

(1976) 12 BOM CK 0011

In the Bombay High Court

Case No : Company Petition No. 80 of 1972 in Company Application No. 71 of 1967

B. Mehta and Co.

APPELLANT

Vs

Puranmal Bubna and Others
 Official Liquidator Vs
Puranmal Bubna and Others

RESPONDENT

Date of Decision : 22-12-1976

Acts Referred:

Companies Act, 1956 — Section 425, 426, 427, 428, 429

Sick Textile Undertakings (Nationalisation) Act, 1974 — Section 35, 4, 4(6)

Citation : (1979) 49 CompCas 98

Hon'ble Judges : P.R. Mridul, J

Bench : Single Bench

Judgement

Mridul, J.—By this report the official liquidator seeks, inter alia, a direction as to whether he should obtain consent of the Central Government under s. 35 of the Sick Textile Undertakings (Nationalisation) Act, 1974, for continuance of liquidation proceedings in respect of Edward Textiles Ltd. in liquidation (hereinafter called "the company"). He also seeks directions as to whether he should withdraw misfeasance summons which he had taken out against erstwhile officers and directors of the company having regard to the impact of the directions of the National Textile Corporation as also the Central Government. Notices were issued to the National Textile Corporation and the Central Government. They appeared before me through their counsel and have made submissions in respect of the directions sought for by the official liquidator.

2. On 4th August, 1967, the company was directed to be wound up by this court under the provisions of the Companies Act, 1956. On 4th July, 1972 the official liquidator took out a misfeasance summons against former directors and officers of the company under s. 543 of the Companies Act, 1956. The said misfeasance summons is pending in this court. By an Ordinance promulgated by the President of India on 23rd December, 1972, being Ordinance No. 17 of 1972, the management of textile companies designated as sick textile undertakings was

taken over and transferred to the Central Government. The said Ordinance, viz., "The Sick Textile Undertakings (Taking over of Management) Ordinance, 1972" took within its sweep management of a sick textile undertaking "which is being wound up whether voluntarily or by or under the supervision of any court". Thus, the said Ordinance applied to the company which was being wound up under the supervision of this court. In fact, the company is listed as one of the sick textile undertakings set out in the First Schedule to the said Ordinance. It is mentioned as item No. 12 in the said Schedule. S. 3 of the said Ordinance by its non obstante provision overrides all provisions of law as also judgments, decrees or orders of any court or tribunal or other authority as are inconsistent with the provisions of the Ordinance. S. 4(3) of the said Ordinance by its deeming provision, inter alia, provides not only for tangible properties to be included in the sick textile undertakings but also "all other rights and interest in, or arising out of, such property as were immediately before the appointed day, in the ownership, possession, power or control of the textile company". All the provisions of the said Ordinance may not be noticed but of significance is s. 7(b) which confers authority upon the Central Government to stay operation of all any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force. Equally significant are the provisions of s. 8 of the Ordinance Sub-s. (1) of s. 8 of the Ordinance enjoins that "no proceedings for the winding up of a textile company, within the meaning of this Ordinance, shall lie in any court or be continued whether by or under the supervision of or voluntarily, except with the consent of the Central Government". Sub-s. (2) of s. 8 ordains that "in computing the period of limitation prescribed by any law for the time being in force for any application which may be made in the course of winding up of any textile company in respect of any matter arising out of any transaction in relation to a sick textile undertaking, the time during which this Ordinance is in force shall be excluded". Relevant are the two concepts found in the two sub-sections "proceeding for the winding up of a textile company" or "continuance thereof" and "any application which may be made in the course of winding up of any textile company". These two concepts are two different legal categories. They embody legislative scheme of dichotomy between proceedings which result in winding-up order. The latter proceedings are more appropriately designated as the "proceedings in the course of winding-up".

