

In Re: Oswal Foods Ltd.

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Court : Allahabad

Decided On : Nov-16-2006

Reported in : [2008]145CompCas259(All); [2009]95SCL194(All)

Judge : Sunil Ambwani, J.

Appellant : In Re: Oswal Foods Ltd.

Disposition : Application dismissed

Judgement :

Sunil Ambwani, J.

1. M/s. Oswal Foods Ltd. (in liquidation) was wound up by this Court on a petition filed by M/s. J. K. Corp. Ltd., a creditor to the extent of Rs. 51,21,968 as on August 30, 2000, by an ex parte order. A recall application was filed on November 7, 2000. It was directed to be listed before the hon'ble M. C. Jain, J. (since retired). The matter could not be heard, thereafter.

2. In the recall application it is stated by Shri Suraj Jain, one of the directors of the company (in liquidation) that he came to know about the winding up order by communication given by the official liquidator dated October 18, 2000. No summons, process or notices were tendered to the company at its registered office. The company and its directors as well as the officials had no knowledge about the proceedings. The newspapers Amur Ujala published from Allahabad and

Pioneer from Varanasi do not have circulation in Khalilabad, district Basti. It is stated in paragraph 9 that on account of certain adverse market circumstances the company was compelled to close down its manufacturing activities between April 1998 and December 1999. With effect from January 2000 the company had once again commenced production and is engaged in manufacturing activity utilizing 70 per cent, of its production capacity. During April 1, 2000 and September 30, 2000, it purchased 11238.98 MT of raw material of the value of Rs. 20.30 crores and has processed 9579.52 MT of vanaspati ghee, which has been marketed in the name and style of Arpan. The value of the manufactured product was Rs. 24.50 crores. Sixty persons are employed in the company, and the company is paying Rs. 15 lakhs towards trade tax. The company is a running concern and there is a reasonable hope of its rehabilitation.

3. Besides it is stated in paragraph 12 that in the preceding year due to accumulated losses as per the balance-sheet exceeded its net worth, a reference was made to Board for Industrial and financial reconstruction (BIFR), which was registered on July 10, 2000.

4. In the reference made to BIFR the company disclosed that as on September 30, 1999, it was indebted to Allahabad bank to Rs. 193.12 lakhs, State Bank of India Rs. 457.77 lakhs and Rs. 236.70 lakhs towards interest and BNP Rs. 82.30 lakhs. The company had also taken loan from financial institutions namely IDBI, IFICI, ICICI and other State Financial Corporations and Small Industries Development Corporation to which it was indebted for Rs. 1193.46 lakhs towards principal and Rs. 547.94 lakhs towards interest. There was provident fund, electricity and other dues to the extent of Rs. 83.40 lakhs and that the net worth of the company was fully eroded.

5. The BIFR rejected the reference. The matter went to AAIFR, which also rejected the appeal on June 19, 2006, on the ground that reference was barred by time. Aggrieved the petitioner filed Writ Petition No. 15932 of 2002, which was dismissed on November 7, 2006.

6. Shri Rajnath N. Shukla appearing for the official liquidator informs that the official liquidator has received information about the indebtedness of the company to

IFCI and that DRT, Chandigarh has decreed the claim for Rs. 16,57,99,574 (rupees sixteen crores fifty seven lakhs ninety nine thousand five hundred and seventy four only).

7. The company has not paid anything towards liability nor has denied the liability towards petitioning creditor of Rs. 51,21,968 as on November 5, 1999.

8. The ex-directors have not filed statement of affairs and have not handed over the possession of the assets to the official liquidator. The winding up proceedings were not stayed at any stage. Shri. S.K. Saxena, the official liquidator informs that there was complaint about removing of assets, on which UPFC has appointed its security. There was some liability of sales tax dues, which was challenged by the petitioner in the writ petition in which recovery was stayed, however, a restraint order was passed against the company from selling the assets.

9. It appears that the company made another reference to BIFR on June 21, 2004, based on its last audited balance-sheet as on September 30, 2001, on the basis of meeting of board of director dated April 28, 2004. It was stated in the reference that the company started commercial production on March 8, 1990. The operations were temporarily suspended since July 2002. The net worth of the company was Rs. 885.40 lakhs consisting of paid-up capital of Rs. 707.40 lakhs and free reserve. The entire net worth was fully eroded due to accumulated losses which stood at Rs. 2719.27 lakhs. The company had investment in plant and machinery of Rs. 1214.22 lakhs.

10. It was pointed out to the Board in the proceedings held on August 22, 2006, that the company's first reference based on audited balance-sheet as on September 30, 1999, was rejected on February 30, 2001, on the ground that the company had manipulated its accounts and the company could not prove that it had adopted transparent approach by adopting due diligence and prudent method in a transparent manner in selling of its sugar plant. In fact the company had sold the sugar division to JHV Sugar Corporation and had still shown a loss of Rs. 1394.30 on sale for the period ended September 30, 1999, thereby overstating its losses for the year. In spite of directions of BIFR the company or its auditors could not give any justification for the losses, when one of the units was sold in the same

year.

