

(1999) 08 CAL CK 0031

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction Appeal No. 480 of 1994 and C.P. No. 281 of 1993

Eastern Paper Mills Limited

APPELLANT

Vs

The Board for Industrial and Financial Reconstruction (BIFR)
and Others

RESPONDENT

Date of Decision : 09-08-1999

Acts Referred:

Companies (Court) Rules, 1959 — Rule 103, 95, 96
Companies Act, 1956 — Section 433, 433(1), 442, 447
Constitution of India, 1950 — Article 14
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 10(1), 15(1), 15(1), 17(3), 18

Citation : (2000) 1 CALLT 69 : (2002) 109 CompCas 1065

Hon'ble Judges : Satyabrata Sinha, J; Mohammad Habeeb Shams Ansari, J

Bench : Division Bench

Judgement

M.H.S. Ansari, J.—The appellant herein is the "Company" which has been directed to be wound up by an order dated 3.8.1994 of the learned Company Judge in Company Petition No. 281 of 1993. Aggrieved thereby the instant appeal has been preferred.

2. After having heard the learned counsel for either parties we are of the opinion that it is not necessary to deal with various contentions urged before the court by the learned counsel for either parties and only certain relevant facts need to be noted.

They are :--the company on or about 17.1.89 made reference before the Board for Industrial and Financial Reconstruction (for short BIFR.) u/s 15(1) of the Sick Industrial Companies (Special Provision) Act, 1985 (hereinafter referred to as "the Act"). After an enquiry the BIFR on 11.12.1989 u/s 10(1) of the Act came to the conclusion that the company has become a Sick Industrial Company within the meaning of the provision of section 3(1)(b) of the Act. It was, therefore, deemed fit, by BIFR to explore the possibility of reviving the company. In

exercise of the power conferred on BIFR u/s 17(3) of the Act, IRBI was appointed as an operating agency to examine the viability and prepare a scheme for revival/rehabilitation of the company in terms of section 18 of the Act. Ultimately by his order dated 12.11.1991 BIFR recorded its opinion that it is just and necessary that the company should be wound up in terms of section 20 of the Act.

3. Aggrieved by the said order the company preferred an appeal before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) which was disposed of by an order dated 26th August, 1993 dismissing the appeal filed by the company as also Appeal No. 114 of 1991 filed by the Eastern Paper Mill Ltd. Workers Union, Calcutta on the ground that there appears to be no possibility for rehabilitation of the company.

4. The orders passed by AAIFR in two appeals being Appeal Nos. 113 and 114 of 1991 were forwarded to the Calcutta High Court and the learned Company Judge after noting that the writ petition filed by the Company against the order passed by BIFR had been dismissed and appeal, preferred, therefrom, was also disposed of by an order dated 20th May, 1994 directed that the company is liable to be wound up on the ground that it is just and equitable to do so. An order for winding up was accordingly passed and official liquidator was directed to take over possession of the estates of the company.

5. Aggrieved against the said order the instant appeal has been preferred.

6. Main contention urged on behalf of the appellant-company by the learned Additional Solicitor General is that the impugned order suffers from illegality and procedural irregularities. It is the submission of the learned Additional Solicitor General that the company could not have been directed to be wound up by the order under appeal without affording the company, its shareholders, creditors and contributors and without an advertisement having been published before passing an order for winding up of the company. It was further contended by the learned Additional Solicitor General relying upon the Judgments of the Madras High Court in J.M. Malhotra v. Union of India & Ors. reported in 1997 (89) Comp Cas 600 that even though the opinion submitted by the BIFR/AAIFR formed the basis for winding up of the Sick Industrial Company by the High Court it was nevertheless the duty of the court to have considered the correctness of the opinion so submitted by the Board and decide as to whether the company was required to be wound up. In the absence of such consideration by the court, it was contended that the order under appeal is not sustainable.

7. The only question, therefore, for consideration is whether on the opinion of the BIFR/AAIFR it was open to the learned Company Judge to order the winding up of the company even before any direction was made by the learned Company Judge as to the advertisement postulated under Rule 96 and herein envisaged thereafter under the same Rule 96.

8. A somewhat similar question came up for adjudication before a Division Bench of this court in which one of us (Ansari, J) was a party, though in a different

context, (*Khaitan Paper Machine Ltd. v. M/s. Wires and Fabrics (SA) Ltd.* (A.C.O. No. 16/99, C.A. No.361/99, C.P. No. 432/97 disposed of on 10.2.99). In that case the winding up of order was made on a petition filed by a petitioning creditor on the ground that the company therein was unable to pay its just debts. The question was whether the company has a right to file any affidavit opposing the winding up even though it may not have disputed the debt on which the winding up petition was filed by a creditor.

