

(1988) 01 BOM CK 0033
In the Bombay High Court
Case No : Appeal No. 118 of 1984

The Podar Mills Ltd.

APPELLANT

Vs

J.K. Synthetics Ltd.

RESPONDENT

Date of Decision : 08-01-1988

Acts Referred:

Companies Act, 1956 — Section 397, 398, 8
Sick Textile Undertakings (Taking Over of Management) Act, 1972 — Section 10, 8, 8(1)
Textile Undertakings (Taking Over of Management) Act, 1983 — Section 2, 3(1), 3(7), 4, 4(8)

Citation : AIR 1988 Bom 203

Hon'ble Judges : Sujata Manohar, J;Lentin, J

Bench : Division Bench

Advocate : S.C. Dharmadhikari, instructed by Kanga and Co, for the Appellant;
S.H. Doctor, instructed by Malvi Ranchhoddas and Co., for the Respondent

Final Decision : Allowed

Judgement

Sujata Manohar, J.—The present appeal is from an order dismissing Judge's Summons taken out by the appellants for stay of all further proceedings in Company Petition No. 352 of 1983 and for restraining the respondents from taking any further steps in the Company Petition.

2. On 23rd June 1983 the respondents filed a petition for winding up the Appellant Company. On 14th September 1983 consent terms were filed in Company Petition under which, inter alia, the Appellant Company admitted the claim of the respondents and agreed to pay the claim amount by monthly instalments. Under Clause 4 of the consent terms it was provided as follows :

"4. In the event of the company failing to pay any three instalments or the last instalment on its due date as mentioned hereinabove the petition do stand admitted and the petitioners to give advertisement thereof in the "Free Press Journal", Bombay Samachar and Maharashtra Government Gazette. The petition

to be made returnable four weeks alter the last advertisement is published."

The first instalment became payable on 20th September 1983. This instalment was sent by the appellants along with their registered letter on 21st September, 1983. It was received by the respondents only on 28th September 1983. There is also some dispute about the quantum of this instalment (which need not be gone into at this stage). The next instalment was on 20th October, 1983. On 18th October 1983 the Textile Undertakings (Taking Over of Management) Ordinance came into force. This Ordinance was later replaced by the Textile Undertakings (Taking Over of Management) Act of 1983. The Act was passed on 25th December 1983 but was deemed to have come into force on 18th October, 1983.

3. In view of the provisions of the Textile Undertakings (Taking Over of Management) Act, 1983 the Management of two undertakings of the appellants which are described at items 9 and 10 of the first schedule to the said Act, have been taken over by the custodian appointed under the said Act as per the provisions of the said Act. The appellants thereupon did not pay the 2nd and 3rd instalments which fell due under the consent terms on 20th October 1983 and 20th November 1983. The respondents then addressed a letter dated 21st November 1983 to the appellants pointing out, inter alia, that the appellant had committed three defaults in payment of instalments under the consent terms. In view of the provisions of Clause 4 of the consent terms, they contended that the petition stood admitted and the respondents were entitled to advertise the petition as provided in the consent terms. The appellant took out a Judge's Summons on 19th January 1984 being Company Application No. 12 of 1984 for stay of further proceedings in the Company petition.

4. The question which requires determination in this appeal is whether in view of the provisions of the Textile Undertakings (Taking Over of Management) Act, 1983 the respondents are entitled to take further steps in their Company Petition No. 352 of 1983 for winding up the appellant company.

5. The Textile Undertakings (Taking Over of Management) Act, 1983 vests in the Central Government management of certain textile undertakings which are mentioned in the First Schedule to the said Act. In the recital to the Act it is stated that" by reason of mismanagement of the affairs of these undertakings.....their financial position became wholly unsatisfactory even before the commencement in January 1982 of the textile strike in Bombay, and their financial condition has thereafter further deteriorated. Certain public financial institutions have advanced large sums of money to the companies owning these undertakings with a view to making the said undertakings viable..... Further investment of very large sums of money is necessary for reorganising and rehabilitating the said undertakings and thereby to protect the interests of the workmen employed therein and to augment the production and distribution at fair prices of different varieties of cloth and yarn so as to subserve the interests of the general public....." With this background the Textile Undertakings (Taking Over of Management) Act, 1983 has been passed. Section 2 Sub-sections (d)

and (e) define "Textile Undertakings" and "textile company". These definitions are as follows :

2. (d) "textile undertakings" or "the textile undertaking" means an undertaking specified in the second column of the First Schedule;

(e) "textile company" means a company (being a company as defined in the Companies Act, 1956) specified in the third column of the First Schedule, as owning the undertaking specified in the corresponding entry in the second column of that Schedule";

Under Section 3 Sub-section 1 on and from the appointed day the management of all the textile undertakings shall vest in the Central Government. Under Sub-section (2) it is provided

As follows :

Section 3 :

"(2) The Textile undertaking shall be deemed to include all assets, rights, leaseholds, powers, authorities and privileges of the textile company in relation to the said textile undertaking and all property, movable and immovable, including lands, buildings, workshops, projects, stores, spares, instruments, machinery, equipment automobiles and other vehicles, and goods under production or in transit, cash balances, reserve fund, investments and booklets and all other rights and interests in or arising out of such property as we re, immediately before the appointed day, in the ownership, possession power or control of the textile company whether within or outside India and all books of account, registers and all other documents of whatever nature relating thereto."

