

(1947) 03 CAL CK 0014
In the Calcutta High Court
Case No : Suit No. 144 of 1946

In Re: Naokhila Loan Company Ltd.

Date of Decision : 17-03-1947

Acts Referred:

Citation : (1947) 03 CAL CK 0014

Judgement

Das, J.—This is an application on the part of Kumar Tushar Kumar Roy of Dighapatiya. claiming to be a creditor of the Naokhila Loan Coy., Ltd., for an order that the scheme sanctioned by this Court on the 27th March, 1933, be set aside, and that the Company be wound up by the Court under the provisions of the Indian Companies Act. The petition was presented before me on the 27th August, 1946. On that occasion, before giving directions for advertisements and fixing a date for the hearing of the application, I directed the applicant to give notice to the Company so that I could give directions for advertisements after hearing the views of the Company. A notice was accordingly given to the Company, and an affidavit affirmed by one Mahomed Husain Khan, said to be the accountant of the Company, was filed in opposition to the application. The matter came up before me on the 15th January, 1947, and after hearing the Company I directed advertisements to be issued for the hearing of the application. Those directions have been carried out, and the application has now come up before me for final hearing. No other creditor has appeared before me, either to support the application or to oppose the same.

2. The material facts are shortly as follows. The nominal capital of the Company is rupees one lac. The amount of capital paid up or credited as paid up is Rs. 50,000. The Petitioner admittedly is a creditor of the Company to the extent of Rs. 17,474-5. It appears that in 1932, the Company found itself in financial embarrassment. Accordingly, the Company prepared a scheme of arrangement between itself and its creditors, and obtained leave to hold meetings under sec. 153 of the Indian Companies Act. The scheme was approved by the requisite majority of creditors and was eventually sanctioned by this Court on the 27th March, 1933. The scheme provided, amongst other things, that, out of the realisations, the Board of Directors as constituted under the scheme should allow

the Company to retain always a sum not exceeding Rs. 4,000 to meet emergent contingencies and law expenses. It also provided that, out of the realisations, the Board, in the next instance, should pay to the Company a sum not exceeding Rs. 5,000 per annum to meet establishment and other charges of the Company, provided that in urgent cases of necessity the Board might sanction any amount in excess of the sum mentioned above. Finally, the scheme provided that the Board would, in the next place and subject to a sufficient amount accumulating, distribute the entire amount in their hands amongst the depositors pro rata. For the purposes of- such distribution, each depositor should be deemed to be a creditor for the amount shown to his credit up to the 31st December, 1932, in the books of the Company, with such interest accruing thereon not exceeding 4 per cent, per annum, as might be decided to be paid by the depositors themselves at the meeting to be held annually before the end of January for the purpose of deciding the same.

3. On the 31st December, 1932, the amount due to the Petitioner was Rs. 16,218-8 in deposit account. Since the scheme was sanctioned, the Company has paid Rs. 151-10-9 on account of interest. At present, the amount due to the Petitioner is Rs. 16,066-13-3 for principal and Rs. 1,407-8-6 on account of interest which has accrued due since the sanctioning of the scheme; in other words the amount due to the Petitioner is now greater than what it was before the scheme was sanctioned.

4. It appears that the Company has been running at a loss ever since the date of the sanction of the scheme. The reserve fund of Rs. 60,000 has been totally wiped off by these losses, and there has been a loss of Rs. 2,88,053-14-6 up to the 31st December, 1943. Particulars of the losses have been set cut in paragraph 10 of the petition, and they show a progressively increasing figure. It is admitted that since 1939 no payment has been made by the Company to any of its creditors. It is alleged and not seriously disputed that some of the Directors were debtors to the Company and the amounts due from them have become barred by limitation by reason of no steps having been taken for the recovery thereof. This fact was noticed by the Company's auditors as far back as the 25th December, 1942.

