

(2005) 05 DEL CK 0032

In the Delhi High Court

Case No : CP 422 of 2000 and CA 1232, 1397 and 1398 of 2001, 199, 1048 and 1049 of 2002, 326, 398, 532 and 539 of 2003 and 539 of 2004

In Re: Electronics Trade and Technology Development Corporation

Date of Decision : 09-05-2005

Acts Referred:

Companies Act, 1956 — Section 189, 433, 433(3), 434

Citation : (2005) 05 DEL CK 0032

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mohan Shandilaya, for ET and T licensees Association, Anjana Gosain, for UOI, Meenakshi Arora, for Employees Association and Ravindra Kumar, for Official Liquidator Manoj Arora, for the Appellant;

Judgement

A.K. Sikri, J.—M/s Electronics Trade and Technology Development Corporation (hereinafter referred to as 'the company') is a public sector undertaking incorporated under the Indian Companies Act, 1956 (for short 'the Act'). It was brought into existence in August, 1974 under the administrative control of the Ministry of Information and Technology, Government of India with the object of organizing and undertaking trade with other countries in all types of electronic equipments. However, it went into rough weather as it suffered substantial losses over a period of time which kept on accumulating. Accordingly, in the year 1995, the company submitted a restructuring proposal to the Government of India which envisaged infusing fresh funds to the extent of Rs. 15 crores. This proposal was examined by the Government of India and the Government asked the company to get the proposal's viability determined by the SBI Caps Market Limited. However, while this process was still on and under examination, due to the Disinvestment policy of the Government and setting up of the Disinvestment Commission (for short 'the Commission') as a consequence thereto, working of the company was referred to the Commission in the year 1997. In December, 1997, the Commission gave its report pinning that the company should discontinue its operations, but the existing contract should be completed. The company, Therefore, carried on with its existing contracts but in

the process kept on suffering further losses. During the year 1999-2000, the company incurred a total loss of Rs.1693.23 lacs (after interest and depreciation) and a loss of Rs.135.99 lacs (before interest and depreciation). This brought the matter to the attention of the Cabinet which in its meeting held on 23rd September, 2000 decided to close down the company and directed the company to take steps for filing petition for winding up. Following this mandate, the Board of Directors of the company in its meeting held on 23rd October, 2000 passed a resolution that the company be wound up under the supervision of this court and called for a General Body meeting for this purpose. This general body meeting was held on 31st October, 2000 and in this meeting special resolution in accordance with Section 189 of the Act for winding up of the company under the supervision of this court was carried. This special resolution is in the following terms:

"RESOLVED THAT as per Cabinet decision on winding up of the Electronics Trade and Technology Development Corporation Limited in pursuant to the provisions of Sections 433(a) and (e) of the Companies Act, 1956 and Articles of Association of the Company, the Company be wound up under the supervision of the Hon''ble High Court at Delhi, which will be effective from the date the Court declares the Company be wound up and that the Board of Directors be and are hereby authorised to make necessary applications, file the necessary petitions and applications and take action for the winding up of the Company, by the said High Court.

FURTHER RESOLVED THAT the consent of the Company be and is hereby accorded to the Board of Directors of the Company to present a petition to the Hon''ble High Court of Delhi for winding up of the Company by the Court from such date as it may determine.

RESOLVED FURTHER THAT the Chairman-cum-Managing Director and/or the Company Secretary or such other person as may be nominated by the Chairman-cum-Managing Director be and are hereby authorised to initiate action for winding up of ET and u/s 433 of the Companies Act and for this purpose they are authorised to sign and verify pleadings, petitions, affidavits replies and appeals and other documents and applications/petitions to be submitted before the Competent Court and to do all further acts, deeds and things which are necessary to the proceedings.

RESOLVED FURTHER THAT the company''s Legal Advisors, (presently) M/s Arora Mehra and Associates be and are hereby authorised by the Board of Directors of the Company to present a petition to and appear before the Hon''ble High Court of Delhi for winding up of the Company and other incidental matters thereto.

FURTHER RESOLVED THAT the Liquidator (s) shall be appointed by High Court/ Government as the case may be for the purpose of winding up of the Company and he/they be and is/are hereby authorised to exercise all the powers mentioned in Companies Act, 1956 with respect to winding up of the Company

and Chairman-cum-Managing Director of the Company be instructed to give a notice of such appointment to the Registrar of Companies.

FURTHER RESOLVED THAT consequent upon the winding up of the Company employees of the company would be eligible for compensation available under the Voluntary Separation Scheme (VSS) package as approved by the Government as per OM No.2 (32)/97-DPE/WC date 5-5-2000."

