In Re: Caledonian Jute and

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Court : Company Law Board CLB

Decided On : Feb-10-1995

Reported in : (1996)85CompCas180

Judge : A Ramanathan

Appellant : In Re: Caledonian Jute and

Judgement :

1. This is a petition by Caledonian Jute and Industries Limited (hereinafter referred to as "the company") under section 80A of the Companies Act, 1956 (hereinafter referred to as "the Act"), seeking consent of the Company Law Board to the issue of further 111,000--9.1 per cent. redeemable cumulative preference shares of Rs. 100 each credited as fully paid-up, redeemable at par within a period of 10 (ten) years from the date of their issue, in lieu of the existing irredeemable 10,000--7 per cent. cumulative preference shares of Rs. 100 each fully paid-up. According to the company, the cumulative dividend on the preference shares is in arrears as on March 31, 1992, for 11 (eleven) years and the arrears amounted to Rs. 10,01,000. The shareholders of the company including the impugned preference shareholders have passed a resolution at the annual general meeting held on September 29, 1992, to issue further 9.1 per cent. redeemable cumulative preference shares of Rs. 100 each equal to the nominal value of the shares to be redeemed.

2. At the preliminary hearing of the case, the company was directed to send intimation to all the preference shareholders by registered post about the date of next hearing so that opportunity could be provided to them. On receipt of the

intimation from the company, 9 (nine) preference shareholders filed their objections in writing. Certain preference shareholders also appeared before this Bench either in person or through authorised representatives. Though all of them sought immediate redemption including the arrear of dividend, some were agreeable to the arrears of dividend being settled by issue of further preference shares.

3. Shri G. S. Asopa, advocate, appearing on behalf of the company at the various hearings held from June, 1993, to September, 1994, reiterated the stand of the company as stated in the petition and stated that as per the relevant balance-sheet as at March 31, 1992, the company is not in a position to redeem the impugned preference shares.

He also emphasised that no dividend has become due tin these shares during the last 11 (eleven) years as no dividend was declared by the company. He further submitted that, according to the proviso to Section 80A(1) of the Act, it is necessary to include the dividend amount in the value of the further shares to be issued only after any dividend has become due. According to him, the word "due" has to be interpreted in the context of any dividend which has been declared. Through a subsequent affidavit filed on behalf of the company in September, 1994, the written notes of arguments submitted in the matter of Naihati Jute Mills Company Limited, was adopted by the petitioner. The substance of the written notes of arguments is as follows : (i) The word "due" used in the proviso to Section 80A(1) cannot be construed to mean "arrear". The word "due" is meant to cover cases of redemption during an accounting period.

(ii) The right to receive arrears of dividend can be incorporated in the further share scrips so that such arrears could be paid as and when the company makes profits and is able to declare such dividend.

(iii) If the word "due" is to be interpreted as "arrear", then, it would amount to granting certain unintended advantages to the existing preference shareholders, viz., (a) he will get further dividend on the arrear of dividend as it would become part of the nominal value of the preference shares ; (b) the voting right of the preference shares will be unduly increased by the amount of arrear of dividend, added to the nominal value.

4. Elaborate submissions were made with regard to the intent of the amendment introduced by the Companies (Amendment) Act, 1988, through the insertion of Section 80A. Section 80A(1) of the Act, though makes it obligatory to redeem the irredeemable preference shares within 5 (five) years from the commencement of the Amendment Act, it does not envisage payment of arrears of dividend on such redemption. This being so, the proviso to Section 80A(1) of the Act cannot be construed to enlarge the scope of the main section to pay the dividend as well. In this connection, the decision in Duncan v. Dixon [1890] 44 Ch 211 was cited to the effect that a proviso cannot be construed as enlarging the scope of an enactment. Dividend becomes due only when the same is declared at the annual general meeting of a company, a finding in Band v. Batrow Haematite Steel Co. [1902] 1 Ch 353 which was also cited.

