22 of the Act would be deemed to have been suspended. The Supreme Court further held that it may be against the principles of equity, if the creditors are not allowed to recover the dues from the company. But such creditors may approach the Board for permission to proceed against the company for recovery of their dues/outstandings/overdues or arrears by whatever name it is called. The Board at its discretion may accord its approval for proceeding against the company. If the approval is not granted, the remedy is not extinguished. It is only postponed, sub-section (5) of section 22 provides for exclusion of the period during which the remedy is suspended while computing the period of limitation for recovering the dues, and, thus, upheld the order of the High Court quashing recovery proceedings against the properties of the company.

6. A single judge of the Bombay High Court in *M/s. Ramniklal and Co. and others Vs. The Wallace Flour Mills Co. Ltd., Company*, has elaborately considered this issue and held (page 554) :

"It is clear from the provisions of the Act that a winding-up petition is required to be kept merely in abeyance pending the enquiry u/s 16 or framing of the scheme under the Act or pending the implementation of the scheme framed thereunder. The marginal note to section 22 of the Act provides an indication that the proceedings in question are merely required to be suspended. The operative part of section 22(1) of the Act provides that the winding-up proceedings may continue with the consent of the Board or the consent of the Appellate Authority. If the proceedings can continue with the consent of the Board or consent of the Appellate Authority or in the event of the conditions precedent prescribed u/s 22(1) of the Act ceasing to exist, there is no reason as to why the pending winding-up petitions must necessarily abate or must necessarily be dismissed. Section 31 of the Act provides that certain pending proceedings shall not abate where the receiver or the official liquidator was already appointed before the commencement of the Act. The section cannot be reasonably pressed into service for the purpose of making a submission to the effect that in all other cases the proceedings abate when the operative part of section 22 of the Act can

be reasonably interpreted to mean that the winding up proceedings are merely required to be suspended and kept in abeyance and are not required to be dismissed and they do not abate".

7. A learned single judge of this court in *Taxtrade Limited v. Andhra Cotton Mills Ltd.* [1989] 1 ALT 282 : [1989] 1 APLJ 16, held that :

"When once it is shown that a reference is registered under the Act, section 22 becomes applicable and, consequently, the jurisdiction of the court under the Companies Act is excluded by implication. The Board is given wide powers and the petitioners can certainly approach the Board for relief during this stage. Till the Board passes an order u/s 22(3), there is no restraint against the companies in alienating their properties, and probably the petitioners may be able to move the Board if considered necessary. The language of section 22(1) and that of section 31 indicate that such winding-up proceedings shall not be proceeded with further. Apart from the difference in language of section 22(1) and section 31, it is also open to the petitioners to seek and get consent of the Board to continue any winding-up proceedings".

8. In the instant case, an argument was advanced by learned counsel for the respondent that when the proceedings before the BIFR are pending, the application for winding-up does not lie. But, however, he further submits that when the winding-up proceedings are in progress and if the company is declared sick under the provisions of the Act, by the BIFR, the pending proceedings shall not be proceeded with. Therefore, this section has got two limbs. As far as the latter limb of the section is concerned, as to whether the proceedings can be proceeded with, when the matter was admitted by the BIFR, it is now made clear that they stand suspended until the proceedings are cleared by the BIFR. But, however, in the former case, it is sought to be contended that the application itself does not lie.

9. Learned counsel for the petitioner submits that pendency of the proceedings before the BIFR was only made known to the petitioner, when the winding-up application has been filed, and therefore, it is entitled to continue the proceedings de hors the pendency of the proceedings before the BIFR. I am afraid I cannot accept this contention. The knowledge of the petitioner has nothing to do with the pendency of the proceedings before the Board. Once the proceedings are in seisin of the Board the bar gets automatically attracted. It is immaterial whether the creditor has knowledge or not.

10. A proper analysis of section 22 connotes that in the following circumstances the application for winding-up either does not lie or cannot be proceeded with except with the concurrence of the BIFR or the Appellate Authority, as the case may be :

(a) enquiry u/s 16 is pending,

(b) any scheme referred to u/s 17 is under preparation or consideration,

(c) when a sanctioned scheme is under implementation,

(d) when an appeal u/s 25 is pending.

11. The words "shall lie" and "be proceeded with" are required to be interpreted. "Shall lie" obviously refers to the pre-initiation stage and "be proceeded with" refers to the post-initiation period. Therefore, if the matters relating to be covered by clauses (a) to (d) supra are pending before the BIFR no application for winding-up shall lie in respect of the industrial company unless the consent of the BIFR is obtained. Thus, there is an initial bar itself for filing any application. But the situation is different when the application for winding-up, or distress like situations are already pending when the BIFR admits the references. In such a situation, the pending applications/proceedings shall not be proceeded with further except with the consent of the BIFR.

12. Admittedly, in the instant case, the matter was admitted by the BIFR in 1991, and the matter relating to revised rehabilitation scheme is under consideration by the BIFR. The application for winding-up has been filed in April, 1995. In such a situation, the application has to be held as not maintainable.

13. Thus, I find that the application, as filed by the petitioner in 1995, which is after the proceedings were initiated before the BIFR and during the pendency of the proceedings is not maintainable and no application for winding-up lies before this court. Under these circumstances, I have to necessarily hold that the application does not lie in view of the bar contained u/s 22(1) of the Act.

14. However, the interest of the petitioner has been amply protected by sub-section (5) of section 22, wherein the limitation prescribed under the relevant statute shall be deemed to be extended till the bar u/s 22 of the Act is cleared.

15. Accordingly, the company petition is dismissed. There shall be no order as to costs. However, this order does not preclude the petitioner from obtaining permission/approval of the Board and initiating proceedings for winding-up of the respondent-company.