2. Thereafter, present petition was filed on 17th November, 2000 seeking winding up of this company.

3. This petition was admitted on 20th November, 2000 and it was directed that notice be advertised in Delhi Gazette and one issue of Times of India (all editions) and one issue of Jansatta (Hindi), returnable on 6th April, 2001. These citations were duly published in compliance with the aforesaid orders. Pursuant to these citations, many applications came to be filed for intervention. These applicants can broadly be classified into two categories. One set of applicants represent the the employees and other, the ETandT Licensee Association (for short `licensee association") and other license holders. They were allowed to intervene in these proceedings.

4. The aforesaid two sets of parties, namely, workers and the licensees, objected to the winding up of the company. The workers were, obviously, concerned with their employment or, in the alternative, suitable terminal benefits. The General Secretary of Welfare Association of ETandT officers filed affidavit opposing the petition for voluntary winding up, inter alia, on the ground that the company was a going concern commercially and financially viable and had shown a consistent upward trend in its profit in last consecutive three years. It was also pointed out that the company had issued office orders dated 24th November, 2000 inviting applications for voluntary separation from the employees (in the nature of VSS) effective up to 23rd February, 2001. But the terms for such voluntary separation were based on unrevised pay scales. In the office order dated 24th November, 2000 the employees of the company were also informed that such employees who fail to opt for VSS by the stipulated date, would be eligible only for retrenchment compensation as per the provisions of the Industrial Disputes Act, 1947. Therefore, the employees had opted for the VSS without prejudice to their rights and contentions. The employees' Association also stated that in its letter dated 14th March, 2002, it had drawn the attention of the Ministry of Information Technology to the recommendation of the Disinvestmentss Commission wherein it was proposed that if some of the employees having entrepreneurial aptitude, the Government should encourage them by providing assistance as suggested by the Commission in its fifth report and, Therefore, if these employees are given the jobs in the new set up they would be willing to refund the ex-gratia amount either in full or in part to become members of the Society and would work hard to bring up the business of the new set up. In this affidavit dated 26th April, 2002 reference was also made to another circular dated 12th April, 2002 issued by the company regarding implementation of the modified VSS with effect from

6th November, 2001.

The company had given, when it was functional, from time to time, licenses to various computer education centres for providing education in the computers. Those centres were being run under the auspices of the company and the students enrolled by those centres, after completing their requisite courses, were getting diplomas/degrees by the company. With the filing of this petition, these franchisees apprehended that their interest would be threatened in case the company is wound up and that is the reason that these licensee as well as ETandT Licensee Association got itself imp leaded in these proceedings and objected to the winding up of the company.

5. In this scenario the question arose about the fate of the employees as well as fate of these centres and, in turn, fate of thousands of students enrolled by these centres. The matter was examined from this angle from time to time and various directions were issued by this court. Notices were also issued to the Ministry of Information and Technology, Central Government to resolve these twin issues.

6. In so far as employees are concerned, they have accepted their dues in terms of revised VSS issued vide circular dated 12th April, 2002 and setting out the parameters on the basis of which the VSS could be formulated by Public Sector Enterprises for the employees as per office memorandum dated 11th April, 2002. Other submissions of theirs are taken note of while discussing the objections of the licensee association.

7. The key issue was the fate of education centres. To resolve this issue, the company filed additional affidavit on 7th January, 2003 stating that Electronics Corporation of India Ltd. (ECIL), which is a Government of India enterprise had shown active interest in taking over the computer education division of the company. Notice was accordingly issued to ECIL . Thereafter, order dated 20th May, 2003 was passed, after hearing all the parties and the position which emerged till that date has been brought out in a lucid manner in that order. Therefore, I deem it proper to reproduce the said order:

"An application is filed by the petitioner as applicant, which is registered as C.A.532/2003. In the said application, reference is made to the order dated 26.3.2003 passed by this court directing both the employees association as also the licensees association to come up with a viable scheme for taking over the Computer Education Division. It is also stated in the said application that the Government of India has decided that in the interest of the students studying in these computer centers, the licensees may get accreditation to DOEACC, which is a society formed by the Department of Information Technology for purposes of standardisation of computer education business.

The employees association and the licensees association are also represented today in court through their counsel. They have stated that they are ready for a meeting to find out a solution and also to present a viable scheme for taking over the Computer Education Division either with the petitioner or with any other

organisation under the control of the Department of Information and Technology.

In the context of the aforesaid stand taken by the parties hereto, it is ordered that a meeting shall be called by the petitioner company of the employees association and the licensee association as also a representative from DOEACC, as early as possible

In the said meeting an effort shall be made to find out a solution to the problem that is being faced by the employees association as also the licensees association, who are before this court and, if possible, a viable scheme shall be propounded by all concerned so that the Computer Education Division could again run and training could be imparted.

