

(2005) 11 AHC CK 0126

In the Allahabad High Court

Case No : Company Application No. 2 of 1990 and Writ Petition No's. 5929 and 10976 of 1990

In Re: J.K. Satoh Agricultural Machines Ltd.

Date of Decision : 30-11-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 64
Companies Act, 1956 — Section 441, 454, 481, 530, 531
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 16, 17, 18

Citation : (2007) 138 CompCas 955 : (2006) 5 CompLJ 102

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : V.B. Upadhyay, Bharat Ji Agarwal, Piyush Agarwal, Navin Sinha, Vipin Sinha and R.P. Agarwal, for the Appellant;

Final Decision : Disposed Off

Judgement

Sunil Ambwani, J.—The Company Application No. 2 of 1990 dated 31.1.1990 was registered, on a recommendation made by Board for Industrial and Financial Reconstruction (BIFR) u/s 20(1) of the Sick Industrial Companies (Special Provisions) Act 1985 (in short, the Act) to wind up M/S J.K. Satoh Agricultural Machines. Ltd. (JKSAML)-the company. The reference order is under challenge by the company in Writ Petition No. 5929 of 1990, and by J.K. Synthetics Ltd. (JKSL), the holding company, in Writ Petition No. 10976 of 1990.

2. I have heard Sri V.B. Upadhyaya, Senior Advocate and Sri Bharat Ji Agarwal, Senior Advocate assisted by Sri Piyush Agarwal for petitioners in both the writ petitions and as well as the company application.

3. Sri V.B. Upadhyay, Senior Counsel made a prayer that instead of winding up JKsaml, the Company on the recommendation of BIFR, the Court in the facts and circumstances of the case, may exercise its powers u/s 481 of the Companies Act 1956 and dissolve the company. He submitted that the company has paid off all its creditors, and thus the liquidation of the company after its

Winding up will be an exercise in futility. On queries made by the Court about the authority of the Directors and their competence to sell off all the movable and immovable assets of the company during the pendency of the Proceedings, an adjournment was taken and that on the next date Sri Bharat Ji Agarwal, Senior Advocate made submissions to allow, the writ petitions and reject the recommendations, and in the alternative to dissolve the company.

4. Briefly stated the facts leading to and filing of these two writ petitions challenging the recommendation of winding up by BIFR and subsequent facts are stated as below;

5. The company was incorporated under the Companies 1956. JKSL holds 5, 40,000 equity shares of Rs. 10/- each in JK SAML which constituted 50.77 % of the share holding in the company. The company was incorporated on 21.8.1969 with the objects to manufacture power tillers and diesel engines, under the technical collaboration of M/S Satoh Agricultural Machines Manufacturing Company Ltd. of Japan, with an estimated turn over of 6000 numbers per year, and set up its factory in Village Chakarpur, Kanpur. It started commercial production but was not able to sell more than 250 of power tillers in any year. The company fell into losses amounting to Rs. 1,20,31, 838.00 upto year ending 30.3.1989 which completely eroded its net worth of Rs. 1,17,34, 580/- . The company did not make profits in any of the preceding five years and became a sick unit. It retrenched all the Workmen, w.e.f. 1.1.1984. All except 98 workmen made a reference to Industrial Tribunal, U.P. which by its Award dated 30.11.1985 held that the retrenchment was legal and awarded four month's wages as compensation to the workmen. The workmen were not satisfied and, filed a Civil Appeal No. 2854 of 1987 against the award in Supreme Court.

6. The company made a reference to BIFR u/s 15 of the Act on 1/19.6.1987. The reference was returned by the Board to be made in proper form. A proper reference in Form-A was made on 11.7.1987. The company, however, thereafter made an application to the Board to strike off the reference as it had fallen sick before the enforcement of the Act. The Board did not agree and declared the company as sick industrial company vide its order dated 14.9.1987 quoted as below;

The company was registered on 29.9.1970. Its paid up capital as on 31.12.1986 was Rs. 126.36 lakhs with no free reserves. The accumulated losses on that date amounted to Rs. 1,70,76,973/-. There were cash losses to the extent of Rs. 8, 21, 804/- during the year ending 31.12.1985. Thus all the ingredients of sick industrial company within the meaning of Section 3(1)(o) of the Act were satisfied. The company was sick on 31.12.1986 and continues to be sick as disclosed at the hearing by the parties.

