
(2000) 08 CAL CK 0029

In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction APOT No. 194 of 2000, ACO No. 45 of 2000, CA No. 257 of 1999, BIFR No. 77 of 1987

Debabrata Mukherjee and Others

APPELLANT

Vs

Dunbar Mills Ltd. and Others

RESPONDENT

Date of Decision : 16-08-2000

Acts Referred:

Companies (Court) Rules, 1959 — Rule 96
Companies Act, 1956 — Section 433, 434, 439, 440

Citation : (2001) 1 CALLT 370

Hon'ble Judges : Tarun Chatterjee, J; Amitava Lala, J

Bench : Division Bench

Advocate : Mr. Abrajit Mitra and Mr. R. Mitra, for the Appellant; Dr. Tapas Banerjee, Mr. Ashoke Dhandania, Mr. Ashim Banerjee and Mr. Arijit Banerjee, for the Respondent

Judgement

A. Lala, J.—This appeal is arising out of two orders passed by a single Bench of this Court dated 10th January and 17th January, 2000 in CA No. 257 of 1999 connected with BIFR Case No. 77 of 1987.

2. Some of the members of a workers' Union of Durban Mills (In liquidation) (herein after referred to as "the Company") made an application for framing a scheme for rehabilitation of the Company before the trial Court. The learned trial Judge considered the matter at length and rejected the application filed by some of the workers of the Company on 10th January, 2000 by holding that the petitioners were quite unable to establish a case to put any force on the proposed scheme for rehabilitation of the Company. It was held by the trial Court that no such rehabilitation scheme could be allowed where there was no surety of funds and no source of funds has been indicated clearly. In the order impugned in this appeal, it was also found by the learned trial Judge that in fact, the alleged financier has not till date come forward either by filing an affidavit or by supporting this application made by some of the workers of the Company. From the order of the learned trial Judge, it also appears that the application for

recommendation of BIFR would appear in the list of the learned trial Judge on 17th January, 2000 as "specially fixed matter".

3. Following such directions made by the learned trial Judge in the aforesaid order dated 10th January, 2000 an order was passed by the learned trial Judge, on 17th January, 2000 directing the Company to be wound up. The Official Liquidator was directed to take possession of the assets of the Company and to serve notice directly and he was directed to serve directly upon the secured creditors and to publish the text of the orders in two newspapers. At the time of passing such order on 17th January, 2000, the learned trial Judge held that in view of the order dated 10th January, 2000 dismissing the application made by some of the workers to frame a scheme after Board of Industrial and Financial Reconstruction (BIFR) recommending winding up of the Company, it only remained for the Court to make the formal order for winding up.

4. The petitioner has come up with two fold submissions. First, according to the appellants the Court cannot proceed on the basis of the recommendation of the BIFR but must apply its mind and then decide the issue. Secondly, the formalities as to the advertisements etc. which are required under the law must be directed to be done before the winding up of the Company.

5. So far as the first appeal is concerned, we do not see any reason to interfere with the order as it is crystal clear that by the order dated 10th January, 2000 the learned trial Judge gave reasons for rejecting the application and ultimately by a further dated 17th January, 2000 passed a formal order of winding up on the basis of such reasoning for dismissing the application on 10th January, 2000. Therefore, it cannot stand to reason that the learned trial Judge had proceeded without any application of mind when the application for framing rehabilitation scheme filed by some of the workers of the Company was considered and rejected.

6. Mr. Abhrajit Mitra, the learned counsel however, strongly relied upon a decision reported in (2000)1 Calcutta Law Times, 69 (HC) (Eastern Paper Mills Ltd. v. Board of Industrial and Financial Reconstruction). Strong reliance was placed by Mr. Mitra on Paragraph 20 which is as follows :--

"In the instant case, as noticed above, though the company was heard in the matter presumably upon notice having been given, the winding up petition was not admitted nor direction for advertisement, was issued. The order of winding up has been passed, based solely upon the opinion of BIFR/AIFR. There has, thus, been breach of the provisions of Rule 96 of the Company Court Rules."

