

Mistry Foxdar and Co. Vs. Osmanshahi Mills Ltd. and

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Court : Mumbai

Decided On : Feb-27-1974

Reported in : [1974]44CompCas471(Bom)

Judge : J.R. Vimadalal, J.

Acts : Sick Textile Mill Undertakings (Taking Over of Management) Act, 1972 - Sections 2, 4 and 4(3)

Appellant : Mistry Foxdar and Co.

Respondent : Osmanshahi Mills Ltd. and ;maharashtra State Textile Corporation Ltd.

Advocate for Pet/Ap. : A.N. Mody, Adv.;V.V. Tulzapurkar, Adv.;For Official Liquidator : Party-in-person

Judgement :

Vimadalal, J.

1. This is an application by way of a judge's summons taken out by the Maharashtra State textile Corporation Ltd. under the Sick Textile Undertakings (Taking Over of Management) Act, 1972, for an order that the official liquidator who was appointed provisional liquidator of the respondent-company on the 28th of April, 1971, and was subsequently discharged by this court on the 21st of June, 1972, be directed to hand over all the properties and assets of the said company which are still in his possession, including a sum of Rs. 10 lakhs with the state Government and the interest accrued due thereon, to the applicants. The facts of the case are that the respondent-company was registered under the Companies Act, 1956 (1 of 1956). It has its registered office at Nanded and its mills are also at Nanded. The affair of the respondent-company and its financial position were in a very bad state and the petitioners filed and its financial position were in very bad state and the petitioner filed a winding-up petition against it in which the official liquidator was appointed provisional liquidator on the 28th of April, 1971, as already stated above. The result was that the Government of Maharashtra moved the Government of India, and by a notification issued under section 18A of the industries (Development and Regulation) Act, 1951, published on the 31st of August, 1971, the present applicants were appointed as Authorise Controller to take over the management of the whole of the undertaking of the said company for a period of 5 years. The applicants thereafter filed an application for vacating the order appointing the provisional liquidator and for the handing over of the possession of the properties and assets of the respondent-company to the applicants, but whilst the said application was pending, a writ petition was filed in the Delhi High Court challenging the said notification dated 31st August, 1971, and a stay of the operation of the said notification was obtained from

that high Court. Pursuant to an amendment of the Industries (Development and Regulation) Act, 1951, another application for vacating the order appointing provisional liquidator and for the handing over of opposition of the properties and assets of the respondent-company to the applicants was filed which application was granted by this court on the 21st of June, 1972, but in view of the said order passed by the Delhi High Court, this court directed that the official liquidator was not to hand over possession of the properties and assets of the respondent-company till the said order was vacated.

2. In the meantime, the State of Maharashtra submitted a scheme to this court to run the mills, and on a report submitted to him by the official liquidator, my brother, Nathwani, by his order dated 11th April, 1972, sectioned that scheme, and a leave and licence agreement was entered into between the state of Maharashtra and the official liquidator, and the applicants were appointed as the chief executive authority under the said scheme. Possession of the mills was thereafter handed over to the Government of Maharashtra for running the same on leave and licence basis, commencing from 1st May, 1972. One of the provisions of the said scheme was that the Government of Maharashtra would pay to the official liquidator depreciation in respect of the buildings, machinery, plant furniture and fixtures on the market value thereof as ascertained by an independent value, proportionate to the period for which the licence subsisted. It was further provided by the said scheme that the State Bank of Hyderabad, who claimed to be secured creditors, were to be paid by the Government of Maharashtra 1/3rd of the depreciation amount payable for the first year. The Government of Maharashtra did not, however, accept the valuation of the valuers, and it is not disputed that, under the circumstances, it agreed to pay a sum of Rs. 15 lakhs to the official liquidator towards depreciation for the first year, on an ad hoc basis, under the said scheme.

3. Whilst the undertaking of the respondent-company was being run under the said leave and licence agreement, the President of India promulgated an Ordinance, which was followed by an Act entitled 'The Sick Textile Undertakings (Taking Over of Management) Act, 1972, which came into force on 31st October, 1972, under which the management of the whole of the undertaking of the respondent-company was vested in the Central Government. It is common ground that the writ petition filed in the Delhi High Court has been dismissed and the stay order granted by it is, therefore, no longer operative. The stand taken up by the applicants after the management was taken over under the said Ordinance and the said Act was that the original leave and licence agreement stood automatically terminated and that the applicants held possession of the undertaking of the respondent-company as from 31st October, 1972, not as the chief executive authority under the said leave and licence agreement, but as the custodian appointed under the said act which came into force on the 31st of October, 1972, as already stated above. As the official liquidator has continued in possession of the assets and properties of the respondent-company, the applicants have taken out the present judge's summons for the reliefs already set out above.

4. There is really no dispute between the parties in regard to the handing over of the possession of the mills to the applicants, but the dispute on this judge's summons has Centre on the question as to whether the applicants are entitled to receive the sum of Rs. 10 lakhs which the State Government of Maharashtra has paid by way of depreciation to the official liquidator under the scheme sanctioned by this court. The facts stated above are really not in dispute. The dispute in regard to the said sum of

Rs. 10 lakhs will have to be resolved by me in the light of the provisions of the Sick Textile Undertakings (Taking Over of Management) Act, 1972 (hereinafter referred as 'the Act'). Both sides have relied on the scheme of the act in support of their respective contentions and it will be, therefore, necessary for me to refer to the relevant provisions of the said Act.

