
(1991) 04 BOM CK 0097
In the Bombay High Court

Ramniklal and Co.

APPELLANT

Vs

Wallace Flour Mills Co. Ltd. and other cases

RESPONDENT

Date of Decision : 12-04-1991

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 14, 15, 16, 17, 17(1)

Citation : (1993) 78 CompCas 546

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : S.S. Rahimtoola, for the Appellant; I.M. Chagla, instructed by Nanu Hormusjee and Co., for the Respondent

Judgement

D.R.Dhanuka J.

1. Several creditors have filed winding up petitions in this court against a company known as the Wallace Flour Mills Co. Ltd. on the ground of non-compliance with statutory notices. These winding up petitions are not yet admitted and are pending in this court. Company Petition No. 512 of 1990 was filed by Ramniklal and Co. who claim to be creditors of the said company in the sum of about Rs. 39,16,500.11. Soon after the filing of this petition, the petitioning-creditor in this petition and the petitioning-creditors in other similar petitions took out judge's summonses for grant of interim reliefs during the pendency of the petitions for winding up. By the judge's summons in Company Application No. 316 of 1990 (connected with Company Petition No. 515 of 1990), the petitioning-creditor seeks appointment of the official liquidator, High Court, Bombay, as the provisional liquidator of all the assets and properties of the company, including the properties mentioned in the schedule to the judge's summons. By prayer (b) of the said judge's summons, the petitioning-creditor seeks an injunction restraining the company and its agents and servants from selling or disposing of or dealing with any of its assets/properties, including the properties described in the schedule annexed hereto, Similar judge's summonses

have been taken out in the companion petitions.

2. It is not disputed and it is not disputable that the company is in financial difficulties and it has not been able to pay its admitted debts in the ordinary course.

3. By an order dated October 5, 1990, I granted ad interim relief in terms of prayer (b) of the judge's summonses up to October 10, 1990, after omitting the words "dealing with" therefrom. On October 5, 1990, it was informed by learned counsel for the company, on instructions, that the company had already entered into an agreement to sell the property described at item No. 8 of the Schedule to the judge's summonses in favour of one Shri G. D. Agarwal. By the said order, the company was restrained from taking any further steps in respect of the said alleged liquidation till October 10, 1990. The company was directed to file an affidavit disclosing true facts regarding disposal of the properties mentioned in the schedule to the judge's summonses and the agreements already entered into in respect thereof, if any. By my further order dated October 11, 1990, I continued the ad interim order dated October 5, 1990, till the disposal of the judge's summons subject to various limitations, restrictions and conditions set out therein. As regards the property described at item No. 8 of the schedule to the judge's summonses, the appropriate authority has now issued its certificate u/s 269UL(3) of the Income Tax Act, 1961, stating therein that it has no objection to the transfer of the said property for an apparent consideration of Rs. 70,00,000. The said property is not yet transferred in view of the orders of injunction granted by this court on October 5, 1990, and October 11, 1990.

4. The company made a reference to the Board for Industrial and Financial Reconstruction (for short, "the Board") constituted u/s 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (Act No. I of 1986) (for short, "the Act"), in terms of section 15 of the Act. By its order dated January 11, 1991, the Board has declared the said company a sick industrial company u/s 3(1)(o) of the Act. A copy of the order passed by the Board dated January 11, 1991, is annexed to the affidavit of Hemant Pratapsingh Vissanji, a director of the company, dated February 25, 1991, made in support of the application for vacating the ad interim orders dated October 5, 1990, and October 11, 1990. The said application is being considered by this order. The Board is seized of the said proceedings and is still to pass its orders under sections 17(1) and 17(2) of the Act. It is obvious from the said order dated January 11, 1991, that the Board has adjourned the proceedings for a period of three months in order to enable the company to present an agreed scheme for consideration of the Board, inter alia, providing for disposal of its surplus non-performing assets. Only after consideration of the scheme which may be proposed by the company, the Board will decide as to whether it is practicable for the company to make its net worth positive within a reasonable time. The powers of the Board under sections 17(1) and 17(2) of the Act are very wide. The said provisions impliedly authorise the Board to permit the company to prepare a scheme for its consideration before

the Board decides as to whether it is practicable for the company to make its net worth positive within a reasonable time. If the Board ultimately decides that it is not practicable for the company, which is a sick industrial company, to make its net worth positive within a reasonable time, the Board may direct any of the operating agencies to frame a scheme providing for taking of such measures in relation to such company as the Board deems fit. It is obvious from a plain reading of section 18 of the Act that such a scheme may provide for the sale or lease of a part or whole of the industrial undertaking or any of its assets and prescribe the method to be adopted for sale of some of its assets, as deemed fit, for rehabilitation or reconstruction of the sick unit.

