

(2024) 10 BOM CK 0005

Bombay High Court (Nagpur Bench)

Case No: Company Appeal No. 4 Of 2007

Maharashtra Antibiotics And
Pharmaceuticals Ltd, Thru. M.D.
And Anr

APPELLANT

Vs

Environmental Engineers Inc.
Thru. S.D. Paliwal And Anr

RESPONDENT

Date of Decision: Oct. 4, 2024

Acts Referred:

- Companies Act, 1956 - Section 111A, 441, 441(2), 481, 536(2)
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 20, 20(4), 32

Hon'ble Judges: Anil L. Pansare, J

Bench: Single Bench

Advocate: A. A. Naik, R. R. Deo, Aseem Naphade, Deepanjali Mishra

Final Decision: Allowed

Judgement

Anil L. Pansare, J.

1. The appellants are aggrieved by the order dated 27-10-2006 passed by the Company Law Board, Western Region, Bench at Mumbai in Company Petition No. 7/111A/CLB/WR/2004 directing the appellant no. 1 – M/s. Maharashtra Antibiotics and Pharmaceuticals Limited as also the respondent no. 2 - SICOM Limited to transfer the shares to the respondent no. 1, who allegedly purchased 40530 equity shares of Rs. 100/- each held by respondent no. 2.

2. The respondent no. 1 had approached the Company Law Board under Section 111A of the Companies Act, 1956 (for short 'the Companies Act') seeking directions to the appellant no. 1 to accept share transfer deeds along with share certificate and to

transfer 40530 shares of Rs. 100/- each in the name of respondent no. 1.

3. The appellant no. 1 is joint venture of Government of India through appellant no. 2 - Hindustan Antibiotics Limited, which is wholly owned company having share holdings of the Government of India, Government of Maharashtra through respondent no. 2 - SICOM and IDBI Bank. The appellant no. 2 holds 59% shares of the appellant no. 1 - company, respondent no. 2 had 33% shares and IDBI has 8% shares.

4. There is no dispute that Board for Industrial and Financial Reconstruction (BIFR) has on 4-7-2000, passed an order under Section 20 of the Sick Industrial Companies Act recommending for winding up of the company. The order of recommendation was forwarded to this Court, which has registered the same as Company Petition No. 15/2000. There is further no dispute that respondent no. 1 has purchased impugned shares on 8-9-2002 which is subsequent to the order passed by BIFR recommending for winding up of the company as also the registration of company petition.

5. Heard Mr. A. A. Naik, learned Senior Counsel for the appellant and Mr. Naphade, learned counsel for respondent no. 1.

6. The appellants had challenged the transfer by relying upon sub-section (2) of Section 536 of the Companies Act which reads thus :

“(2) In the case of a winding up by [the Tribunal], any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, [unless the Tribunal] otherwise orders, be void.”

7. Mr. Naik, learned Senior Counsel has taken aid of sub-section (2) of Section 441 to contend that winding up of a company, in the present case, has commenced in the year 2000. He submits that the order dated 4-7-2000 of BIFR was received by this Court on or about 13-11-2000 and the notices were issued on 1-12-2000 and thus, the winding up of a company had commenced in the year 2000. He further submits that subsequent to commencement of winding up of company, any disposition of the property of the company and any transfer of shares in the company, if made without approval of this Court, is void and, therefore, it was impermissible for the Company Law Board to direct the appellant to transfer the impugned shares to the respondent no. 1. According to Mr. Naik, the respondent no. 1 ought to have obtained prior permission of this Court before purchasing the shares belonging to respondent no. 2.

8. The Company Law Board, however, has taken a view that unless winding up order is passed by this Court, the rigor of Section 536(2) of the Companies Act will be not attracted. Consequently, the Company Law Board has validated the transfer of shares.

9. Mr. Naphade, learned counsel for respondent no. 1 submits that the order passed by the BIFR recommending winding up of a company is nothing but an opinion of the Board and will only form basis for the proceeding to be continued against the sick industrial company for the purpose of winding up. He submits that it is always open to the Company Court to go into the correctness of the opinion so submitted by the Board and decide whether winding up order should be passed. Thus, according to him, unless winding up order is passed, which in the present case, admittedly is not passed till date, the deeming fiction as envisaged under Section 441(2) of the Companies Act will not come into effect.

