(1993) 10 BOM CK 0023

In the Bombay High Court

Case No : Company Petition No. 254 of 1990

Sanjay Forging and Steel Industries APPELLANT

Vs

Bombay Forgings Pvt. Ltd. RESPONDENT

Date of Decision : 13-10-1993

Acts Referred:

Companies Act, 1956 — Section 433
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 18, 22, 22(1)

Citation : (1995) 82 CompCas 586

Hon'ble Judges : M.S. Rane, J

Bench : Single Bench

Advocate : Asif Patel, for the Respondent

Judgement

M.S. Rane, J.—Both the petitioners and their advocates not present, the matter is being disposed of in view of the legal position as explained hereinbelow.

2. The points involved in the petition herein filed by the creditors for winding up the respondent-company, viz., M/s. Bombay Forgings Pvt. Ltd. (hereinafter referred to as "the company" for brevity''s sake) on the ground of inability of the company to pay debts, are as under :

(i) Whether the petitioner filed, without obtaining prior permission u/s 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) (hereinafter referred to as "the SIC Act"), from the Board for Industrial and financial Reconstruction ("BIFR" in short) against the company already declared as "a sick unit" by the BIFR under the SIC Act, prior to the presentation of the petition in the court is void ab initio and liable to be dismissed as being not maintainable.

(ii) Whether the petition can be kept alive by keeping it in abeyance pending the inquiry u/s 16 or preparation of the scheme u/s 17 of the SIC Act.

3. The company was declared as a sick unit under the provisions section 17 of

the SIC Act prior to the filing of the petition herein. It is also a fact that the petition has been filed without obtaining prior permission of BIFR and the said declaration continues.

4. The learned advocate for the respondent-company has tendered the true xerox copies of the order dated January 11, 1988, passed by the Board declaring the company a sick unit. It is clear from the said order that the reference was made under the said Act prior to the filing of the petition and the declaration as a sick unit is made on January 11, 1988. The petition herein has been filed on November 27, 1989, which was accepted on April 11, 1990, and admitted on October 31, 1990.

5. Sections 22(1) and (3) of the SIC Act which are relevant read as under :

"22. (1) Where in respect of industrial company, an inquiry u/s 16 pending or any scheme referred to u/s 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relation to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof shall lie or be proceeded with further, except with the consent of the Board, or, as the case may be the appellate authority ....

(3) During the period of consideration of any scheme u/s 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments on force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board :

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate."

6. On behalf of the respondents it is contended that the petition filed without the consent of the Board is not maintainable.

7. It is clearly implied by a plain reading of above sub-section (1) that (i) in respect of the company if reference is made under the SIC Act before BIFR and (ii) if such reference is pending before the Board or the appellate authority, then

(iii) no proceedings for the winding up of the industrial company or for execution, distress, etc., shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the appellate authority. It would be crystal cleat that making of reference and pendency thereof, i.e., reference, are two main conditions when consent of the Board is required for initiating winding-up proceedings. The expressions appearing "shall lie or be proceeded with further" are most crucial and of vital significance. Undoubtedly, the expression "no proceeding shall lie" clearly envisages the initial institution of the proceedings for winding up. Whereas the expression "be proceeded with further", it clearly provides and means that the same refers to the reference made later on or at subsequent stages of institution of the petition in the court as is clearly spelt out from the first part of sub-section (1) of section 22 of the SIC Act. To put it clearly it talks of, in the first instance, proceedings filed before the reference to BIFR when it speaks of "shall lie". The second category of the proceedings contemplated are those where reference to the BIFR is made after the filing of the proceedings and, therefore, the expression used is "be proceeded with further". Obviously and naturally, the question of obtaining prior consent of the Board would arise, firstly, for initial filing of the proceedings for winding up as well as further continuation thereof.

8. Sub-section (1) of section 22, thus as noticed above, makes clear distinction of the two stages of the institution of the winding-up proceedings, i.e., prior to the reference and after the reference. It thus clearly means that, of in a given case as in the instant case, where the reassurance was already made to the BIFR and declaration made as a sick company by the Board, then the prior consent of the Board for the institution is imperative and mandatory in view of the expression "shall lie" appearing in the statute.

9. I may usefully refer to certain decisions which lend support to the view as expressed by me above.

10. The first is the decision of Supreme Court in the case of The Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others, which arose directly on the interpretation and meaning of sub-section (1) of section 22 of the SIC Act. The facts in the said case disclose that the petitioner a gram panchayat, adopted proceedings u/s 129 of the Bombay Village Panchayat Act against the respondent-company for the recovery of property taxes due from the company, which was declared a sick company be the Board under the provisions of the SIC Act. The company challenged the same in a writ petition claiming protection u/s 22 of the SIC Act (as in the instant case) in the High Court. The High Court accepted the petition and restrained the gram panchayat from recovering the property taxes without the consent of the Board. The matter was carried to the apex court, which confirmed the decision of the High Court reiteration and reaffirming that the proceedings adopted without prior consent of the Board were not maintainable. The observations appearing in para 11 of the said judgment are eloquent, which bring out the legal position luminously clear (at page 173) :

"It may be against the principles of equity if the creditors are not allowed to recover their dues from the company, but such creditors may approach the Board for permission to proceed against the company for the recovery their dues/ outstandings/overdues or arrears by whatever name they are called. The Board, at its discretion, may accord its approval for proceeding against the company. If the approval is not granted, the remedy is not extinguished. It is only postponed. Sub-section (5) of section 22 provides for exclusion of the period during which the remedy is suspended while computing the period of limitation for recovering the dues."

11. I may also refer to three more decisions, directly on the point - two of this court and one of the Gujarat High Court.

12. In the case of M/s. Ramniklal and Co. and others Vs. The Wallace Flour Mills Co. Ltd., Company, , my brother judge, Dhanuka, had to consider a case where the company was declared a sick company under the SIC Act after the filing of the petition seeking winding up and it is rightly held in that case that the winding up petition was not required to be dismissed and it was ordered that the proceedings be kept in abeyance, which is in consonance with the expression "be proceeded with further" appearing in sub-section (1) of section 22 of the SIC Act.

13. The second decision is rendered by my brother judge Shri Jhunjhunuwala in the case of In Re: C.J. Gelatine Products Ltd., , directly on the point. The facts were the same as in the case in hand. The company was declared a sick company prior to the filling of the winding up petition and where the company claimed protection u/s 22(1) of the SIC Act, the claim of the company was accepted and the petition was dismissed.

14. Next is Division Bench decision of the Gujarat High Court in the case of Testeels Ltd. Vs. Radhaben Ranchhodlal Charitable Trust, , construing the meaning of section 22(1) of the SIC Act, the Bench accepted the claim of the company, raised in an identical manner as in the case before this court, and held that the petition for winding up filed without prior consent of the Board was not maintainable and consequently proceeded to dismiss the same.

15. In view of the clear provisions of law noticed above, considered in the various decisions referred to above, and the ratio laid down therein, and in view of the facts and circumstances as obtaining in the matter herein, the same would squarely apply in this case. Consequently, it is held that the petition herein is not maintainable as being filed without prior consent of the BIFR.

16. Hence, the following order.

17. Petition is dismissed. However, there shall not be order as to costs.

18. Issuance of certified copy is expedited.

