
(2004) 07 SHI CK 0006
In the High Court Of Himachal Pradesh
Case No : Company Appeal No. 5 of 2004

Gountermann Peipers (India) Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-07-2004

Acts Referred:

Companies Act, 1956 — Section 100, 101, 102, 103, 391
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 16, 17, 22, 22(1)

Citation : (2005) 126 CompCas 489

Hon'ble Judges : V.K. Gupta, C.J; M.R. Verma, J

Bench : Division Bench

Advocate : Prathap Chatterjee, Rajan Deb, Gautham Mitra and Sandeep Kaushik, for the Appellant; N.K. Thakur, for Respondent No. 1, R.M. Suri, Rohit Suri and Atul Jhingan for Respondent No. 2, Deepak Gupta and Jagdish Vats for Respondent No. 3 and B.C. Negi, for the Respondent

Final Decision : Allowed

Judgement

V.K. Gupta C.J.

1. This appeal u/s 391(7) of the Companies Act, 1956, is directed against the judgment dated June 10, 2004, passed by a learned single judge of this court in Company Petition No. 13 of 2003 whereby, invoking Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 ("1985 Act", for short), the learned single judge ordered that the proceedings in Company Petition No. 13 of 2003 (filed under Sections 391 to 394 read with Section 81(1A) and Sections 100 to 103 of the Companies Act, 1956) would remain in abeyance till the Board for Industrial and Financial Reconstruction ("BIFR" for short) decides the reference pending before it which had been made by the first appellant-company u/s 15 of the 1985 Act.

2. The appellants had filed the aforesaid petition under Sections 391 to 394, read with Section 81(1A) and Sections 100 to 103 of the Companies Act, 1956, being

Company Petition No. 13 of 2003 in this court on November 17, 2003, for obtaining sanction and approval of a scheme of arrangement between both the appellant-companies and the shareholders and creditors of these companies. Various prayers were made in the aforesaid company petition of the appellants with which we are not concerned in this appeal. The object of the aforesaid company petition, however, was to obtain sanction of this court to the aforesaid arrangement between the two appellant-companies and their shareholders and creditors whereby and whereunder the textile division of appellant No. 1-company together with all its assets, liabilities and all rights and claims relating thereto was proposed to be transferred to and be vested in appellant No. 2-company on the terms and conditions which had been enumerated in the said scheme of arrangement. The salient features of the proposed scheme of arrangement between both the appellant-companies and their shareholders and creditors have been spelt out in detail in the aforesaid Company Petition No. 13 of 2003, particularly in para. 2 of the said petition and in other related paras.

3. Both the appellants had originally filed Company Petition No. 12 of 2003 in this court u/s 391(1) of the Companies Act, 1956, praying therein, inter alia, for permission to convene the meetings of the shareholders of the companies for consideration and approval of scheme of arrangement between the two appellant-companies and for consideration of other ancillary matters. The purpose and object of the scheme was to enable the second appellant to undertake the business of the established undertaking which would result in an independent and optimum growth and development of the spinning mill business and Iron Steel Roller Division through two separate companies which would ultimately benefit both the companies, their shareholders, creditors, employees and all others concerned. In the aforesaid Company Petition No. 12 of 2003 it was submitted that the scheme would facilitate the rationalisation of the financial structure of both the companies. It was also averred that the two projects would be implemented effectively and that the management of the two projects by the two separate companies would be convenient and advantageous, keeping in view the future independent management set up with focus on "stipulation". The demerger of the companies would result in better administration, operational organisation and efficiency with optimum utilisation of all the resources.

4. Taking into consideration the aforesaid averments in Company Petition No. 12 of 2003, the learned single judge of this court directed the company to hold the meeting of the secured and unsecured creditors and shareholders on November 16, 2003, at the registered office of the first appellant at Bharatgarh Road, Nalagarh, District Solan, for consideration of the aforesaid scheme of arrangement as had been proposed by the company.

5. Mr. Naresh Sood, Advocate-Chairman, Mr. Sunil Mohan Goel, Advocate-Alternate Chairman, Ms. Devyani Sharma, Advocate-Chairperson, Mr. Neeraj Gupta, Advocate-Chairman, Mr. Anish Garg, Advocate-Alternate Chairman, Mr. Ankush Dass Sood, Advocate-Chairman, Ms. Jyotika, Advocate-Alternate

