
(2004) 01 KAR CK 0049
In the Karnataka High Court
Case No : OSA No's. 67, 68 and 70 of 2003

EHG Elektroholding GMBH and Others	APPELLANT
Vs	
NGEF Limited and Others	RESPONDENT

Date of Decision : 05-01-2004

Acts Referred:

Companies Act, 1956 — Section 441
Company Court Rules, 1959 — Rule 6, 7
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20 (1), 20 (2), 20 (4)

Citation : (2005) 1 BC 407 : (2004) 122 CompCas 447 : (2004) 4 CompLJ 556 : (2004) ILR (Kar) 1155 : (2004) 2 KCCR 1139

Hon'ble Judges : N.K. Jain, C.J.;V.G. Sabhahit, J

Bench : Division Bench

Advocate : R.V.S. Naik, for King and Partridge, Vijayashankar for B.C. Prabhakar, Varadaraj R. Havaladar and M.V. Parameshwarappa, for the Appellant; A.N. Jayaram, A.G. for State and Udaya Holla, for R-2, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Jain, C.J.—These three original side appeals arise out of the order passed by the learned Company Judge on 8.10.2003 in Company Application No. 771/2003 in Company Petition No. 154/2002.

2. The relevant facts as stated are:

New Government Electric Factory Limited ("NGEF" for short), a Government Company, called for tenders. The tenders were called for under advertisement dated 15.9.2001, proposing to sell its surplus assets which included various pieces of land, in two parts. The dispute pertains to 5th item of Part-II, viz., 40 acres and 18 guntas of freehold land, off Madras Road, near Byappanahalli, Railway Marshalling Yard, Bangalore (6 Km from M.G. Road, Bangalore). In pursuance of the Global tenders called for, number of applicants submitted the tender in respect of 40.45 acres of land and M/s. Chandra Developers Pvt. Ltd.

submitted its tender offering Rs. 125 per sq.ft. After negotiation and deemed completion of the tender formalities, the said applicant agreed to pay the price of Rs. 278 per sq.ft, and gave acceptance letter dated 11.02.2002. The Board approved the same as per the decision of the Board meeting held on 25.02.2002. Sanction of rehabilitation scheme was ordered on 26.7.1996 in case No. 602/94. Since the Company - NGEF was in financial difficulties and was unable to pay the debts of its creditors, proceedings were initiated before the Board for Industrial and Financial Reconstruction (for short "BIFR"). The BIFR by a detailed order has held that the NGEF is not likely to make its net worth exceed its accumulated losses within a reasonable time while meeting all its financial obligations and that the Company as a result thereof is not likely to become viable in future and hence it is just, equitable and in public interest and it should be wound up u/s 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short the SIC Act) and the opinion was forwarded to this Court along with copies of all earlier orders/proceedings, for necessary action in accordance with law vide order dated 2.8.2002. Therefore, the Company Petition No. 154/2002 came to be registered.

In the said petition, Company Application No. 771/2003 was filed by M/s. Chandra Developers Pvt. Ltd. under Rules 6 and 7 of the Company Court Rules paying to direct NGEF to execute a sale deed selling the property measuring 40 acres 18 guntas (40.45 acres) of freehold land at Madras Road, near Byappanahalli Railway Marshalling Yard, Bangalore. It is also stated that under similar circumstances advertisements have been issued by the NGEF in respect of several other properties and pursuant to offers received, the NGEF has executed sale deeds, and that similarly, even after the matter was referred to BIFR, the NGEF has executed agreements to sell in favour of the other applicants and under the circumstances, it is necessary to direct the NGEF to execute a sale deed in favour of the applicant herein and no injury will be caused to the NGEF. The said application was opposed by the NGEF as also the secured creditors and EHG Elektroholding GmbH which is also holding share in the said Company.

The learned Company Judge after considering the contentions of the learned Counsel appearing for the parties held that the BIFR while forwarding the recommendation for winding up of the Company vide order dated 2.8.2002 has observed that the Company would have to seek further directions in the matter from the concerned High Court, and therefore the application before the High Court was maintainable and permitted the sale. It was further ordered that sale proceedings shall be deposited before this Court and disbursement shall be as per the final order in the Company Petition No. 154/2002.