7. In the aid of such Judgment he wanted to establish before this Court that even if the matter was recommended by BIFR for the purpose of declaring winding up of a Company but since the Court has to give an independent application of mind whether such company will be wound up or not the Company Court has to apply the procedural aspects including admission and advertisement in connection thereto. He also cited another judgment reported in (1997) 2 CAL LT 454

[Eastern Paper Mills Ltd. v. The Board of Industrial and Financial Reconstruction (BIFR) & Ors.] in which one of us was a member. In this decision, it has been held that it is not obligatory on the High Court to order winding up of a sick industrial company even when it received an opinion from the BIFR in this regard without examining the correctness of such opinion, on hearing the concerned parties.

8. There is no dispute in respect of such well-settled principle. But there is obviously a dispute about the applicability of procedural aspects on account of admission and advertisement. In other words there is no dispute about the subject but there is a dispute about the object.

9. Dr. Tapas Banerjee, learned senior counsel appearing on behalf of the respondent No. 2 joined issue therein by saying that principles as laid down in (2000) 1 CAL LT 69 (Eastern Paper Mills Ltd. v. The Board of Industrial and Financial Reconstruction (BIFR) & Ors.) is not a good law in view of the ratio of several Supreme Court and High Court judgments not referred therein but applicable in this context.

10. First, he cited (1990)1 CAL LT 152 : (1990) 2 kar CLR 55 (Industrial Reconstruction Bank of India v. Textile Processing corporation of India Limited & Another) Para 12 of the Judgment speaks as follows :

"It is quite clear from section 20(2) of said Act that a distinction is being made in the said section regarding the proceedings to be taken before a winding up order and after a winding up order. In our opinion, sub-section (2) of section 20 makes it quite clear that the High Court has got no option but to pass an order of winding up on the basis of the opinion of the Board, But after such order is passed, the proceedings in the winding up order in respect of a particular case Industrial Company shall be in accordance with the provisions of the Companies Act, 1956. The winding up proceedings consist generally of two parts, one is before the winding up order is passed and another is after the winding up order is passed. In our opinion, by section 20(2) if there is any opinion of the Board within the meaning of the said Act, then the Court has no option but to pass an order of winding up without following any further procedure laid down in respect of the Companies in general. To put in shortly, in that case there is of question of any advertisement to be published. However, after such winding up order is passed the procedures laid down in respect of winding up proceedings in the Companies Act, have full application and will have full effect. In our opinion, a distinction is made so far as the proceedings before and after the Act are concerned by virtue of sub section (2) the proceedings before the order have been dispensed in the case of the opinion of the Board within the meaning of section 20 of the said Act."

11. So far as the first part is concerned the same might not be a good law in view of the subsequent judgment including the Judgment already referred being Eastern Paper Mills and Another Vs. The Board for Industrial and Financial

Reconstruction and Others, wherein it was held that it was obligatory on the part of the High Court to accept the opinion from the BIFR without examining the correctness of the same.

12. But so far as the second part is concerned i.e. in respect of question of admission and advertisement etc., that cannot be made since there is a distinction between the proceeding ordinarily initiated under sections 433, 434 and 439 of the Companies Act and the proceeding being recommended by BIFR to adjudge its viability. Therefore, such part is to be dispensed with by the Special Act being Sick Industrial Companies (special provisions) Act, 1985.

13. Similar situation arose before a Division Bench of the Madras High Court as well as in the Supreme Court in the respect. In (1997) 89 Company Cases, 600 (J.M. Malhotra, V.R. Ramaraju v. Union of India & Ors.) a Division Bench of the Madras High Court held that sub sections (1) and (2) of section 20 of the Act dispense with only the requirement of sections 439 or 440 as the case may be of the Companies Act for the purpose of initiating a proceeding for winding up of Company under part VII Chapter II and also the enquiry into the question as to whether it is just and equitable to order winding up of a Company. The rest of the proceeding for winding up shall have to be conducted in accordance with the Companies Act from such order.

