

(1991) 12 DEL CK 0047

In the Delhi High Court

Case No : Civil Writ Appeal No. 413 of 1991

The Upper India Couper Paper Mills Co. Limited

APPELLANT

Vs

The Appellate Authority for Industrial and Financial
Reconstruction and Others

RESPONDENT

Date of Decision : 06-12-1991

Acts Referred:

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

Citation : AIR 1992 Delhi 207 : (1992) 75 CompCas 653 : (1992) 47 DLT 566

Hon'ble Judges : B.N. Kirpal, J;Arun Kumar, J

Bench : Division Bench

Advocate : A.B. Divan, Lira Goswami, Rajiv Shakdhan, S.R. Khandelwal and
Subodh Markandey, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) The petitioner company has challenged in this writ petition under Article 226 of the Constitution the order of the Appellate Authority for Industrial and Financial Re-construction (hereinafter referred to as the Appellate Authority) whereby it has upheld the order of the Board for Industrial and Financial Reconstruction (hereinafter referred to as the Board) who had decided vide its order dated 17th August, 1990 that proceedings should be taken before the High Court for winding up the petitioner company.

(2) Briefly stated, the facts are that the petitioner company was stated to have been established over a 100 years ago and has its registered office at Lucknow. For various reasons it started incurring losses. It is alleged that in order to make the company viable application was filed with the appropriate Authority in the State of Uttar Pradesh for permission to expand the unit on the existing site. This permission was not granted. In view of the accumulated loss and the acute financial condition, the Board of Directors of the company on 21st November, 1987 passed a resolution to the effect that a reference should be made to the Board u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985

(hereinafter referred to as the said Act).

(3) After the case was registered, the Board passed on 24th February, 1989. In this order the petitioner was declared to be a sick industrial company within the meaning of that expression occurring in Section 3(l)(o) of the Act. The Board also appointed one Director of the Company. After taking Other facts and circumstances into consideration the Board further came to the conclusion, by the said order that the petitioner company could not make its net worth positive on its own with a reasonable time without special assistance. The Board then appointed I.C.I.C.I. (respondent No 3) as the operating agency u/s 17(3) of the Act. The said operating agency was required to submit a report after consultation with all concerned including the labour unions. According to respondent No. 3 no positive assistance was rendered by the petitioner so as to enable the said respondent No. 3 to prepare a report or a scheme as contemplated by the order which had been passed by the Board on 24th February, 1989. The case of the petitioner is that it had appointed a firm of Consultants who was to prepare the feasibility report which was to be submitted to respondent No. 3. The Consultants did not carry out this project with the result that the petitioner was obliged to appoint another Consultant. The newly appointed Consultant gave the report add. according to the petitioner, this report was submitted to respondent No. 3 sometime in April, 1990. Be that as it may, the operating agency, respondent No. 3. still did not submit any scheme. It appears that in the meantime the case was being listed, from time to time, before the Board. The petitioner pleaded before the Board that the operating agency should be directed to complete the examination of the proposal which was submitted by the petitioner in April. 1990. The Board then passed an order on 7th May, 1990 in which it took note of the contention of the operating agency to the effect that the petitioner had only submitted certain papers/information which contained general outline of their plans/ideas etc., but no definite, workable or acceptable proposals had been received by the operating agency so far. On behalf of the labour unions it was contended before the Board that there appeared to be possibility of reviving the existing unit at Lucknow. We may here notice that the proposal which was sought to be mooted by the petitioner was that it should be allowed to sell its assets at Lucknow and a new industrial undertaking or unit should be set up at Kotdwar with the assistance from some financial institutions. With regard to this it was held by the Board vide its order of 7th May, 1990 that this case of starting a new industrial unit at Kotdwar could not be dealt within the scope of the Act "which visualises rehabilitation or sale of the unit, amalgamation or a winding up thereof." The Bench of the Board reserved orders and on 17th August, 1990 final orders were pronounced by the Board.

