(1988) 04 GUJ CK 0021

In the Gujarat High Court

Case No : O.J. Appeal No''s. 9 and 10 of 1988 and Company Application No. 73 of 1988 (in Co. Petition No''s. 43 and 44 of 1986)

Testeels Ltd. APPELLANT

Vs

Radhaben Ranchhodlal Charitable Trust
 Arvindbhai N. Talati Vs Testeels Ltd. RESPONDENT

Date of Decision : 15-04-1988

Acts Referred:
Companies (Court) Rules, 1959 — Rule 100, 101
Industries (Development and Regulation) Act, 1951 — Section 18A, 18E(1)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 16(4), 17, 17(3), 18

Citation : (1989) 66 CompCas 555 : (1989) 2 GLR 1158

Hon'ble Judges : P.R. Gokulakrishnan, C.J;R.A. Mehta, J

Bench : Division Bench

Advocate : A.H. Mehta and R.P. Vaghela, P.M. Thakkar, for the Appellant; S.T. Nanavati, for the Respondent

Judgement

R.R. Gokulakrishnan, C.J.—Both those O. J. Appeals arise from the order passed in Company Petitions Nos. 43 of 1986 and 46 of 1986.

Both the company petitions were filed by different charitable trusts against the same appellant herein for the purpose of winding up the appellant-

company due to its inability to pay the huge rents payable to the respondents. The learned company judge admitted the company petitions and

passed the following order on April 29, 1987:

Admit. For the present, at the request of Mr. S. I. Nanavati, the matter is adjourned till reopening of the court for the purpose of advertisement.

S.O. to June 25, 1987.

2. A similar order was passed in both the company petitions and as against these orders, the present O.J. Appeals Nos. 9 of 1988 and 10 of 1988

have been filed. In the O.J. appeals, the appellant, Testeels Limited, apart from various other grounds contended that in view of the provisions u/s

22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (Act No. 1 of 1986), the company petitions filed by the respondent in each of

these O. J. appeals have to be dismissed. Hence the short question that arises in these O.J. appeals is as to whether the company petition can be

dismissed in view of section 22 of the abovesaid Act. For that purpose, it is necessary to interpret section 22 of the said Act.

3. As far as the present case is concerned, no doubt, the respondents in each of these O.J. appeals have compromised the matter with the

appellant in each of these O. J. appeals and the consent terms are kept on record. As far as the appellant-company is concerned, the Board for

Industrial and Financial Reconstruction, in exercise of the powers conferred under sub- section (4) of section 16 of the Sick Industrial Companies

(Special Provisions) Act, 1985, and all other powers enabling them in this behalf, has appointed, by order dated January 11, 1988, until further

orders, one G. Mukherjee, to be a special director of Testeels Limited for safeguarding its financial and other interests. Section 16(4) of the said

Act reads as follows:

Where the Board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under sub-section (1) or, as the

case may be, under sub-section (2), it shall appoint one or more persons to be a special director or special directors of the company for

safeguarding the financial and other interests of the company.

4. By another order of the same date (January 11, 1988), the Board, u/s 17(3), appointed ICICI as the operating agency for preparing a scheme

for rehabilitation of the company and the Board also gave certain guidelines and a draft scheme was directed to be submitted by ICICI within 90

days.

5. Section 22(1) of the said Act reads as follows:

22(1) Where in respect of an industrial company, an inquiry u/s 16 is 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 relating 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.

6. Rule 100 of the Companies (Court) Rules, 1959, states that a petition for winding up shall not be withdrawn after presentation without the leave

of the court.

7. Rule 101 of the Companies (Court) Rules, 1959, deals with substitution of a creditor or contributory for the original petitioner. Thus, a petition

for winding up filed by any party, in view of the Act and the Rules made thereunder, ensures to the benefit of all the creditors and it cannot be

withdrawn without following the procedure envisaged under the Act and the Rules made thereunder. In the light of the provisions under the

Companies Act, we have to see the effect of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, and as to the legality of

an order of dismissal of the company petition in the light of section 22 of the said Act.

8. The Statement of Objects and Reasons for enacting the Sick Industrial Companies (Special Provisions) Act, 1985, clearly states that in order to

fully utilise the productive industrial assets, afford maximum protection of employment and optimise the use of the funds of the banks and financial

institutions, it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. It also states that

it would be also equally imperative to salvage any productive assets and realise the amounts due to the banks and financial institutions, to the extent

possible, from the non-viable sick industrial companies. Having the above factors in mind, the Statement of Objects and Reasons for enacting the

said law states that a need has, therefore, been felt to enact in public interest a legislation to provide for timely detection of sickness in industrial

companies and for expeditious determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to

be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost practicable despatch.

9. Having the above object in view, section 16 of the Act, which deals with inquiry into the working of the sick industrial companies and section

16(4) which we have extracted in para, supra, enables appointment of one special director or special directors of the company for safeguarding the

financial and other interests of the company.