3. The 1972 Ordinance was replaced by the Sick Textile Undertakings (Taking Over of Management) Act, 1972. The format of the Act in respect of the material provisions of the 1972 Ordinance is the same. The provisions of the 1972 Act are in pari materia with the corresponding provisions of the 1972 Ordinance. The said provisions need not be noticed. It may, however, be emphasised that the provisions of ss. 4 and 8 of the Ordinance correspond to the provisions of ss. 4 and 8 of the 1972 Act

4. The taking over of the management as it turned out was precursor to the nationalisation of the sick textile undertakings. The President promulgated on

21st September, 1974, the Sick Textile Undertakings (Nationalisation) Ordinance, 1974. Under the said Ordinance, the rights of the owners in respect of sick textile undertakings were abrogated with effect from the appointed day which was the 1st April, 1974. The "owner" as defined in the said Ordinance in s. 2(g) thereof includes a liquidator of a sick textile undertaking. S. 3 of the Ordinance transfers and vests in the Central Government absolutely the right, title and interest of an owner in relation to every sick textile undertakings as and from the appointed day. S. 4 of the Ordinance by sub-s. (1) thereof provides for general effect of vesting and, inter alia, ordains that not only the assets, rights, leaseholds, powers, authorities and privileges or properties or equipment or machinery but also "all other rights and interests in, or arising out of, such property as were immediately before the appointed day in the ownership, possession, power or control of the textile company in relation to sick textile undertakings" shall be deemed to be the sick textile undertaking within the meaning and for the purposes of the said Ordinance. Sub-s. (6) of s. 4 provides that no suit or appeal or other proceedings of the description mentioned therein shall abate or be discontinued or be, in any way, prejudicially affected by reason of the transfer of the sick textile undertaking of the textile company or of anything contained in the said Ordinance. The said sub-section further ordains that such suit or appeal or the proceeding might be continued, prosecuted and enforced by or against the National Textile Corporation. Sub-section (7) of s. 4 directs handing over of possession of books of account, registers and all other documents as well as the whole or any part of any sick textile undertaking of which the management could not be taken over by the Central Government prior to the promulgation of the Ordinance. S. 8 of the Ordinance provides for payment of compensation. The amount of compensation is quantified in the First Schedule. The company is listed as a sick undertaking which is nationalised under the said Ordinance in the said Schedule at item No. 33. The compensation that is specified in the said Schedule for the company is Rs. 66,28,000. S. 10 of the Ordinance provides for accountability of the owners in certain circumstances. The said section is not material. S. 35 of the Ordinance provides for the proceeding for the winding up of a textile company, the right, title and interest whereof in relation to the sick textile undertaking owned by it have vested in the National Textile Corporation under the Ordinance "shall lie in any court except with the consent of the Central Government. "The provisions of s. 35 of the Ordinance thus make a departure from the corresponding provisions of s. 8(1) of the 1972 Ordinance of the 1972 Act.

5. The 1974 Ordinance was replaced by the Sick Textiles Undertakings (Nationalisation) Act, 1974. The provisions of the Act in so far as they are material for the purpose of the present directions are in pari materia with the provisions of the Ordinance. All the provisions need not, therefore, be noticed. Suffice it to observe that the material provisions contained in ss. 4, 8, 10 and 35 of the 1974 Ordinance, and the Sick Textile Undertakings (Nationalisation) act, 1974, are basically identical. S. 4 of the 1974 Act reiterates the deeming

inclusion of all other rights and interests in or arising out of such property as constituting a part of the sick textile undertakings nationalised under the said Act. Sub-s. (6) of s. 4, however, makes a modification in respect of pending suits, appeals and other proceedings. It restricts the larger area covered by the corresponding provisions of the 1974 Ordinance and provides by the material provisions thereof as follows :

"4. (6) If, on the appointed day, any suit, appeal or other proceeding of whatever nature in relation to any matter specified in sub-s. (2) of s. 5 in the textile company, is pending the same shall not abate, be discontinued or be, in any way, prejudicially affected by reason of the transfer of the sick textile undertaking"

6. S. 5(2) deals with the liabilities arising out of the loans advanced to the persons mentioned therein or wages, salaries and other dues or liabilities of the description mentioned therein. The provisions of the said sub-s. (3) are not material.

7. Section 35 of the 1974 Act is in the same language in which the corresponding provisions of s. 35 of the 1974 Ordinance is couched. S. 35 of the 1974 Act need, therefore, not be reproduced.