Reference was also made to reinforce this proposition to MFR D'Cruz v.K. N. Viswanathun, AIR 1941 Mad 806. A point was also made that the word "due" though used in Section 87, has been clearly contrasted therein to include arrears by means of specific explanation which in the present case is absent. The proviso to Section 80A(1) of the Act at the most may be interpreted to require the issue of further shares including therein the right to the arrears of dividend in respect of the unredeemed shares. As such the words "the right to arrear" have to be read into the phrase in brackets (i.e., including the dividend thereon). It is further submitted that as per the principles of accountancy also the interpretation cannot stand as further shares can be issued only against a corresponding asset but in the case of arrears of dividend, there is no corresponding asset excepting a fictitious asset which cannot be permitted by any law. Moreover, the interpretation of the word "due" as equal to "arrears" would be detrimental to the rights of equity shareholders and the creditors of the company which is not the intention of the Legislature.

5. It was submitted by further written notes of arguments that the rule in Heydon's case [1584] 3 Co. Rep 7a ; 76 ER 637, which is also known as the "mischief rule" cannot be applied in the present case. It is stated that the Supreme Court in CIT v.

Sodhra Devi [1957] 32 ITR 615 ; AIR 1957 SC 832, has stated that Heydon's case [1584] 3 Co. Rep 7a ; 76 ER 637 is applicable when the words in question are ambiguous and are reasonably capable of more than one meaning. In the present case, the word "due" used in Section 80A has a definite meaning in the Companies Act, even if it is capable of two meanings, i.e., to mean "arrears as well" the rule will not still allow the interpretation. This is because, as per the rule, the situation prevailing before the amendment and situation after the amendment, both have to be taken into account.

In the pre-amendment situation no further shares could have been issued for the arrears of dividend. The object of the amendment is to make irredeemable preference shares redeemable in order to release a locked up fund. This object is still served by the amendment. It is, therefore, submitted on behalf of the company that at the most the Company Law Board can direct the issue of separate new preference shares in respect of arrears of dividend with a minimum preference dividend just to retain the character of the preference shares.

6. I have carefully considered the contents of the petition, the written submissions as well as the arguments of the learned advocate appearing on behalf of the petitioner-company. A scrutiny of the audited accounts of the company immediately prior to the date of the petition, i.e., for the year ended March 31, 1992, shows that against a capital of Rs. 46 lakhs (both preference and equity), the company has accumulated losses of Rs. 144.88 lakhs and there is only a balance of Rs. 7.62 lakhs in the general reserves. The accumulated dividend in arrears as on that date amounted to Rs. 10.01 lakhs. In this situation, the company will not be able to comply with the provisions of Section 80 of the Act for the redemption of the preference shares and accordingly I am satisfied that the company is .not in a position to redeem the preference shares, 7. Objections (both written and oral) have been made by 13 (thirteen) preference shareholders who are mostly small shareholders seeking an order for redemption of the preference shares. These preference shareholders came to the scene consequent to my direction to the company to send them notices by registered post and allowing them to file their objections, if any, before this Bench. During the hearing, the company was also directed to explore the possibility of arranging a settlement for

the objecting shareholders. However, the company reiterated that no settlement is possible and as such the objections of these shareholders remain on record.

8. The prayer of the company seeking the consent of the Company Law Board for issue of further shares to the preference shareholders is in order. However, the crucial issue relates to the quantum of the new shares to be issued in redemption of the old preference shares. The crux of the question is whether the further shares will be only for the nominal value of the old shares or will they include the value of the dividend in arrears. According to the company, the proviso to Section 80A(1) contemplates the issue of further shares only equal to the amounts due. Since the arrears of preference dividend have not become due, the same are not required to be included in the value of the further shares. Elaborate submissions were, therefore, made on the concept of "amounts due". A careful reading of Section 80A(1) shows that in the case of irredeemable preference shares, every company which has such share outstanding, is obliged to redeem these shares within 5 (five) years from the date of commencement of the Companies (Amendment) Act, 1988, i.e., such shares should be redeemed by June 14, 1993. In such a case, all the shareholders would get their money and if dividends are in arrears but not due, they may not be paid such dividend. The proviso to Section 80A(1) contemplates a situation where a company is not in a position to redeem the preference shares and is carving out an exception for these cases. The present case falls within the exception. The alternative provided in such cases is that the company may issue further preference shares by which the old preference shares are deemed to be redeemed. The procedure laid down for this purpose is to obtain the consent of the Company Law Board through a petition. The essential features of the deemed redemption by issue of further preference shares, are : (a) the amount of the further preference shares is prescribed specifically which is equal to "the amounts due" ; (b) the amounts of the further preference shares shall include the dividend on the old preference shares ; (c) the issue and the quantum of the issue is protected by the presence of the non obstante clause ; (d) the further preference shares shall be redeemable in nature. The problem of interpretation of the proviso with reference to the inclusion or non-inclusion of arrears of dividend does not arise in the case of non-cumulative preference shares sjnce the right to receive the dividend lapses in the case of such shares. On the