3. Being aggrieved by the said order, the NGEF Ltd., has preferred O.S.A.NO. 68/2003, EHG Elektroholding GmbH, has filed OSA No. 67/2003 and secured creditor - State Bank of Mysore has filed OSA. 70/2003.

4. The cases arise out of a common order with an identical question. As agreed, they are heard together finally at admission stage.

5. Sri Vijayashankar, learned Senior Counsel appearing for NGEF Ltd - appellant in OSA No. 68/2003 submitted that the acceptance of the tender of the applicant - M/s. Chandra Developers Pvt. Ltd., was subject to approval by the Government, the Government had not approved the same. Learned Senior Counsel submits that this is apparent from letter dated 18.9.2003 written by the Government to the NGEF directing it to oppose the application, and therefore, the learned Company Judge erred in holding that there was a concluded contract, and granting permission was illegal, and the order is liable to be set aside.

6. Sri Varadaraj R. Havaladar, learned Counsel appearing for the secured creditor - State Bank of Mysore - the appellant in OSA No. 70/2003 submitted that the appellant was not aware of the sale, which has been held behind his back. It is submitted that the learned Single Judge erred in holding that there was a concluded contract and failed to note that the price offered by respondent No. 1 - M/s. Chandra Developers Pvt. Ltd. is also inadequate, and that the grant of permission would affect the vested rights of this appellant and other secured creditors. He also submits that the appellant has got share in the NGEF, and unless there is an order of winding up in view of the provisions of Section 20 of SIC Act, the BIFR would be having control over the properties of the Company and only after a winding up order is passed the Company Court would get jurisdiction to permit sale, and thereof the impugned order passed by the learned company Judge cannot be sustained, as it is in violation of the Articles of Association. He has relied upon the provisions of Section 20 of SIC Act and the decision of this Court in BPL LTD. v. IMTT SYSTEMS (KAR.) LTD.

7. Sri R.V.S. Naik, learned Counsel for the appellant - EHG Elektroholding GmbH, in OSA 67/2003, while reiterating the argument of Sri Vijayashankar, learned Counsel, submitted that the learned Company Judge did not appreciate the decision in BPL Ltd.'s case (supra) in proper perspective and erred in relying upon the decision in USHA R. SHETTY AND ORS. v. RADEESH RUBBER PVT. LTD., and also failed to note that the State Government had not approved sale, and therefore, the impugned order dated 8.10.2003 granting permission is liable to be set aside as it is in violation of Articles of Association.

8. Sri Udaya Holla, learned Counsel appearing for M/s. Chandra Developers Pvt. Ltd. submitted that it is wrong to say that the appellant in OSA No. 70/2003 was not aware of the sale, which has been effected by public auction and rather it supported the winding up order, and further the points raised in these appeals were never specifically agitated before the learned Company Judge which is also apparent from the affidavit dated 10.11.2003 that the alleged important condition stipulated in the Board resolution has been omitted. Therefore, the same cannot be permitted to be raised at the appellate stage. Otherwise, also this argument is not helpful in the facts of the given case. Mr. Udaya Holla further submits that pending rehabilitation scheme, the BIFR recommended for winding up of the company vide order dated 2.8.2002 and has directed the parties to approach the High Court regarding sale of properties and application has been