8. The provisions of law referred to above as also the facts adverted to above throw up two questions for determination. The questions are : (1) what is the impact of the legislative provisions referred to above on the liquidation proceedings, and (2) whether the official liquidator is required to obtain consent of the Central Government for continuance of the liquidation proceedings. These questions, however, will have to be determined within the legal periphery of the proceedings in the misfeasance summons dated 4th of July, 1972, referred to above.

9. Sub-s. (1) s. 3 of the 1974 Act transfers on and from the appointed day "every sick textile undertaking and the right, title and interest of the owner" therein absolutely to the Central Government. The company is the owner of the sick textile undertaking by virtue of the fact that it fulfills all the attributes of a sick textile undertaking as defined in ss. 2(h) and 2(j) of the 1974 Act. The official liquidator falls within the concept of owner as defined in the 1974 Act. Thus, the claims of the company in respect of the undertaking which is nationalised would also fall within the ambit of the sick textile undertaking which is nationalised under the 1974 Act. This follows from the language of s.4(1) of the 1974 Act. The said s. 4(1) reads as under :

"The sick textile undertaking referred to in s. 3 shall be deemed to include all assets, rights, leaseholds, powers, authorities and privileges and all property, movable and immovable, including lands, buildings, workshops, stores, instruments, machinery and equipment, cash balance, cash on hand, reserve funds, investments and book debts and all other rights and interests in, or arising out of, such property as were immediately before the appointed day in

the ownership, possession, power or control of the owner of the sick textile of the sick textile undertaking, whether within or outside India, and all books of account, registers and all other documents of whatever nature relating thereto and shall also be deemed to include the liabilities and obligations specified in sub-s. (2) of s. 5."

10. It cannot be disputed nor has it been disputed that all assets, rights, powers, authorities and privileges, all properties, movable or immovable, including lands, buildings, workshops, stores, instruments, machinery, equipment, cash balance, cash on hand, reserve funds, investments and book debts belonging to the sick textile undertaking of the company vest in the Central Government by virtue of the combined effect of the provisions of ss. 3 and 4 of the 1974 Act. If that be so, "other rights and interests in, or arising out of, such property as were immediately before the appointed day in power or possession or control of the owner of the company" would also fall within the ambit of the deeming provisions of sub-s. (1) and would be deemed to be the sick textile undertaking for the purposes of s. 3 of the 1974 Act. This inference is not seriously disputed. What is argued is that a claim in misfeasance is not a right or an interest of the undertaking in or arising out of any property of the undertaking which is nationalised. I am afraid, this is an entirely erroneous understanding of the nature of the misfeasance proceedings.

11. Section 543 of the Companies Act, 1956, provides for misfeasance proceedings. It empowers the court to assess damages against delinquent directors or officers of the company. A plain reading of the section shows that it is a procedural or a machinery section. It authorises the court to assess damages in respect of misapplication, wrongful retention or other forms of accountability for the moneys and properties of the company by a director or a manager or a liquidator or an officer thereof. The section also authorises the court to assess damages against such delinquents as are found to be guilty of any misfeasance or breach of trust in relation to the company. It is clear that the section by itself does not create any new cause of action. The act of misapplication, wrongful retention or other forms of accountability for the money or property of the company or misfeasance or breach of trust are acts which were or are otherwise actionable at law in accordance with the rules of law and equity. The nature of the misfeasance proceedings under the section admits of no doubt. Misfeasance proceeding is merely a proceeding of a summary character by which the court in the course of winding up a company assesses and compels the delinquent directors and officers to make payment in respect of the acts of misfeasance or malfeasance, breach of trust or wrongful retention or other misconduct. It was, therefore, held in *Kumarapuram v. Pestonjee* [1903] 5 Bom LR 633 that the misfeasance proceeding is merely a summary way of enforcing against directors or other officers a liability for breach of trust or other misconduct which previously might have been enforced by action. It is undoubtedly true that some judgments show and, in my opinion, correctly, that s. 543 takes within its sweep not only enforcement of such rights which could have been enforced by a