5. The questions which arise for consideration of this court are whether section 22 of the Act is applicable in the present situation and whether the same can be availed of by the company. The second question for consideration of the court is as to whether the winding up petitions and the applications for interim reliefs are liable to be dismissed or treated as abated or whether the said proceedings are merely liable to be suspended and kept in abeyance. Another connected question which will arise for consideration of the court would be as to whether the ad interim orders dated October 5, 1990, and October 11, 1990, are automatically suspended or are liable to be vacated or modified in order to facilitate the preparation, sanction and implementation of the scheme under the Act.

6. I must state at the outset that there is a conflict of judicial opinion on the question of the effect of section 22 of the Act on pending winding up proceedings. There is no direct judgment of the Supreme Court or of this court on the subject. The High Courts of Gujarat, Andhra Pradesh and Karnataka have differed in their respective interpretation of the said provisions. It is necessary to consider the scheme and the salient features of the Act.

7. On January 8, 1986, the Act received the assent of the President of India. As obvious from the preamble to the Act, the Act was passed to make, in public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings and the speedy determination by a board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies. The Act came into force on January 12, 1987, except in respect of sections 15 to 34. Sections 15 to 34 came into force with effect from May 15, 1987. Section 4 of the Act provides for establishment of the Board. Section 5 of the Act provides for constitution of the appellate authority for Industrial and Financial Reconstruction. Section 14 of the Act provides that the proceedings before the Board or the appellate authority are judicial proceedings. Section 15 of the Act requires the board of directors of an industrial company, which has become a sick industrial company, to make a reference to the Board within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a "sick industrial company" within the meaning of the said expression as defined in section 3(1)(o) of the Act.

Section 16 of the Act provides for holding of an inquiry into the question as to whether the industrial company has become a sick industrial company. The said section also enables the Board to appoint one or more special directors of the company under inquiry. Sections 17(1) and 17(2) of the Act can be considered together. Section 17(1) of the Act provides that if after making an inquiry u/s 16 the Board is satisfied that a company has become a sick industrial company, the Board shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be by order in writing, whether it is practicable for the company to make its net worth positive within a reasonable time. Section 17(2) of the Act provides that if the Board decides that it is practicable for a sick industrial company to make its net worth positive within a reasonable time, the Board shall, by order in writing, give such time to the company as it may deem fit to make its net worth positive. No order has been passed by the Board u/s 17(1) or section 17(2) of the Act so far. The scheme proposed by the company is under preparation. The Board has adjourned the proceedings in order to enable the company to prepare the agreed scheme or a proposal which will enable the Board to consider as to whether it is practicable for the company to make its net worth positive. Only if the Board comes to the conclusion that it is not practicable for a sick industrial company to make its net worth positive within a reasonable time, would the Board invoke its powers u/s 17(3) of the Act by directing any of the operating agencies to prepare a scheme in terms of section 18 of the Act. Section 18 of the Act provides for preparation and sanction of the scheme by the operating agency. Such scheme may, inter alia, provide for the sale of surplus assets, for sale of non-performing assets, for sale or lease of part of an industrial undertaking or the method of such sale or lease. The scheme when sanctioned shall come into force on such date as the Board may specify. Section 20(1) of the Act provides that the Board may, in a given situation, record its opinion that it is just and equitable to wind up the company. In such an eventuality, the company is required to be wound up.

Section 22 of the Act is directly relevant. The marginal note to section 22 of the Act reads as under :

"Suspension of legal proceedings, contracts, etc." - The said section provides that where in respect of an industrial company an inquiry u/s 16 is pending or any scheme referred to in section 17 is under preparation or consideration or a sanctioned scheme is under implementation or an appeal u/s 25 is pending, then notwithstanding anything contained in the Companies Act I of 1956, no proceeding for the winding up of the industrial company shall lie or be proceeded with further, except with consent of the Board or the appellate authority. The said section also makes provisions for suspension of proceedings for appointment of a receiver, levy of execution, distress or the like against the properties of the company, with which we are not directly concerned for the moment. Sections 22(3) and 22(4) of the Act provide for making of declarations suspending the rights or remedies of the creditors and the suspension of proceedings before the various authorities in the contingencies specified therein.

Section 31 of the Act provides that where a receiver or official liquidator has been appointed in any proceedings pending immediately before the commencement of the Act in any High Court for winding up of an industrial company, such proceedings shall not abate but continue in the High Court.