11. The appeal was rejected on September 16, 2006. The second reference based on audited balance-sheet as on September 30, 2000, was heard on November 7, 2002. IDBI appointed as operating agency, reported on March 12, 2003, that the company had not co-operated with them and as such they could not conduct SIA. The BIFR observed that the company was not serious for its financial rehabilitation. In June 2004 the company filed a third reference based on its auditors' result for the year ending September 30, 2001, December 31, 2001 and December 31, 2003. The company, however, did not inform the Board that in the meantime on November 5, 1999, it was wound up by the High Court and that a recall application was pending. The proceedings of BIFR dated February 22, 2006, however, shows that there is a reference to the order of the High Court dated August 30, 2000, by which the company was wound up.

12. Paragraph 2.4 of the order of BIFR dated August 22, 2006, shows that the representative of the company submitted that no SIA had taken place as the company could not pay the SIA fee in advance and that on December 31, 2003, appointment of official liquidator was stayed by the High Court.

13. There is no such order by which the appointment of official liquidator was stayed nor any such order was produced by counsel for the petitioner. The statement was apparently given to mislead the Board.

14. It was then stated before the Board that the groups was on revival path. The IDBI and BNP had been paid off and that the discussions with IFCI and ICICI were under way, and the SBI and Allahabad Bank will be approached for settlements. On a request made by the company 15 days' time was granted by the Board. Counsel appearing for the petitioner is not in a position to inform the court with the status of proceedings before the BIFR.

15. The statement given by representative of the company also shows that it did not disclose to the Board the dues of IFCI as on March 15, 2001 and the fact that IFCI had filed a claim, which was decreed by DRT, Chandigarh.

16. It was admitted by the representative of the company in BIFR that the production of company was laying closed since 2002. Infact the production was closed much earlier.

17. The aforesaid facts clearly establish that the company is not interested in rehabilitation. It is only filing references in BIFR to seek protection from recoveries. It has not done any business for the last three years and is picking and choosing creditors for payment from the sources, which have not been disclosed. The no dues certificate given by IDBI on June 19, 2006, for settling the loan for Rs. 102.04 lakhs appears to be doubtful as the dues were much more and the source for making payment is not disclosed. It appears that in order to get some advantage to some other company of the group the IDBI was paid of, in preference to the other creditors.

18. Learned Counsel for the applicant has relied upon *Rishabh Agro Industries Ltd. v. PNB Capital Services Ltd.* : (2000)5SCC515 and *Modi Rubber Ltd. v. Madura Coats Ltd.* [2004] All. CJ. 1416 : [2006] 130 Comp Cas 32 in which relying upon *Rishabh Agro Industries Ltd.* : (2000)5SCC515 the Division Bench of this Court held that even after the winding up it is open to the directors of the company to explore the possibility of rehabilitation. The court also relied upon *Real Value Appliances Ltd. v. Canara Bank* : [1998]3SCR170 . It was held that winding up order under the Companies Act is not the end of the proceedings pending before the company judge, but is infact commencement of the process of liquidation. The ultimate order is dissolution. The ex-directors may explore the possibility of rehabilitation, which includes a reference to BIFR. The Division Bench judgment in *Modi Rubber Ltd.* has been taken to Supreme Court, where the matter is referred to a larger Bench. The position of law as such is that even after winding up of the company the ex-directors can explore the possibility of revival. It, however, does not mean that where the company has become sick and is not making any effort for rehabilitation, may go on seeking rehabilitation only in order to avoid the evil day or with ulterior motive of removing the assets, and picking up and choosing the creditors for making payment for the purposes, which are not connected with rehabilitation of the company (in liquidation). In the present case the production is closed for the last many years. The ex-directors have not infused any fresh funds

into business. Two references made to BIFR have been turned down. In the third reference the company is not co-operating with the Board for preparation of any revival plan. Infact there is no rehabilitation plan in existence and that the proceedings have been delayed in BIFR only on a false statement that the appointment of official liquidator was stayed by the court on December 31, 2003.

19. In the facts and the circumstances I find that the efforts of the ex-directors are not bona fide. They are misleading both the High Court as well as BIFR for avoiding liquidation. In the meantime they are not interested in running the unit. It is apparent that the entire attempt is to siphon off whatever assets as available.

The recall application is accordingly rejected with costs of Rs. 10 lakhs imposed on Shri Suraj Jain, son of late Sri Amar Nath Oswal, for misleading both this Court and BIFR and for delaying the proceedings for last six years. The ex-directors shall file the statement of affairs and hand over all the assets of the company to the official liquidator without any delay with report to the court in a month. List on January 15, 2007.

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