10. Section 17 deals with the powers of the Board to make suitable orders for appointing an operative agency to prepare a scheme for

rehabilitation of the sick industrial company and ICICI has been so appointed by the Board for that purpose in the case of this company. In and by

section 18 of the Act, the operating agency specified under the Act has been given full powers to prepare as expeditiously as possible and

ordinarily within a period of 90 days from the date of such order, a scheme with respect to such a company providing for any one or more of the

measures enumerated in that section. In short, a reading of section 18 makes it clear that ample provision for preparing a comprehensive scheme

for protecting the interest of the company has been made. Section 19 of the Act deals with rehabilitation by giving financial assistance and it reads

as follows:

19. Rehabilitation by giving financial assistance.- (1) Where the scheme relates to preventive, ameliorative, remedial and other measures with

respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or

concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or

State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for

such financial assistance being hereafter in this section referred to as the person required by the scheme to provide financial assistance) to the sick

industrial company.

(2) Every scheme referred to in sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his

consent within a period of sixty days from the date of such circulation.

(3) Where, in respect of any scheme, the consent referred to in sub-section (2) is given by every person required by the scheme to provide

financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction, the scheme shall be

binding on all concerned.

(4) Where in respect of any scheme, consent under sub-section (2) is not given by any person required by the scheme to provide financial

assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit.

11. Section 20 of the Act deals with winding up of a sick industrial company 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 it is just and

equitable that the sick industrial company should be wound up, it may record and forward its opinion to the concerned High Court.

12. Thus, reading the abovesaid provisions in the background of the Statement of Objects and Reasons for enacting the said law, it is clear that the

legislation, in order to revive and rehabilitate sick industries has come forward with specific provision. The financial assistance envisaged u/s 19 of

the said Act, as correctly put forward by Mr. Mehta, learned counsel appearing for the appellant, cannot be forthcoming if the winding up

proceeding is alive without the same being dismissed. In the light of the above provisions of law, we can discuss the effect of section 22 of the said

Act. The section clearly states that no proceedings for the winding up 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. If, in this

section 22, the wordings:

...no proceedings for the winding up...shall lie...

are only stated, there would not be any difficulty in coming to the conclusion that winding up proceedings which are pending should also be

dismissed. The difficulty arises only when we read with the wordings in section 22 which is to the effect that:

......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......

13. The underlining supplied by us* (Here printed in italics.), reads ""shall lie"" or ""be proceeded with"". If it cannot be proceeded with, there is no

question of the company court or any other court dealing with this matter, further proceeding and dismissing the petition. Since the Legislature

though it fit to include the words ""be proceeded with further"", a meaning, has to be given to these words also. The words, in our opinion, cannot be

interpreted to mean that the winding up proceedings already started should be kept in abeyance without further proceedings in the matter. The

various provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, which have been enacted to safeguard the economy of the

nation and to protect the viable sick companies definitely puts an end both to the contemplated winding up proceedings and the pending winding up

proceedings. A Bench of this High Court in Company Petitions Nos. 16/68, 25/68, and 32/68 had occasion to consider the effect of the Industries

(Development and Regulation) Act, 1951. In and by the said Act, the Government made an order authorising the Gujarat State Textile

Corporation to take over the management of the whole of the undertaking of the company subject to certain terms and conditions. The Gujarat

State Textile Corporation, which was appointed as the authorised controller, made an application for being joined as a party in the said company

petitions and after it was joined as a party, it made an application to the learned company judge that the petition should be dismissed by reason of

section 18E(1)(c) of that Act. A bench of this High Court, dealing with this section gave its decision after considering the provisions of section

18E(1)(c). For the purpose of our case, we can reproduce the relevant portion of the section which came to be interpreted in that case and it

reads as follows:

No proceeding for the winding up of such undertaking or for the appointment of a receiver in respect thereof shall lie in any court except with the

consent of the Central Government.

14. Section 18E(1)(c) provides that where the management of an industrial undertaking, being a company, is taken over by the Central

Government, then, notwithstanding anything contained in the Act or in the memorandum or articles of association of such undertaking, no

proceeding for the winding up of such undertaking or for the appointment of a receiver in respect thereof shall lie in any court except with the

consent of the Central Government. According to the Bench of this High Court, the inhibition enacted in the section is that ""no proceedings"" for

winding up of the company ""shall lie in any court"". This expression is, according to the Bench, clear and unambiguous and according to its plain

grammatical construction, it means that no proceeding shall be sustainable in any court irrespective of as to when it was instituted. The Bench

further held that it takes in not only proceedings to be instituted in the future, but also pending proceedings. The Bench further held that the

expression ""no proceedings..........shall lie in any court,"" means that no proceedings shall be sustainable in any court, whether it is instituted,

subsequent to the making of the order u/s 18A or it was pending at the date when the order u/s 18A was made. Proceeding further, the Bench of

this High Court in that decision held that:

the whole object of the proceedings for winding up is to destroy its corporate existence, and the continuance of a pending proceeding for winding

up, if allowed by the court in exercise of its discretion, would clearly conflict with the permanent object being the making of an order u/s 18A,

namely that the industrial undertaking should continue to function. We have, therefore, no doubt that in enacting section 18E(1)(c), the Legislature

intended to oust not only the institution of a future proceeding but also the continuance of a pending proceeding for winding up.