Section 3 Sub-section 7 provides as follows : Section 3 :

"(7) For the removal of doubts, it is hereby declared that any liability incurred by a textile company in relation to the textile undertaking before the appointed day shall be enforceable against the concerned textile company and not against the Central Government or the Custodian."

6. u/s 4. the Central Government is empowered to appoint a custodian of a textile undertaking for the purposes of carrying out the management of such an undertaking. Under Sub-sections 8 and 9 it is further provided as follows :

Section 4 :

""(8) Every person having possession, custody or control of any property forming part of the textile undertaking shall deliver forthwith such property to the Custodian or to any officer or other employee of the Central Government or the Custodian, as may be authorised by the Central Government or the Custodian in this behalf.

(9) Any person who, on the appointed day, has in his possession or under his control any books, papers or other documents relating to the textile undertaking

the management of which has vested in the Central Government under this Act shall, notwithstanding anything contained in any other law for the time being in force, be liable to account for the books, papers and other documents (including such minutes books, cheque books, letters, memoranda, notes or other communication) to the Custodian and shall deliver them up to the Custodian or to any such person (being an officer or other employee of the Central Government or the Custodian) as may be authorised by the Central Government or the Custodian in this behalf."

The appellant company is a textile company as defined in the Act. Its name appears in column 3 of the first schedule against items 9 and 10. Section 8 which is the most material section is :o the following effect :

8. Application of Act 1 of 1956-

(1) So long as the management of the textile undertaking of a textile company remains vested in the Central Government under this Act, notwithstanding anything contained in the Companies Act, 1956 or in the memorandum or articles of association of such company,

(a) to (b)

(c) No proceeding for the winding up of the textile company or for the appointment of a liquidator or receiver in respect thereof shall lie in any court except with the consent of the Central Government."

7. It is the contention of the appellants that by reason of the provisions of Section 8(1)(c) of the said Act further proceedings in the winding up Petition No. 352 of 1983 should be stayed. Before the trial Judge it was contended by the respondents that Section 8 should be so construed as to apply only to a textile undertaking and not to the entire textile company. In view of the clear distinction made in the Act between a "textile undertaking" and "textile company" it is not possible to construe Section 8 as applying only to a textile undertaking. In fact Section 8 Sub-section (1) clearly sets out that so long as the management of a textile undertaking of a textile company remains vested in the Central Government no proceedings for the winding up of the textile company or for the appointment of liquidator or receiver in respect thereof shall lie in any court except. with the consent of the Central Government. The section itself uses both the terms, "textile undertakings" and "textile company", with a clear reference to their definition." The provisions of Section 8(1)(c) apply to the Textile Company itself; in the present case, to the appellants.

8. It is however, urged by Mr. Doctor learned counsel for the respondents that the provisions of Section 8(1)(c) are prospective in operation and they cannot be applied to a case where a winding up petition has already been filed before the said Act came into operation, as in the present case. "Now, statutes which take away substantive rights are normally to be considered as prospective, unless such statutes have been made retrospective either expressly or by necessary

implication. See in this connection *Mahadeolal Kanodia Vs. The Administrator-general of West Bengal*, . We have to consider whether provisions of Section 8(l)(c) apply to a pending company petition for winding up. The section itself does not expressly state that the provisions apply to pending winding up proceedings. We have, therefore, to see whether by necessary , implication the provisions of Section 8(l)(c) apply to a pending winding up proceeding.

9. Section 8(l)(c) provides that no proceedings for the winding up of the textile company shall lie in any court except with the consent of the Central Government. It also provides that no proceedings for the appointment of a liquidator or receiver in respect of the textile company shall lie in any Court, except with the consent of the Central Government. Therefore, if any company application is made for the appointment of a liquidator after coming into operation of the said act the Court cannot consider this application or pass orders thereon unless the applicant has obtained the consent of the Central Government. The section expressly so prescribes. If, therefore, there is a winding up petition which is pending before the Court, the court is prohibited from appointing a liquidator without the consent of the Central Government. It is difficult to see how the Court can proceed with a pending winding up petition without the consent of the Central Government because the final order in a winding up petition must necessarily be an order for the appointment of a liquidator of the Company which is being wound up. It would therefore be absurd to construe Section 8(l)(c) as laying down that a pending winding proceeding can be proceeded with without the consent of the Central Government but the Court cannot make an order appointing a liquidator in such a petition without the consent of the Central Government. In our view, therefore, the language of Section 8(l)(c) necessarily implies that a pending winding up proceeding cannot be proceeded with without the consent of the Central Government.