7. By an order dated, 17.5.1988 the Board found that the Order declaring the company as sick industrial company was a valid order as not only the net worth of the company had been wiped off by the accumulated losses but there were

cash losses also during the year ending which ended on 31.12.1986 as also in the preceding year ended on 31.12.1985. Sri Mehta appearing for the company made a contention that there was no possibility of the company being rehabilitated as the demand of power tiller was not adequate and that out of several licensed company for manufacturing of power tillers three have already closed down and two were taken over by the State Government. The Board decided not to take any measures in rehabilitation and issued notices to all concerned to file their objections/suggestions as to why the recommendation be not made for winding up.

8. The company, however, took a different stand then what was stated by its representative before the Board, and made a request vide letter dated 16.8.1988 to the Board to reconsider the matter. The Board took note of the! change of the stand of the company in its order dated 22.8.1988 and reiterated its opinion to be forwarded to the High Court.

9. At this stage, it appears that the company was not willing to either rehabilitation, or for its winding up and consequent liquidation and chose a strange course of action which was apparently malafide and amounts to misfeasance on the part of its directors.

10. M/s Engineer Kamgar Sangh a workers union of the company filed an appeal against the order of the BIFR dated 12.12.1988. The AAIFR made an observation on 12.12.1988 that a writ petition has been filed in Allahabad High Court in respect of orders directing winding up of the company. By order dated 19.4.1989 the AAIFR, directed IRBI to prepare a rehabilitation plan. The IRBI initially reiterated its stand that it was not possible to rehabilitate the Company. AAIFR thereafter set aside the order of BIFR dated 22.8.1988 on the ground that BIFR did not make any efforts of rehabilitation and remitted the matter for preparation of rehabilitation scheme u/s 18 of the act. The BIFR in pursuance of remand order, directed IRBI to submit its report. IRBI completed the exercise in pursuance of insistence of AAIFR and submitted its interim report reiterating that it was not possible to rehabilitate the company and that finances of the company do not i even permit the workers to form cooperative to make any profitable venture. A final report was submitted by the IRBI on 25.10.1989 that it was not possible to rehabilitate the company. With regard to its report, of the factory visit, it was stated that the factory is situate by the side of Kanpur road (main road in an industrial estate) at Panki. The factor) areas is about 59 acres out of which the built up area is 02 acres and. there is vacant tend and 57 acres mainly for demonstration of powers tillers. It was reported that there were dues of the holding company of Rs. 194.06 lacs, which are secured against all the assets of the company. Besides these there are no dues to any financial institutions/banks, as they were repaid out of the loans raised from the holding company. The dues of the unsecured creditors amounted to only Rs. 5.02 lakhs, and that JKSL was not agreeable to a merger proposal. Para 8 of the order the IRBI concluded that the scheme submitted by Engineering Kamgar Sangh was not viable and was not

supported, by financial arrangement.

11. The BIFR vide its order dated 24.1.1990 reserved the orders for 29.1.1990 after observing as follows;

8. Shri Vasant D. Mehta, Advocate, appearing on behalf of JKSAM prayed to the Bench for not passing any other u/s 20 of the Act. In support he mentioned that for JKSAM the holding company (JKSL) is the only creditor, and in the interest of shareholders he is making the request to the Bench. A" discussion followed regarding the shareholding pattern of JKSAM which is around 73% from Promoter Directors; the residual is from public.

9. Shri Mehta disclosed that JKSAM owns factory area measuring about 59 acres, of which 57 acres is vacant land which was used mainly for demonstration for the use of power tiller the manufacture of which has since been stopped. Sale of this vacant land has not been considered, as the outside liability of JKSAM is only to the extent of Rs. 5 lakhs. Other liabilities are being taken care of by JKSL, and there is no proposal for any capital expenditure. Shri Mehta stated that the land is free hold, situated 15 miles off Kanpur towards Panki. The same was procured from the Govt. for industrial . purposes. What present value the land could fetch he could not tell. Shri Gupta of EKS intervened that on a rough reckoning, the prevailing price of the land is in the region of Rs. 500 per sq. yard. Relying on this, the present value of the land may be to the order of Rs. 8 crores to Rs. 12 crores depending on the level of price prevailing in the area or the minimum floor price fixed by a statutory authority.