(4) In the order of 17th August, 1990 it was observed that during the course of the proceedings the Board had formed a prima facie opinion that the company was not a viable unit and should have been wound up. Notice to show cause why it should not be wound up had accordingly been issued on 6th February, 1990. The order then referred to the proceedings of 7th May, 1990 and it was observed

that after the operating agency had pointed out that the petitioner company had not submitted any detailed workable proposal till that date, the Board would have straightaway passed orders as it was clear that the Unit was not viable. The case was, however, adjourned at the request of representative of the labour. When no definite proposals were received, the Board vide its order dated 17th August, 1990 came to the conclusion that the unit was not viable and it had to be wound up. This opinion of the Board was directed to be Communicated to the High Court for necessary action under the Company Law. In coming to this conclusion the Board took note of the fact that the Company had made it clear that its intention was to sell the land and to get funds so that new industrial undertaking could be started elsewhere. With regard to this contention the Board held that the same was not within the jurisdiction of the Board.

(5) Against the said order of 17th August, 1990 an appeal was filed before the Appellate Authority. It was submitted before the Appellate Authority, on behalf of the petitioner, that the scheme which had been submitted by it on 24th April, 1990 was a scheme for rehabilitation of the sick industrial company and the finding of the Board that this scheme was not covered within the scope of the Act was erroneous. The Appellate Authority, on the contentions so raised, posed for its decision the following question :

"THE question for determination is whether putting an absolutely new plant at a far away place comes within the scope of the Act."

(6) The Appellate Authority then referred to the provisions of Section 18(I)(a) which talks of re-construction, revival or rehabilitation of the sick industrial unit and came to the conclusion that it agreed with the Board "that the establishment of entirely new plant at a far off place (Does not amount to rehabilitation and is not covered under the Act. The appeal is consequently dismissed in limine."

(7) It is the aforesaid decision of the Appellate Authority which is challenged in this writ petition. The main contention behalf of the petitioner is that the said conclusion of the Appellate Authority is contrary to the provisions of the Act because as a measure of rehabilitation it may be necessary for a new plant to be established at a different place. It is contended by Mr. Dewan that what was to be seen by the Appellate Authority and the Board was the rehabilitation of the company and not the rehabilitation of the unit. On behalf of the respondents it is contended that when no concrete proposal had been received from the petitioner the operating agency could not formulate any scheme and, Therefore, the only order which could legitimately be passed in the present case was an order for winding up of the Company.

(8) In order to examine the rival contentions it is necessary, in our opinion, to refer to the relevant provisions of the Act.

(9) It is not in dispute that the petitioner is a sick industrial Company within the meaning of that expression u/s 3(1)(0). Company is defined by Section 3(I)(d) to mean a company as defined in Section 3 of the Companies Act. Section 3(f)

defines an industrial undertaking which inter alias means any undertaking pertaining to a scheduled industry carried on in one or more factories by any company. When a company becomes a sick industrial company then Section 15(1) makes it mandatory for the Board of Directors of the Company to make a reference to the Board within the specified period. The reference which is made to the Board is for determination of the measures which should be adopted with reference to such a sick industrial company. Section 16 requires the Board to make an enquiry for determining when the any industrial company has become a sick industrial company. Section 17 deals with the powers of the Board for making suitable orders on completion of the enquiry u/s 16. Sub-sections 1 to 3 of the said Section 17 read as follows:

"17(1) 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. (2) If the Board decides under sub-section (1) 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 and subject to such restrictions or conditions as may be specified in the order, give such time to the company as it may deem fit to make its net worth positive. (3) If the Board decides under sub-section (1) that it is not practicable for a sick industrial company to make its net worth positive within a reasonable time and that it is necessary or expedient in the public interest to adopt all or any of the measures specified in Section 18 in relation to the said company it may, as soon as may be, by order in writing, direct any operating agency specified in the order to prepare, having regard to such guidelines as may be specified in the order, a scheme providing for such measures in relation to such company."

