

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CAPP NO.42 of 2015 (O&M)

DATE OF DECISION: SEPTEMBER 08, 2015

M/s Punjab Tissues Limited (PTL.)Appellant

Versus

The Official Liquidator, High Court of Punjab and
HaryanaRespondents

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE TEJINDER SINGH DHINDSA

Present: Mr.sunil Chadha, Senior Advocate with
Ms.Swati Verma, Advocate for the appellant.

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TEJINDER SINGH DHINDSA, J.

M/s Punjab Tissues Limited i.e. the appellant-Company has preferred the instant appeal under Section 483 of the Companies Act, 1956 against the order dated 14.8.2015 passed by the learned Company Judge in Company Petition No.11 of 2003 whereby the reference received from the Board of Industrial and Financial Re-construction (BIFR) recommending winding up of the appellant-Company has been accepted and the Company has been ordered to be wound up.

2. The appellant-Company was declared a Sick Industrial Company under Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter to be referred as

“SICA”). A rehabilitation proposal submitted by the Company was taken on record by the BIFR. Vide order dated 18.12.2002, BIFR after having held various meetings/hearings recommended for winding up the appellant-Company under Section 20(1) of SICA. Such recommendation dated 18.12.2002 was forwarded to this Court vide letter dated 7.1.2003, and upon which Company Petition No.11 of 2003 came to be registered.

3. Vide impugned order, dated 14.8.2015, the appellant-Company has been ordered to be wound up. The Official Liquidator has been appointed to be Liquidator of the Company. Citation of winding up has been directed to be published in the Indian Express (English), Dainik Bhaskar (Hindi), both Chandigarh Editions, and in the Official Gazette of Chandigarh Administration, Union Territory, Chandigarh by the Official Liquidator. Winding up has been ordered based on the recommendations made by BIFR in its order dated 18.12.2002 and upon noticing that the Company Petition has been pending in this Court since long and with no positive result.

4. Learned counsel appearing for the Appellant-Company would submit that aggrieved of the order, dated 18.12.2002, passed by BIFR, the appellant-Company had preferred an appeal before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) and which appeal had been dismissed in default on 2.6.2003 and an application seeking restoration/revival of the said appeal was still pending consideration. It was further submitted that there were only three secured creditors of the appellant-Company i.e. State Bank of Patiala, Punjab State

Industrial Development Corporation (PSIDC) and the Punjab Financial Corporation (PFC). Learned counsel has submitted that the Company had no other secured or unsecured creditors and during the pendency of the Company Petition, the appellant-Company had fully satisfied the claim of State Bank of Patiala by paying a sum of ₹142 lacs and upon which, a 'No Due Certificate' dated 23.11.2005 had been issued. It has also been stated that during the pendency of proceedings before the learned Company Judge, the appellant-Company had paid an amount of ₹214.52 lacs to other secured creditors i.e. PSIDC and PFC. Submission has also been raised that on 15.10.2009, PSIDC had informed the appellant-Company that an amount of ₹5,24,27,482/- had been worked out under a One-Time Settlement (OTS) out of which 15% i.e. ₹88.90 lacs already stood paid and an additional amount of ₹66 lacs had been deposited on 14.11.2009. Reference has also been made to an approval having been given by the Punjab State Cabinet to another liberal One time Settlement (OTS) Policy, 2015 for settlement of the dues of PSIDC, PFC and Punjab Agro Industries Corporation (PAIC) and its subsidiary Corporations. In a nut-shell, it has been argued that all the afore-noticed facts had been brought to the notice of the learned Company Judge and yet the impugned order of winding up dated 14.8.2015 has been passed.

5. The issue that arises for consideration is as to whether this Court, while exercising its jurisdiction for winding up a Company under Section 433 of the Companies Act, would confine its consideration only to the recommendations of the BIFR and

thereby by-pass the procedure with regard to admission of a petition and advertisement thereof as contemplated under the Companies Act and the Companies (Court) Rules, 1959.

6. Section 20 of SICA relates to winding up of a Sick Industrial Company and reads as under:

“(1) 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 the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court.