8. The Act has an overriding effect over the provisions of the Companies Act, 1956.

Mr. Rahimtoola, learned counsel for the petitioners in support of the judge's summonses, has submitted that the inquiry u/s 16 of the Act is already concluded and is not pending and no scheme referred to u/s 17 of the Act is under preparation or consideration. Learned counsel has submitted that the expression "any scheme referred to u/s 17 is under preparation" can only mean the scheme prepared by the operating agency in pursuance of the order of the Board u/s 17(3) of the Act. Mr. Rahimtoola has submitted that section 22(1) of the Act is not applicable to the situation prevailing in this case, as the conditions of applicability of the section are not satisfied. The object of a winding up order is to destroy the corporate personality of the company. The Act was passed by Parliament with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings and taking of remedial measures by the Board, as more particularly provided in the Act. The first part of section 22 of the Act, cannot be, therefore, interpreted hyper technically so as to defeat the very object of the Act. No scheme is still under preparation by the operating agency as no order is yet passed u/s 17(3) of the Act. Before the Board makes up its mind u/s 17(1) or section 17(2) of the Act, the Board can consider a scheme which may be proposed by the parties and then decide as to whether it is reasonably practicable for the company to make its net worth positive. The first part of section 22(1) of the Act does not state that the said section shall apply only if the scheme u/s 17(3) of the Act is under preparation and not otherwise. The proposed scheme which is under preparation by the company for being considered by the Board is a step preparatory to the taking of a decision by the Board u/s 17(1) and section 17(2) of the Act. All ancillary powers are always implicit in the conferment of the main power. Accordingly, I have no hesitation in rejecting this submission of Mr. Rahimtoola and in holding that section 22 of the Act is clearly attracted and is applicable, as the proposed scheme is referable to the implied power of the Board under sections 17(1) and 17(2) of the Act. I shall now consider the effect of the applicability of section 22(1) of the Act on pending winding up petitions.

9. Relying on the judgment of the High Court of Gujarat in the case of Testeels Ltd. v. Radhaben Ranchhodlal Charitable Trust [1989] 66 Com Cas 555, Mr. Chagla, learned counsel for the company, has submitted that the winding up petition and the interim applications herein are liable to be dismissed, as the company is declared as a sick industrial company by order dated January 11, 1991, passed by the Board (a copy whereof is exhibit 3 to the above-referred affidavit dated February 25, 1991), and the scheme pertaining to the company

referable to section 17 of the Act is under preparation. Learned counsel for the company has also invoked section 31 of the Act in support of his submission. In the above-referred judgment, the Chief Justice, Shri P. R. Gokulakrishnan, speaking for the Bench of the High Court of Gujarat, observed that the proceedings for winding up could not be kept in abeyance and were liable to be dismissed if the conditions precedent prescribed under the first part of section 22(1) of the Act were satisfied. The Division Bench of the High Court of Gujarat held that the words "or be proceeded with further" cannot be interpreted to mean that the winding up proceedings already started should be kept in abeyance without proceeding further in the matter. The Division Bench referred to the statements and objects pertaining to the Act and held that the Act contemplated dismissal of winding up petitions in the contingencies specified in section 22 of the Act. I have carefully gone through the judgment with the help of learned counsel on both sides. With respect, I am unable to subscribe to the view taken by the Division Bench. Unless the winding up order is passed by the company court, the corporate existence of the company is intact. It is clear from the provisions of the Act that a winding up petition is required to be kept merely in abeyance pending the enquiry u/s 16 or framing of a scheme under the Act or pending the implementation of the scheme framed thereunder. The marginal note to section 22 of the Act provides an indication that the proceedings in question are merely required to be suspended. The operative part of section 22(1) of the Act provides that the winding up proceedings may continue with the consent of the Board or the consent of the appellate authority. If the proceedings can continue with the consent of the Board or consent of the appellate authority or in the event of the conditions precedent prescribed u/s 22(1) of the Act ceasing to exist, there is no reason as to why the pending winding up petitions must necessarily abate or must necessarily be dismissed. Section 31 of the Act provides that certain pending proceedings shall not abate where the receiver or the official liquidator was already appointed before the commencement of the Act. The section cannot be reasonably pressed into service for the purpose of making a submission to the effect that in all other cases the proceedings abate when the operative part of section 22 of the Act can be reasonably interpreted to mean that the winding up proceedings are merely required to be suspended and kept in abeyance and are not required to be dismissed and they do not abate.

