

HIGH COURT OF GUJARAT

M C B PRIVATE LIMITED

Versus

SLM MANEKLAL LIMITED

Date of Decision: 29 November 1991

Citation: 1991 LawSuit(Guj) 268

Hon'ble Judges: [S D Shah](#)

Eq. Citations: **1992 1 GLH 95**

Case Type: Criminal Revision Application

Case No: 6 of 1991

Subject: Company, SICA

Editor's Note:

Sick Industrial Company (Special Provisions) Act, 1985 - S.22 - Companies Act, 1986 - Ss.433, 439 - Inquiry under S.16 before the Board of Industrial Finance and Reconstruction (B.I.F.R.) pending when the creditors of the company filed Winding up petitions - It was contended on behalf of the Company that in view of S.22, the Winding up petitions were required to be dismissed

Acts Referred:

[Companies Act, 1956 Sec 433](#), [Sec 16](#), [Sec 439](#)

[Sick Industrial Companies \(Special Provisions\) Act, 1985 Sec 22](#)

Advocates: [K S Nanavati](#), [A V Trivedi](#), [K M Mehta](#), [G N Joshi](#), [R C Jani](#), [Yogesh S Lakhani](#), [S N Soparkar](#), [M R Bhatt](#)

Cases Referred in (+): 2

[1] These Company Petitions are filed by various creditors of SLM Maneklal Industries Limited seeking order of winding up of the said company inter alia on the ground that the said company has failed to pay its dues to the creditors and that it has no longer remained economically viable unit.

[2] On notices being issued by this Court in the said proceedings the Company has appeared through Advocate M/s. R. P. Bhatt/M. R. Bhatt & Co. and has filed its Affidavit-in-Reply almost in all petitions except in one or two showing cause as to why no order of winding up should be passed.

[3] Today at the admissional hearing of the aforesaid petitions Mr. M. R. Bhatt learned Counsel appearing for the Company has submitted that the said company has made reference to the Board for Industrial and Financial Reconstruction (B.I.F.R.) u/S. 15 of the Sick Industrial Company (Special Provisions) Act 1985 The said reference has been registered by the B.I.F.R. as case No.4 of 1991. He submits that inquiry u/s. 16 of the said Act is pending before B.I.F.R. The Board has recorded the prima facie satisfaction that the company has become a sick industrial company in terms of the provision of Section 3(1) of the Act. He further submits that in view of the provision of Section 22 of the said Act these Company Petitions for winding up are required to be dismissed.

[4] In order to appreciate the submission of Mr. Bhatt relevant provision of Section 22 of the said Act is reproduced hereunder:

Section 22- Suspension of Legal proceedings contracts etc.

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 S. 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 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.

[5] In computing the period of limitation for the enforcement of any right privilege obligation or liability the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded. 5 Based on the above provision and more particularly placing reliance upon the Judgment of Division Bench of this Court in the case of Testeels Limited v. Radhaben Ranchhodbhai Cheritable Trust reported in A.I.R. 1988 (Gujarat) 213 Mr. Bhatt vehemently submitted that the present petitions for winding up are required to be dismissed. He submits that the Division Bench of this Court has positively ruled that the words no proceeding shall lie shall have to be given their natural meaning. Continuance of a pending proceeding for

winding up if allowed by the Court in exercise of its discretion would clearly conflict with the paramount object for which Section 16 (4) of the Act is enacted submits Mr. Bhatt by placing reliance upon the observations made by the Division Bench in the case of Testeels Limited (supra).

[6] In the case of Testeels limited (supra) Honble Chief Justice P. R. Gokulakrishnan speaking on behalf of the Division Bench examined the scheme of Sick Industrial Company (Special Provision) Act. The Division Bench read various provisions of the Act more particularly statement of objects and reasons for enacting the said Act with Sections 16 17 19 and 22 of the said Act and observed that the said Act is enacted in order to revive and rehabilitate the sick industry. The court also found that the financial assistance envisaged u/S. 19 of the said Act would not come forth if the winding up proceeding is not dismissed. The Court also found that various other schemes envisaged u/S. 18 cannot be effectively alive. In the light of aforesaid reading of Sections 16 18 and 19 of the said Act the Division Bench construed the provisions of Section 22 in the following words: 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.

[7] The Division Bench therefore referred to a Division Bench decision of this Court in Company Petition No. 16/68 which was dealing with the effect of the industries (Development and Regulation) Act 1951 After referring to the said decision at length the Division Bench observed in Para 10 as under:

[8] 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 the 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 if allowed by the Court in exercise of its discretion would clearly conflict with the permanent object for which S.16(4) of the Act is enacted. 8 Sitting as a Single Judge ordinarily this Court is bound by the pronouncement of the

Division Bench more so when the Division Bench has expressed its opinion on this very provision and that too in connection with the proceedings against the company whose reference before B.I.F.R was pending.

