
(2013) 03 RAJ CK 0028

In the Rajasthan High Court

Case No : DB Civil Special Appeal (Co.) No. 102 of 2007

Karnav Leather Ltd.

APPELLANT

Vs

R.C. Meena, Provisional Liquidator and Another

RESPONDENT

Date of Decision : 11-03-2013

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 20

Citation : (2013) 114 CLA 343 : (2014) 183 CompCas 529

Hon'ble Judges : Amitava Roy, C.J;Meena V. Gomber, J

Bench : Division Bench

Advocate : S.M. Mehta and Anil Mehta, for the Appellant; A.K. Bhandari, G.K. Garg, J.K. Singhi s, Ms. Sheetal Mirdha, Ms. Anita Agarwal, Anuroop Singhi and P.C. Bhandari, for the Respondent

Judgement

1. These intra court appeals witness challenge in succession to the orders dated 11th May, 2007 and 20th July, 2007 passed in Company Applications No. 60/2004 & 22/2007 in SB Company Petition No. 29/2003, respectively, pertaining to sale of the assets/properties of the appellant-Company by public auction. We have heard Mr. S M Mehta, senior advocate assisted by Mr. Anil Mehta for the appellant and Mr. A K Bhandari, senior advocate assisted by Ms. Sheetal Mirdha, Mr. G K Garg, senior advocate assisted by Ms. Anita Agarwal, Mr. J K Singhi, senior advocate assisted by Mr. Anuroop Singhi and Mr. P C Bhandari for the respondents.

2. Facts in brief, indispensable for the present adjudication, are that the appellant-company ("the company") had taken loan from various financial institutions and in its bid to salvage its productive assets approached the Board for Industrial and Financial Reconstruction, New Delhi ("the Board") for its revival and rehabilitation under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA") together with other appropriate reliefs. The Board, however, forwarded its opinion dated 11th June, 2003 u/s 20 of SICA to this court to wind up the company. This notwithstanding, to resuscitate itself

the appellant submitted an offer for one time settlement to the Industrial Development Bank of India ("IDBI"), the operative agency for the consortium of secured creditors, and several parleys were held in connection therewith.

3. While such efforts were in progress, the learned Company Judge, on a scrutiny of the records forwarded by the Board, by order dated 23rd January, 2004, appointed Mr. B C Meena as the provisional official liquidator. It was thereafter that on 18th January, 2007, the official liquidator issued an advertisement inviting tenders for sale of the assets of the company. On this advertisement, the company made necessary enquiries and it transpired that there was no judicial order permitting such sale, and that the leave to that effect had been granted only on the administrative side. It, therefore, filed an application under rule 9 of the Company (Court) Rules, 1959 ("the Rules") before the learned Company Judge to recall the advertisement dated 18th January, 2007. The learned Company Judge by his order dated 2nd March, 2007, however, on a consideration of such application, made the sale subject to the decision rendered in the company petition. The appellant-company thereafter filed another application on 13th April, 2007 praying for a copy of the application said to have been filed by the provisional official liquidator seeking permission to put on sale its properties/assets and also the order passed thereon. On this, the learned Company Judge by order dated 27th April, 2007 while observing that prior permission u/s 457 of the Companies Act, 1956 ("1956 Act") had not been obtained and that the matter having been placed on the administrative side, the official liquidator was permitted to publish the tender notice on 18th January, 2007, directed that the matter be placed on the judicial side. Thereby, the official liquidator was restrained from selling the assets of the appellant-company.

4. The official liquidator pursuant to this order filed another application before the learned Company Judge on 9th May, 2007 under rule 9 of the Rules pointing out that an application u/s 457(1) of the 1956 Act was in fact pending since 2004 along with another application for confirmation of sale. The learned Company Judge consequently, on 11th May, 2007, on a consideration of the application dated 21st December, 2004 and after hearing the learned counsel for the parties, empowered the official liquidator as contemplated u/s 457(1) of the 1956 Act to take necessary steps in the matter of sale of the company's assets by auction and finalize the bids. The process of sale, however, was thereby made subject to the decision in the Company Petition No. 29/2003.