10. Section 441 of the Companies Act reads as follow.

"441. Commencement of winding up by Tribunal. –

(1) Where, before the presentation of a petition for the winding up of a company by the Tribunal, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Tribunal, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Tribunal Shall be deemed to commence at the time of the presentation of the petition for the winding up."

11. Sub-section (1) of Section 441 applies to voluntary winding up of the company whereas sub-section (2) is applicable to the proceedings other than voluntary winding up. Admittedly, in the present case, the winding up of the company commenced on the basis of recommendation made by BIFR and therefore present proceedings will fall under sub-section (2). The question is whether said transfer is hit by sub-section (2) of Section 536.

12. Mr. Naik, learned Senior Counsel, in support of his contention, has relied upon the judgment of Hon'ble Supreme Court in the case of **NGEF Ltd. Vs. Chandra Developers (P) Ltd. and anr. [(2005) 8 SCC 219]**. The petitioner company therein, which was joint venture of Government of Karnataka which was holding about 90% shares, became sick. The reference was made to BIFR in terms of Sick Industrial Companies Act, 1985 (SICA). All the assets of the company had been placed either under mortgage and/or offered as collateral securities to various financial institutions. The petitioner – company with prior permission of BIFR and its secured creditors had sold some of its surplus land for the purpose of paying wages to the workers and refund of loans to the financial institutions. Some of the parties pleaded before BIFR to not wound up the company but BIFR decided to recommend the winding up of the company and send the

same to the Company Court. As regards request of the company for sell of its assets, BIFR took a view that company will have to seek appropriate direction from the High Court concerned. The Supreme Court was required to consider the effect of the provisions of SICA and the Companies Act as regards the status of the company's property and powers of BIFR and the Company Court during the period from the date of presentation of the recommendation of BIFR before the Company Court until the order of winding up was passed by the Company Court. The Supreme Court considered the relevant provisions and held thus :

“49. Section 32 of SICA contains a non obstante clause stating that provisions thereof shall prevail notwithstanding anything inconsistent with the provisions of the said Act and of any rules or schemes made thereunder contained in any other law for the time being in force. It would bear repetition to state that in the ordinary course although the Company Judge may have the jurisdiction to pass an interim order in exercise of its inherent jurisdiction or otherwise directing execution of a deed of sale in favour of an applicant by the Company sought to be wound up, but keeping in view the express provisions contained in sub-section (4) of Section 20 of SICA such a power, in our opinion, in the Company Judge is not available. (See BPL Ltd.)

50. We may, however, observe that the opinion of the Division Bench in BPL Limited to the effect that the winding up proceeding in relation to a matter arising out of the recommendations of BIFR shall commence only on passing of an order of winding up of the company may not be correct. It may be true that no formal application is required to be filed for initiating a proceeding under Section 433 of the Companies Act as the recommendations therefor are made by BIFR or AAIFR, as the case may be, and, thus, the date on which such recommendations are made the Company Judge applies its mind to initiate a proceeding relying on or on the basis thereof, the proceeding for winding up would be deemed to have been started; but there cannot be any doubt whatsoever that having regard to the phraseology used in Section 20 of SICA that BIFR is the authority proprio vigore which continues to remain as custodian of the assets of the Company till a winding up order is passed by the High Court.”

13. Thus, the Supreme Court observed that the opinion to the effect that winding up proceedings in relation to a matter arising out of the recommendations of BIFR shall commence only upon passing an order of winding up of the company may not be correct. The Supreme Court then opined that the date on which such recommendations are made, the proceedings for winding up would be deemed to have been started. The Court, however, clarified that until order of winding up is passed, BIFR shall continue to remain custodian of the assets.

14. Mr. Naik has then referred to yet another judgment of the Supreme Court in the case of **Rishab Agro Industries Ltd. Vs. P.N.B. Capital Services Ltd. [(2000) 5 SCC 515]** to contend that the date on which the BIFR made recommendation to wind up the company will be the date of commencement of winding up proceedings in terms of Section 441 of the Companies Act. The Supreme Court has held as under.

“11. It may also be noticed that winding up order passed under the Companies Act is not the culmination of the proceedings pending before the Company Judge but is in effect the commencement of the process. The ultimate order to be passed in such a petition is the dissolution of the company in terms of Section 481 of the Companies Act. The words "shall be deemed to commence" in Section 441 of the Companies Act clearly show the intention of the legislature that although the winding up of a petition does not in fact commence at the time of presentation of the petition itself but it shall be presumed to commence from that stage. The word "deemed" used in the Section would thus mean, "supposed", "considered", "construed", "thought", "taken to be" or "presumed".”