company but also such new rights as might have been created in favour of the official liquidator under the provisions of the Companies Act, 1956. But even so, the creation of the new rights in favour of the official liquidator which can be enforced in a proceeding under s. 543 of necessity is the enforcement of a right for and on behalf of the company. This is the true effect of the provisions of the material sections of the Companies Act, 1956, which sections deal with appointment of the liquidator and their powers, functions and duties. S. 448 of the Companies Act, 1956, provides for the appointment of an official liquidator. S. 449 provides for the appointment of an official liquidator as a liquidator of the company on a winding up of the company. It enjoins the official liquidator to perform such duties in reference to a company which is wound up as the court may impose in that behalf. S. 456 does not vest the property or rights, titles and interest of the company therein or pertaining thereto in the official liquidator but merely gives the official liquidator the custody of the property. Sub-s. (1) in so far as it is material provides that where a winding-up order has been made or where a provisional liquidator has been appointed, the liquidator shall take into his custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled. Sub-s. (2) of s. 456 by legal fiction ordains that "all the property and effects of the company shall be deemed to be in the custody of the court as from the date of the order for the winding up of the company". Thus, the combined reading of sub-ss. (1) and (2) of s. 456 merely shows that the custody of the court and the official liquidator as contradistinguished from vesting thereof, the sections do not vest all or any property or the effects or actionable claims to which the company is entitled either in the court or in the official liquidator. S. 457 is of great importance. It enumerates the powers of the official liquidator. The said section, inter alia, authorises the official liquidator to "institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company. [S. 457(1)(a)]. It also authorises the official liquidator to carry on the business of the company so far as may be necessary for the beneficial winding up of the company [clause (b) or to sell the immovable and movable property and actionable claims of the company either by public auction or by private contract [clause (c)]. It authorises the official liquidator to raise on the security of the assets of the company moneys that may be required for the purpose of the beneficial winding up [cl.(d)]. It also authorises the official liquidator to do all such other things as may be necessary for winding up the affairs of the company [cl.(e)]. The reference to the company in cls. (a) to (e) of sub-section (1) of s. 457 leaves no manner of doubt that the powers that are to be exercised by the official liquidator are the powers which are exercised by him for and on behalf of the company or for the benefit of winding up of the company or for the purposes of realising the assets or effects of the company. Thus, the official liquidator acts for the company. He is also required to act in the name of the company. S. 458 merely provides for the discretionary powers of the court. It does not detract from the basic position that the conferment of the powers upon the official liquidator by s. 457 is for benefit of the beneficial winding up of the company.

The governing perimeter of the powers conferred upon the official liquidator is the beneficial winding up of the company and doing of things which sub-serve the said purpose. In my opinion, the actions that are taken or the rights and obligations of the official liquidator are all in his capacity as a statutory authority empowered to wind up the company subject to the supervision of the court. Under the provisions of law, the official liquidator is merely constituted a custodian of the properties, effects or actionable claims to which a company is entitled. Thus, the creation of new rights in favour of the official liquidator are more or less creation of a right in favour of the company which is being wound up. It would be anomalous to hold that the conferment of the power on the custodian of a company is not the conferment of the power on the owner of whom the custodian is merely a delegate or an agent by virtue of the provisions of law. It must, therefore, be held that the misfeasance proceedings are enforcement of the rights of a company in respect of the forms of misconduct which come within the pale or the purview of s. 543 of the Companies Act, 1956. The rights upon the clear intendment of the 1974 Act fall within the ambit of s. 4(1) thereof. Such rights, therefore, must be held to be rights having been transferred to and vested in the Central Government on and from the appointed day, viz., 1st April, 1974. That being the position, I must take the view that the benefits of the misfeasance proceedings or the misfeasance proceedings themselves are proceedings which relate or pertain to the rights which vest in the Central Government and the National Textile Corporation by virtue and under the provisions of the 1974 Act. I find much substance in the grievance of Shri M. H. Shah that it is a very curious position that although all properties of the company (including cash balance or other wherewithals) vest in the Central Government or the National Textile Corporation yet the liquidator is required to proceed with misfeasance on his own steam by utilising his own funds even though the fruits of such proceedings would not come to the official liquidator but would imperatively go to the Central Government or the National Textile Corporation. This is a well-founded grievance. But the means of redressing it do not lie with this court. It is a matter for the administrative justice or remedial action of the Central Government or the National Textile Corporation. They may take such action or evolve such workable arrangement in respect thereof as they might be advised to secure benefits of these proceedings. It may also be that the legal lacuna noticed above or an anomalous position referred to above requires legislative intervention. That is a matter for Parliament to consider. But this court sitting as it does to interpret the law and to administer justice in consonance therewith is not in a position either to accord administrative relief to the official liquidator or to bridge in the legislative lacuna which the combined reading of the provisions of the Companies Act in winding up and the provisions of the 1974 Act disclose. All that this court can do is to permit the official liquidator to drop such proceedings.