5. According to the appellant-company, however, this order was passed without affording an opportunity to it for filing reply and contest the application dated 21st December, 2004. On the next date, i.e., 13th July, 2007 fixed for confirmation of the sale, it was pleaded on behalf of the appellant-company that the finalization of the bids offered in the auction sale be deferred as it was still in the process of negotiations with its creditor, IDBI and Canara Bank to work out the scheme for compromise. This prayer was resisted on behalf of the bidders on the ground that they had deposited huge amount of earnest money which was

lying with the official liquidator since long and that the ground of negotiation was only a ruse to further delay the proceedings. The learned counsel for the appellant-company, on instructions, having conveyed its willingness to pay interest on the earnest money by way of compensation, the learned Company Judge deferred further orders on the confirmation of the bids by a week, leaving it (appellant-company) at liberty to effect a compromise as was sought to be represented to be in the offing. On the next date, i.e., 20th July, 2007 as the appellant-company sought for further time to complete the negotiations, the learned Company Judge, on a consideration of the relevant aspects and noticing, amongst others, the failure on its part to give a written undertaking in terms of its assurance on the previous date and make payment of interest on the earnest money, declined to accede to its prayer and directed that the sale be confirmed in favour of Chaudhary & Sons (Forgings) (P.) Ltd., Ghaziabad (UP). The official liquidator was ordered to take necessary consequential steps as contemplated in law.

6. In the above factual backdrop, the learned counsel for the appellant has insistently argued that sans any order for winding up of the appellant-company, the process of sale of its assets is per se not sanctioned by law and is thus liable to be adjudged non est. Referring to section 20(4) of SICA, in particular, the learned counsel has urged that forwarding of the report of the Board to the High Court ipso facto does not equip it with the authority to permit sale of the assets of the sick establishment without first directing the winding up thereof. Without prejudice to these, learned counsel urged that as the learned Company Judge, by his earlier orders, made the sale subject to the adjudication of the company petition, the confirmation of sale on a review (hereof is impermissible. In support of his contentions, reliance has been placed on the decision of the Apex Court in NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another,

7. In reply, the learned counsel for the official liquidator has argued, with reference to sections 450, 454 and 457 of the 1956 Act and sections 20, 22A of SICA, that the learned Company Judge did have the jurisdiction and competence to examine the report of the Board and other materials on record, as to whether the same justified winding up of the appellant-company and as an incidental measure permit the sale of its assets, as done. As the appointment of the provisional official liquidator was pursuant to a conscious decision as contemplated u/s 457 of the 1956 Act, the same is unassailable and that the sale having been conducted, amongst others, in compliance of the requirements of section 454 of the enactment, it cannot be faulted with. While contending that the price fetched in the auction sale was much above the amount that was sought to be secured through the negotiations, it was argued as well that in absence of any challenge to the order of appointment of the provisional official liquidator, the steps taken by him in accordance with law, are beyond reproof. It was argued as well that with the interim restraint granted by this appellate forum, the process has come to a standstill and though the property is in the custody of the official liquidator, the state of status quo in all respects, is not in

overall benefit, more particularly, of the auction purchaser and the creditors.

8. Learned counsel for Arpit Granites (P.) Ltd., the nominee of the highest bidder Chaudhary & Sons (Forgings) (P.) Ltd., Ghaziabad (UP) has urged further, with reference to the order dated 11th June, 2003 of the Board, that in terms of section 20(2) of SICA, the High Court is obligated to wind up the appellant-company and that the proceedings thereof being only a formality, the challenge to the auction sale is misconceived. In absence of any grievance with regard to the mode of conduct of such sale and allegation of collusion or irregularity in connection therewith, the present impugnement ought to be rejected in limine as every day's delay is causing immense detriment and hardship to the auction purchaser and all concerned, he urged. Reliance was placed on the decision of the Apex Court in FCS Software Solutions Ltd. Vs. LA Medical Devices Ltd. and Others,

9. The pleadings of the parties and the contrasting arguments have been duly evaluated.

10. Admittedly, as on date, the company petition has not yet been finally disposed of and no final order for winding up of the appellant-company has yet been passed. As the sequence of the orders passed by the learned Company Judge would reveal, following an evaluation of the report of the Board recommending winding up of the appellant-company and other records, a provisional official liquidator had been appointed and as permitted by the company court auction sale of its assets/properties has been completed and proceeds thereof lie in deposit with the provisional official liquidator. A bare perusal of the report dated 11th June, 2003 of the Board reveals its considered opinion that the appellant-company is not likely to be viable in future and that it was just, equitable and in public interest that it ought to be wound up u/s 20(1) of SICA. This opinion had been forwarded to this court for further necessary action in accordance with law.

11. The learned Company Judge by order dated 23rd January, 2004 appointed the provisional official liquidator and as the succeeding facts would thereafter unfold, eventually by order dated 11th May, 2007 he was vested with the power u/s 457(1) of the 1956 Act and accorded permission to complete the sale, the process whereof had been in the meantime initiated by the advertisement dated 18th January, 2007. The process of sale however was thereby, made subject to the final decision in the Company Petition No. 29/2003. Thereafter, by order dated 20th July, 2007, the sale was confirmed in favour of Chaudhary & Sons (Forgings) (P.) Ltd., Ghaziabad (UP) and the official liquidator was directed to take follow up steps. It is thus more than apparent that the exercise for sale of the assets/properties of the appellant-company was undertaken and completed before final orders being passed in Company Petition No. 29/2003 registered on the recommendation dated 11th June, 2003 of the Board forwarded u/s 20(1) of SICA. It would be apt at this stage to extract this legal provision:

20. Winding up of sick industrial company. - (1) Where the Board, after making inquiry u/s 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court.