Chairman and Mr. Raman Sethi, Advocate-Alternate Chairman were appointed vide order dated October 17, 2003, passed by this court to hold a meeting of the creditors and submit their respective reports to the court along with the result of the meeting within seven days of the conclusion of the meeting. The reports were ordered to be duly supported by the respective affidavits of the chairman/alternate chairman. The respective chairman accordingly held the meetings and submitted their reports to this court. As per the report submitted by Mr. Naresh Kumar Sood, Advocate-Chairman, as many as sixty two creditors of the first appellant-company, including secured creditors, namely, IDBI, IFCI, ICICI, Exim Bank, West Bengal Industrial Development Corporation, State Bank, Indore, Allahabad Bank and other unsecured creditors voted in favour of proposed modifications being adopted and for being carried into effect in furtherance of the scheme of arrangement. However, State Bank of India and Industrial Investment Bank of India, the secured creditors opposed the modified scheme of arrangement. The modified scheme of arrangement was prepared, adopted and carried into effect by more than three-fourths majority. Thereafter, the modified scheme dated November 16, 2003, was submitted before the court. The first and second appellant-companies accordingly thereafter filed the company petition for final sanction of the modified scheme.

6. As a consequence of the aforesaid developments, vide order passed on November 19, 2003, the appellants were directed to ensure the publication of the notice in a newspaper and to take other steps inviting, inter alia, objections. The learned single judge (company judge of this court) thereafter heard the matter on a few occasions. The order dated April 2, 2004, passed by the learned single judge reveals that the first appellant had in the meanwhile made a reference to the BIFR under the 1985 Act, in terms of Section 15 of the 1985 Act and upon the pending company petition coming up before him, in the light of the intervening development of the BIFR having been approached in terms of Section 15 of the 1985 Act, and the registration of reliefs in terms of Section 16 of the 1985 Act. The order dated April 2, 2004, passed by the learned single judge, however, was challenged by the appellants before a Division Bench of this court but the Division Bench while dismissing the appeal filed by the appellants remanded the matter for consideration by the learned single judge by observing that the learned single judge would, in the course of proceedings in Company Petition No. 13 of 2003 shall consider the applicability of Section 22 of the 1985 Act to the issues involved for adjudication in the said company petition.

7. It is in the aforesaid background that the learned single judge vide the impugned judgment dated June 10, 2004, has passed an order whereby proceedings in Company Petition No. 13 of 2003 have been directed to be kept in abeyance till the decision of the reference made by the first appellant to the BIFR u/s 15 of the 1985 Act.

8. Section 22(1) of the 1985 Act reads thus :

"Suspension of legal proceedings, contracts, etc.--(1) Where in respect of an

industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything, contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

9. In the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, a landlord of the premises had filed an eviction petition against a company u/s 21(1) of the Karnataka Rent Control Act, 1961, even though the BIFR had ordered the winding up of the tenant-company and the appeal filed by the tenant-company against the aforesaid winding up order of the BIFR had been reported by the Appellate Authority for Industrial and Financial Reconstruction. The tenant-company had challenged the aforesaid order in a writ petition filed by it in the Delhi High Court but in the meanwhile, the Karnataka High Court had allowed the winding up petition. In the backdrop of these facts, the tenant-company filed a petition u/s 22 of the 1985 Act in the aforesaid rent control proceedings but the said application filed u/s 22 of the 1985 Act was dismissed by the learned Additional Small Causes Judge by holding that Section 22 had no application inasmuch as the proceedings instituted by the landlord for recovery of possession of the premises of which a sick industrial company was a tenant are not included amongst the category of proceedings required to be suspended u/s 22(1) of the 1985 Act. After exhausting various hierarchies of appeals, the matter ultimately came up to the Supreme Court which, inter alia, framed a question as to whether proceedings instituted by the landlord for the eviction of a tenant, which was a sick company are required to be suspended u/s 22(1) of the 1985 Act. The following observations in the judgment are apposite and we quote (page 449) :

"11. Similarly, in Civil Appeal No. 2553 of 1991 this question has been raised by the appellant-company challenging the order of the learned single judge of the Karnataka High Court dated March 15, 1991, dismissing the revision petition u/s 50(1) of the Karnataka Rent Control Act. For the reasons aforementioned Section 22(1) of the Act cannot be invoked to assail the said order of the High Court on the ground that on the date of passing of the order of the High Court the matter was pending before the Appellate Authority. But in this appeal, the order allowing the eviction petition was passed by the XII Additional Small Causes Court on September 30, 1989, and at that time the matter under Sections 15 and 16 was pending before the Board. It is, therefore, necessary to consider the second

question about the applicability of Section 22(1) to eviction proceedings instituted by the landlord against the tenant who happens to be a sick company. In this regard, it may be mentioned that the following proceedings only are automatically suspended u/s 22(1) of the Act :

- (1) Proceedings for winding up of the sick industrial company ;
- (2) Proceedings for execution, distress or the like against the properties of the sick industrial company ; and
- (3) Proceedings for the appointment of a receiver."