12. The misfeasance proceedings, as already stated above, are merely a summary mode of enforcing the rights of the company. These misfeasance

proceedings squarely fall within the opening part of s. 4(6) of the 1974 Act, viz., "any suit, appeal or other proceeding of whatever nature". But as already noticed above, that clause is further qualified by the restrictive expression "in relation to any matter specified in sub-s. (2) of s. 5 "of the Act. S. 5(2) of the Act deals with liabilities arising out of loans advanced by the Central Government, or a State Government, or both, to a sick textile undertaking after the management of such undertaking had been taken over by the Central Government), by the National Textile Corporation or by a State Textile Corporation, or by both, together with interest due thereon, or wages, salaries and other dues of employees of the sick textile undertaking, in respect of any period after the management of such undertaking had been taken over by the Central Government. The misfeasance proceedings before me do not relate to any of the liabilities of the description mentioned in clause (a), (b) or (c) of sub-s. (2) of s. 5 of the 1974 Act. The misfeasance proceedings are, therefore, outside the purview of and are not hit by the mischief of s. 4(6) of the 1974 Act. In other words, the present misfeasance proceedings cannot be said to be misfeasance proceedings which have to be continued or prosecuted by the National Textile Corporation.

13. The right of the official liquidator to proceed with the misfeasance proceedings having been established, the only question that requires consideration is whether the official liquidator is required to obtain the consent of the Central Government for the continuance of the said misfeasance proceedings or for the continuance of the other liquidation proceedings in respect of the company. S. 35 of the Act has been noticed above. S. 35 interdicts "a proceeding for the winding up of a textile company" in respect of the right, title or interest in relation to the nationalised sick textile undertaking. There is no dispute, as indeed there cannot be any dispute, that the misfeasance proceedings are in relation to the company which is textile company and is in respect of a sick textile undertaking which has been nationalised under the 1974 Act. But that is not the crucial factor. The real question is whether the misfeasance proceedings can be considered to be a proceeding "for the winding up" of the company. The word "for" is a word of variable import. It is a preposition which takes its colour from the noun it prefixes. Thus, the word "for" must take its colour from the expression "winding up". Read literally, the expression "for winding up" connotes a proceeding which results in the winding up of the company, in other words, a proceeding for a winding-up order against a company. The word "for" does not mean "in". The expression, it follows, does not mean proceedings in winding up a company. There is a broad distinction between a proceeding for winding up a company and the proceeding in winding up a company. This distinction is unfolded by the legislative scheme contained in Part VII of the Companies Act, 1956. S. 425 provides for the modes of winding up. Ss. 426 to 432 deal with contributories and are not material. Ss. 433 and 434 provide for the circumstances in which a company may be wound up by the court. Ss. 435 to 438 provide for transfer of proceedings and jurisdiction of court. S. 439 and s. 440 form part of a group of sections which is captioned "petition for winding up".

