Gear Enterprises Vs. Mafatlal Engineering Industries Ltd.

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Court : Mumbai

Decided On : Oct-07-1993

Reported in : [1995]83CompCas756(Bom); 1994(1)MhLj348

Judge : M.S. Rane, J.

Acts : Sick Industrial Companies Act, 1985 - Sections 15, 16, 17, 18, 22, 22(1) and (3) and 25; Sick Industrial Companies (Special Provisions) Act, 1985 - Sections 22(1)

Appeal No. : Company Petition No. 138 of 1990

Appellant : Gear Enterprises

Respondent : Mafatlal Engineering Industries Ltd.

Advocate for Def. : Vikram Trivedi, Adv.

Advocate for Pet/Ap. : Ms. A.S. Kaushik, Adv.

Judgement :

M.S. Rane J.

1. The points involved in the petition herein as also in another petition, both field by the creditors for winding up the respondent-company, viz., Mafatlal Engineering Industries Ltd. (hereinafter referred to as 'the company' for the brevity's sake), on the ground of inability of the company to pay debts, are as under:

(i) Whether the petition filed, without obtaining prior permission under section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) (hereinafter referred to as 'SIC' Act) from the Board for Industrial and Finance 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 be keeping it in abeyance pending the inquiry under section 16 or preparation of the scheme under section 17 of the SIC Act.

2. Undisputedly the company was declared as a sick unit under the provisions of 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 the prior permission of the BIFR. It is also undisputed that till date, the said declaration continues.

A few relevant dates -

1. In 1987, a reference was made under section 15 of the SIC Act to the BIFR.

2. August 22, 1988, the BIFR declared the company a sick company.

3. May 27, 1989, the company stopped operation.

4. September, 1989, ICICI the operating agency prepared a report.

5. February 2, 1993, the BIFR formed an opinion that the company is not viable and recommended its winding up.

6. A petition was filed in this court on October 16, 1989, and accepted on March 14, 1990, that it after the declaration as a sick company.

7. The petition was admitted on September 12, 1990.

3. It is stated that the union of the employees of the company has challenged the said order of the BIFR in the writ petition in which interim stay is granted and the said proceedings are pending.

4. On behalf of the company, it is submitted that the petitions filed, without obtaining the prior consent of the BIFR, as required under section 22(1) of the SIC Act are void ab initio and liable to be dismissed as being not maintainable. In support, certain decisions were referred to, which would be considered later on.

5. As against the above submission of the advocate on behalf of the company, it is argued on behalf of the petitioning creditors that the petition does not warrant dismissal but has to be kept in abeyance by adjourning sine die. Learned counsel for the petitioners highlighted that the scheme is under preparation and, as provided under sub-section (3) of section 22, the proceedings against the company would remain suspended.

6. The divergent contentions of the parties can be considered and appreciated in the light of the relevant statutory provisions and on the basis of judicial decisions on the point.

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

'22. (1) Where in respect of an industrial company, an inquiry under section 16 is pending of any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 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.

22. (3) During the period of consideration of any scheme under section 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 order or other instruments in

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.'

7. It is clearly implied by a plain reading of sub-section (1) above that (i) in respect of the company if a reference is made under the SIC Act before the 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 clear that the making of a reference and pendency thereof, i.e., the reference, are the two main conditions when consent of the Board is required for initiating winding up proceedings. The expression 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', clearly provides and means that the same refers to a 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 of the Act. To put it clearly it talks, in the first instance, of proceedings filed after the reference to the 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 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 contention thereof.

8. Sub-section (1) of section 22, thus as noticed above, makes a clear distinction between 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, in a given case as in the instant case, where the reference 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. First is the decision of the Supreme Court in the case of Gram Panchayat v. Shree Vallabh Glass Works Ltd. : [1990]1SCR966 , 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, Gram Panchayat, adopted proceedings under section 129 of the Bombay Village Panchayat Act against the respondent-company for the recovery of property taxes due from the company, which was declared as a sick company by the Board under the provisions of the SIC Act. The company challenged the same in a writ petition claiming protection under section 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 enquiry 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 of their dues/outstanding/overdues or arrears by whatever name they are called. The Board, at its discretion, may accord its approval for proceedings 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 Ramniklal and Co. v. Wallace Flour Mills Co. Ltd., : AIR1992 Bom207 , my brother judge Dhanuka, has 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 as rendered by my brother judge Shri Jhunjhunuwala in the case of C.J. Gelatine Products Ltd., In re directly on the point. The facts were the same as in the case in hand. The company was declared a sick company prior to other filing of the winding up petition and where the company claimed protection under section 22(1) of the SIC Act, the claim of the company was accepted and the petition was dismissed.

14. Next is the Division Bench decision of the Gujarat High Court in the case of Testeels Ltd. v. Radhaben Ranchhodlal Charitable Trust, : (1989)2GLR1158 , 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 provision of law noticed above, considered in the various decisions referred to above, and the ratio laid down therein, in my view the facts and circumstances as obtained 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. Petition is dismissed. However, there shall not be order as to costs.