(1998) 07 CAL CK 0026

In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction, Company Petition No. 39 of 1997

Sudersan Trading Company APPELLANT

Vs

The Kelvin Jude Co. Ltd. RESPONDENT

Date of Decision : 28-07-1998

Acts Referred:

Companies Act, 1956 — Section 171, 22(1), 446(1)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (1999) 1 CALLT 108

Hon'ble Judges : Sujit Kumar Sinha, J

Bench : Single Bench

Advocate : Mr. P.C. Sen, Mr. Utpal Bose and Mr. S.K. Ganguly, Mr. S.B. Mukherjee and Mrs. U.B. Mukherjee, for the Appellant; Mr. P.K. Mullick and Mr. Hirak Mitra, for the Respondent

Judgement

1. The facts involved in this winding-up petition are not in dispute.

It appears that in relation to the Kelvin Jute Co, Ltd. ("the said Company" for short) the Board for Industrial and Financial Reconstruction (BIFR) by its order dated 13th July, 1989 in exercise of its powers under The Sick Industrial Companies Special Provisions) Act. 1985 ("the said Act" for short) sanctioned a scheme for its rehabilitation. During the subsistence of the said rehabilitation scheme the petitioning creditor lent and advanced to the said Company between 11th February and 25th February, 1994 interest-free loan of Rs. 21,00,000/- in aggregate for the implementation of its rehabilitation scheme.

2. On 9th November, 1995 the BIFR expressed its opinion that the said Company should be wound up. The Company thereupon preferred an appeal before the appellate authority under the said Act.

3. During the pendency of the appeal before the said appellate authority the petitioning creditor presented this petition on 17th January, 1997 for the winding up of the said Company. Thereupon, the then Company Judge by his orders

respectively dated 11th February, 1997 and 1st April, 1997 granted stay of this petition ultimately until 9th May, 1997. By his further order dated 13th May. 1997, he adjourned the hearing of this petition until 9th June, 1997.

4. On 6th May, 1997 the said appellate authority by its order dismissed the appeal of the said Company.

5. Thereafter a writ petition has been filed by the Union representing the workers of the said Company fn which interim orders have been passed directing inter alia stay of proceedings agatnst the said Company. The learned writ court has further by its order impleaded the petitioning creditor as a party respondent in the said writ petition. Being aggrieved by the said order of the learned writ court the petitioning creditor preferred an appeal before the Division Bench of this court. In disposing of the stay application and the appeal of the petitioning creditor the Division Bench observed as follows:-

"So far as the order adding the appellant as a party in the writ application is concerned, as no restraint order was passed against the added respondent in the writ application, we are of the view that no appeal lies against the said order only adding the appellant as a party respondent in the writ application .....

Regarding the apprehension of the appellants that by the order of the trial court, their application for winding up of the company pending before the company court would be jeoperdised, we, however, do not agree with the submissions made by the learned counsel on such apprehension ....."

6. Following the aforesaid clarifications by the Division Bench, this winding-up petition has been heard by me.

7. It was submitted on behalf of the said Company that this petition is not maintainable having regard to the fact that it was presented during the pendency of its appeal before the appellate authority under the said Act when the provisions of section 22(1) of the said Act applied. It is therefore, necessary to look at the provisions of the said section which in so far as they are material provide as follows :-

"..... no proceedings for the winding-up of the industrial company..... shall lie or be proceeded with further except with the consent of the Board or, as the case may be, the appellate authority." The marginal note of the said section 22 reads as "suspension of legal proceedings, contracts, etc.".

8. The expression "lie" and the phrase "be proceeded with further" obviously refer respectively to the commencement and continuance of the wlndlng-up proceedings.

9. The question is as to whether the consent of the BIFR or of the appellate authority can be said to be without exception prospective or retrospective. If the said consent is prospective then in its absence the winding-up proceedings whether commenced or continuing would be liable to be dismissed. However, if

such consent can be given retrospectively then such consequences would not follow. At best, it could be said that the winding-up proceedings would be taken to have commenced on the date when such consent was given.