S. 439 makes provision for applications for winding up. The word "for" used in the said expression clearly connotes "for an order of" winding up by the court. The section designates the persons who can present a petition for winding up or manner in which or limitations subject to which the right to present the petition can be exercised. S. 440 ancillary to s. 439 and provides for the right to present a winding-up petition where a company is being wound up voluntarily establishes the distinction between the pendency of a petition or the winding up of a company and the commencement of winding up of a company by court. The legal fiction pertaining to deemed commencement clearly establishes that the petition for the winding up of a company is not and cannot be equated with a proceeding in the winding up of a company. S. 445 is tale-telling. It casts an obligation, inter alia, on the petitioner in "winding up proceedings" to file with the Registrar a certified copy of the winding-up order. S. 457 confers powers and enjoins duties upon the official liquidator "in winding up by the court". The acts of the liquidator in pursuance of s. 457 are proceedings by him in the course of winding up. I have been shown nothing to come to the conclusion that the expression "for winding up" must be equated with the expression "in the course of winding up". There is yet another approach to the problem. The 1972 Ordinance and the 1972 Act are the a cognate piece of legislation : the provisions of the said Ordinance and the said Act interlace with the provisions of the 1974 Act. Both the statutes deal with the same subject-matter. The objectives they seek to subserve are common and identical. The 1972 Act placed an embargo, by s. 8(1) thereof, on a proceeding for winding up Sub-s. (1), material portion thereof, ordained that no proceeding for winding up shall lie in any court. This obviously had reference to a petition for a winding-up order. Sub-s. (2) of s. 8 provides for exemption from limitation for "any application in the course of winding up". Different expressions have been used in the two sub-sections of s. 8. Sub-s. (1) refers to "proceedings for winding up" whereas sub-s. (2) deals with an application "in the course of winding up". The use of different contingencies. Moreover, for petition for winding up no limitation is prescribed either by the Companies Act, 1956, or by the Limitation Act, 1963. To such a situation provision of sub-s. (2) will not be attracted. There is, however, period of limitation prescribed for misfeasance proceedings which is a proceeding in the course of winding up. Sub-s. (1) of s. 8 is re-enacted in s. 35 of the 1974 Act. Sub-s. (2) of s. 8 of the 1972 Act has not been re-enacted. It goes without saying that s. 8(2) of the 1972 Act, while referring to an application in the course of winding up, emphasises the distinction or the legislative intent to treat differently as different subject-matters a proceeding for winding up or a proceeding in the course of winding up. Moreover, s. 35 has to be read in the context of s. 4(6) of the 1974 Act. The non-re-enactment of sub-s. (2) in the 1974 Act is deliberate. A comparison or the provisions of sub-ss. (1) and (2) of s. 8 of the 1972 Act and s. 35 of the 1974 Act seen in the setting of other provisions thereof makes, it abundantly clear that the legislature while enacting the 1974 Act was aware of the contradistinction between a pre-winding-up order situation and the post-winding-up order situation. In my opinion, by not re-enacting sub-s. (2) of s. 8 into the 1974 Act

the legislature intended to make a departure in respect of the contingency covered by sub-s. (2) of s. 8 of the 1972 Act. This underpins the connotation which is accorded by me to the expression "a proceeding for winding up" occurring in s. 35 of the 1974 Act. I must, therefore, reject the contention that for the continuance of the misfeasance proceedings, which are outside the embargo contained in s. 4(6) of the 1974 Act, the liquidator is required to obtain consent of the Central Government.

14. In the result, I answer the directions sought by the liquidator in the report in prayer (a) in the negative. In my opinion, it is not necessary for the official liquidator to obtain the consent of the Central Government under s. 35 of the 1974 Act. In so far as the direction in terms of prayer (b) is concerned, no directions are given at this stage, the official liquidator being at liberty to re-submit his report in that behalf for appropriate directions as and when he deems it necessary.

15. With regard to the direction in terms of prayer (c), it must be observed that in the course of the hearing before me it was made very clear by the learned counsel appearing for the National Textile Corporation that the Corporation was not inclined to put the official liquidator in funds so as to enable him to meet the necessary expenses for prosecution of proceeding with a misfeasance summons. In my opinion, it would be most inequitable to require the official liquidator to proceed with the misfeasance summons when the benefit thereof, if any, would go to the National Textile Corporation and the Central Government, but for the purposes of securing those benefits and fruits, the official liquidator is not being put in funds by the National Textile Corporation or the Central Government. I, therefore, authorise the official liquidator to withdraw the misfeasance summons in respect of the acts of delinquency alleged against the former directors and officers of the company. I answer the direction in terms of prayer (c) in the affirmative.