14. One of the parties being aggrieved preferred an appeal before the Supreme Court of India when by a judgment as reported in (1997)89 Comp Cas 609 (V.R. Ramaraju v. Union of India & Ors.) it has been held that it is obvious that sub section (2) has to be construed to mean that the High Court in deciding the question of winding up of the Company has to take into account the opinion of the Board forwarded to it under sub section (1) and is not to abdicate its own function of determining the question of winding up. So read, sub section (2) does not suffer from any infirmity.

15. Dr. Banerjee further brought to our notice to various paragraphs being 30, 31, 33, 43, 46 and 50 of Joseph Kuruvilla Vellukunnel Vs. The Reserve Bank of India and Others, A Five Judges Bench decision to show that a procedure for winding up banks and institutions to the exclusion of the Companies Act is to be found in other statutes. Therefore, such banks and institutions are to be liquidated under special laws to the exclusion of the Companies Act, under the statutes creating them.

16. Hence, applying the similar analogy it can be construed that when a Company is under BIFR, the Sick Industrial Companies (Special Provisions) Act, 1985, being a Special Act will have prevailing effect over the Companies Act.

17. Mr. Ashok Dhandania and Mr. Asim Banerjee, learned counsel, appeared on behalf of other respondents and supported contentions of such respondent. In addition to above, Mr. Dhandania brought to our notice the Rules 95, 96 and 99 under Company (Court) Rules as well as Form 48 being prescribed form of advertisement of petition to establish that in case of recommendation of BIFR

such rules cannot be applicable.

18. Rules 95 speaks for petition for winding up. Rule 96 speaks for admission of petition and directions as to Advertisement Rule 99 speaks for advertisement of petition in the prescribed form i.e. under Form No. 48. Much emphasis was given by Mr. Dhandania on Rule 96 by saying that the situation for the purpose of acceptance or non-acceptance of the recommendation of BIFR and admission of petition and directions as to advertisement under Rule 96 are completely different aspects altogether. Both Mr. Dhandania and Mr. Banerjee have brought to our notice to the format of the advertisement under Form No. 48 which also speaks, about the advertisement of petition in the Court and there is no such provision even in the format for the purpose of advertisement of the petition when the matter is recommended by the BIFR for the purpose of consideration by the Court for accepting the same. Even Rule 24 which is also made for the purpose of advertisement of the petition does not speak for the same.

19. In reply, Mr. Mitra contended before this Court that the rules do not say that it will not be applicable in case of any recommendation of BIFR.

20. We have considered the matter at length. Special law always has a overriding effect over the general law in the arena of conflict. Law is to be read that there is no necessity for the Court to abdicate its own function of determining the question of winding up as to whether it is just and equitable by applying the requirement of sections 439 or 440 as the case may be. In other words, applicability of such sections are dispensed with by the appropriate provisions of the Special Act. Therefore, the Rules under Company (Court) Rules, 1959 as above specially Rule 96 as applicable under such provisions of Companies Act made for the purpose of admission of petition and directions as to advertisement etc. have no leg to stand.

21. This proposition of law will not in any way concern with the application of mind of the Court independently in case of recommendation made by the BIFR. The two aspects are totally different from each other when the earlier one is procedural and the later one is substantial.

22. As a result whereof the appeal should fail and accordingly, it is dismissed. However, no order is passed as to costs. This order is passed by treating the appeal as on day's list by consent of the parties and when no fruitful purpose will be served in keeping the same pending. Service of the notice of appeal stands waived. Undertaking, if any, in terms of the prayer (a) stands discharged. All formalities are dispensed with. In view of the dismissal of the appeal, connected application becomes infructuous and accordingly, it is also dismissed as infructuous.

23. All interim orders, if there be any stand vacated. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisition for drawing up and completion of the order as well as the certified copy thereof.

All parties are to act on a signed copy minute of the operative part of this Judgment on the usual undertaking and subject to satisfaction of the officer of the Court in respect as above.

T. Chatterjee, J.

24. I agree.

25. Appeal dismissed