(10) Section 18 relates to the preparation and sanction of the scheme and sub-sections (1) (a) and (d) of Section 18, which are relevant are follows :

"18 (1) (A)- THE reconstruction, revival or rehabilitation of the sick industrial company; (1) (d)-the sale or lease of a part or whole of any industrial undertaking of the sick industrial company;"

(11) The last provision of the Act which may be noticed is Section 20 which provides for winding up of sick industrial companies. Sub-sections (1) and (2) of Section 20 which are relevant read as follows :

"(1) 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 party, 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. (2) The High Court shall, on the basis of the opinion of the Board, order winding up of the sick industrial company and may proceed and cause to proceed with the winding up of the sick industrial company

in accordance with the provisions of Companies Act, 1956 (1 of 1956)".

(12) What we have to examine in this case, is really the power of the Board when dealing with a case of a sick industrial company. The scheme of the Act seems to indicate that when a company has become a sick industrial company, within the meaning of Section 3(l)(o) then within the stipulated period a resolution by the Board of Directors has to be passed u/s 15(1) of the Act. By this resolution a reference is made to the Board who thereafter conducts an enquiry u/s 16 of the Act. After the enquiry has been completed there are two types of orders which can be passed by the Board u/s 17. Firstly, it may come to the conclusion that it is practicable for the company to make its net worth positive within a reasonable time. In this connection it may pass orders under sub-section (2) imposing restrictions or conditions and giving time to the company to make its net worth positive. The second type of order which can be passed is under sub-section (3) of Section 17. The jurisdiction to pass an order u/s 17(3) arises only after the Board has come to the conclusion that under Sub-section (1) it is not practicable for the sick industrial company to make its net worth positive within a reasonable time. The order which is passed u/s 17(3) is to appoint an operating agency in order to prepare a scheme. Section 18 has to be read along with Section 17(3). The opening words of Section 18 make it clear that it is only when an order u/s 17(3) has been passed that a scheme can be prepared in respect of the sick industrial company providing for any one or more of the measures stipulated in the said Section. Two of the measures mentioned therein are for re-construction, revival or rehabilitation of the sick industrial company and secondly, the sale or lease of a whole or part of the industrial undertaking of a sick industrial company. Sub-section (2) of Section 18 further provides that the scheme may make a provision for a number of things including change in the Board of Directors, transfer to the transferee industrial company of the business etc. of the sick industrial company and so on and so forth.

(13) What happens if the conditions u/s 17(3) are not satisfied or a scheme u/s 17(1) cannot be prepared. The answer lies in Section 20 which, inter alia, provides that if the Board is of the opinion that it is just equitable that the sick industrial company should be wound up then it should refer and forward its opinion to the concerned High Court. In other words when a reference is made u/s 13(1) and the Board comes to the conclusion that the company is a sick industrial company the effort has to be made u/s 17 so as to revive the company. u/s 17(1) it is for the company itself to satisfy the Board that it will be in a position to make its net worth positive within a reasonable time. If such satisfaction is not arrived at then the Board may think it necessary or expedient in public interest to adopt all or any of the provisions of Section 18 and direct the appointment of an operating agency which has been done in the present case. If the Board does not or cannot act u/s 17(3) then the only action which the Board can take, to our mind, is to form an opinion of the type contemplated by Section 20 of the Act and recommend the winding up of the company.

(14) Coming to the facts of the present case we find that in the first order of 24th February, 1989 the Board had come to the conclusion that the company was unable to make its net worth positive within a reasonable time. Having: held that the provisions of Section 17(1) could not be invoked in the present case, the Board was of the opinion that it was necessary or expedient in the public interest to try and rehabilitate the company and, in this connection, it passed an order u/s 17(3) and appointed respondent No. 3 as the operating agency. According to the operating agency it did not receive any tangible proposal from the petitioner on the basis of which any valid or reasonable scheme for rehabilitation or revival, as contemplated by Section 18 could be framed. This submission was made even though the petitioner had forwarded some proposal in April, 1990 and the petitioner had desired the Board to direct the operating agency to furnish a scheme. Reading the two orders dated 7th May, 1990 and 17th August 1990 of the Board it is clear that it came to the conclusion that the operating agency was not in a position to prepare a scheme as contemplated by Section 18 of the Act Having already determined, vide order dated 24th February, 1989, that the provisions of Section 17(1) were not applicable and thereafter having come to the conclusion that no scheme u/s 17(3) read with Section 18 could be prepared, the Board then came to the conclusion that u/s 20 of the said Act a report should be submitted to the High Court for the winding up of the company.