9. The Division Bench in that case considered the provisions contained in the Companies Act, the Company Court Rules as also the practice developed in this court in dealing with petitions for winding up.

10. As far as the provisions of the Act are concerned, they envisage an application for winding up being presented u/s 433 on any of the grounds mentioned therein. Section 433 however, itself provides that the company may be wound up by the court if the several grounds are established. In other words even if the grounds are established. It is still open to the court to decide against winding up.

11. The Company Court Rules (referred to as the Rules) envisages (i) the presentation of an application for winding up in the manner prescribed in Rule 95; (ii) the admission of the winding up after such presentation under Rule 96; and (iii) the direction as to advertisement also under Rule 96. These are three distinct steps. Rule 96 envisages a fourth step, namely, the hearing.

12. The form of the advertisement is set out in Form No. 48 to the Rules. The advertisement is required to state not only the fact of the presentation of the petition for winding up but also the date when the petition was directed to be heard. The creditors, contributors or other persons supporting or opposing the winding up order are required, in terms of the advertisement, to signify their Intention five days before the date fixed for hearing. It is clear, therefore, that the hearing succeeds the advertisement. The company also has a right to file an affidavit opposing the winding up under Rule 103 of the Company Court Rules. The company's affidavit is to be filed not less than 5 days before the hearing of the petition.

13. Rule 96 gives the discretion to the court if it thinks fit to direct notice to be given to the company before giving directions for advertisement. It has been held that the company does not have a right to be heard before advertisement as it has a right to be heard before the final order of winding up is passed. It is upto the court whether the company should be heard or not. (*Vide Extrusion Process Private Limited. v. Jibabhai Margabhai Patel Ltd.*); XXXVI Company Cases 60.

14. With respect to the practice obtaining in this High Court, the Division Bench observed :

"As far as this court is concerned a practice has developed by which a company is invariably given notice of a winding up petition. An opportunity is given to the

company to file an affidavit in answer to the winding up petition. The petitioner is also given liberty to file an affidavit-in-reply. All this takes place before the admission stage. There is a full scale hearing. After the court comes to a conclusion that the ground made out by the petitioner falls within the grounds as mentioned in section 433, the court then directs admission. If the petition is admitted upon the inability of the company to pay its debts, the court normally gives an opportunity to the company to pay off the debt of the petitioning creditor as determined by the court and directs advertisements only in default of such payment."

15. After the advertisements are published, the matter becomes a representative one and all creditors and contributories or other persons may either oppose and/or support the winding up when the matter is taken up for hearing u/s 443. Even at this stage the court is not bound to wind up the company. Section 443(1) provides :

"Section 443(1) : On hearing a winding up petition, the court may :-

- (a) dismiss it, with or without cost; or
- (b) adjourn the hearing conditionally or unconditionally ; or
- (c) make any interim order that it thinks fit; or
- (d) make an order for winding up the company with or without costs, or any other order that it thinks fit;"

16. The court may exercise any of these alternative powers. The observation of the Division Bench of this court in John Herbert and Co. Pvt. Ltd. Vs. Pranay Kumar Dutta, , that the court forms a prima facie view at the time of the admission must mean a prima facie view as to whether the company should be wound up u/s 443. It cannot be said, having regard to the practice of this court, that the court, forms a prima facie view as to the ground on which the winding up petition is admitted. Thus if a petitioning creditor files a winding up petition on the ground that the company is unable to pay its debts and the company opposes the application by filing an affidavit seeking to establish before the court that the debt was a disputed one and the court comes to a conclusion that the company's dispute is not a bonafide one, it must be held that the finding as to the existence of the debt by the court is final one. However, it does not allow from this, having regard to section 433 and 443, that the company must be wound up.

17. If the finding of the debt were sufficient to establish the claim of winding up, there would have been no need to advertise and the court could immediately and directly pass an order for winding up of the Company. Clearly the court has to take into consideration matter over and above the actual inability of the company to pay that particular debt on the basis of which the company petition may have been admitted. This is also the principle which is recognised in section 442 which allows an application to be made for stay of the winding up proceedings between

the presentation of a winding up and the passing of a winding up order. The views of the creditors or contributories or other persons are also of moment otherwise the same would not have been called for by advertisement before directing the company to be wound up. Furthermore, it is clear that events may have taken place which would be material to the winding up of the company between the date of the admission and direction for advertisement and the date of hearing. This principle has been approved in the case of *Madhusudan Govindadas & Co. v. Madhu Wollen Industries Private Ltd.* (1972) 42 Comp Cas 125 at page 132 where it was held;

"The wishes of the shareholders are also considered, though, perhaps the court may attach greater weight to the views of the creditors. The law on this point is stated in *Palmar's Company Law*, 21st edition, page 742, as follows :

This right to a winding-up order is, however, qualified by another rule, viz, that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order."