filed before the Company. Once recommendation is made for winding up of the Company, there is commencement of proceedings and therefore, the permission granted by the learned Company Judge is justified. He submits that the point regarding adequacy of compensation cannot be gone into. More so, the property has been valued by Tata Consultancy at appropriate time, and that apart the same will not affect the right of the secured creditors. This Court cannot go into the point at this stage when the Board has approved the proposed sale on 25.2.2002. He submits that the applicability of the Articles of Association does not arise. Neither the documents/Articles of Association were filed nor the point was raised. More so, the winding up proceedings had commenced and the matter was remitted to this Court for a direction. It is also seen that the Government has not questioned the approval of sale by the Board at the relevant time, nor it could have raised, which is apparent from the letter dated 7.3.2002/2.9.2002 written with reference to letter dated 8.8.2002, stating that the NGEF is not authorised to dispose of its assets without the approval of the High Court of Karnataka. In other words, it would mean that the Government will abide by order that would be passed by the Court. The permission has been granted. Under the circumstances, the argument that the order passed by the learned Company Judge is without jurisdiction for want of consent by the Government is not helpful. The appellants cannot take advantage of the alleged letter dated 18.9.2003 asking the NGEF to oppose, that on that basis the grant of permission cannot be interfered with. The learned Counsel submits that NGEF has executed sale deed on 17.1.2002 in favour of one M/s. Salarpuria Housing Society under similar circumstances. These appeals have been filed only to deny the fruits of the sale, which was accepted on 11.2.2002 and approved by the Board on 25.2.2002, and when the applicant has already deposited 10% substantial amount of Rs. 4,74,83,656 on 23.10.2003. Therefore, no injury will be caused to the NGEF. The other application with the additional documents cannot be considered at this stage. He also submits that permission, sought for by the appellant in OSA No. 70/ 03, cannot be granted. The appeal is not maintainable and is liable to be dismissed. He submitted that the decision in the case of BPL Ltd. (Supra) relied upon by the learned Counsel appearing for the secured creditor is in fact helpful to him to contend that the Court has got jurisdiction to grant permission.

9. The learned Advocate General submitted that global tenders were called for and the applicant before the learned Company Judge had submitted a tender, after negotiation price was accepted and recommendation had also been made by the NGEF for confirmation of the acceptance of tender of the applicant. Since the matter went to the BIFR, the BIFR directed the Company to seek further directions from the concerned High Court. The learned Advocate General submits that the point whether the applicant has only to approach the BIFR u/s 20(4) of the Act or can move this Court, has been taken note of by the learned Company Judge and thereafter after hearing the parties the required permission has been accorded.

10. We have given anxious consideration to the contentions of the learned Counsel appearing for the parties. It is clear from the perusal of the material on record that there is no dispute that tenders were called for disposal of surplus assets of NGEF by paper publication dated 5.9.2001 and the bid of the applicant before the learned Company Judge for purchase of 40.45 acres at the rate of Rs. 278/- per sq. ft. was accepted in the meeting of the Board of Directors of the company. It is seen that in pursuance of the advertisement dated 5.9.2001 the bid was accepted on 11.2.2002 and the Board of Directors approved the same in its meeting held on 25.2.2002. It was approved by the Board. The company sought for permission to sell the assets so as to generate funds to discharge the liabilities of the secured creditors, employees and other creditors, as the matter was pending before the BIFR, permission was necessary and the BIFR instead of granting permission, recommended for winding up of the company vide order dated 2.8.2002 u/s 20(1) of the Act and further recommended to the parties to move Company Court for permission to sell its assets. On that basis this Company petition was registered in Co.P. No. 154/2002. Under the circumstances, it is clear from the provision of Section 20(4) of the SIC Act and the pendency of the winding up proceedings referred above, as stated, the learned Company Judge has jurisdiction to consider the application seeking permission for sale. The question of sending back the matter to the BIFR for permission to sell would not arise nor approval of the Government was necessary in the facts of the given case. As stated, the BIFR observed that the company being a sick unit, further direction in the matter from the concerned High Court is required. The learned Company Judge after hearing the parties granted permission to sell, as such the same cannot be interfered with.

11. The Division Bench of this Court in BPL LTD. v. IMTT SYSTEMS (KAR) LTD. (supra) held as follows:

"The Scheme of SICs Act, as contained in Sections 22, 22A, 20 and 32 of that makes it clear that from the date of commencement of an inquiry in regard to any reference received u/s 15, till passing of an order of winding up by the High Court u/s 20(2) of the SICs Act, BIFR retains absolute control over the affairs of the Company and can either prevent any sale or permit any sale and the sick industrial Company is entirely governed by the provisions of SICs Act. On the other hand, once an order of winding up is made by the High Court u/s 20(2) of SICs Act, acting on the opinion of BIFR u/s 20(1), the control and jurisdiction over the Company, its affairs and assets passes over to the High Court and BIFR ceased to have any power to pass any orders or give any directions."

