

# GUJARAT HIGH COURT

Testeels Limited

Vs.

Radhaben Ranchhodlal Charitable Trust

O. J. Appeals Nos. 9 and 10 of 1988 with Company Appln. No. 73 of 1988 (in Co. Petn. Nos. 43 and 44 of 1986)

(P.R. Gokulakrishnan, C.J., and R.A. Mehta, J.)

15.04.1988

## JUDGMENT

### **P.R. Gokulakrishnan, C.J.**

1. Both these O.J. Appeals arise from the order passed in Company Petitions Nos. 43/86 and 46/86. Both the Company Petitions were filed by different Charitable Trusts against the same appellant herein for the purpose of winding up the appellant-company due to its inability to pay the huge rents payable to the respondents. The learned Company Judge admitted the Company Petitions and passed the following order on 29th April, 1987 :

"Admit. For the present at the request of Mr. S.I. Nanavati, the matter is adjourned till reopening of the Court for the purpose of advertisement. S.O. to 25-6-1987."

A similar order was passed in both the Company Petitions and as against these orders, the present O.J. Appeals Nos. 9 of 1988 and 10 of 1988 have been filed. In the O.J. Appeals, the appellant, Testeels Limited apart from various other grounds, contended that in view of the provisions under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (Act No. 1 of 1986), the Company Petitions filed by the respondent in each of these O.J. Appeals have to be dismissed. Hence, the short question that arises in these O.J. Appeals is as to whether the Company Petition can be dismissed in view of Section 22 of the above said Act. For that purpose, it is necessary to interpret Section 22 of the said Act.

2. As far as the present case is concerned, no doubt, the respondents in each of these O.J. Appeals, have compromised the matter with the appellant in each of these O.J. Appeals and the consent terms are kept on record. As far as the appellant-Company is concerned, the Board for Industrial and Financial Reconstruction, in exercise of the powers conferred under Sub-section

(4) of Section 16 of the Sick Industrial Companies (Special Provisions) Act, 1985 and all other powers enabling them in this behalf, has appointed, by order dated 11-1-1988, until further orders, one G. Mukherjee, to be a Special Director of Testeels Limited for safeguarding its financial and other interests. Section 16(4) of the said Act reads as follows :

"Where the Board deems it fit to make an inquiry or to cause an inquiry to be made into any industrial company under Sub-section (1) or, as the case may be, under Sub-section (2), it shall appoint one or more persons to be a special director or special directors of the company for safeguarding the financial and other interests of the Company."

By another order of the same date (11-1-1988), the Board, under Section 17(3), appointed ICICI as the Operating Agency for preparing a scheme for rehabilitation of the Company and the Board also gave certain guidelines and a draft Scheme has directed to be submitted by ICICI within 90 days.

3. Section 22(1) of the said Act reads as follows :

"22(1) where in respect of an industrial company, an inquiry under Section 16 is pending or 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 (1 of 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 cansent of the Board or, as the case may be, the Appellate Authority."

Rule 100 of the Companies (Court) Rules, 1959 states that a petition for winding up shall not be withdrawn after presentation without the leave of the Court.

4. Rule 101 of the Companies (Court) Rules, 1959 deals with substitution of creditor or contributory for original petitioner. Thus, a petition for winding up is filed by any party, in view of the Act and the Rules made there under, enures to the benefit of all the creditors and it cannot be withdrawn without following the procedure envisaged under the Act and the Rules made there under. In the light of the provisions under the Companies Act, we have to see the effect of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 and as to the legality of an order of dismissal of the company petition in the light of Section 22 of the said Act.

5. The Statement of Objects and Reasons for enacting the Sick Industrial Companies (Special Provisions) Act, 1985 clearly states that in order to fully utilise the productive industrial assets, afford maximum protection of employment and optimise the use of the funds of the banks and financial institutions, it would be imperative to revive and rehabilitate the potentially viable sick

industrial companies as quickly as possible. It also states that it would also be equally imperative to salvage any productive assets and realise the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industrial companies through liquidation of these companies. Having the above factors in mind, the Statement of Objects and Reasons for enacting the said law states that a need has, therefore, been felt to enact in public interest a legislation to provide for timely detection of sickness in industrial companies and for expeditious determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost practicable despatch.

6. Having the above object in view, Section 16 of the Act, which deals with inquiry into working of the sick industrial companies and Section 16(4), which we have extracted in para supra, enables appointment of one Special Director or Special Directors of the Company for safeguarding the financial and other interests of the company.