other hand, in the case of cumulative preference shares, the right to the arrears of dividend continues. The problem posed in this case would not have arisen if the proviso had merely stated that "the issue of further redeemable preference shares shall be equal to the amount due" and had stopped with that. In such a case, one has to strictly go by the term "the amounts due" which may mean the principal amount plus dividend to the extent it had become due. In addition, if any premium is also payable on redemption, such premium may also constitute a part of the amounts due. Accordingly, as submitted on behalf of the company, any amounts declared as dividend will also be included in the value of the further preference shares. On the other hand, the emphasis applied by the word in parenthesis following the words "amounts due", viz., "including the dividend thereon", requires one to consider the implication of these words. I am in complete agreement with counsel for the company that the word "due" is to be interpreted as stated in the two cases cited, viz., Bond v. Barrow Haematite Steel Co. [19021 1 Ch 353 and MFR D'Cruz v. K. N. Viswanathan, AIR 1941 Mad 806, to include only any dividend which is already declared. However, in such case, the words "including the dividend thereon" becomes redundant. We have to either discard these words in parenthesis as of no consequence or to interpret their relevance in the context of the amendment introduced in 1988. It is in this context that the rule in Heydon's case [1584] 3 Co.

Rep 7a ; 76 ER 637 is important. A departure from the normal rule of construction is contemplated by the Supreme Court in CIT v. Sodhra Dem [1957] 32 ITR 615 ; AIR 1957 SC 832, whenever there is any ambiguity in the word used in the statute. In the present case, by the addition of the words "including the dividend thereon" after the words "the amounts due", an ambiguity has certainly been created. In order to sort out an ambiguity the court applied the rule in Heydon's case [1584] 3 Co. Rep 7a ; 76 ER 637 particularly in the context of an amendment. The four rules contemplated in that case are : 2nd. what was the mischief and defect for which the common law did not provide.

3rd. what remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth, and 9. If we apply the above rules, we find that before the amendment if the company was not in a position to redeem the preference shares, it used to extend the preference shares for a further duration. In such a case the shareholders' right to receive arrears of dividend is postponed but not forfeited. The remedy provided by Parliament through the amendment was to either redeem the preference shares or, if not possible, to get new redeemable shares issued. Prior to the amendment if redemption was extended, the cumulative dividend also used to be carried over. In the present situation since the old shares are deemed to be redeemed, the arrears of cumulative dividend cannot be carried over in terms of the proviso. It was, therefore, suggested by learned counsel for the company that the Company Law Board may direct that the right to receive the arrears of cumulative dividend on the old preference shares could be attached to the further preference shares.

Though this is appropriate and will take care of Heydon's rule [1584] 3 Co. Rep 7a ; 76 ER 637, the provisions as contained in Section 80A(1) do not permit a mere attachment of the right to receive the cumulative dividend on the old preference shares along with further shares. It specifically contemplates the issue of further shares of a certain amount which should include the dividend. Hence, the suggestion of learned counsel, though appropriate, may not be strictly in accordance with the provisions of law. In the circumstances, the only possible interpretation is that, the arrears of dividend should also be included in the value of the further preference shares which may militate against the concept of treating a dividend which is not due otherwise as an amount due. However, this term can be justified because of the presence of the non obstante clause which not only exempts the issue but also the quantum of the issue.