(15) The Appellate Authority, to our mind, did not really appreciate the real controversy which was there before it The Appellate Authority purported. to interpret the provisions of Section 18(I)(a) and came to the conclusion that the establishment of a new plant at a far off place does not amount to rehabilitation and is not covered under the Act. The Appellate Authority overlooked: the fact that the provisions of Section 18 did not, in the present case, come into play. The provisions of Section 18 would have been relevant only if a proposal had been submitted by the operating agency appointed u/s 17(3) of the Act. No proposal having been submitted, the interpretation, the scope and. effect of Section 18 could not arise.

(16) The real grievance of the petitioner before the Board was that the operating agency had not promulgated a scheme, According to the petitioner it had supplied to the operating agency relevant material in April, 1990. The contention of the operating agency was to the contrary The submission was that no definite proposal had been promulgated or forwarded by the petitioner for the operating agency to consider. The Board accepted the contention of the operating agency and thereupon decided that the proper course, in the present case, was that the petitioner company should be wound up. Under these circumstances the only contention which could legitimately be raised before the Appellate Authority was whether the Board should or should not have accepted the submission of the operating agency and whether it should not have directed the operating agency to formulate a scheme u/s 18.. The perusal of the order of the Appellate Authority seems to indicate that the contention, in this form, was possibly not raised before it by the counsel for the petitioner company and that is why the

Appellate Authority did not apply its mind to this aspect of the matter. It was open to the petitioner to contend that a scheme could have been formulated by the operating agency but if the Appellate Authority came to the conclusion that the decision of the Board viz that it was not feasible to have a scheme formulated u/s 18 by the operating agency, was correct then the decision of the Board would have to be upheld. As the Appellate Authority has not applied its mind to this aspect of the case we have no alternative but to set aside the order and remand the case to the Appellate Authority.

(17) Before concluding we would, however, like to observe that the interpretation sought to be put on Section 18(l)(a) by the Appellate Authority is not quite correct. Section 18 itself provides for re-construction, revival or rehabilitation of the sick industrial company and in addition thereto it also provides for sale, lease of whole or part of the industrial undertaking of the sick industrial company. There is clearly a distinction between the industrial undertaking and a sick industrial company. The words "company" and "undertaking" are not synonymous. A sick industrial company may have one or more industrial undertakings. In an effort to rehabilitate or revive the company it may be necessary to sell off its assets and to start afresh industrial undertaking at a different place. If there are more than one units, the Board may come to the conclusion that only one unit may need to be closed down or shifted. Be that as it may what is important to note is that a scheme to be framed u/s 18 can legitimately provide for establishment of an entirely new plant at a distant place. This may be in addition to the existing undertaking or by closing down one or more of the existing undertakings. What is sought to be revived is the company and not the undertaking.

(18) Before concluding we would like to note the contention on behalf of respondent No. 3 to the effect that the petitioner has not given any valid proposal on which a scheme of rehabilitation could be formulated. According to the learned counsel the outline of the proposal submitted by the petitioner envisages loans to the extent of over Rs. 14 crores to be obtained from the Financial institutions. It is submitted by the learned counsel that the proposal does not indicate as to which financial institutions will give the loans and nor is it possible for the Board to give any direction to any financial institution to give the loans. On the facts of the present case it was submitted by the learned counsel, that it was not possible for the operating agency to formulate any workable scheme. It is not necessary for us to go into the correctness of the contention because this is precisely the contention which will have to be examined by the Appellate authority. The Appellate Authority will have to see whether a proper workable scheme u/s 17(3) read with Section 18 can be formulated but if it comes to the conclusion that it is not possible for a workable scheme being found out, then the only alternative left is to uphold the finding of the Board that the company should be wound up.

(19) For the aforesaid reasons this writ petition is allowed. The order "dated

22nd November, 1990 passed by the Appellate Authority is quashed and the appeal filed by the petitioner before the said Appellate Authority is restored The Appellate Authority should dispose of the said appeal, as expeditiously as possible, after notice to all the parties and in accordance with law.

(20) There will be no order as to costs.