It is pointed out by the counsel appearing for the ECIL that although at one stage ECIL was interested in taking over the aforesaid Computer Education Division but subsequently on second thought they have decided not to take over the same.

Renotify on 2.9.2003, before which date a viable scheme, if prepared by the parties, shall be placed on record. Till then the interim order shall continue."

8. It is clear from this order that the Government had proposed that the licensees of these computer centres may get accreditation to DOEACC which is also a Government Society as it is formed by the Department of Information and Technology and in order to discuss this problem the court directed meeting of all the parties to find a solution to the problem that is being faced by the employees Association as well as licensees Association. The matter was discussed from time to time thereafter and minutes of some of these meetings are filed on record. Thereafter, this case came up for hearing on 2nd September, 2003 when this court noted the submission of Mr. P.K. Datta, Joint Director, representing the Ministry of Communications and Information Technology, Department of Information Technology, Government of India that he would have a sitting with the Executive Director of DOEACC Society and would prepare a scheme and modalities for the running of the business and activities, which was being carried out by the company. It was directed that such scheme and modalities be submitted within six weeks. Against this order, the licensees Association preferred an appeal before the Division Bench and, Therefore, no further progress could be made in this petition for quite some time. However, the appeal was dismissed as withdrawn.

9. In this petition, an affidavit of Mr. P.K. Datta, Joint Director, Ministry of Information and Technology was filed on 17th October, 2003 stating that in compliance with the orders dated 2nd September, 2003, the officers of the Department of Information and Technology have had several meetings with the members of the DOEACC to work out the modalities of running computer education activities. It is stated in that affidavit that DOEACC is formed for the purpose of canalizing the computer education in the country and is now a mega society of the Government of India. The modalities which were worked out and as stated in this affidavit are as under:

"(a) The licensees of ETandT may continue to run their respective computer education centres in terms of the agreement signed with M/s ETandT Ltd., till the validity of contract.

(b) At the expiry of contract period with M/s ETandT Ltd., the licensee may switch over to DOEACC Scheme and in no case the contract with ETandT would be extended. No new franchisee would be enrolled by ETandT.

(c) The licensees will have to obtain DOEACC accreditation, if not already accredited to function as DOEACC approved institute independently, before they are permitted to function under DOEACC scheme.

(d) If any licensee wishes to terminate the existing contract with ETandT Ltd., under relevant clause, he may do so after fulfilling his obligations under the contract with ETandT. He will be taken under the DOEACC scheme to function as DOEACC approved institute independently after obtaining DOEACC accreditation.

(e) During the period of contract with ETandT, a franchisee shall enroll students only for those courses which could be completed within the validity of the contract period.

(f) The obligations of the contract shall be duly honoured by the licensees and ETandT Ltd. in issuing certificates etc. to students who complete their training.

(g) The trade name of M/s ETandT can be used till a licensee is functioning under the ETandT contract. The moment a licensee switches over to the DOEACC scheme, he shall be governed by rules and regulations of the DOEACC Society in this regard."

10. It is also pointed out that the company has 164 franchisees who are running the computer education activities. The franchisees are using the trade name, design, copy right material, technical know how etc. of the company. The agreements of these licensees with the company had expired in 2004. The computer education activities presently run by these franchisees of the company is proposed to be run in future under the DOEACC Society which is mandated to carry out human resources development activities in the IT Education and Training. The proposal of transfer of computer education society from the company to the DOEACC Society would provide continuity to the interest of students as they would continue to get computer education training from autonomous institution viz. DOEACC Society under the Ministry of Communications and Information Technology whose accredited courses (viz. O/A/B level) are recognized by the Government of India for the purposes of employment. The DOEACC Society has over 750 approved institutes all over the country to run accredited courses. The DOEACC Society authorises these institutes to run courses and computer education as per their prescribed syllabi. The syllabi of the Society are structured in such a manner so as to enable students to attain requisite levels of standard which are acceptable to the IT Industry for employment purposes. It would also be in the interest of the

students that the modalities for transfer of computer education activities from the company to DOEACC Society, which is under the administrative control of the Department of Information and Technology, is implemented and the company, which is incurring losses, should discontinue all its operation with immediate effect.

