

(1961) 11 KAR CK 0009
In the Karnataka High Court

In Re: Mysore Spun Silk Mills Ltd.

Date of Decision : 13-11-1961

Acts Referred:

Companies Act, 1956 — Section 391, 455, 460 (6)
Industrial Disputes Act, 1947 — Section 25 F, 25 FFF

Citation : (1963) 33 CompCas 713

Hon'ble Judges : A. Narayana Pai, J

Bench : Single Bench

Judgement

1. This is an application u/s 460(6) of the Companies Act, 1956, by the petitioning creditor in the main petition questioning the correctness of the decision of the liquidator embodied in his order dated November 13, 1961, admitting the claims of the workmen of the company for preferential payment of amounts due on account of such items as notice-pay compensation, for retrenchment, etc.

2. Originally, the claims of workers had been examined by the liquidator on the basis of four proofs, two by individual employees, one by Rangiah purporting to act on behalf of 242 workers, and the lost by Mohamed Peer purporting to act on behalf of 1,129 workers. The liquidator did not entertain the claim of one of the individuals. No further question arises about it. The rest of the claims have been examined by him. He made an order in respect thereof on September 7, 1960. There was an appeal against the order to the company court, being Creditor's Appeal No. 8/61 preferred by Mohamed Peer. The matter, however, was not examined on merits. On a joint memorandum filed by the parties the court remitted the entire matter back to the official liquidator, directing him to examine the claims under different heads.

3. The subsequent order dated November 13, 1961 which is the subject-matter of this application, was made pursuant to that order of remand.

4. One of the points of attack against the order was that the official liquidator not only failed to comply with the order of remand but also committed and irregularity in stating the consolidated amount representing the total claim of all

the workers admitted by him. This has now been rectified. During the course of the arguments when this matter was last before this court in March, 1962, the official liquidator took time to prepare a tabulated statement showing the amounts separately in respect of each individual worker and also showing against the name of each one of them, amounts admitted by him under several heads of claim. That statement was produced time ago and the matter had been adjourned at least twice so that the parties may acquaint themselves fully with the details of the matter and place before the court whatever objections of particulars attacks they may have to make against the amount of the claim of individuals as admitted by the liquidator.

5. Among the other questions of law debated before me, the most important one relates to the question whether of the official liquidator is right in having admitted the claims of the workers for compensation in excess of three months' salary. That question arises in view of section 25FFF of the Industrial Disputes Act, and particularly the proviso and Explanation to the first sub-section thereof. I set out below the entire text of sub-section (1) of that section.

"(1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of section 25F, as if the workman had been retrenched :

Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause(b) of section 25F shall not exceed his average pay for three months.

Explanation.-An undertaking which is closed down by reason merely of financial difficulties (including financial losses) or accumulation of indisposed of stocks shall not be deemed to have been closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section."

6. With a view to bring the case within the ambit of of the proviso, the attempt on behalf of the learned counsel for the applicant herein (the petitioning creditor in the main petition) has been to show that the closure of the mills in this case was due to unavoidable causes beyond the control of the employer. The employer in this case clearly means the board of directors together with other persons who were in actual charge of the management of the mills. Reliance was placed upon certain observations in the final report of the official liquidator u/s 455 of the Companies Act relating to his statement of the reasons which led to the winding up. The official liquidator, in addition to stating certain objective facts available from the records of the company, particularly the profit and loss position for a number of years as available from the accounts and the audited balance-sheets of the company has also extracted passages from the reports of a committee of

experts who, at the instance of the Central Silk Board, had made an investigation into the affairs of the company, and of an officer of the Department of Efficiency Audit of the State Government. Among other things, the official liquidator also made a reference to the existence of two rival labour organizations referring to them as "perpetually fighting against each other" and "having on several occasions resorted to `go-slow tactics" in consequence of which production and quality had suffered considerably".

7. Reliance is also placed upon the statement of objections filed by the official liquidator in the Creditor's Appeal No. 8"61 referred to above. In paragraph 2 thereof, in support of his contention that workmen were not entitled to anything more than what he had already allowed under his previous order (i.e., three months" wages by way of compensation) the liquidator stated :

"The closure took place on account of winding up proceeding being instituted and on account of other causes mentioned in the notice of closure dated December 24, 1958, which was on account of unavoidable circumstances beyond the control of the employer and hence the compensation allowed is correct".

8. The notice of closure which was put up on the notice board of the company on 24th December, 1958, reads as follows :

"NOTICE OF CLOSURE

WHEREAS an application for the winding up of the company has been instituted and activities of the Mills have become paralysed :

WHEREAS the company has been incurring losses for a fairly long time and it is no longer possible to keep the mills running without incurring the further heavy losses in the present circumstances;

AND WHEREAS in the circumstances aforesaid and owing to financial difficulties and want of raw materials and consumable stores and for other unavoidable reasons, it is decided to close the Mills ;

It is hereby notified to all those to whom it concerns that the Mills will be closed from 26th December, 1958.

