

(2010) 12 RAJ CK 0078

In the Rajasthan High Court

Case No : Company Petition No. 19 of 2009 and Order on Application No's. 6780 and 17945

In Re: Jaipur Metals and Electrical filed by Genus Power Infra. Ltd and Umang Board (P) Ltd.

Date of Decision : 13-12-2010

Acts Referred:

Companies (Court) Rules, 1959 — Rule 99
Companies Act, 1956 — Section 439, 439(4), 445, 557
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 20(1)

Citation : AIR 2011 Raj 39

Hon'ble Judges : Ajay Rastogi, J

Bench : Single Bench

Judgement

Ajay Rastogi, J.—Board for Industrial and Financial Reconstruction ("BIFR") in exercise of its powers u/s 20(1) of Sick Industrial Companies (Special Provisions) Act, 1985 ("Act, 1985") after holding inquiry u/s 16, and taking note of all relevant facts and circumstances on record, and after opportunity of hearing being afforded to all the concerned parties, on having come to its conclusion vide order dt. 26/09/2002 in Case No. 3/1999 that M/s Jaipur Metal and Electrical Ltd ("JMEL") is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations - as a result therefore, is not likely to become viable in future, has forwarded its opinion to the Company Court vide its letter dt. 03/10/2002 and recommended that Company-JMEL be wound up.

2. At the stage of admission where recommendations made by BIFR are to be examined for winding up of company-JMEL, two applications (No. 6780/dt. 15/03/2010) by M/s Genus Power Infrastructure Ltd and (No. 17945/dt. 26/08/2010) by M/s Umang Board (P) Ltd, have been filed seeking their impleadment as party to instant company petition; and question raised for consideration by both the applicant-Cos.(Genus and Umang) is as to whether at a stage anterior to the making of winding up of Company-JMEL, applicants (Genus and Umang) are required to be impleaded and heard by Company Court.

3. What has been averred by applicant (Genus) seeking impleadment is that State Government being major share holder considered for revival of Company JMEL and accordingly took necessary steps through Request for proposal (REP) inviting private promoters to bid for acquiring of JMEL, vide notice dt. 08/09/2008 (Ann.A/2) pursuant to which applicant Genus tendered its bid offer and was declared successful bidder vide letter dt. 08/10/2008 (Ann.A/3) and the RFP document provided the successful bidder to enter into a memo of understanding (MOU) with the State Government, JME Employees Credit and Thrift Soc. Ltd and JMEL Mazdoor Sangh - pursuant to which, MOU is said to have been entered into and executed and in terms whereof, payment towards employees" dues worth Rs. 6.83 Crores while Rs. 1.09 Crores towards State Government dues has been paid by applicant-Genus and pursuant to MOU, applicant (Genus) also submitted draft of rehabilitation scheme. On the said score, it has been prayed that applicant (Genus) is the creditor of Co.-JMEL and may be allowed to be impleaded to address the Company Court at the stage of admission of winding up petition pending consideration.

4. Whereas another application has been filed by M/s Umang Board (P) Ltd ("Umang") seeking impleadment as party to the winding up petition on the premise that JME Employees Credit and Thrift Soc. Ltd while holding 1,72,083 numbers of equity shares, each of Rs. 100/- fully paid of JMEL (being 59.49% of total paid up capital) entered into purchase agreement for transfer of aforesaid share holding of JMEL in favor of applicant-Umang for sale consideration of Rs. 1,72,08,300/- out of which Rs. 21,00,000/- was paid at the time of execution of aforesaid share purchase agreement dt. 24/12/2007 (Ann.A/2) and pursuant to which, applicant-Umang claimed that Company-Umang has acquired 59.49% of total paid capital of JMEL; as such, Company-Umang is a person interested to be heard in winding up petition at the stage of admission.

5. Both the applications of Genus and Umang have been opposed by one of secured creditors (M/s Alchemist Asset Reconstructions Co. Ltd) and JMEL Mazdoor Sangh who were allowed to be impleaded in winding up proceedings vide order dt. 29/04/2010.

6. Shri Sudhir Gupta and Shri RC Joshi, Counsel opposing applications jointly submit that merely by making certain payments towards employees" dues and State Government dues, applicants (Genus) cannot be termed as Creditor or contributory of the Company JMEL; as such is not required to be heard at the stage anterior to the date of winding up order while after company petition being admitted, and publication of notices as per the procedure provided U/r 99 of Co. (Court) Rules, 1959 - in terms of Form No. 48, it gives opportunity to creditor, contributory or other person desirous of supporting or opposing the making of a winding up order but at the stage of admission, applicant has no right of say.

7. As regards 2nd application filed by M/s Umang, it has been opposed on the premise that no shares have been transferred to M/s Umang so far and a sum of Rs. 21 lacs paid towards sale consideration in terms of MOU has also been

refunded and - in absence of holding of any shares of Company JMEL, it is neither creditor nor contributories as provided u/s 439 of Companies Act, 1956 ("Co. Act"); as such, has no right of hearing at the stage of admission of winding up petition.

8. At the cost of repetition, it is reiterated that it is not a petition for winding up presented by Co.-JMEL's creditors/ prospective creditors or contributories as provided u/s 439 of Co. Act, it is BIFR who has recommended that the Company should be wound up in exercise of power u/s 20(1) of Act, 1985.