10. Order reserved for 29th January, 1990.

12. By an order dated 3.1.1.1990 challenged in these proceedings the BIFR recorded its opinion that the company has stopped its production since 1984, IRBI has not found any possibility of rehabilitating the unit, the merger or amalgamation has not been found feasible and that it was left with no option but to make a final opinion in favour of winding up of the company. It further found that ". it was also just and equitable that the Sick Industrial Company should be wound up and the recommendation be forwarded to the " High Court. The last paragraph of the recommendation is quoted as bellows;

11. While parting with this case, we may refer to the fact that the company owns 57 acres of free-hold vacant land situated at 15 miles off Kanpur towards Panki which had been procured from the State Government for industrial purposes. The State Government of U.P. may well consider the feasibility of resuming or acquiring the said land for being used for alternative industrial or other permissible purposes. Copy of the order be also forwarded to the State Government.

13. In Writ Petition No. 5929 of 1990 filed by the company while issuing notices, this Court by its order dated 15.3.1990 stayed the operation of the order of BIFR dated 31.1.1990. JKSL challenged the order in Writ Petition No. 10976 of 1990

claiming its right to file the writ petition as a holding company, and in this writ petition also by order dated 5.8.1990, the operation of the order of BIFR dated 31.1.1990 was stayed.

14. The recommendation made by BIFR was registered as Company Application No. 2 of 1990. Notices were issued on 1.8.1990. Learned counsel for the company pointed out to the Court on 13.2.1991 that a writ petition has been filed. He was asked to keep the Court informed about the progress of the writ petition. The writ petitions were pending in the Court for a long period of 15 years. It is only after the Hon'ble Chief Justice passed orders that all writ petitions arising out of orders of BIFR in "AAIFR shall also be heard by the Company Judge and determination was so modified, that both the writ petitions came to be heard by me. In between the efforts made by the Official Liquidator to get both the matters connected did not succeed.

15. The Directors of the company have during the pendency, the company has disposed off the entire land, buildings," plant and machinery of the company. In the affidavit of Sri Mahendra Pal Singh, Director of JK SAML filed in Company Case No. 2 of 1990. documents have been filed to establish that the land of the company situate at Sachendi, Tehsil , Pargana and District Kanpur Was actually purchased vide sale deeds dated 23.2.1973, from private parties. M/S Ranjeet Bus Services filed a Civil Suit No. 784 of 1988 for recovery of Rs. 33, 000/- with pendente lite and future interest at the rate of 20% per annum on the allegations that it had entered into a contract in November, 1979 for providing bus services at the rate of Rs. 7000/- per month and that there were outstanding of Rs. 16, 908/- to be paid by M/S J.K. Satoh Ltd. JKSL was impleaded as defendant No. 2. The company admitted the liabilities and thus a consent decree was passed on 16.11.1988. In execution of (this decree of only Rs. 33000/- an. application was made for appointment of receiver and that instead of executing the decree through Court Amin, the Court on the request of the company appointed Sri Jagendra Swroop, Advocate to dispose of its assets, purportedly in pursuance of order dated 18.12.1991 on a compromise in which it was agreed between the parties that instead of recovering the amount through Court Amin and Sri Jagendra Swroop, Advocate shall be appointed to take necessary steps, to sell off all all the movable and immovable properties of the company. The dues of State Bank of India in Cash Credit Account were settled and a certificate to that effect was issued by State Bank of India on 11.4.1989. Shri Jagendra Swroop, Advocate, in pursuance of the compromise to which both JK SAML and J.K.S.L were parties proceeded to advertise the properties and accepted the bid of Rs. 60 lakhs for entire movables (plant and machinery), which is alleged to have been paid to the Sales Tax Department towards the sales tax dues; and sold the entire land and building for Rs. 145 lakhs (with vacant possession) to M/S J.N. Group of Companies and Associates and the entire amount was paid by him to JKSL on behalf of the company to wipe its secured debt. JKSL confirmed the receipt of Rs. 1.45 lakhs vide its letter dated 15.4.1996, received from the company through M/S J.N. Group of Companies. The executing Court by its order

dated 1.5.1999 confirmed the sale and declared that the decree has been satisfied by making payment to the plaintiff.