Thus, the Supreme Court, in a way, has explained the necessity to use the expression “shall be deemed to commence” in Section 441 of the Companies Act. The reason why said expression has been used is that the Company Judge, in a given case, may not approve recommendations made by BIFR to wind up company. However, once recommendations are approved and winding up order is passed, the Company Court becomes custodian of the assets of the company. The disposition of the property thereafter is permissible only with prior approval of the Company Court. The deeming provision, in my view, takes care of the disposition of property or transfer of shares etc. that takes place during the intervening period.

15. Mr. Naphade, learned counsel for respondent no. 1 submits that the recommendations of BIFR is nothing but its opinion, the correctness of which can be examined by the Company Court. In support, he has referred to the judgment of Madras High Court in the case of **V. R. Ramaraju Vs. Union of India and others [1994 SCC OnLine Mad 349]**. The High Court held that the recommendations of BIFR will only form a basis for proceedings to be continued against the sick industrial company for the purpose of winding up, however, it is open to the Company Court to go into the correctness of the opinion so submitted and decide whether it should proceed with the winding up of the company in accordance with the Companies Act. The judgment of the Madras High Court has been upheld by the Supreme Court. Mr. Naphade, on the basis of the aforesaid findings of the High Court, argued that since it is not obligatory on the part of Company Court to order winding up of the company upon recommendation of BIFR, unless the winding up order is passed, the winding up of a company cannot be said to have commenced merely because the recommendation has been received by the Company Court.

16. I do not find substance in the aforesaid argument in as much as the answer to the argument finds place in **Rishab Agro Industries Ltd.** (supra). The judgment indicates that although the winding up of the petition does not commence at the time of presentation of petition (for the purpose of passing order of dissolution of company), it shall be presumed to commence from that stage (for all other purposes of the Companies Act). It is so because for the purpose of passing order of dissolution of the company, winding up order will have to be passed. However, until winding up order is passed, the company is not free to deal with its assets at its pleasure. The deeming provision is meant for various other purposes of the Companies Act, one of which is to validate the disposition of property or transfer of shares after commencement of winding up. The validation is required because the disposition of the property of the company or any transfer of share in the company or alteration in the status of its members has far reaching effects on the entitlement of the creditors to receive their dues.

17. Thus, the rigor of Section 536(2) of the Companies Act will apply to any disposition of the property of the company and/or any transfer of shares in the company or alteration in the status of its members from the date of presentation of the winding up petition and unless otherwise ordered, such disposition of property, transfer of shares etc. shall be treated as void.

18. In fact, this position has been, ratified by the Supreme Court in the case of **Pankaj Mehra and anr. Vs. State of Maharashtra and ors. [(2000) 2 SCC 756]** wherein the Supreme Court having considered the effect of Section 441(2) and 536(2) of the Companies Act held thus :

“14. In the above backdrop alone we can consider the impact of the legislative direction in Section 536(2) that any disposition of the property of the company made after the commencement of the winding up (i.e. after the presentation of a petition for winding up) shall be void. There are two important aspects here. First is, that the word "void" need not automatically indicate that any disposition should be ab initio void. The legal implication of the word "void" need not necessarily be a stage of nullity in all contingencies.”

19. Thus the Court has held that any disposition of the property of the company made after the commencement of winding up i.e. after presentation of the petition for winding up shall be void, unless otherwise ordered by the Court. The Supreme Court has then explained the legal implication of the term ‘void’.

20. As such, this judgment was cited by Mr. Naphade, learned counsel for respondent no. 1 to contend that the transaction under question i.e. transfer of shares in favour of respondent no. 1 shall not stand void automatically and, therefore, the Company Law Board has correctly approved/validated the transaction. On this point, he has invited

my attention to paragraph nos. 19 and 20 of the said judgment which read thus :

“19. In Gray’s Inn Construction Co. Ltd., Re the Court of Appeal (Civil Division) considered the principle on which discretion of the court to validate the dispositions of property made by a company, during the interregnum between presentation of a winding up petition and the passing of the order for winding up, has been dealt with. Section 227 of the English Companies Act, 1948 is almost the same as Section 536(2) of the Indian Companies Act. Dispositions which could be validated are mentioned in the decision. The said decision was cited before us in order to emphasise the point that courts would be very circumspect in the matter of validating the payments and the interest of the creditors as well as the company would be kept uppermost in consideration. Be that so, the said decision is not sufficient to support the contention that disposition during the interregnum would be irretrievably void.