15. The Bench also considered two objections advanced in that case, namely, (a) that if the pending proceedings for the winding up are dismissed,

it would not be possible be avoid fraudulent preferences which may have been made by persons in management of the company within a period of

six months prior to the institution of the winding up proceedings and the interest of the creditors would, in consequence, suffer, and(b) that if the

pending proceedings of the winding up were to be dismissed, the creditors who might not have filed suits for enforcement of their claims against the

company in the belief that they would seek to enforce their claims in winding up might be seriously prejudiced, if their claims in the meantime

became time- barred. For those objections, the Bench of this High Court held as under as far as the first objection is concerned:

The Legislature had to make a choice between these two competing considerations, one affecting public interest and the other affecting the

interests of the creditors. The Legislature chose to protect public interest even if it means that, in the process of doing so, the interests of the

creditors might suffer. It may be pointed out that, as a matter of fact, the risk of creditors'' interest suffering would not be very serious. If the

industrial undertaking functions smoothly and efficiently under the engagement of the Authorised Controller, it is quite possible that the industrial

undertaking might make profits and the creditors might ultimately receive full payment of their dues.

16. As regards the second objection, the Bench held:

The mere institution of winding up proceedings does not stop the period of limitation from running and a creditor who waits until the conclusion of

the winding up proceedings does not stop the period of limitation from running and a creditor who waits until the conclusion of the winding up

proceedings or the petition for winding up is dismissed, he may lose his claim, if in the meantime, it has become time-barred. It is, therefore no

argument against the construction placed by us on section 18E(1)(c) to say that because the dismissal of the winding up proceedings might result in

the claims of some creditors becoming time-barred by reason of their having waited for the final disposal of the winding up proceedings, such a

construction should not be accepted.

17. Finally, the Bench categorically held that once an order u/s 18A is made in respect of an industrial undertaking, a proceeding for winding up the

industrial undertaking pending at the date of the making of the order must come to an end unless the consent of the Central Government is obtained

for continuance of such proceeding.

18. We have already extracted the Statement of Objects and Reasons for enacting the Sick Industrial Companies (Special Provisions) Act, 1985.

The various provisions which we have extracted in paragraph supra, amply make out the purpose and the objects sought to be achieved in treating

certain companies as sick industrial companies. The financial assistance that can certain institutions may give for any industrial company, which can

be had u/s 19 of the Act will fell shy to advance any amount when the winding up proceedings are pending. The whole object of the proceedings

for winding up is to destroy its corporate existence and the continuance of a pending proceeding for winding up, if allowed by the court in exercise

of its discretion, would clearly conflict with the permanent object for which section 16(4) of the Act is enacted. Further, the preamble for enacting

the Sick Industrial Companies (Special Provisions) Act, 1985, clearly states as follows:

An Act to make in the public interest, special provisions with a view of securing the timely detection of sick and potentially sick companies owning

industrial undertakings, 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 and the expeditious enforcement of the measures so determined and for matters connected therewith or

incidental thereto.

19. Especially when a Bench of this High Court whose decision we have clearly interpreted held the words ""no proceedings shall lie"" to mean that

neither can fresh proceedings be instituted nor can proceedings already instituted be sustained, it is too much to say that the proceedings already

instituted can only be stayed, but cannot be dismissed. The words ""or be proceeded with"" occuring in section 22, cannot, in any way, restrict the

meaning that has to be given to the words, ""no proceedings shall lie"". Any creditor can have the proceedings continued with the consent of TEL

Board or, as the case may be, of the appellant authority as provided u/s 22 of the Act. The saving provisions contained in section 31, saves only

two categories of cases, i.e., where a receiver has been appointed in any proceedings pending immediately before the commencement of this Act

in any High Court for winding up an industrial company or where an official liquidator has been appointed in any proceedings pending immediately

before the commencement of this Act in any High Court for winding up of an industrial company.

20. Company Application No. 73 of 1988 is an application for substitution as petitioning creditor in these two winding up petitions. Mr. Vaghela,

learned counsel for the applicant, submitted that as the original petitioners have settled the matter with the company, they are likely to withdraw or

allow to be dismissed the company petitions for winding up and therefore, the applications for substitution. This application is a fresh proceeding,

after the aforesaid orders of the Board u/s 16(4) and section 17(3), and is made without obtaining any consent of the Board, Moreover, we have

already come to the conclusion that no proceedings for winding up would lie, including pending winding up petitions. Therefore, no question

survives for substitution in the winding up proceeding which has to be dismissed.

21. Thus, from the foregoing discussions and in view of the principles laid down in the Bench decision of this High Court, which had been referred

to above, O.J. Appeals Nos. 9 of 1988 and 10 of 1988 will stand allowed, with the result that Company Petitions Nos. 43 of 1986 and 44 of

1986 will stand dismissed. Company Application No. 73 of 1988 is also dismissed. There will be no order as to costs.