12. A reference can also be made to the decision in V.R. RAMAJAU v. UNION OF INDIA AND ORS., wherein their Lordships held that the High Court has to take into account the opinion of BIFR in determining the question of winding up and observed as under:

" Sub-Section (2) of Section 20 of the Sick Industrial companies (special provisions) Act, 1985, 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 for Industrial and Financial Reconstruction 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."

13. It is also clear from the provisions of Section 441 of the Companies Act that there will be commencement of winding up proceedings on the Presentation of petition for winding up. As stated, in this case the winding up of NGEF starts from 2.8.2002 on the recommendation of BIFR u/s 20(1) of the SIC Act. The learned Company Judge of this Court has taken note of the recommendation of BIFR and on consideration granted permission.

14. It is also clear from the perusal of the order passed by the learned Company Judge that the only point that was argued before him was that the application had to be filed before the BIFR and not before the learned Company Judge. The learned Company Judge, having regard to the fact situation of the case has held that the matter need not be referred back to the BIFR as the BIFR itself had directed the parties to obtain necessary direction from this Court. Therefore, the argument that grant of permission for sale is bad for want of approval of Government, it is not acceptable as per the material and facts of the given case.

15. The other question about the adequacy of consideration was not canvassed before the learned Company Judge and could not have been canvassed when the application for seeking permission against the acceptance of bid by calling for global tender had not been challenged. It is also seen that the appeal against winding up order has been dismissed. A perusal of Section 20(4) of SIC Act specifically empowers the BIFR, notwithstanding the provisions for winding up u/s 20(2) of the Act. Any sale in pursuance of a direction by the BIFR u/s 20(4) of SIC Act before an order of winding up u/s 20(2) of SIC Act is valid. Considering the facts of the given case, the direction given by the learned Company Judge cannot be said to be erroneous or illegal so as to call for any interference.

16. No doubt, the secured creditors have priority. A secured creditor can stand outside the winding up and realise his security without intervention of the Court, by effecting the sale of the mortgaged property, by private treaty or public auction, as held by the Supreme Court (in *M.K. RANGANATHAN v. GOVERNMENT OF MADRAS*). In the instant case, in the absence of any application made by them either before the BIFR or before the learned Company Judge, the permission so accorded cannot be held to be bad. It is also not acceptable that the appellant-State Bank of Mysore had no knowledge. The Division Bench in *BPL Ltd* case (supra), with regard to direction of the Board for sale of assets, observed that "the Company Court does not sit in appeal over the orders of BIFR nor exercises power under Articles 226 and 227 of the Constitution. Therefore, when the BIFR has approved the sale, the question of Company Court re-examining the correctness of the price or the procedure adopted for sale/or holding the sale to be invalid or ordering resale does not arise." The Division

Bench also observed that there is no inconsistency between the provisions of SIC Act and the Companies Act. The Division Bench further held in that case that the sale of assets of Company by secured creditor as per direction of the Board, prior to date of winding up order, is not void for want of leave of the Court and also that there is no question of obtaining any leave or permission of this Court. The above case is not helpful to the appellants in the facts of the present case. It has also come on record that the State Bank of Mysore-secured creditor supports the passing of winding up order. It is stated by them that they will stand outside the pending proceedings and they will take steps for recovery of their dues through an appropriate forum, in accordance with law. The appellant - State Bank of Mysore can do so, if so advised, as per law. Under the circumstances, the order of the learned Company Judge, dated 8.10.2003, needs no interference in OSA No. 70/2003. As stated, in pursuance of the direction of the BIFR dated 2.8.2002, the permission granted by the learned Company Judge on 8.10.2003 calls for no interference in other appeals i.e., OSA Nos. 67/2003 and 68/2003 also.

In view of the above discussions, we find no error or illegality in the detailed order passed by the learned Company Judge so as to call for any interference in these appeals. Accordingly, OSA. Nos. 67/2003, 68/2003 and 70/2003 are dismissed with no order as to costs.