5. The term 'owner' has been defined in section 2(c) of the act as meaning, inter alia, the company by which a textile undertaking is owned. Sub-section (d)(iii) of the same section defines the expression 'sick textile undertaking' as meaning a textile undertaking which, inter alia, has been leased to the Government or any other persons, or the management of which has been taken over by the Government or any other person under any leave or license granted by liquidator under the orders of any court. I am not referring to the other clauses of the definition of the said expression as I am concerned in this case with this particular clause. The expression 'textile undertaking' has been defined in section 2(g) as an undertaking engaged in the manufacture of textiles to which the provisions of the Factories act, 1948, apply. There is, however, no definition of the term 'undertaking' in the said Act. Section 2(h) enacts that, in such cases, the definition, if any, in the Industries (Development and Regulation) Act, 1951, is to apply. In that Act also, there is, however, no definition of the term 'undertaking'. That term must, therefore, be given the appropriate meaning that it carries in the context in which it is used in the act. In my opinion, the word 'undertaking', as used in the Act, denotes the industrial establishment as distinguished from the company itself. It is important to bear in mind that the act makes a distinction between 'the undertaking' and the company which owns it. It is also important to bear in mind that under section 4 it is only the 'management' of a sick textile undertaking that is to vest in the central Government, the ownership thereof remaining in the company. Sub-section (3) of section 4 provides that the sick textile undertaking shall be deemed to include, inter alia, all assets of the textile company 'in relation to the said sick textile undertaking. Sub-section (6) of the said section provides that every official liquidator or to her person in possession of a sick textile undertaking must, on the commencement of the act, deliver possession of 'the said undertaking' to the custodian appointed under section 5 of the Act. Section 5 which provides for the appointment of of such an undertaking lays down in sub-section (3) thereof that, on the appointment of a custodian, the charge of the 'management' of the sick textile undertaking is to vest in the custodian, and all persons in charge of the management of such undertaking must deliver to the custodian all assets, etc., 'relating to the sick textile undertaking'. Section 7(1)(b) of the Act provides for the suspension of all contracts, assurance of property, agreements, settlements, awards, standing orders or other instruments in force, and of all rights and liabilities arising thereunder, in such manner as may be specified in a notification. A notification dated 29 November, 1973, has been issued in the present case under the said section in terms thereof which provides for the suspension of all contracts, etc., and all rights and liabilities arising thereunder, for a period of one year from the date of that notification.

6. Strong reliance was placed by Mr. Baptista on behalf of the applicants on the use of the word 'assets' in section 4(3) and section 5(3) already mind the qualifying words that are to be found in those sections. The management which is to vest in the central Government or the custodian is management of the assets of the textile company 'in relation to the sick textile undertaking'. It is, therefore, clear that it is not as if the management of all the assets of the company vests in the Central Government or the custodian. It is quite clear, on a consideration of the provisions referred to above that

the company continues to be the owner and continues to be entitled to the management of all its assets, except those which could be said to be assets relating to the sick textile undertaking. In my opinion, therefore, the assets of which the management vests in the Central Government or the custodian are only the assets which have some relation to the working of an industrial establishment manufacturing textiles to which the Act is made applicable, such as the stock-in-trade, raw material, machinery, plant, furniture, fixtures as well as the premises in which the industry is being run. As was pointed out to me in the course of the arguments by Mr. A.N. Mody, it may well be that a company owns two entirely disconnected industrial undertakings, e.g., a cement undertaking and a textile undertaking and it was never the intention of the act to vest the management of any assets of the company in the Central Government or the custodian appointed by it which might conceivably be used by the company for purposes other than the working of the industrial establishment manufacturing textiles. To give any wider meaning to the expression 'assets' would mean that even the management of the share capital of the company would vest in the custodian, a consequence which could never have been intended.

7. The next question that I must proceed to consider is whether the amount of Rs. 10 lakhs which is in question in the present proceedings constitutes an asset of the company in relation to the sick textile undertaking, or in other words, an asset which has some relation to the working of the textile mill itself. First of all, it is erroneous to assume that the said sum of Rs. 10 lakhs is something which is earmarked and can exist in specie or is available without meeting the financial commitments and liabilities of the company which the official liquidator is called upon to meet, as stated by him in paragraph 14 of his affidavit dated 5th February, 1974. Those expenses and liabilities will have to be met from the said sum of Rs. 10 lakhs, at any rate, partially. Secondly, it must be borne in mind that the scheme provides for this payment being for depreciation in respect of the buildings as well as the machinery, plant, furniture and fixtures included in the premises which were then licensed. The said amount of Rs. 10 lakhs paid to the official liquidator could very well have been used up by him for the company, and the fact that it has not actually been used up makes no difference. It belonged to the company and was, in my opinion, not an asset which could be said to be related to the working of the textile mill. There are also some lands belonging to the company situated at Hingoli mentioned in paragraph 15 of the said affidavit of the official liquidator dated 5th February, 1974, which, I am told, are situated several miles away from the industrial establishment of the sick textile undertaking in the present case. Those lands, in my opinion, cannot be said to be assets of the company which have any relation to the working of the sick textile undertaking, and I make it clear that the official liquidator is not to hand over possession thereof to the applicants. Since he has now already been discharged, he should apply to the company judge for directions on a report as to what he should do with them and with all other property which has no relation to the working of the textile mills. Notice of that report should be given to the petitioner, the company, as well as the applicants. I, therefore, pass the following order on this judge's summons:

'I order that the official liquidator, who was appointed as the provisional liquidator of the company on 28th April, 1971, and was subsequently discharged by this court on the 21st of June, 1972, do hand over to the applicants the properties and assets of the company in relation to the said sick textile undertaking which are in his possession, excluding the said sum of Rs. 10 lakhs and the interest accrued due thereon, and excluding the lands at Hingoli, to the applicants. The applicants must pay the

petitioners' costs of this judge's summons. Counsel certifies.'

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