7. Section 17 deals with the powers of Board to make suitable order for appointing an operative agency to prepare a scheme for rehabilitation of sick industrial company and ICICI has been so appointed by the Board for that purpose in case of this Company. In and by Section 18 of the Act, the operating agency specified under the Act has been given full powers to prepare as expeditiously as possible and ordinarily within a period of 90 days from the date of such order, a scheme with respect to such a company providing for any one or more of the measures enumerated in that Section. In short, a reading of Section 18 makes it clear that ample provision for preparing a comprehensive scheme for protecting the interest of the Company. Section 19 of the Act deals with rehabilitation by giving financial assistance and it reads as follows :

"19. Rehabilitation by giving financial assistance :

(1) Where the scheme relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, the scheme may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, a State Government, any scheduled bank or other bank, a public financial institution or State level institution or any institution or other authority (any Government, bank, institution or other authority required by a scheme to provide for such financial assistance being hereafter in this Section referred to as the person required by the scheme to provide financial assistance) to the sick industrial company.

(2) Every scheme referred to in Sub-section (1) shall be circulated to every person required by the scheme to provide financial assistance for his consent within a period of sixty days from the date of such circulation.

(3) Where in respect of any scheme the consent referred to in Sub-section (2) is given by every person required by the scheme to provide financial assistance, the Board may, as soon as may be, sanction the scheme and on and from the date of such sanction the scheme shall be binding on all concerned.

(4) Where in respect of any scheme consent under Sub-section (2) is not given by any person required by the scheme to provide financial assistance, the Board may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit."

8. Section 20 of the Act deals with winding up of sick industrial company where the Board, after making inquiry under Section 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, 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.

9. Thus, reading the abovesaid provisions in the background of the Statement of Objects and Reasons for enacting the said law, it is clear that the legislation in order to revive and rehabilitate the sick industry has come forward with specific provision. The financial assistance envisaged under Section 19 of the said Act, as correctly put forward by Mr. Mehta, the learned counsel appearing for the appellant, cannot be forthcoming if the winding up proceeding is not dismissed. Various other schemes envisaged under Section 18 cannot be effectively administered by having the winding up proceedings alive without the same being dismissed. In the light of the above provisions of law, we can discuss the effect of Section 22 of the said Act. The Section clearly states that 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. If in this Section 22, the wordings :

"xxx no proceedings for the winding up xxx xxx shall lie xxx"

are only stated, there would not be any difficulty in coming to the conclusion that winding up proceedings which are pending should also be dismissed. The difficulty arises only when we read the wordings in Section 22 which is to the effect that :

"xxx 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 xxx xxx  
xxx

The underline supplied by us, reads 'shall lie' or 'be proceeded with'. If it cannot be proceeded with, there is no question of the company court or any other court dealing with this matter, further proceeding and dismissing the petition. Since the Legislature thought it fit to include the words "be proceeded with further", a meaning has to be given to these words also. The words, in our opinion, cannot be interpreted to mean that the winding up proceedings already started should be kept in abeyance without further proceeding in the matter. The various provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, which have been enacted to

safeguard the economy of the Nation and to protect the viable sick companies definitely puts an end both to the contemplated winding up proceedings and the pending winding up proceedings. A Bench of this High Court in Company Petn. Nos. 16/68, 25/68 and 32/68 had occasion to consider the effect of the Industries (Development and Regulation) Act, 1951. In and by the said Act, the Government made an order authorizing the Gujarat State Textile Corporation to take over the management of the whole of the undertaking of the company subject to certain terms and conditions. The Gujarat State Textile Corporation, who was appointed as the authorized controller, made an application for being joined as a party in the said company petitions, and after it was joined as a party, it made an application to the learned Company Judge that the petition should be dismissed by reason of Section 188(1)(c) of that Act. A Bench of this High Court, dealing with this Section gave its decision after considering the provisions of Section 188(1)(c). For the purpose of our case, we can reproduce the relevant portions of the Section which came to be interpreted in that case and it reads as follows :

"No proceeding for the winding up of such undertaking or for the appointment of a receiver in respect thereof shall lie in any Court except with the consent of the Central Government."

Section 188(1)(c) provides that where the management of an industrial undertaking, being a Company, is taken over by the Central Government, then, notwithstanding anything contained in the Act or in the Memorandum or Articles of Association of such undertaking, no proceeding for the winding up of such undertaking or for the appointment of a Receiver in respect thereof shall lie in any Court except with the consent of the Central Government. According to the Bench of this High Court, the inhibition enacted in the Section is that "no proceeding" for winding up of the Company "shall lie in any Court". This expression is, according to the Bench clear and unambiguous and, according to its plain grammatical construction, it means that no proceeding shall be sustainable in any Court irrespective as to when it was instituted. The Bench further held that it takes in not only proceeding to be instituted in the future, but also pending proceeding. The Bench further held that the expression "no proceeding.....shall lie in any Court", means that no proceedings shall be sustainable in any Court, whether it is instituted, subsequent to the making of the order under Section 18A or it was pending at the date when the order under Section 18A was made. Proceeding further, the Bench of this High Court in that decision held that :

"the whole object of the proceeding for winding, up is to destroy its corporate existence, and the continuance of a pending proceeding for winding up, if allowed by the Court in exercise of its discretion, would clearly conflict with the permanent object being the making of an order under Section 18A, namely, that the industrial undertaking should continue to function. We have, therefore, no doubt that in enacting Section 18E(1)(c) the Legislature intended to oust not only the institution of a future proceeding but also the continuance of a pending proceeding for winding up."