16. From these documents annexed to the affidavit of Sri Mahendra Pal Singh, Director of the company, I find that having obtained the stay orders, the company which was declared as a sick industrial company and was recommended to be wound up, got its entire movable and immovable properties of which the land alone was worth more than eight crores, sold only for Rs. 206 lakhs in execution of a consent Court decree of Rs. 33,000/- passed by Civil Judge, Kanpur Nagar. The suit was decreed on admission of the amount and the parties entered into compromise in the execution proceeding adopting a novel method of selling properties for Rs. 2 crores, for satisfying a decree of Rs. 33,000/- only. The attachment and sale was in total disregard to the provisions of Order 21 Rule 64 CPC, as interpreted by Supreme Court in *Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and Others*, and *Ambati Narasayya v. M Subba Rao* and *Anr. 1989 Supp 92 SCC 693* in which it was held that the executing court must enquire whether the sale consideration of a portion of the property is sufficient to satisfy the decree and put only that portion to sale. In this case only a part of the stores or scrap of industrial shed (sold for Rs. 60 Lacs), could have satisfied the decree of Rs. 33000/-. There is no doubt that the Directors both M/S J.K. Satoh Agricultural Machines (JKSAML) Ltd. and M/S J.K. Synthetics Ltd. (JKSL) played a fraud upon the Court, and succeeded in siphoning off the entire properties of the company for which recommendation was made for winding up, by a collusive decree and execution in which the executing court namely 1st Additional Civil Judge, Kanpur Nagar fully supported them.

17. The company has filed a supplementary affidavit in pursuance of orders of this Court dated 21.4.2005 annexing therewith the annual report of the company, disclosing that the company has no other liabilities except to its shareholders to the extent of Rs. 1, 63, 99, 630.00 (Rupees one crore sixty three lacs ninety nine thousand six hundred and thirty only) and has got; a cash balance of only Rs. 11,796.00. The chartered accountants in their report have confirmed that manufacturing activity of the company was suspended on 8.11.1983. It has no stocks and has not taken any loans (secured or unsecured) and granted loans and accepted deposits from the public. It was declared as sick industrial company. The BIFR made recommendations on 31.1.1990 to the Court and that the opinion of BIFR have been stayed by the High Court on 15.3.1990. In para 9 of the auditor's reports it is stated that the company has accumulated losses of Rs. 1, 63, 87, 834/- (Rupees one crore sixty three lacs, eighty seven thousand eight hundred and thirty four) at the end of financial year 31.3.2005.

18. The Directors of the company and JKSL thus succeeded in disposing of, the entire assets, without intervention of the Official Liquidator who could have sold the properties, after advertisement in a fair and transparent manner for market

value, and distributed the assets under the statutory provisions of the Companies Act 1956 and Companies (Court) Rules 1959, after ascertaining its dues and liabilities, and could have paid the share holders of the value or more than the value of their shares from the sale proceeds. The 98 workers are said to enter into settlement on some payments after which the Special Leave to Appeal was dismissed by Supreme Court.

19. I also find that the lands which were admittedly of the value of worth Rs. 8 to 12 crores at a minimum price as recorded in the order of BIFR, was sold by the company in a collusive execution proceedings only for Rs. 1.45 crores. It is not far to see as to who would have gained out of the consent decree and fraudulent sale.

20. Sri Bharat Ji Agarwal, learned counsel for the petitioner states that under the unamended Sections 22 and 22A of the Sick Industrial Companies (Special Provisions) Act 1985, there was no restriction to sell the assets of the company. In U.P. State Sugar Corpn. Ltd. Vs. U.P. State Sugar Corpn. Karamchari Assn. and Others, the Supreme Court had interpreted the provisions of Section 15, 22A, 23A, 23B of the Act and held that the reference made to the Board of a potentially sick industrial company did not prohibit the company from disposing of its assets, unless there were specific orders passed u/s 22A of the Act. The Act was subsequently amended in 1993 providing that further no suit for recovery of money and for enforcement of any security against the industrial company or any guarantee in respect of any loan or advances where an inquiry u/s 16 is pending, or any scheme referred to u/s 17 is under preparation shall lie, and be proceeded with further, except with the consent by the Board or as the case may be the appellate authority. In Real Value Appliances Ltd. Vs. Canara Bank and Others, it was held by Supreme Court that the registration of reference u/s 15(1) of the Act, amounts to the initiation of proceedings u/s 16 attracting the provisions of Section 22 of the Act.