10. Reference in this connection may also be made to the provisions of section 446(1) of the Companies Act. 1956, which is an analogous Act. The said section provides that "When a winding-up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced or if pending at the date of the windlng-up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose."

11. The corresponding provisions of section 171 of the 1913 Companies Act were construed by the Supreme Court in its decision in the case of "Bansidhar Sankarlal v. Md. Ibrahim and Anr." reported in All India Reporter 1971 Supreme Court 1292 to mean that proceedings instituted without leave of the court may be regarded as ineffective until leave is obtained but once leave is obtained the proceedings will be deemed to be instituted on the date of granting of such leave.

12. The provisions of section 22 of the said Act are procedural in nature like those of the said section 446 of the Companies Act and as such the consent as contemplated in section 22(1) of the said Act cannot be regarded as prospective. It follows therefore that the commencement of this windlng-up petition remained suspended or in abeyance during the period the provisions of the said section 22 of the said Act were in force. The said provisions continued to be in force until the date of the order of the appellate authority dismissing the appeal of the said Company i.e. 6th May, 1997.

13. By reason of the aforesaid order of the appellate authority under the said Act the present wlndlng-up proceedings to my mind have revived and can be proceeded with and it is not necessary for the petitioning creditor to institute fresh wlndlng-up proceedings.

14. The view that I have taken that the wlndlng-up proceedings remained in suspension or in abeyance in the absence of the consent of the BIFR or of the appellate authority is reinforced by the language of the marginal note appended to the said section 22(1)(supra). My view further seems to accord with the decision of D.R. Dhanuka J. in the case of "M/s. Ramniklal & Co. and others v. The Wallace Flour Mills Co. Ltd." : All India Reporter 1992 Bombay 207 where in paragraph 16 of the report, the learned Judge held as follows :-

The effect of 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 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 consent of the Board for Industrial and Financial Reconstruction or wilh

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 ceases to operate. I accordingly order that the winding up petition and the Judge''s summonses do stand adjourned sin a die subject to the right of the parties to revive the same as aforesaid."

15. The facts in the aforesaid Bombay case nor in any of the decisions cited on behalf of the said Company quadrate with the facts in the present case and it is therefore not necessary to refer to them in any detail.

16. It would be recalled that in this case the BIFR had expressed its opinion for winding up of the said Company. The appellate authority under the said Act has also affirmed the said opinion of the BIFR by dismissing the appeal of the said Company. Further by reason of the said stay orders granted by the then learned Company Judge the present winding-up petition lemained suspended or in abeyance. This windlng-up petition was heard after the provisions of section 22 of the said Act had ceased to apply. Having regard to the aforesaid the present winding-up petition, in my opinion, is perfectly maintainable.

17. There is no dispute that the said Company is indebted to the petitioning creditor in the sum of Rs. 21,00,000/-.

18. The union of workers of the said Company intervened in the present proceedings and it was submitted on their behalf that their arrear dues have been paid by the present management of the said Company and that the rehabilitation scheme that has been put into effect by the branch management will ensure to the benefit of all concerned. It was also submitted on behalf of the said Union that it is in the public interest that the said rehabilitation scheme set in motion by the present management should be implemented.

19. Having regard to the aforesaid, I consider it just and proper that the following order should be made.

20. The windlng-up petition is admitted subject to scrutiny by the department.

21. If, however, the Company pays to the petitioning creditor the sum of Rs. 21,00,000/- together with costs of this application assessed in the sum of Rs. 5,000/-, aggregating Rs. 21,05,000/- in 20 monthly instalments: the first of such instalments shall be paid by 30th August, 1998 and the subsequent instalments by the 20th of each succeeding month until the entire amount is paid, then the winding-up petition shall remain permanently stayed. In default of payment as aforesaid liberty to mention.

22. The parties are to act on a signed copy of the operative portion of this Judgment.

23. Order accordingly