(2) The High Court, shall on the basis of the opinion of the Board, order winding up of the sick industrial company and may proceed and cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956 (1 of 1956).

(3) For the purpose of winding up of a sick industrial company, the High Court may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of the sick industrial company and the officer so appointed shall for the purposes of the winding up of the sick industrial company be deemed to be, and have all the powers of, the official liquidator under the Companies Act, 1956 (1 of 1956).

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), the Board may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of section 529A, and other provisions of the Companies Act, 1956 (1 of 1956).

12. It would be patent from sub-section (2) of Section 20 that whereas the High Court, on the basis of the opinion of the Board is to order the winding up of sick industrial company or cause it to be so done in accordance with the provisions of 1956 Act, the Board as envisaged in sub-section (4) may cause to be sold the assets/properties of the company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution thereof in accordance with the provisions of section 529A and other provisions of the said enactment. Noticeably, u/s 22A, the Board is vested with the power to direct, in case it is of such opinion, the sick industrial Company not to dispose of its assets without its (Board's) consent, inter alia, during the period beginning from the recording of its opinion for winding it up under sub-section (1) of section 20 till the commencement of the proceedings relating thereto before the concerned High Court.

13. The hon"ble Apex Court in NGEF Ltd. (supra) was seized, amongst others, with the poser as to whether a High Court pending its decision on the issue of winding up of a company u/s 20(2) of SICA is possessed of the jurisdiction to cause sale of its assets, more particularly, in the face of subsection (4) of section 20 of the legislation. In the textual facts of the reported decision, the jurisdictional High Court had permitted sale of a plot of land of the appellant

therein during the pendency of the company petition initiated on the receipt of the report of the Board recommending winding up thereof (appellant). In endorsement of the permissibility of such sale reference inter alia, was made of sections 456, 457 and 536(2) of the 1956 Act as well as the inherent powers of the company court. On a comparative analysis of the aforementioned provisions of the 1956 Act, the rules thereunder as well as sections 20 and 22A of SICA, their lordships held in authoritative terms that a company declared to be sick in terms of the provision of SICA, continued to be sick unless it was directed to be wound up and having regard to section 20(4) of the enactment, the Board alone had the jurisdiction as regards sale of its assets, till the order of winding up of a Company is passed. While underlining that SICA was a special statute, and later in point of time, compared to 1956 Act and that sub-section (4) of section 20 contains a non obstante clause, the hon"ble Apex Court enunciated that though on receipt of the recommendation of the Board, the High Court could initiate a proceeding for winding up of the sick industrial company, section 536(2) of the 1956 Act did not ipso facto confer any jurisdiction upon the company court to direct sale of its assets. Elaborating this proposition, their lordships observed that notwithstanding the fact that the procedure outlined in the 1956 Act would apply for the sale of the assets of the sick industrial company, the process with regard thereto can be initiated only after the order of winding it up is passed in the company petition. The hon"ble Apex Court was of the view that the scheme of SICA suggested that the Board retains control over the assets of the sick industrial company pending decision of the High Court on the issue of winding up thereof and in terms of the relevant provisions it could either prevent or permit any sale of its assets. It was clarified that such power with the Board would remain till a winding up order is passed by the High Court and a stage arrives for the High Court for issuing orders for distribution of the sale proceeds. That the provisions of SICA would prevail over those of the 1956 Act was emphasized upon. Resort to the inherent power of the company court to validate any sale of the assets of the sick industrial company pending a decision on the aspect of its winding up, was not approved as well. Though great emphasis has been laid by the learned counsel for the respondents, amongst others, on sections 450, 454 and 457 of the 1956 Act contending as well that the reported decision is distinguishable on facts, in the teeth of the unqualifying and resounding conclusions drawn against the permissibility of sale of the assets of the sick industrial company till it is wound up on the order of the company court as adumbrated, those, in our comprehension do not have any overriding effect. Having regard to the scope and ambit of the power of the company court to order or cause to effect sale of the assets of a sick industrial company pending its decision to wind up the same on the receipt of the recommendation of the Board as contemplated in section 20(1) of SICA, as conditioned by section 20(4) thereof and as held in NGEF Ltd. (supra) we are of the unhesitant view that the impugned orders dated 11th May, 2007 and 20th July, 2007 cannot be sustained in law and on facts.

The impugned orders are thus set aside. The appeals are allowed. No costs.
A copy of this order be placed in both the files.