5. In his report dated 18th December, 1933, at the foot of the audited accounts as up to the 31st December, 1943, the auditor remarked that the cash realisation of book debts was too small. For want of funds the entire award fees were not paid, nor the certified copies of the Debt Settlement Board's awards were obtained. There was a cash balance of Rs. 150 or more during the year, yet the award fees were not paid and the certificate processes were executed by the Government for the realisation of the same. The auditor also remarked that, like previous years, no lists of book debts had been prepared or submitted to him during the audit, and that, therefore, he could not verify the correctness of the amount shown in the balance-sheet under heads "Loans," outstanding interest on loans, law costs and deposits with other Companies and landed properties. In

short, since 1939, the Company appears to me to have been run only for the benefit of its employees, the creditors not having received any sum since that year.

6. Mr. De, appearing on behalf of the Company, has strenuously maintained that no application lies for setting aside a scheme once it is sanctioned by the Court. He referred me to certain observations of Lord-Williams, J., made in the case of *In re: Mymensingh Loan Office, Ltd.* (1936) 41 C.W.N. 599, and also to the observations of the Court of Appeal in England in the case of *Nicholl v. Everhardt & Co.* 61 L.T. 489. In the view that I have taken, it is not necessary for me to consider whether the Court has any power under sec. 153 or otherwise to make an order for setting aside the scheme.

7. It will be noticed that the scheme has not expressly fixed a time within which the creditors would be paid. The scheme cannot go on for ever. In such circumstances, I am bound to hold that the law will imply that the payment would be made to the creditors within a reasonable time. If this be the correct interpretation of the scheme, then the lapse of over 13 years since the date of the sanction of the scheme appears to me to have been more than a reasonable time within which payment should have been made. The scheme is undoubtedly binding on all the members and creditors of the Company. But if the scheme is that payment would be made within a reasonable time and no payment is made within a reasonable time, then, obviously, there has been a breach on the part of the Company of the terms of the scheme.

8. In the next place, the scheme is certainly binding on all members and creditors of the Company, and the creditors are not entitled to demand payment of their dues otherwise than in terms of the scheme. It may be that the scheme will prevent a creditor from presenting a winding-up petition on the ground of non-payment of his debts, but a winding-up petition may be presented by creditors, including any contingent or prospective creditors, under sec. 166, and such petition may be presented on any of the grounds mentioned in paragraph 162 of the Indian Companies Act. I do not think that the position of a creditor who is bound by a scheme is worse than a contingent or prospective creditor. As I have said, it may be that such a creditor will not be entitled to present a winding-up petition on the ground that the Company is unable to pay its debts or has failed to pay after having been served with a statutory notice under sec. 163 of the Act, but I do not see any reason why such a creditor should not be entitled to present a winding-up petition if default is made in filing the statutory report or in holding the statutory meeting or if there be grounds which the Court may consider to be just and equitable that the Company should be wound up.

9. In the case of *Madan Gopal v. The People's Bank of Northern India, Ltd.* ILR (1935) Lah 1029, a Special Bench of the Lahore High Court made an order for the winding-up of the Company, although the scheme sanctioned by the Court was in operation at the time. Mr. De seeks to distinguish that case on the ground that in that case there had been a breach of the terms of the scheme, so that the

foundation of the scheme had disappeared and the fact that certain directors and creditors were utilising the scheme for their personal advantage made it just and equitable that the Company should be wound up. The facts of that case were undoubtedly different. But in the case before me, if my construction of the terms of the scheme be correct, there has been a breach of the scheme on the part of the Company in that the creditors have not been paid within a reasonable time. In the next place, having regard to the facts I have detailed above, it seems to me that it is just and equitable that the Company should be wound up. The continuation of this Company does not appear to me to benefit the creditors in any way. The assets of the Company are being progressively dissipated and the Company is in a moribund condition.

10. In these circumstances, the order that I make on this application is that this Company be wound up by this Court under the provisions of the Indian Companies Act. The applicant will get the costs of this application out of the assets.