The Bench also considered two objections advanced in that case, namely; (a) that if the pending

proceedings for the winding up is dismissed, it would not be possible to avoid fraudulent preferences which may have been made by persons in management of the Company within a period of six months prior to the institution of the winding up proceeding and the interest of the creditors would in consequence suffer and (b) that if the pending proceeding of the winding up were to be dismissed, the creditors who might not have filed suits for enforcement of their claims against the Company in the belief that they would seek to enforce their claims in winding up might be seriously prejudiced, if their claims in the meantime became time barred. For these objections, the Bench of this High Court held as under : as far as the first objection is concerned :

"The Legislature had to make a choice between these two competing considerations, one affecting public interest and the other affecting the interests of the creditors. The Legislature chose to protect public interest even if it meant that, in the process of doing so, the interests of the creditors might suffer. It may be pointed out that as a matter of fact the risk of the creditors' interests suffering would not be very serious. If the industrial undertaking functions smoothly and efficiently under the engagement of the Authorized Controller, it is quite possible that the industrial undertaking might make profits and the creditors might ultimately receive full payment of their dues."

As regards the second objection, the Bench held :

"The mere institution of a winding up proceeding does not stop the period of limitation from running and a creditor who waits until the conclusion of the winding up proceeding does so at his own risk. If the proceeding for winding up is dismissed, he may lose his claim, if in the meantime, it has become time barred, It is, therefore, no argument against the construction placed by us on Section 18E(1)(c) to say that because the dismissal of the winding up proceeding might result in the claims of some creditors becoming time-barred by reason of their having waited for the final disposal of the winding up proceeding, such a construction should not be accepted."

Finally, the Bench categorically held that once an order under Section 18A is made in respect of an industrial undertaking, a proceeding for winding up the industrial undertaking pending at the date of the making of the order must come to an end unless the consent of the Central Government is obtained for continuance of such proceeding.

10. We have already extracted the Statement of Objects and Reasons for enacting the Sick Industrial Companies (Special Provisions) Act, 1985. The various provisions, which we have extracted in paragraphs supra, amply make out the purpose and the objects sought to be achieved in treating certain companies as sick industrial companies. The financial assistance that can be given by certain institutions for any industrial company, which can be had under Section 19 of the Act will feel shy to advance any amount when the winding up proceedings are pending. The whole object of the proceedings for winding up is to destroy its corporate existence and the

continuance of a pending proceeding for winding up, if allowed by the Court in exercise of its discretion, would clearly conflict with the permanent object for which Section 16(4) of the Act is enacted. Further, the preamble for enacting the Sick Industrial Companies (Special Provisions) Act, 1985, clearly states as follows :

"An Act to make in the public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto."

When especially a Bench of this High Court, whose decision we have extracted in paragraphs supra has clearly interpreted the words "no proceedings shall lie" to mean that neither fresh proceedings can be instituted nor already instituted proceedings can be sustained. It is too much to say that the proceedings already instituted can only be stayed, but cannot be dismissed. The words "or be proceeded with" occurring in Section 22, cannot, in any way restrict the meaning that has to be given to the words "no proceedings shall lie". Any creditor can have the proceeding continued with the consent of the Board or, as the case may be, by the Appellate Authority as provided under Section 22 of the Act. The saving provision contained in Section 31, saves only two categories of cases, i.e. where a Receiver has been appointed in any proceedings pending immediately before the commencement of this Act in any High Court for winding up of an industrial company or where an Official Liquidator has been appointed in any proceeding pending immediately before the commencement of this Act in any High Court for winding up of an industrial company.

11. Company Application No. 73 of 1988 is the application for substitution as petitioning creditor in these two winding up petitions. Mr. Vaghela, the learned counsel for the applicant, submitted that as the original petitioners have settled the matter with the Company, they are likely to withdraw or allow to be dismissed the Company petitions for winding up and, therefore, the application for substitution. This application is a fresh proceeding, after the aforesaid orders of the Board under Section 16(4) and Section 17(3) and is made without obtaining any consent of the Board. Moreover, we have already come to the conclusion that no proceeding for winding up would lie, including the pending winding up petitions. Therefore, no question survive for substitution in the winding up proceeding, which has to be dismissed.

12. Thus, from the foregoing discussions and in view of the principles laid down in the Bench decision of this High Court, which has been referred above, O.J. Appeal Nos. 9/88 and 10/88 will stand allowed, with the result the Company Petitions Nos. 43/86 and 44/86 will stand dismissed. Company Application No. 73/88 is also dismissed. There will be no order as to costs.

Order accordingly.