10. Their Lordships further held (page 450) :

"Eviction proceedings initiated by a landlord against the tenant company would not fall in categories (1) and (3) referred to above. The question is whether they fall in category (2). It has been urged by learned counsel for the appellant-company that such proceedings fall in category (2) since they are proceedings against the property of the sick industrial company. The submission is that the leasehold right of the appellant-company in the premises leased out to it is property and since the eviction proceedings would result in the appellant-company being deprived of the said property, the said proceedings would be covered by category (2). We are unable to agree. The second category contemplates proceedings for execution, distress or the like against any other properties of the industrial company. The words "or the like" have to be construed with reference to the preceding words, namely, "for execution, distress" which means that the proceedings which are contemplated in this category are proceedings whereby recovery of dues is sought to be made by way of execution, distress or similar process against the property of the company. Proceedings for eviction instituted by a landlord against a tenant who happens to be a sick industrial company, cannot, in our opinion, be regarded as falling in this category."

11. Mr. R.M. Suri, learned counsel appearing for State Bank of India--objector respondent No. 2 has submitted that the order passed by the learned single judge is unassailable because Section 22(1) of the 1985 Act indeed had application to the facts and circumstances of this case and that the proceedings forming the subject-matter of Company Petition No. 13 of 2003 even though were not for the winding up of the company or for execution or distress but they did fall within the category of "like nature" as these were against the properties of industrial companies. We are unable to agree. As has been critically analysed and succinctly enumerated in the aforesaid judgment in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, even though proceedings for winding up of the industrial company or proceedings for the appointment of a receiver could be initiated by the company itself, proceedings for execution, distress or "the like nature" against the properties of the industrial company had to be initiated, only at the instance of someone other than the company because a company cannot initiate

proceedings against itself for execution, or for distress, etc., against the company or its properties.

12. Mr. B. C. Negi, learned counsel appearing for respondent No. 4 while drawing our attention to Section 22(1) of the 1985 Act, particularly the expression "no proceedings for the winding up of the industrial company" used therein has submitted that the present case should be considered covered by the aforesaid provision because Company Petition No. 13 of 2003 filed by the appellants in this court should be treated as being in the nature of a winding up petition and in support of this submission, Mr. Negi has relied upon Sub-section (2) of Section 392 of the Companies Act, 1956, which is contained in Chapter V of Part VI of the Companies Act, 1956. For ready reference, Sub-section (2) of Section 392 of the Companies Act is reproduced hereunder which reads thus :

"(2) If the court aforesaid is satisfied that a compromise or arrangement sanctioned u/s 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made u/s 433 of this Act."

13. A bare look at Sub-section (2) of Section 392 clearly leaves no room for any doubt that the order of winding up of a company, either on its own motion, or on the application of any party interested in the affairs of the company, can be passed by the court only after it is satisfied that a compromise or an arrangement sanctioned u/s 391 of the Act cannot be worked satisfactorily. The stage therefore, when an order of winding up of a company can be passed, u/s 392(2) of the Act comes only after an order of compromise or arrangement has been passed by the court in terms of Section 391 of the Act and after the passing of such an order, the court finds and is satisfied that the compromise order, the arrangement sanctioned by it cannot work satisfactorily. On this reasoning therefore, it can be held that an order in terms of Section 391 cannot be construed in the nature of a winding up order at all because, actually the order u/s 391 is entirely different than the winding up order and the question of winding up of a company can arise only after the arrangement or compromise sanctioned u/s 391 fails. The submission of Mr. Negi, therefore, does not appear to have any merit and is rejected by us.

14. Viewed from any angle, our considered opinion is that Section 22 of the 1985 Act in the facts and circumstances of this case had no applicability and that the proceedings in Company Petition No. 13 of 2003 could not be suspended or kept in abeyance on the ground of the aforesaid reference having been made to the BIFR under the 1985 Act.

15. Whether the scheme as is forming the subject-matter of Company Petition No. 13 of 2003 requires approval from the High Court is a matter which has to be decided on consideration of all relevant aspects. We have been informed at the Bar that extensive and elaborate arguments were addressed and submissions

made from all sides before the learned single judge on the merits (or demerits) of the approval of sanction and with respect to various aspects of the Scheme. We wish to offer no comments but would like to remit the matter to the learned single judge for his consideration and for the disposal of Company Petition No. 13 of 2003 on its merits in the light of the aforesaid observations.

16. Based on the aforesaid reasoning, this appeal accordingly is allowed and the impugned judgment dated June 10, 2004, is set aside. The matter is remitted to the learned single judge for disposal of Company Petition No. 13 of 2003 on its merits and in accordance with law.

17. Since before us it was very strongly contended by the appellants and learned counsel appearing for respondent No. 2 that the matter is of grave urgency, we direct that Company Petition No. 13 of 2003 be listed before the learned single judge on July 19, 2004. We request the learned single judge to dispose of Company Petition No. 13 of 2003 at his earliest convenience.

18. Appeal allowed. No order as to costs.