By Order of the Board,

R. Basavappaji,

Manager."

9. Although such appears to have been the position taken up by the official liquidator in his report u/s 455 and in opposition to Creditor's Appeal No. 8/61, it is interesting to note that the position taken up by the petitioning creditor at that stage and in those proceedings is quite opposed to the one that he has now chosen to take.

10. When the final report u/s 455 had been filed, the petitioning creditor, with

the leave of the court, filed a long statement of objections.

11. The following extracts from those objections are of importance :

"The contents of these two paragraphs are general but the impression conveyed therein that the losses resulted from factors beyond the control of the management is emphatically denied.

The crux of the matter was that there was gross mismanagement which alone was responsible for continuous losses.

It is not true to say that the labour unrest and the rivalry between two labour associations was an important reason for the losses incurred by the mills. Labour in Channapatna is in no way worse than that in other hundreds of other factories all over the State. It was because of the complete lack of grasp or sense of direction in the people who were in charge of the mills that the company made losses.

Mismanagement of labour relations was but one part of the total mismanagement of company's affairs."

12. It is possible to look upon the attitude so taken up by the petitioning creditor on the one hand and the official liquidator on the other, as amounting to no more than opinion entertained by them on the reaction which they then noticed between the actual closure and certain circumstances immediately preceding the closure. That is a matter on which more opinions than one were reasonably possible.

13. But, there can be no doubt that one could proceed on the basis of figures available in the audited accounts of the company as reasonably indicative of the financial stability of the company and the trends in its working from the point of view of utility or profit to the members of the company.

14. In paragraph 6 of the official liquidator's report u/s 455, he has given a tabulated statement showing the profit earned or loss incurred by the company year by year and the dividends declared by it from 1943 right down to 1958 in which year this winding up petition came to be presented. It is noticed therefrom that throughout the period 1943 to 1947 the company was making good profit and declaring dividends at what appears to be a reasonably good rate for an industry. In 1943 and 1947 the dividend rate was 12 1/2% in 1944 it was 15% and in 1946 it was 16 1/4%. After 1948 the position does not appear to have been so comfortable. In 1948 itself there was a small loss of Rs. 3,000 and odd. In 1949, just over Rs. 1,000 represented the net profits of the company. Although the position seemed to have improved during the years 1950 and 1951, there was a heavy loss in 1952, amounting to Rs. 4,71,298. The loss in 1955 was nearly Rs. 2,00,000. Although it appeared as if the company was looking up during the succeeding two years with a profit of Rs. 42,000 in 1956 and Rs. 3,00,030 in 1957, the year 1958 closed with a loss of Rs. 4,85,765.

15. Another aspect of the matter disclosed entirely by admitted or indisputable facts which cannot possibly be described as a mere opinion is that for some years immediately preceding the actual closure the company had been borrowing highly. Indeed, this continued or uninterrupted program of borrowing is pointed out by the petitioning creditor in his objections to the liquidator's report u/s 455 as an important factor which had a crippling effect on the working of the industry. It may be, as pointed out by his learned counsel, the objections were not actually pressed. But, I cannot understand the not pressing of the objections as having the effect of wiping out the effect of the petitioner having entertained an opinion that the heavy borrowing program of the company must have been one of the most important contributory causes of the ultimate failure which brought the company into the winding up court. It is no doubt true that the primary or important object of those objections was to invite an investigation into the affairs of the company with a view to find out the alleged frauds or acts of mismanagement. It is only in the sense that the petitioning creditor did not insist on this request being given effect to, that the withdrawal of his objections may be said to have some meaning.

16. The team of experts who examined the position of the mills with a view to suggest ways and means of improving its working did observe certain difficulties in the matter of obtaining proper or suitable raw materials and also did point out certain deficiencies in the matter of making arrangements with the suppliers of such raw materials. The first is a matter of fact and the second is a matter of opinion. If the working had resulted in profits, the management which was responsible for the program which resulted in profit would surely have taken credit for having managed the affairs successfully. In all cases where industries have to be built up, certain decisions have to be taken by promoters or organisers at the earlier stages of the industry. Apart from the fact that the accuracy or effectiveness of an opinion depends upon the accuracy and extent of the information regarding the primary facts collected for the purpose, there is always scope for two opinions being entertained as to the possibility of ultimate success in respect of every program of development of an industry. I do not think therefore that merely because a team of experts have pointed out certain factors as having contributed to the ultimate failure and tried to suggest that a different manner of working would have resulted in profit or would not have resulted in losses, it can furnish sufficient basis for a court to come to a conclusion that the closure was due to circumstances beyond the control of the employer.