10. Arguments were also advanced that the inclusion of the arrears would increase the value of the preference capital and may entitle the preference shareholders to not only further dividend on the arrear of dividend hut also in the case of non-declaration of dividend, entitle him to undue benefit in voting rights as per Section 87 of the Act.

Both these contentions are well justified. However, the dividend on arrear dividend could be taken care of by suitable adjustment of the rate of dividend on the further preference share which is possible now in view of the absence of any regulation with regard to the rates of dividend. As regards additional voting rights which the preference shareholders may be entitled to under Section 87, such a question arises only in case of default. The voting right is consequential to the provisions of law and the same has to naturally follow in the case of a default. As against the alleged special benefit that the preference shareholders may get, it may also be kept in view that in equity the inclusion of the dividend is justified because, strictly speaking, the shareholder is entitled to cash payment. Since he sacrifices the liquidity, the proviso aims to compensate him by way of addition of the arrear of dividend to the value of equity shares.

11. An argument was also advanced that, as decided by the Chancery Division in Duncan v. Dixon [1890] 44 Ch 211, the proviso cannot be construed as enlarging the scope of the main provision. This argument is not applicable in the present case because the proviso here seeks to provide an alternative to the main provision in a contingency. The question would arise only if the main provision does not contemplate payment of dividend but the proviso is interpreted to provide for the payment of dividend. The proviso here only contemplates a theoretical inclusion in the value of the further preference shares. The actual payment, however, would arise at the time of redemption of the further preference shares. The proviso also would not in any way affect the interest of the creditors as alleged by the company because payment to the preference shareholders in any case will follow the payment to the creditors. It is, however, possible that a preference in payment of dividend may ensue before paying off the equity shareholders in the event of winding up which, however, has been specifically contemplated by the provisions of law.

12. It was also argued that the inclusion of the arrear dividend in the value of the preference shares will be contrary to accounting principles. This contention is not sustainable in view of the opinion of the Expert Advisory Committee of the Institute of Chartered Accountants of India (vide Chartered Accountant May, 1992, on pages 954-955), According to the committee, "the section clearly mentions that the preference shares may be issued to cover the arrears of preference dividend also. The committee notes that the liability for arrears of dividend on old preference shares has crystallised due to the operation of law". In view of this, the accounting

body ought to have contemplated normal accounting procedures to deal with this situation.

13. In view of the above, I allow the company to reduce the percentage of dividend on further preference shares suitably so that the quantum of dividend remains unchanged. The proposal of the company to retain the right to receive the arrears of dividend on the old preference shares to be attached to the further preference shares, not being in accordance with the provisions of Section 80A(1), is rejected. I further direct that : (i) the company may issue further redeemable cumulative preference shares of Rs. 100 each fully paid-up effective from June 14, 1993, in lieu of the existing 10,000--7 per cent. tax-free cumulative preference shares of Rs. 100 each, including the arrears of dividend accrued thereon ; (ii) the company shall work out up to June 14, 1993, the arrear of dividend on the existing preference shares and also work out the fractional entitlement appropriately and shall discharge the fractional amount in cash to the holders of the preference shares ; (iii) the further redeemable cumulative preference shares shall carry a fixed cumulative but preferential right of dividend at such percentage so that the overall quantum of dividend remains unchanged and these shares shall be redeemed at par before the expiry of 10 (ten) years from the effective date or such earlier date as may be decided by the board of directors in accordance with the provisions of the Companies Act, 1956 ; (iv) the company shall make the above issue within 90 (ninety) days of the receipt of this order and shall comply with necessary provisions of the Companies Act, 1956, consequent on the above consent for the allotment of further preference shares.

15. The above order is without prejudice to any approval/consent which may be required to be obtained by the petitioner under the provisions of any other enactment.

16. A copy of this order shall be sent to the Registrar of Companies, West Bengal, for information.