11. The necessary modalities have been worked out and in view of the statement contained in the aforesaid affidavit, there would not be any problem for these centres to run and carry forward their activities even if the company is wound up. Mr. Shandilaya, learned counsel appearing for the licensees Association stated that it was not in public interest to wind up the company as the company had successfully run the computer courses through these franchisees over a period of time and the diplomas/degrees awarded by the company had its own value in the market. Therefore, the company be allowed to exist for the sake of these computer centres so that students are able to get their education under the auspices of the company. I am afraid, this plea of learned counsel has no merit in view of the decision taken by the Department of Information and Technology as contained in affidavit dated 17th October, 2003 as per which these computer centres are being saved from closure. The company has only given the license to such computer centres. The interest of these computer centres and the students enrolled by these computer centres is protected on getting accreditation of DOEACC which is also a Society run by the same Department/Ministry of the Government and has sufficient reputation and name in the field of computer education. After the accreditation, students would naturally be able to get the certificates/diplomas/degrees of DOEACC. Merely because the licensees Association wants the company to continue to exist, their plea cannot be allowed to prevail. The company is running into losses for last several years. These losses have mounted over a period of time. In these circumstances, decision is taken at the apex level (at Cabinet level) to wind up the company. It is also a policy decision of the Government. I may add that during arguments, a pointed query was made as to whether the Government still sticks to the earlier decision, Ms. Anjana Gosain, learned counsel for the Government affirmed by stating that even on the review of the earlier decision, it had decided to stand by its earlier decision and to go-ahead with the winding up of the company. There is a resolution of the Board of Directors. The General Body by special resolution has also resolved on winding up of the company.

12. The decision to wind up the company even otherwise is free from any mala fides or arbitrariness. There are cogent reasons for winding up of the company. The company is suffering the losses continuously. If in such circumstances, decision is taken to wind up the company, such a decision of the company, i.e. the Board of Directors and members of the company cannot be faulted with. Since it is a public sector company, decision was taken at the highest level in the Government echelons to winding up this company. It was a policy decision and judicial interference with such a decision is not available, that too, in these company proceedings when the Company Court finds that all the ingredients for

winding up of such a company are fulfilled and necessary procedure followed.

13. In the context of action of the Union of India to disinvest and transfer 51% shares of M/s Bharat Aluminium Company Limited (BALCO) the question of validity of such a decision came up for consideration before the Supreme Court in the case of BALCO Employees Union (Regd.) Vs. Union of India and Others, and while rejecting the challenge to the said decision, the Supreme Court made the following pertinent observations:

"91. In a democracy, it is the prerogative of each elected government to follow its own policy. Often a change in government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court.

92. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is the Parliament and not the courts. Here, the policy was tested and the motion defeated in the Lok Sabha on 1st March, 2001.

93. Thus, apart from the fact that the policy of Disinvestmentss cannot be questioned as such, the facts herein show that fair, just and equitable procedure has been followed in carrying out this Disinvestmentss. The allegations of lack of transparency or that the decision was taken in a hurry or there has been an arbitrary exercise of power are without any basis. It is a matter of regret that on behalf of State of Chhattisgarh, such allegations against the Union of India have been made without any basis. We strongly deprecate such unfounded averments which have been made by an officer of the said State."

15. It became necessary to refer to the aforesaid judgment as the employees Association and the licensee Association have challenged the decision of the Government/company on the touchstone of public policy as well and have attempted to say that it is not in public interest to wind up the company. It is, thus, clear that this submission of the licensee Association is not well founded. I may add that even today the Government has reiterated the earlier decision taken to wind up the company.

16. It may not be out of place to mention that against this company, one creditor, namely, Garden Reach Ship Builders and Engg. Ltd. had filed winding up petition under Sections 433(3) and 434 of the Act (CP No. 412/1998). The petition was founded on the averments that the petitioning creditor had given an inter corporate loan to the company to the extent of Rs.5 crores and out of this loan only Rs.1.5 crores was refunded and the balance Rs.3.5 crores was not paid back with agreed interest calculated thereon. Liability of the company was

Rs.7,11,65,069/-. That petition was admitted vide order dated 30th October, 2001 and following observations in this order were made:

"Under the circumstances, since the liability of the respondent company is admitted and it appears from the record that the respondent company is unable to pay its debts, the only option open is to order winding up of the respondent company. This appears to be the only just and equitable course in the circumstances of the case.

Accordingly, the petition is admitted for hearing."

17. This petition was disposed of vide order dated 21st August, 2002 only because of the reason that present petition was also admitted. However, liberty was given to the said petitioning creditor to revive the said petition in case present petition is rejected. What needs to be noticed is that the company owes debts to other creditors as well. In another petition, same view is taken viz., that it would be desirable to wind up this company. Thus even if there was no move on the part of the company to file the present proceedings, the winding up of the company is inescapable.

18. The company is accordingly ordered to be wound up. The Official Liquidator is appointed as the Liquidator. He shall proceed with the liquidation proceedings. Notice of appointment of the Liquidator be given to the Registrar of Companies. The liquidator shall submit his report within four months which shall be taken up on the administrative side. Citations shall be published in Statesman (English), Jansatta (Hindi) and Delhi Gazette. Steps in this behalf shall be taken by the Liquidator.

19. This petition and all applications are disposed of accordingly.

20. No costs.