17. One particular circumstance, however, has been strongly relied upon to show that the closure was really inevitable and beyond the control of the management.

18. At or about the time the winding up petition came to be filed, the company was contemplating entering into a certain arrangement with a firm called Harilal Bikhbai & Sons. The arrangement was in the nature of a lease of the machinery in favour of the said firm.

19. The several conditions set out in that lease represented the opinion of those in charge of the mills at that time to the effect that the further working of the mills on the conditions so set was likely to be profitable. Some time after the petition had been entertained by this court, attempt was made to give effect to that arrangement by proceedings u/s 391 of the Act. In the course of those proceedings, the learned counsel for the labour organisation lent strong support to the proposed scheme.

20. The argument based on these facts is that whereas every one connected with the affairs of the company including the representatives of the labour force was of the opinion that a reconstitution of the company or reorganisation of its made of working in the light of the arrangement with Harilal Bikhabai & Sons placed before the court u/s 391 of the Act would have rehabilitated the company and placed its working on a sound footing resulting in the liquidation of its then existing debts, the closure became inevitable by reason of the pendency of the winding up petition. That the scheme had reasonably good prospects or success is said to be a good and fair inference to draw in view of the fact that a general meeting of the members of the company had also expressed a favorable opinion about it. In the course of the proceedings before this court u/s 391 of the Companies Act, the scheme could not be put through, not because the court declined to accept or confirm it, but because its sponsors did not proceed further with it.

21. If this line of argument is to be taken to its logical conclusion, the inevitability of the failure of the company was the filing of the winding up petition. But for that, it is argued, the company might well have gone forward with the scheme or arrangement mentioned above, and having regard to the opinion of not only the management but also of the members and workers of the company, it could reasonably have been expected to have worked successfully. Therefore, it is contended that the closure was due to circumstances beyond the control of the employer within the meaning of the proviso to sub-section (1) of section 25FFF of the Industrial Disputes Act.

22. It should be remembered that the notice of closure was put up shortly after the presentation of the winding up petition and some time before a provisional liquidator was appointed by this court. During that period the company was making every effort to oppose the further progress of the winding up petition and to rehabilitate itself, if possible, by means of the scheme aforesaid. Until therefore the effectuate of the scheme was finally given up whatever may be the reasons that persuaded the sponsors to do, it could not have been said that the pendency of the winding up petition had made it inevitable for the management to close down the mills. The decision to close down was taken some time prior to the actual putting up of the notice of closure. The examination of the circumstances leading up to the decision must have taken such length of time as to make it clearly possible that the question of closing down the mills must have been under consideration even before the company thought that it was possible

that winding-up petition was about to be filed against it.

23. Leaving out of account, therefore, the possibility of entertaining different opinions as to the exact and real connection existing between the fact of closure and the circumstances attending the working of the company immediately before the closure, the only substantial facts on which a court can come to a conclusion are the serious losses which the company incurred for a period of five or six years immediately preceding the presentation of the winding up petition and the continued need which the company felt of borrowing large sums of money during that period. If so, I think, it is an acceptable argument to state that the prime or governing factor which led to the closure was extreme financial difficulty in which the company found itself placed at or about that time.

24. The learned counsel for the petitioner-applicant in this case, relying upon certain observations contained in the judgment of their Lordships of the Supreme Court in *Hati Singh Manufacturing Company v. Union of India* 1, contended that it is only when the closure is merely on account of financial defects or accumulation of indisposed of stocks that the closure is not to be deemed due to circumstances beyond the control of the employer. The further argument based on that contention is that if the factors which may reasonably be said to have contributed to the closure include some circumstances other than or in addition to financial difficulties or accumulation of indisposed of stocks, one should necessarily come to a conclusion that the

(1) *Hatisingh Mfg. Co. Ltd. and Another Vs. Union of India (UOI) and Others*, .

closure was due to circumstances beyond the control of the employer. It seems to me that that is not what their Lordships meant. Indeed, to read their Lordships' decision in that way would really lead to attributing to their Lordships and interpretation of section 25FFF which is destructive of the very object of that section. The Explanation under the proviso excludes the possibility of financial difficulties and accumulation of indisposed of stocks being pressed before a court as circumstances beyond the control of the employer. It cannot be read negatively as suggesting that every circumstance other than those two existing separately or along with them, should necessarily oblige a court to come to a conclusion that the closure was due to circumstances beyond the control of the employer. The question whether the closure was due to such circumstances is itself a matter for investigation, as to the extent of which investigation the Explanation places no fetters whatever. All that the Explanation says is that the two factors mentioned above cannot be relied upon in support of a case that the closure was due to circumstances beyond the control of the employer.

