In Re: Rishi Enterprises

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Court : Gujarat

Decided On : Apr-02-1990

Reported in : [1992]73CompCas271(Guj); (1991)2GLR1213

Judge : M.B. Shah, J.

Acts : Palmer's Company Law

Appeal No. : Company Petition Nos. 108 to 110 of 1989 and 10 of 1990

Appellant : In Re: Rishi Enterprises

Judgement :

Shah, J.

1. Mr. Raval, the learned advocate appearing on behalf of the petitioners, vehemently submitted that once the company fails to pay the undisputed amount, then this court should admit the petitions and should not adjourn the. According to his submissions, this court has absolutely limited discretion. For that purpose, he has relied upon the decision of the Supreme Court in the case of Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd. [1972] 42 Comp Cas 125.

2. In my view, there is such absolute law. The section itself confers judicial discretion upon the courts. In the present case, it seems that the intention of the

petitioners in insisting on admission of these matters is only to coerce the company and extract from it immediately by any means the amount which is payable to the petitioners. There is no such law that a company which is a running company employing about 500 employees who are paid their wages regularly and which is having a business of crores of rupees every year should be brought to a grinding halt by admitting these petitions merely because it is in some financial difficulty at the moment. On the contrary even in those cases where the company is closed, it has been laid down that it is the duty of the court to welcome revival rather than affirm the death of the company. It has been also held that it would not be right to say that creditors can insist on winding up of the company by the court as a matter of right if the position of the company is such that it would be unable to pay its debts to the even if the company can be resurrected. The petitioning creditor cannot be permitted to insist on his pound of flesh from the company which may be a death blow to the company only on the ground that for a temporary period a running company is not in a position to pay the debt. This would to clear from the following decisions of this court.

3. In the case of New Swadeshi Mills of Ahmedabad Ltd. v. Dye-Chem Corporation [1986] 59 Comp Cas 183, a Division Bench of this court has held as under (at page 186) :

'It is the case of the creditors that the company is unable to pay its debts and that it is just and equitable that the company should be wound up. The circumstances call for no proof of inability on the part of the company to pay its debts as such inability is self-evident on the admitted facts. There are huge debts, secured as well as unsecured, which, as matters stand, are far beyond the means of the company to meet. Even so, a court will exercise a sound discretion in deciding whether to wind up a company or not and in doing so consider any relevant factors. It may be that despite the inability to pay its debts, a company has still prospects of coming back to life and if the court is told of any specific proposal, which in the opinion of the court is likely to materialise, the court will be inclined to give a chance to resurrect the company. It should be the policy of the court to attempt to revive though at the moment the company may not be solvent and may not be able to meet its obligations to its creditors. But this should be only if it is

shown that there is reasonable prospects for resurrection and survival. It may be easy for a court when once it is shown that the company is unable to pay its debts to bury it deep, and distribute whatever is available as distributable surplus. But it is the duty of the court to welcome revival rather than affirm the death of the company and for that purpose the court is called upon to make a discreet exercise.'

4. Similarly, in the case of Navjivan Trading Finance P. Ltd., In re [1978] 48 Comp cas 402, this court has held as under (at page 415) :

'It is no doubt true that the modern trend as etched by a number of pioneering decisions rendered by D. A. Desai J. of this High Court (no wonder tens of thousands of workers with gratitude filled eyes feel beholden to him for it is against winding up of a company so long as it is possible to resurrect the company. Winding up is the last thing that the court would do and not the first thing that the court would go having regard to its impact and consequences, for winding up of a company would result in,

(1) closing down of a unit which produce some goods or provides some services;

(2) it would throw out of employment numerous persons and result in grave hardship to the members of families of such employees;

(3) loss of revenue to the State by way of collection that the State could hope to make on account of customs or excise duties, sales tax, income-tax, etc.;

(4) scarcity of goods and in diminishing of employment opportunities. The court would not, therefore, be too keen or too anxious to wind up a company by an order of court only on the ground that the company is unable to pay its debts. In fact, it would be a blow to do so, so long as a matter of right if the position of the company. It would not be right to say that creditors can insist on winding up of a company is such that it would be unable to pay its debts to them even if the company can be resurrected. When the persons to who the company becomes indebted enter into dealings with the company, they do so because they hope to make profits out of the transactions with the company in the usual course of

business. It is an incidental risk and an occupational hazard for the person who enter into such dealings which they undertake in order to earn profits. In fact, it is possible that in the course of their dealings for several years, they would have made huge profits out of the transaction entered into with the company. It would not, therefore, be right to wind up the company merely because the company is unable to pay its debts so long as it can be resurrected by a scheme or arrangement.'

5. Even in the case of Madhusudan Gordhandas and Co. v. Madhu Woollen industries P. Ltd. [1972] 42 Comp Cas 125, the Supreme Court has laid down that if there is opposition for winding up orders by the creditors and shareholders, the court will consider their wishes and may decline to make a winding up order. The relevant discussion is as under (at page 132) :

'The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st edition, page 742, as follows :

'This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some good reason, they object to a winding up order, the court in its discretion may refuse the order.'

The wishes of the creditors will, however, be tested by the court on the grounds as to whether the case of the persons opposing the winding up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case (see P & J Macrae Ltd., In re [1961] 31 Comp Cas 424; [1961] 1 All ER 302 (CA).'

6. The court also considered that if the petition is filed out of improper motive to coerce the company then the court may refuse winding up.

7. In the present case, it is the say of Mr. Shah, the learned advocate appearing on behalf of the company, that because of financial difficulties created on account of dispute with Coal India Ltd. and other purchasers, large amounts of the company are being withheld and, therefore, it is not possible for the company immediately to pay the amounts. Still, however, the company is trying to pay the dues and the company has paid 15% of the amount as ordered by this court previously and that the entire amount is paid to other petitioning creditors. Mr. Shah, learned advocate, has also pointed out that the company would pay some amount to the petitioners on or before April 25, 1990. He further submits that at present by pressing for admission of these petitions, the desire of the petitioners is only to coerce and disrepute the company so that it cannot do further business.

8. Mr. Soparkar, learned advocate appearing on behalf of the labourers (newly added party), submitted that the court may not admit these matters at this stage. Otherwise, the only suffers would be the labourers. They would be deprived of their bread. He further submitted that the intention of the petitioners in insisting on admission of these matters is only to see that they get their money immediately out of priority. He further submitted that at present if the matters are admitted, the petitioners who are unsecured creditors are not likely to be benefited.

9. In view of the law laid down by this court as well as the Supreme Court, it is abundantly clear that the petitioning creditors have no absolute right to insist on winding up of the company even if the company is unable to pay its debts.

10. Hence, it would be in the interest of justice to give the company some time to come out of its monetary financial crisis. Hence, at present these matters are not admitted.