(2) The High Court shall, on the basis of the opinion of the Board, order winding up of the sick industrial company and may proceed and cause to proceed with the winding up of the Sick Industrial Company in accordance with the provisions of the Companies Act, 1956.

(3) For the purpose of winding up of the sick industrial company, the High Court may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of the sick industrial

company and the officer so appointed shall for the purpose of the winding up of the sick industrial company be deemed to be, and have all the powers of, the Official Liquidator under the Companies Act, 1956.

(4) Notwithstanding anything contained in Sub-section (2) or sub-section (3), the Board may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of Section 529A, and other provisions of the Companies Act, 1956."

7. The vires of Section 20 of SICA came to be upheld by a Division Bench of Madras High Court in **JM Malhotra v. Union of India, (1997) 89 Comp. Cas. 600** and it was held that the opinion furnished by BIFR would only form a basis for the proceedings to be continued against the Sick Industrial Company for the purpose of winding up and further proceedings are to be conducted in accordance with the provisions contained in the Companies Act for winding up of the Company. It was held that what sub Sections (1) and (2) of Section 20 of SICA dispense with is only the requirement of Section 439 or 440 as the case may be of the Companies Act for the purpose of initiating a proceeding for winding up of the Company under Part VIII, Chapter II and also the enquiry into the question as to whether it is just and equitable to order winding up of a Company. Rest of the proceedings for winding up shall have to be conducted in accordance with the provisions of the Companies Act. It was observed that even

though the opinion submitted by BIFR forms the basis for ordering winding up of the Sick Industrial Company by the High Court, it would nevertheless be open for the High Court to go into the correctness of the opinion so submitted by BIFR and to decide as to whether it should proceed and cause to proceed with the winding up of the Sick Industrial Company in accordance with the provisions of the Companies Act. It was in the light of such observations that the challenge to Section 20 of SICA contending that it imposes restrictions on the exercise of jurisdiction by High Court and having given unbridled power to BIFR had been repelled.

8. The decision of the Madras High Court in **JM Malhotra's** case (supra) was affirmed by the Hon'ble Supreme Court in **V.R. Ramaraju v. Union of India, (1997) 89 Comp Cas 609** and it was held as under:

“Delay condoned. We do not find any ground to interfere with the High Court's view which has rejected the challenge to the constitutional validity of sub-section (2) of Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985.

It is obvious that sub-section (2) has to be construed to mean that the High Court in deciding the question of winding up of the company has to take into account the opinion of the Board forwarded to it under sub-section (1) and is not to abdicate its own function of determining the question of winding up. So, read, sub-section (2) does not suffer from any infirmity. This

in substance is the view taken by the High Court in the impugned order.

The special leave petition is, therefore, dismissed.”

9. It, therefore, stands settled that even though the opinion submitted by BIFR could form the basis for directing the winding up of the Sick Industrial Company, yet the High Court is not precluded from examining the correctness of such opinion. In other words, it would not be obligatory on the High Court to order winding up of the Sick Industrial Company upon receiving the recommendation and opinion from BIFR in this regard and without examining the correctness of such recommendation on hearing the concerned parties.

10. Part-III of the Companies (Courts) Rules, 1959 relates to “winding up”. Under Rule 95, a petition for winding up of a Company shall be in Form Nos.45, 46 and 47, as the case may be. Rule 96 relates to admission of the petition for winding up and directions as to advertisement and, thereunder, upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. Under Rule 96, a Judge may, if he thinks fit, direct notice to be given to the Company before giving directions as to the advertisement of the petition. Under Rule 98, every contributory or creditor of the Company shall be entitled to be furnished by the petitioner, or by his Advocate, a copy of the petition, within 24

hours of his requiring the same, on payment of the prescribed charges. Rule 99 relates to advertisement of the petition and, thereunder, subject to any directions of the Court, the petition shall be advertised in Form No.48 within the time and in the manner provided by Rule 24.

11. A conjoint reading of the Rules, referred to hereinabove, would make it evident that creditors, contributors and others desirous of supporting or opposing even the admission of the petition for winding up of the Company Petition are put to notice of the petition having been presented before the High Court. The purpose which the advertisement seeks to achieve is to enable a creditor, contributory or any other person either to support or to oppose the making of an order of winding up.