25. In the light, therefore, of the facts available upon record and excluding from consideration variety of opinions possible on the circumstances said to have attended the closure of the mills, I am not satisfied that the petitioner has made out a case that the closure of the company was due to circumstances beyond the control of the employer within the meaning of the proviso to sub-section (1) of

section 25FFF of the Industrial Disputes Act.

26. Once this argument on behalf of the applicant becomes unacceptable, the only question that remains is whether the fixing of four months' wages as reasonable compensation to the workers pursuant to section 25FFF is or is not a just estimate which the official liquidator could make u/s 528 of the Companies Act. Actually it seems to me that it is unnecessary to examine this question because, besides the argument that the proviso to section 25FFF(1) can be invoked in this case to limit the compensation to the maximum of three months' wages, no attempt has been made to show that if the proviso is out of the way four months' wages as compensation is either unreasonable or not a just estimate of the claim. Even otherwise, the maximum of Rs. 1,000 mentioned in section 530(2) may be taken as a measure of the reasonableness of the claim. The tabulated statement filed by the official liquidator setting out the amount of the claims admitted by him under several heads in respect of each worker shows that very few among the workers have come close to the said maximum of Rs. 1,000.

27. There remain two minor points for consideration and they relate to the mode of calculation adopted by the official liquidator in arriving at the amount payable on account of notice-pay and the amount payable in respect of accrued holiday remuneration.

28. Clause (a) of section 25F is the relevant provision of law which requires an employer to pay the worker, in lieu of notice, wages for the period of notice. The period of notice mentioned therein is one month. In calculation one month's pay, the official liquidator, who had on an earlier occasion taken twenty-six days as the basis for calculation, has in the present order taken thirty days as equivalent to a month. Although clause (b) of the same section dealing with compensation uses the term "average pay" clause (a) uses the expression "wages for the period of notice." So far as the average pay is concerned, there is a definition thereof in clause (aa) of section 2. There is no definition of the month in that section. Necessarily therefore we have to have recourse to the General Clauses Act which defines a month as the month according to the British Calendar. That month varies from twenty-eight days to thirty-one days. The closure having taken place some time in December, a month's notice given at or about that time would be or should be taken to be as long as either December or January both of which have thirty-one days. In that view, the official liquidator cannot be said to have erred in taking thirty days as equivalent to a month. The wages for that month naturally would mean the actual wages received or payable for that month. It is necessary to take into account the wages receivable because if at or about the time of closure there had been periods of lay-off considerably contracting the wages actually earned by the workers, to take the actual wages received which may conceivably be wages for a single day as equivalent to wages for a month would be to detract considerably from the value and effect of the provision of section 25F for payment of wages in lieu of notice. The ordinary conduct which

the law expects is the giving of notice. If that alternative is followed the employer is expected to continue the worker in employment for the entire period of one month and pay him wages thereof. If, therefore, he wants to elect the alternative of paying wages for the notice period in lieu of notice, the wages for the notice period should necessarily mean wages receivable for a period of one month. I, therefore, see no error in the calculation of the notice pay.

29. The objection regarding accrued holiday remuneration is raised only in regard to monthly paid workers. The relevant standing order applicable to them is No. 9(1) (ii) which reads as follows :

"On the management being satisfied of the good conduct and regular attendance of an employee he will on his written request be allowed privilege leave of fifteen days" duration with full pay for every year of continuous service provided that such leave shall be given when it is convenient to the management. The leave can be accumulated up to a limit of two months."

30. The argument is that unless there is evidence to show in relation to every worker that the management was satisfied of his good conduct and regular attendance, the worker cannot be said to have earned the leave. The language of the standing order undoubtedly supports the argument. But the answer to it is that the figures for calculating the leave available to or at the credit of each worker were taken by the official liquidator from the books maintained by the company. If the figures relied upon by the official liquidator are found entered in the books of the company, the management under whose directions books are normally maintained may well be said to have satisfied itself that every worker is entitled to have satisfied itself that every worker is entitled to the leave entered to his credit in the said books.

31. All the objections raised in the application to the calculation made by the official liquidator, therefore, fail and are hereby rejected.

32. The opinion stated by the official liquidator that the entire amounts calculated by him were entitled to preferential payment u/s 530(1)(a) and (b) of the Companies Act is not questioned.

33. Company Application No. 34 of 1961 will therefore stand dismissed. The parties will bear their own costs therein.

34. In the result, sanction is accorded for the declaration by the official liquidator of preferential payment of the claims of the workers as set out in the schedule filed by him. Under rule 276 of the Companies (Court) Rules, 1959, I further direct that notice of this declaration fixing the date for payment thereof be given by advertisement in the prescribed form in one issue of Prajavani and by individual notice to persons entitled to payment by pre- paid post under certificate of posting.

35. Application dismissed.