18. This was also noticed by M.V. Shah, J. (As His Lordship then was) in re : *Rishi Enterprises* : (1992) 73 Comp Cas 271 when after considering the various authorities it was held that despite a finding of the court that the company was indebted u/s 433(e) of the Act, a company would not be directed to be wound up, where for example a company is a running company, employing about 500 employees who are paid their wages regularly and which does business of crores of rupees every year; it was emphasised that it is the duty of the court to seek the revival rather than the death of the company. We respectfully adopt this statement of the law.

19. A Division Bench of the Gujarat High Court has also taken a similar view in *New Swadeshi Mills, Ahmedabad, Ltd. v. Dye-Chem Corporation* (1986) 59 Comp Cas 183 at 186.

"The importance of the views of the creditors and contributories specially cannot be understated keeping in view the fact that u/s 447 a winding up order ensures to the benefit of all creditors and contributories u/s 447 of the Act."

20. In the instant case, as noticed-above, though 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. Instead an order of winding up has been passed, based solely upon the opinion of BIFR/AAIFT. There has, thus, been breach of the provisions of Rule 96 of the Company Court Rules.

21. As to the question whether on mere opinion of the BIFR/AAIFR the company could have been wound up, the Judgment in *J.M. Malhotra v. Union of India* (supra) relied upon by the learned Additional Solicitor General is relevant as also the observations made therein. In that case, the question of constitutional vires of section 20 of the Act was the subject matter of decision. The contention was

that section 20 of the Act is violative of Article 14 of the Constitution. While upholding the constitutional validity of section 20 of the Act. It was held ;-

"Therefore, it is not possible to hold that even though the opinion submitted by the Board forms the basis for directing the winding up of the sick industrial company by the High Court, the High Court is precluded from examining the correctness of such opinion. Therefore, it cannot be held that it is obligatory on the High Court to order winding up of the sick industrial company once it receives an opinion from the Board in this regard without examining the correctness of such opinion, on hearing the concerned parties. However, normally, such opinion being one tendered by the Board consisting of experts acting judicially will have a greater weight in deciding the question as to proceeding with the winding up of the Sick Industrial Company. Such opinion of the Board cannot lightly be brushed aside. Even otherwise, it is a jurisdiction conferred upon the High Courts under the Companies Act."

22. The Supreme Court in its Judgment reported at page 609 of the very same volume of 89 Company Cases (V.R. Ramaraju v. Union of India & Ors.) While upholding the High Court's view which had rejected the challenge to the constitutional validity of sub-section (2) of section 20 of the Act observed as follows :-

"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 determine the question of winding up. So read, sub-section (2) does not suffer from any infirmity. This in substance is the view taken by the High Court in the impugned order."

23. In the light of the observations of the Judgment of the Supreme Court extracted (supra) the order under appeal cannot be sustained as there has been no determination of the question whether it was just and equitable to wind up the company. The learned Judge construed the opinion of BIFR/AAIFR as conclusive.

24. As observed by the Madras High Court in its Judgment in J.M. Malhotra's case that when once a report is submitted by BIFR/AAIFR, the same would become the basis for a proceeding to be continued against the Sick Industrial Company for winding up in accordance with the provision of the Companies Act. Sub-section (2) of the section 20 specifically states that the High Court shall, on the basis of the opinion of the Board order winding up of a Sick Industrial Company and may proceed or cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act. Therefore, it is clear that the opinion furnished by BIFR/AAIFR can only form a basis for the proceedings to be continued against the sick industrial company for the purpose of winding up and the further proceedings are to be conducted in accordance with the provisions contained in the Companies Act for winding up of

the company.

25. Upon receipt of the opinion of the BIFR/AAIFR the learned Company Judge in accordance with the practice obtaining in this High Court, rightly in our opinion, gave notice to the company and also an opportunity of hearing was afforded to the company after it had filed its affidavit-in-opposition. The learned Company Judge ought to have thereafter formed the prima facie opinion and directed admission of the petition and advertisement thereof in newspapers. It is only after advertisements are published, as held by the Division Bench in *Khaitan Paper Machine Ltd.* (supra) the matter becomes a representative one. Even at that stage the court was not bound to wind up of the company as it did.

26. For the reasons aforesaid we set aside the order under appeal dated 3.8.94 in Company Petition No, 281 of 1993 and direct that the same be construed as prima facie opinion of the court for admission of the company petition.

Let the matter now be placed before the learned Judge having appropriate determination for appropriate directions as to advertisement and for affidavits. All parties including the appellants before us shall be at liberty to file their affidavit-in-opposition taking up such pleas and contentions as may be open to them in law and as advised. Liberty to the parties to apply before the Company Judge for appropriate interim reliefs.

S.B. Sinha, ACJ.

27. I agree.

28. Appeal disposed of