21. Shri Agarwal submits that in the present Case on the date of the consent decree passed by Civil Court the Board had not formed its opinion to wind up the company. Such an opinion was formed only on 31.1.1990 and was received by this Court on 22.2.1990. This Court took cognizance and had issued notices on 1.8.1990. The winding up proceedings as such u/s 441 of the Companies Act 1956, shall be deemed to have commence on 22.2.1990. He submits that there was no restriction placed by law on the sale of the assets of the company and that JKSL being the only secured creditors had entered along with the company into into a valid compromise in execution proceedings to avoid sale of its assets. Sri Jagendra Swaroop, Advocate appointed as receiver has taken due care to advertise the sale in leading news paper, and had accepted the highest bidders amongst many to secure the best price for movable and immovable properties of the company. He submits that the exercise was made within the frame work of the Company law and that this Court may consider to reject recommendation and in any case even if the Court comes to the conclusion that nothing remains

to be liquidated the company may be straight way be dissolved.

22. Before proceeding to consider the submissions; I find that there is absolutely nothing on record to reject the recommendation of the B1FR. There was no rehabilitation proposals from the company, which had stopped its production in 1983 and its accumulated losses had far exceeded its net worth. The IRBI considered the proposals of the workers union and had confirmed on more than two occasions that it was not possible at all to start production and to rehabilitate the company. In the circumstances the company had become commercially insolvent and thus the recommendation of the Board that it was just and equitable to be wound up deserves to be accepted.

23. The request of the company to dissolve it u/s 481 of the Companies Act 1956 is not a bonafide request. The company had without making any objections or submitting any rehabilitation proposals before the BIFR, obtained the stay of the recommendation of BIFR, and thereafter proceeded with selling off the properties of the company worth more than Rs. 8 crores for a sum of Rs. 1.45 crores, in a course of action which amounts to fraud on the court. The entire properties were sold in execution of a decree of only Rs. 33,000/- in a compromise through Advocate-receiver. The Civil Court exceeded its jurisdiction and abused its powers in allowing the compromise application in execution proceedings in which it confirms sale of properties for Rs. 2.05 crores for satisfying a decree of Rs. 33,000/- only and all this was achieved when the winding up proceeding shall be deemed to have been commenced u/s 481 of the Companies Act 1956 on the recommendation of the Board to wind up the Company, without seeking permission or even informing the High Court. The stay order only suspended the effect of the recommendation of winding up. In these circumstances it was open to the company to have approached the High Court, and sought permission of sale of its assets. Instead it chose to dispose of its movable and immovable properties without informing the civil court about the pendency of writ petitions and the company matter, in a typical Kanpur Style Company fraud, which has ruined the industrial economy of the State.

24. The company is still indebted to the shareholders for an amount of Rs. 1, 63, 99, 630.00. Even if JKSL is treated to be the holding company, the details of the other share holders of the company have not been disclosed.

25. The Company Application No. 2 of 1990 is as such allowed and M/S J.K. Satoh Agricultural Machines Ltd. is directed to be wound up. The Official Liquidator, U.P. is appointed as the Liquidator. The office shall send the requisite information to the Registrar of the Companies with regard to the winding up of the Company and that the winding up shall be advertised in accordance with the provisions of the Companies (Court) Rules 1959. Both the writ petitions are dismissed.

26. The Directors shall filed "Statement of Affairs" u/s 454 of the Companies Act 1956 within 21 days of the pronouncement of this order and shall hand over the

entire assets of the Company to the Official Liquidator. Since all the transactions of sale of movable and immovable properties Were made during the pendency of the reference and the stay orders are being discharged, the Official Liquidator would initiate proceeding under Sections 530, 531, 531A, 532, 533, 536, 537, 542, 543 and 545 of the Companies Act 1956 against the Ex Directors of the company. These proceedings have been pending for more than fifteen years. The Ex Directors, taking advantage of stay orders, acting for pecuniary gains for themselves have played fraud, by disposing of the entire assets of the company worth more than eight crores for only Rs. 2.05 crores, in a collusive sale through Advocate -receiver involving the civil court for executing a decree of only Rs. 33000/-. They neither informed the Civil Court about the pendency of these proceedings nor informed this Court until they had disposed off the entire assets of the company. The Ex Directors are thus made liable to pay to Official Liquidator costs of these proceedings and the costs of the proceedings which he shall incur in recovering the assets, quantified at Rs. Ten Lacs, and are directed to deposit it with the official Liquidator within a month subject to its adjustment at the end of the proceedings, without prejudice to the penal liabilities under the Companies Act 1956.