10. In an almost similar situation, the High Court of Andhra Pradesh was required to interpret section 22 of the Act and the judgment of the High Court of Andhra Pradesh is in the case of *Sponge Iron India Ltd. v. Neelima Steels Ltd.* [1990] 68 Com Cas 201. In this case, the High Court of Andhra Pradesh passed an order to the effect that the company shall not alienate its assets without the leave of the Board. In this case, the High Court of Andhra Pradesh passed a further order to the effect that the winding up petitions were closed, with liberty to the petitioners to make an application for reviving them in the event of its becoming necessary by virtue of any subsequent decision of its Board. The High Court of Karnataka has made somewhat similar observations in the case of *K. Sp. V.*

Shanmugam v. Maharashtra State Co-operative Cotton Growers Marketing Federation Ltd. [1991] 70 Comp Cas 440.

11. I shall now turn to some of the cases decided by our High Court. Some of the said decisions deal with the applicability of section 22 of the Act to pending suits and not to winding up petitions.

12. In Appeal No. 1270 of 1987, arising out of summons for judgment No. 327 of 1987, in Summary Suit No. 687 of 1987, Star Industrial and Textile Enterprises Ltd. v. United Bank of India, Bharucha and Parekh JJ. held that the suit could be proceeded with and section 22 of the Act did not bar further proceedings in the suit. In Special Steels Limited v. Jay Prestressed Products Ltd. [1991] 72 Comp Cas 277, Suresh J. held that the intention of the Legislature was to provide for restraint against proceedings in relation to properties of the company, which was sick, and not against determination of liability in the suit. In Podar Mills Ltd. v. J. K. Synthetics Ltd. [1989] 66 Com Cas 735, the Division Bench of our court interpreted section 8(1)(c) of the Textile Undertakings (Taking Over of Management) Act, 1983. The said section provided that in the contingency specified therein, no proceeding for winding up of the textile company or appointment of a liquidator shall lie in any court, except with the consent of the Central Government. It was held by the Division Bench of our High Court that the said section was applicable also to pending proceedings for winding up and the expression "shall lie" could not be interpreted so as to exclude pending winding up petitions from its scope. The Division Bench relied upon the judgment of the Supreme Court in the case of Maharashtra State Textile Corporation Ltd. v. Official Liquidator [1978] 48 Com Cas 350, wherein a similar view was taken by the Supreme Court. By the operative part of its order, the Division Bench restrained the petitioning-creditors from taking any further proceedings in the petition for winding up until the petitioning-creditors obtained the consent of the Central Government u/s 8(1)(c) of the said Act for proceeding further with the said company petition. At least indirectly, the reasoning of this judgment supports the view which I am inclined to take.

13. In the result, I hold as under :

The effect of the applicability of section 22 of the Sick industrial Companies (Special Provisions) Act, 1985, is as under :

(1) The winding up petition is not liable to be dismissed or treated as having abated.

(2) The winding up petition and the judge's summonses are liable to be suspended and kept in abeyance, with liberty to the parties to revive the same with the consent of the Board for Industrial and Financial Reconstruction or with consent of the appellate authority for Industrial and Financial Reconstruction, as the case may be, or in case the conditions precedent prescribed u/s 22(1) of the Act cease to operate. I accordingly order that the winding up petition and the judge's summonses do stand adjourned sine die subject to the right of the

parties to revive the same as aforesaid.

(3) Ad interim orders dated October 5, 1990, and October 11, 1990, are not automatically suspended, even though the judge's summonses in which the said orders are passed cannot be now taken up for passing of final orders, unless the petitioning-creditors obtain the consent of the Board or section 22(1) of the Act ceases to apply by reason of disappearance of the conditions precedent prescribed therein.

(4) Ad interim orders dated October 5, 1990, and October 11, 1990, are modified as under :

(a) The company shall be at liberty to alienate its assets only with the prior leave of the Board and not otherwise. The company shall give prior adequate notice to the petitioning-creditors before applying for such leave.

(b) The orders of injunction dated October 5, 1990, and October 11, 1990, shall not preclude the Board from considering, sanctioning or implementing the requisite scheme under the Act as it deems fit. In other words, the Board shall be free to exercise its statutory functions under the Act, unaffected by the orders of injunction passed by this court.

(c) Save and except for the above modification, the orders dated October 5, 1990, and October 11, 1990, shall continue to be in force pending further orders.

(d) In case the Board sanctions any scheme for sale of the properties of the company and such scheme comes into force, the orders of injunction dated October 5, 1990, and October 11, 1990, shall stand vacated. Liberty to apply for further directions, if necessary, after the scheme is sanctioned.

(5) There shall be no order as to costs of the hearing on the issue of applicability and effect of section 22 of the Act.