10. It was urged by Mr, Doctor, learned counsel for the respondents that the words "proceedings.....for appointment of a liquidator" refer to proceedings other than winding up proceedings under the Companies Act under which also a liquidator can be appointed; as for example, in a petition u/s 397 or 398. He submitted that the first half of Section 8(l)(c) refers to winding up proceedings while the second half of Section 8(l)(c) refers to proceedings other than winding up proceedings under the Companies Act. We do not see any reason why Section 8(l)(c) should be construed in this fashion. The intention of Section 8(l)(c) is clearly to prevent a textile company whose undertaking is covered by the said Act from being wound up. There are other provisions also in the said Act which support this construction. For example, u/s 4 Sub- section (2) on the appointment of a custodian the management of the Textile undertaking shall vest in such custodian and all persons in charge of the management shall cease to be in charge of such management. Under Sub- section (8) of Section 4 every person having possession, custody or control of any property forming part of the textile undertaking is also required to deliver such property to the custodian. Therefore, every person who is in possession of such textile undertaking is required to hand

over possession to the custodian. The Act therefore, clearly contemplates that textile undertakings which are covered by the Act should be in the possession of the custodian and not any other party, including the Receiver or Liquidator.

11. In the case of Maharashtra State Textile Corporation Limited Vs. Official Liquidator and Others, the Supreme Court was required to construe the provisions of Sick Textile Undertakings (Taking Over of Management) Act of 1972. u/s 8(l) of that Act it was provided as follows :

"No proceeding for the winding up of a textile company, within the meaning of this Act, shall lie in any Court or be continued whether by or under the supervision of any Court or voluntarily, except with the consent of the Central Government."

Analysing this provision the Supreme Court held that the consent of the Central Government was necessary before pending proceedings were continued. In the course of its judgment the Supreme Court observed, "In our opinion, the words "winding up" must be given the widest possible amplitude in order to serve the purpose of the Act namely, to control the proceedings of a textile company which is in liquidation, by the Central Government. Whether the company had been wound up or whether the proceedings for the winding up of the Company had been continuing would make no difference so far as the application of Section 8 of the Management Act is concerned."

12. In the present case also the words "winding up" in Section 8 of the present Act require to be given the widest amplitude, especially when Section 8(l)(c) clearly sets out a liquidator cannot be appointed by the Court in a proceeding unless the proceeding is with the consent of the Central Government. Undoubtedly the language of Section 8(l) of the Sick Textile Undertakings (Taking Over of Management) Act, 1972 is somewhat different from the language of Section 8(l)(c) of the present Act. It is true that u/s 8(l) of the Sick Textile Undertakings (Taking Over of Management) Act 1972 the section refers expressly to proceedings being continued. Such words are absent in the present Section 8(l)(c). But Section 8(l)(c) refers both to proceedings for winding up as also for the appointment of a liquidator or receiver. Therefore in a pending winding up proceeding where the liquidator is required to be appointed after the coming into operation of the said Act the consent of the Central Government is necessary before the proceeding for the appointment of a liquidator can be continued.

13. The words "shall lie" in Section 8(l)(c) in this context do not necessarily refer only to a prospective proceedings. They mean "shall be entertained". u/s 10 also it is provided that no suit etc. shall lie against the Central Government or the custodian for anything which is in good faith done or intended to be done under the Act. It is submitted that the words "shall lie" in Section 10 are clearly prospective. The same phrase is used in Section 8. Hence in Section 8 also the phrase must be construed as prospective. This contention must be rejected. It is the context of Section 10 which, makes the provisions of Section 10 prospective

because Section 10 deals with proceedings against the Central Government or the custodian for anything done or intended to be done under the Act. Such proceeding must necessarily be in respect of anything done after the commencement of the Act. The use of the phrase "shall lie" in Section 10 is therefore not responsible for making the section prospective. The phrase in both Ss. 8 and 10 is intended to mean "shall be entertained" and nothing more. In our view looking to the provisions of Section 8(l)(c) the section applies equally to a pending proceeding for winding up of the company at the time when the Act came into operation.

14. It was finally urged by the respondents that the consent order is a self operative order. It provides for admission of the petition and its advertisement. There is no reason why the petition should not be advertised. It was also urged that at the time of the final hearing of the Company petition for winding up after the petition is advertised, the question of applicability of Section 8(l)(c) may be considered. There is no reason why any relief should be granted to the appellant in the Judge's Summons at this stage. We are unable to appreciate this submission. When a liquidator cannot be appointed in this winding up petition without the consent of the Central Government it is difficult to see what purpose would be served by advertising the petition for winding up. Construction of Section 8(l)(c) of the said Act is a technical issue where presence or absence of other creditors cannot make any difference. It would be futile to permit the respondents to advertise the petition for winding up when they require the consent of the Central Government before obtaining any final orders in the winding up petition.

15. In the premises the appeal succeeds. The order of the learned Judge dismissing the Judge's summons is set aside. The respondents are restrained from taking any further proceedings in Company Petition No. 352 of 1983 including advertising the notice of hearing of the petition in newspapers and Government Gazette until such time as the respondents obtain consent of the Central Government u/s 8(l)(c) of the said Act for further proceeding with the said Company Petition.

Respondents to pay to the appellants costs of the petition.