12. BIFR is an expert body constituted to examine and explore avenues for revival of Sick Industrial Companies. It is only when it is of the opinion that the Company cannot make its net worth exceed its accumulated losses within a reasonable time, can it recommend that the Company be wound up. There can be no quarrel that the opinion of such expert body is entitled to its due weight, but the same can neither be conclusive nor binding on the High Court. The power conferred on the High Court under Section 433 read with Section 443 of the Companies Act to order winding up of a Company is judicial in nature. The ambit of winding up proceedings are far wider than proceedings before the BIFR. The Company Court would be required to apply its mind, consider the material on record and thereafter to take an appropriate decision in the interest not merely of the petitioning

creditor but also in the interest of other creditors, contributories, the workers, the Company itself and also keeping in mind public interest at large. In doing so, it would be permissible for the High Court to examine the correctness of the opinion/recommendation of BIFR and to thereafter decide as to whether the Company should be wound up or not.

13. We are of the considered view that BIFR's recommendation would merely form the basis for continuance of proceedings for winding up of the Sick Industrial Company and further proceedings after receipt of the recommendation of the BIFR are to be conducted by the Company Court in accordance with the provisions of the Companies Act and the Rules made thereunder.

14. The impugned order dated 14.8.2015 passed by the learned Company Judge in Company Petition No.11 of 2003 directing the winding up of the appellant-Company proceeds merely towards acceptance of the recommendation of BIFR received vide communication dated 7.1.2003 and the procedure with regard to the admission of the petition and due advertisement envisaged under the provisions of the Companies Act and the Rules made thereunder has been given a go-by.

15. We are of the opinion that the learned Company Judge ought to have followed the procedure contemplated under the relevant Rules of the Company Court Rules, 1956, as noticed hereinabove, with regard to admission of the petition and due advertisement thereof. Such procedure, if followed, would enure to the benefit of all the concerned parties including the creditors,

contributors etc. and would enable them either to support or oppose even the admission of the petition for winding up. Such procedure of admission of the petition ought also to have been followed in the light of the interpretation of Section 20 of SICA in **JM Malhotra's** case (supra) and the same having been affirmed by Hon'ble Supreme Court of India and wherein it had been held that sub Section (2) of Section 20 has to be construed to mean that the High Court in deciding the question of winding up of the Company has to take into account the opinion of BIFR forwarded to it under sub Section (1) and not to abdicate its own function of determining the question of winding up.

16. Yet another objective that would be achieved upon following the procedure inconsonance with the Company (Court) Rules, 1959 as regards admission of the petition is to facilitate a party concerned, be it a creditor or contributory or any other party concerned to bring to the notice of the Company Court events subsequent to receipt of the recommendation of the BIFR and to build up a case in the light of such subsequent events that the opinion and recommendation of the BIFR should not be accepted and that the Company should not be wound up.

17. In the present case, learned Company Judge vide impugned order dated 14.8.2015 has not directed admission of the winding up petition nor issued directions for advertisement, but instead an order of winding up has been passed based solely upon the opinion/recommendation of BIFR. Thus, there has been a breach of the provisions of Rule 96 of the Companies (Court) Rules, 1959.

18. For the reasons recorded above, appeal is allowed. The order dated 14.8.2015 passed by the learned Company Judge in C.P.No.11 of 2003 is set aside. The Company Petition is directed to be admitted.

19. Advertisement with respect to admission shall be issued in Form No.48 in Indian Express (English), Dainik Bhaskar (Hindi), both Chandigarh editions and in the Official Gazette of Chandigarh Administration, Union Territory, Chandigarh at the expense of the appellant-Company on or before 30.9.2015 stating that the returnable date/date of hearing shall be 30.10.2015.

20. List the petition for admission on 30.10.2015 before the learned Single Judge hearing the Company matters.

21. Appeal is, accordingly, disposed of.

(S. J. VAZIFDAR)
ACTING CHIEF JUSTICE

(TEJINDER SINGH DHINDSA)
JUDGE

SEPTEMBER 08, 2015
SRM

Note: Whether referred to Reporter? (Yes/No)