20. It is difficult to lay down that all dispositions of property made by a company during the interregnum between the presentation of a petition for winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be paralysed, for the company may have to deal with very many day-to-day transactions, make payments of salary to the staff and other employees and meet urgent contingencies. An interpretation which could lead to such a catastrophic situation should be averted. That apart, if any such view is adopted, a fraudulent company can deceive any bona fide person transacting business with the company by stage-managing a petition to be presented for winding up in order to defeat such bona fide customers. This consequence has been correctly voiced by the Division Bench in the impugned judgment.”

21. The Supreme Court has held that it may not be proper to hold that all dispositions of property made by company, during the interregnum between presentation of petition for winding up and the passing of order for winding up would be null and void.

22. Thus the disposition of property or transfer of shares made by the company during the interregnum may not be void but it also approves the deeming fiction. Nonetheless, the said judgment will be helpful to contend that the transaction under question cannot be said to be void, merely because, it has been done subsequent to the recommendation made by BIFR to wind up the company or after commencement of winding up of a company. The validity of transaction, however, will have to be tested.

23. The order impugned indicates that the entire focus of the Company Law Board was on the effect of Section 536(2) of the Companies Act. The Company Law Board was of the view that the provisions of Section 536(2) cannot come into operation since no winding up order has been passed by the Company Court. Accordingly, the Board has

validated the transaction and directed the appellant - company to transfer the shares in favour of respondent no.1.

24. To my mind, apart from the fact that the aforesaid finding is contrary to the law laid down by the Supreme Court, the Board has failed to consider whether the transfer of shares was beneficial to the company. To validate the transaction, there ought to be some justification.

25. On this point, the judgment of the coordinate Bench of this Court in Board For Industrial and Financial Reconstruction, In re – Modi Stone Ltd. (in Liquidation), reported in [2017] 202 Comp Cas 551 (Bom), referred by Advocate Mr. Naphade is helpful. In the said case, the Official Liquidator had filed a report to declare as void sub-lease executed between the lessee company with third party. The coordinate Bench, while declaring sub-lease as void, has referred to number of judgments which deals with grounds to validate the transaction. The Court referred to the judgment of Division Bench of this Court in the case of Tulsidas Jasraj Parekh Vs. Industrial Bank of Western India [AIR 1931 BOMBAY 2] wherein it was held that any bona fide transaction carried out and completed in ordinary course of business can be sanctioned by the Court, but the Court will not allow the assets to be disposed of at the mere pleasure of the company, because the fundamental principle of equality amongst creditors cannot be violated. The Court further held that even if, disposition of the property was prior to the order of winding up, the Court has to come to the conclusion that the transaction was in the best interest of the company, which has to be pleaded and proved.

26. The coordinate Bench then referred to Board for Industrial & Financial Reconstruction Vs. M/s. Hindustan Transmission Products Limited reported in [2013] 176 Comp Cas 53 (Bom) wherein similar view was taken viz. while validating a transaction, the Court has to consider that the transfer must be for the best interest of the company.

27. Accordingly, the coordinate Bench in the case before it opined that the onus was upon sub-lessor company as well as sub-lessee company to plead and prove that the alleged sub-lease was not only a bona fide transaction but was in the interest of the company under liquidation and also that said transaction was carried out in ordinary course of business by the company in liquidation.

28. Applying the aforesaid principles of law, if the transaction under question is tested, it is nobody's case that respondent no. 2 – SICOM company has transferred the shares in favour of respondent no. 1 in the interest of company in liquidation and was a bona fide transaction and further that the said transfer was carried in ordinary course of business. The respondent nos. 1 and 2 have neither pleaded nor proved that the transaction was in the best interest of the appellant no. 1 – company.

29. Having not done so, the transfer of shares cannot be validated. In other words, its a void transaction. The Company Law Board, while scrutinizing the transaction, has completely ignored the vital aspect of best interest of the company. The order impugned, therefore, does not stand scrutiny of law.

30. The appeal is accordingly allowed. Order dated 27-10-2006 passed by the Company Law Board, Western Region, Bench at Mumbai in Company Petition No. 7/111A/CLB/WR/2004 is quashed and set aside. The transfer of shares by respondent no. 2 in favour of respondent no. 1 is hereby declared void.