
(1997) 07 CAL CK 0014

In the Calcutta High Court

Case No : Matter No. 2586 of 1994, C.A. No. 660 of 1997 and APOT No. 85 of 1997

Eastern Paper Mills and Another

APPELLANT

Vs

The Board for Industrial and Financial Reconstruction and
Others

RESPONDENT

Date of Decision : 29-07-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20

Citation : (1997) 2 CALLT 454

Hon'ble Judges : Samir Kumar Mookherjee, Acting C.J.; Amitava Lala, J

Bench : Division Bench

Judgement

1. The appeal is treated as on today's list. There will be an order in terms of prayer (a).
2. This is an appeal directed against an order of the learned single Judge of the writ court passed upon a writ application, preferred by the present appellants. The order is dated 29th November, 1996 and by the said order the learned single Judge disposed of the writ application by granting opportunity to the parties to mention before the appropriate court for expeditious disposal of an alleged execution case or for sale of the property, as proposed by the company, for the purpose of liquidating the dues of the Bank under the decree.
3. The admitted position is that there was a consent decree, passed in a suit, instituted by Mr. Jayanta Banerjee's client, the Bank, against Mr. P.C. Sen's clients and in that consent decree, a Receiver was appointed for certain purposes but such consent decree, admittedly, had not been put into execution and as such there was no existence of any execution case arising out of the said decree. Notwithstanding such factual position, the learned trial Judge proceeded upon a misconceived premise about the existence of such an execution case. Secondly, the other error, on the part of the learned trial Judge, which crept in was a wrong

assumption that the direction of the appellate authority for Industrial and Financial Reconstruction was for framing of a scheme, which actually was a direction for winding up of the company. On the basis of such direction a winding up proceeding was also started, which ended against the appellants and from such an order of the winding up, an appeal is pending before the appropriate appeal court. The learned trial Judge, in passing the said order, appears to have intended to dispose of the writ application, overlooking that the decision therein will finalise the recommendation for winding up in question with its consequential bearing on the decision in the proceeding, pending before the Company Appeal Court.

4. Subsequent to the pronouncement of the impugned order, the judgment of the apex court has been published in (1997) 89 Company Cases 609 wherein a Division Bench Judgment of the Madras High Court reported in the same volume at page 600 has been affirmed.

5. The ratio of the decision of the apex court is two-fold. In the first place, it has held that Section 20 of the Sick Industrial Companies (special provisions) Act, 1985 is *intra vires*, and in the second place, it has laid down that it is not obligatory on the High Court to order winding up of the Sick Industrial Company even when it receives an opinion from the BIFR in this regard without examining the correctness of such opinion, on hearing the concerned parties.

6. In view of the aforesaid two-fold ratio, promulgated by the apex court, it is no longer open to Mr. Sen's clients to urge the *ultra vires* nature of Section 20 of the Act and Mr. Sen in his usual fairness has conceded to the correctness of our aforesaid conclusion. So far as the second fold of the Judgment of the apex court is concerned, the same, on being given effect to and implemented, permits the Company Appeal Court to examine the correctness of the recommendation of the BIFR on the merits, after hearing the concerned parties, with the result that to allow the Writ Court to go into the merits of that question, on a further remand by us, in view of the factual flaws which crept in the judgment of the learned trial Judge, will be to open up a scope of conflict between the two judicial Authorities and without any actual utility.

7. In that view of the matter, we propose to dispose of the appeal by setting aside the order of the learned trial Judge and also dispose of the writ petition by referring the parties to the Company Appeal Court before which the appeal arising out of the winding up order of the Company Appeal Court is pending to canvas all their respective points, relating to the recommendation of the BIFR for adjudication of the propriety of such recommendation on merit and according to law. Since, the apex court has given an opportunity to all the concerned parties to make their submissions before the appropriate Judicial Forum and since Mr. J. Banerjee's client is not a party in the writ proceeding, we add it as a party with consent of Mr. Sen so that it may get an opportunity also to ventilate its view point before the Company Appeal Court.

8. We keep it on record that Mr. Sen's clients undertake to make an appropriate prayer for addition of Mr. J. Banerjee's client before the company appeal court on the basis of this judgment of ours.

9. Before parting with the case, we reiterate that we have not entered into the merits of any of the contentions, relating to or concerning the recommendation of the BIFR, except the intra vires nature of Section 20 of the Sick Industrial Companies (special provisions) Act, 1985 and as such all contentions remain open.

10. Since, the respondents including Mr. Jayanta Banerjee's client could not file any affidavit-in-opposition before the learned trial Judge, we keep on record, on instruction from the Counsel, that the respondents have disputed the truth and correctness of the averments made in the application before this court.

11. Mr. Sen's Advocate-on-record is to cause service of all relevant papers on Mr. J. Banerjee's client.

12. Since, the appeal has been disposed of, the application becomes infructuous and the same is also disposed of as such.

There will be no order as to costs.

All parties are to act on a xerox signed copy of this Dictated Order on the usual undertaking.