9. Section 557 of Co. Act postulates that in all matters relating to the winding up of a company, the court may inter-alia have regard to the wishes of creditors or contributories of the company as proved to it by any sufficient evidence. Question as to whether creditor/contributories can be permitted to support or oppose winding up petition; has been examined by Apex Court while considering scope of Section 557 of Co. Act in *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, . It has been observed that the Rule which the Court has to follow is that if there is opposition to the making of winding up order, the wishes of creditor has to be given its due weightage and Apex Court observed in para 22 ad infra:

22. Another rule which the court follows is that if there is opposition to the making of the winding up order by the creditors the court will consider their wishes and may decline to make the winding up order. u/s 557 of the Company Act 1956 in all matters relating to the winding up of the company the court may ascertain the wishes of the creditors. The wishes of the share holders 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 *Palmer's Co. 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.

The wishes of the creditors will however be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case (See *Re. P. and J. Wacrae Ltd* (1961) 1 All ER 302).

10. As regards creditor who are inclined to oppose a winding up petition, it is settled that the right of the creditor to appear to be heard and to oppose the admission of a petition in view of a mandate of Section 557 of Co. Act. The Bombay High Court in *Bharat Petroleum v. National Organic Chemical* 2004 (1)

Company Law Journal 426 observed ad infra:

The words "relating to the winding up of a company" used in Sub-section (1) of Section 557 are broad enough to comprehend within its purview the stages of admission and of the final hearing of a company petition for winding up. Therefore, as a matter of statutory interpretation, the right of the creditors to appear and be heard in all matters relating to the winding up of a company is recognized by law. That right to appear and be heard comprehends the stage of admission as well.

11. Having due regard to the provisions of Section 557(1) of Co. Act, it is settled position of law that right of the creditors/ contributories to appear and be heard before or after winding up order being passed, is recognized by law and that right to appear and be heard comprehends the stage of admission, as well. There cannot be any dispute that order passed by the Company Court admitting winding up petition by itself, holds serious consequences of the Company as it seriously affects the market position of a company subject to the order.

12. But, "every person" who gives money to the Company cannot be considered as a creditor unless such person is treated as "creditor to whom Company owes debt under contract"; or every person who has paid or given money to the Company otherwise than under any concluded contract, cannot be construed to be creditor of the company. In words and phrases, the terms "credit" and "creditor" are defined, as quoted in para 10 of decision in *G. Siva Ramakrishna v. Rushni Distilleries (P) Ltd* 2008 (3) Comp LJ 231 ad infra:

"Credit" is a debt due in consequence of a contract of hire or borrowing of money, and, according to business usage, connotes no more than a chose in action. Generally, the word means a sum credited on the books of a company to a person who appears to be entitled to it, and ordinarily a debtor-creditor relation is required.

13. Thus, only such of those persons having jural relationship with the company, either by reason of a concluded contract or quasi contract alone can be said to be covered u/s 439 of Co. Act.

14. Applicant-Genus, as alleged, deposited certain payment of employees' dues as also of State Government and mere making of payment of certain dues will not make the applicant- Company as creditor of the Company-JMEL. It is not the case of either of applicants seeking impleadments that they are contributories and rightly so since for a contributory one has to fulfill conditions as provided u/s 439(4) of Co. Act, which indisputably are not meted out by either of applicants seeking impleadments.

15. Thus, contention advanced by Counsel for applicant (Genus) that they are creditors of the Company on account of certain payments of dues of employees as also of State Government being paid under a MOU/agreement being successful bidder, is of no substance. Similarly submission made by Counsel (Shri

Amol Vyas) that the applicant (Umang) being person interested is required to be heard at the stage of admission of winding up petition, is also without substance for the reason that person interested has no locus to be heard at the stage of admission of the winding up petition. Judgment on which Shri Vyas placed reliance in National Textile Workers' Union and Others Vs. P.R. Ramakrishnan and Others, is of no assistance for the reason that the question before the Apex Court was as to whether workman/employee of the Company has a right to appear and oppose winding up petition and in that case, relationship of workmen/employees vis-a-vis Company was examined and it was observed that in case of the company being continue to subsist the workers would be earning their livelihood from such employment and if an order for winding up is made, their services, except in cases of business of the company being continued, would stand terminated by reason of Sub-section (3) of Section 445 which provides that a winding up order shall be deemed to be notice of discharge to the officers and employees of the company. Taking note of such adverse civil consequences on the workers and continuance of their services being seriously jeopardized and their right to work and earn livelihood being disastrously imperiled, it was finally held that the workers may not have right to apply for winding up a company but it does not mean that they cannot appear to support or oppose a winding up petition which is properly filed by one or the other persons specified in Section 439 of Co. Act.

16. As observed (supra), merely having entered into MOU with one of share holdings of Company-JMEL) without there being any transfer of shares made, will not make applicant (Umang) as creditor or contributory and merely because applicant (Umang) claims to be "person interested" in the opinion of this Court has no right to be heard at the stage anterior to the date of order of winding up a company. Before parting with the order, this Court would like to observe that of course an order passed of admitting a petition for winding up a company certainly has serious consequences of the Company as it affects market position whereof but that will not make any person interested to appear and be heard at the stage of admission of winding up petition and if plea of applicants (Genus/Umang) of their right to be heard at the stage of admission of the company for winding up is accepted, it will certainly open flood gates and a number of persons would come before Company Court claiming either for having vital information regarding diversion of the funds of Company under winding up process which can facilitate the Court in taking decision in company petition or their interest may be jeopardized and if that is permitted, it would certainly hamper progress of procedure instead of early disposal. Thus, in considered opinion of this Court, both the applications of applicants (Genus and Umang) to be heard at the stage of admission of company petition for winding up are without substance and are liable to be dismissed at this stage.

17. Consequently, both the applications (No. 6780/dt. 15/03/2010) filed by M/s Genus Power Infrastructure Ltd and (No. 17945/dt. 26/08/2010) filed by M/s Umang Board (P) Ltd, are hereby rejected. Office to proceed.