[9] However Mr. Kamal M. Mehta learned Counsel appearing for the petitioning creditors in Company Petition Nos. 37 to 39 of 1991 has drawn my attention to the decision of the Supreme Court in the case of Gram Panchayat v. Shree Vallabh Glass Works Ltd. reported in A.I.R. 1990 S.C. 1017. Before the Supreme Court the respondent Company was one which was declared to be a Sick Industrial Company within the meaning of clause (O) of Sub.-Sec. 1 of Section 3 of the said Act. The Gram Panchayat Salvad initiated coercive proceeding u/S. 129 of the Bombay Village Panchayat Act to recover sum of Rs. 9 47 539 stated to be the property tax against the said company. The company challenged the said proceeding by way of petition under Article 226 of the Constitution of India claiming protection u/S. 22 of the said Act. The High Court of Bombay granted the petition and restrained the Panchayat from recovering amount without consent of the Board. The Panchayat thereupon moved the Supreme Court by Special Leave Petition and while up-holding the decision of Bombay High Court the Supreme Court made following observations:

[10] Section 22(1) provides that in case the enquiry under S. 16 is pending or any scheme referred to under S. 17 is under preparation or consideration by the Board or any appeal under S. 25 is pending then certain proceedings against the sick industrial company are to be suspended or presumed to be suspended. The nature of the proceedings which are automatically suspended are: (1) Winding up of the industrial company; (2) Proceedings for execution distress or the like against the properties of sick industrial company and (3) Proceedings for the appointment of Receiver. The proceedings on respect of this matters could however be continued against the sick industrial company with the consent or approval of the Board or of the Appellate Authority as the case may be.

[11] From the aforesaid observation made by the Supreme Court it becomes clear that u/S. 22(1) once it is found that enquiry u/s. 16 is pending or any scheme referred to u/S. 17 is under preparation certain proceedings are to be suspended. Having so interpreted Section 22(1) the Supreme Court has enumerated the nature of the proceedings which are automatically suspended they being (1) winding up of industrial company (2) proceedings for execution distress or the like against the properties of sick industrial company and (3) proceedings for the appointment of Receiver. The above quoted observation of the Supreme Court in my opinion leaves no room for doubt about the order which a Company Court can pass in a winding up petition as against the company against whom proceedings are pending u/S. 16 or 17 of the said Act before B.I.F.R. In my opinion such proceedings are automatically suspended and/or

the Court shall have to pass order suspending the said proceedings. The said proceedings are not to be dismissed.

[12] The Supreme Court further observed in the said Judgment as under: 11 It may be against the principles of equity 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/ outstandings/overdues or ar rears by whatever name it is called. The Board at its desecration may accord its approval for proceeding against the company. If the approval is not granted the remedy is not extinguished. It is only postponed. Sub-Section (5) of S. 22 provides for exclusion of the period during which the remedy is suspended while computing the period of limitation for recovering the dues.

[13] The aforesaid observation of the Supreme Court also makes it clear that to be consistent with the underlying object of Section 22 of the said Act the only order that the could can pass is that of suspension of the proceeding and not that of dismissal. The following proposition are deducible from the aforesaid discussion and text of Section 22

1 No proceeding for winding up of the Industrial Company or for execution distress or the like against any of the property of the Industrial Company or for the appointment of a Receiver in respect thereof shall lie. The words shall lie are referable to a future course of action. Therefore if proceedings of the aforesaid nature are to be instituted for the first time after proceeding before the B.I.F.R. is commenced it can be submitted that such proceedings would not lie.

2 However when the proceedings are already initiated and provision of Section 22 is invoked by the company such proceedings shall not to be proceeded with further. The words be proceeded with further make abundantly clear that there is prohibition or ban against proceedings further with such proceedings.

3 The clause that follows namely except with the consent of the Board or as the case may be the Appellate Authority supports the view that the proceedings are not to be dismissed but they are to be kept in abeyance or suspended. If they are to be dismissed question of obtaining permission of the Board for their continuance would not arise. In fact the very stipulation that with the consent of the Board or the Appellate Authority the proceedings can be continued would support the view that the proceedings are to be suspended and are not to be dismissed. The aforesaid factor is clearly brought out by the following one line in Para-11 of the Judgment of the Supreme Court.

If the approval is not granted the remedy is not extinguished it is only postponed. It thus becomes clear that when any proceeding for the winding up of the Industrial company is pending in the High Court and when in respect of such Industrial company an enquiry u/S. 16 is pending or any Scheme referred to under Sec. 17 is under preparation or consideration the proper order which is required to be passed is that of suspending the legal proceeding. The caption to Section 22 Suspension of legal proceeding also supports the said view.

[14] In view of the later Supreme Court decision which takes the view contrary to the view taken by the Division Bench of this Court in case of Testeels Limited (supra) this Court is bound to pass the order of suspending these winding up proceeding so long as the B.I.F.R. is ceased of the matter or till permission is obtained by the petitioning creditors from B.I.F.R. to proceed with the present proceedings.

[15] Mr. M. R. Bhatt learned Counsel appearing for the respondent-Company has submitted that the observations made by the Supreme Court in Para-7 of the aforesaid Judgment are obiter and that this Court may prefer to follow the observation of Division Bench of this Court in case of Testeels Limited (supra). I do not think such a submission can be accepted inasmuch as the principle is now well accepted that even obiter observation of the Supreme Court are also binding on this Court. I do not regard the observations made in Para-7 and Para-11 of the Judgment of the Supreme Court as obiter. The Supreme Court has in fact considered and interpreted Section 22. The Judgment of the Division Bench of this Court in my opinion is impliedly over-ruled and the same is no longer good law.

[16] In view of the aforesaid discussion I pass the following order:

All these Company Petitions shall remain suspended and shall be kept in abeyance till 30/06/1992. By that date the petitioning creditors may obtain appropriate order from B.I.F.R. In case the proceedings before B.I.F.R. continue even on that date that is on 30/06/1992 further order treating these proceedings as in abeyance shall be passed by the Court.

(Nva) Order accordingly.