IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION (L) NO.369 OF 2015
IN
OFFICIAL LIQUIDATOR REPORT NO.347 OF 2014
IN
COMPANY PETITION NO.452 OF 2010

Carl Advertising Pvt. Ltd. …Intervener/Applicant

In the matter between

Bell Finvest India Ltd. ...Petitioner
(Orig. Petitioner)

vs.

M/s. R-Tec Systems India Private Ltd. & Ors. ...Respondent
(Orig. Respondent)

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Mr. Navaneetha Krishnan T., for the Applicant.

Mr. Sharan Jagtiani, for Official Liquidator present.

Mr. Mathews Nedumpara, for the Ex-Directors.

Mr. Madhur Pai, i/b. PRS Legal, for Abhyudaya Bank Ltd.

Mr. S. Ramakantha, Official Liquidator present

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CORAM : S.C. GUPTE, J.

13 AUGUST 2015

P.C. :

. The Company Application seeks a declaration that the order passed by this Court on 20 March 2015 is void as the Intervener/Applicant, who is in occupation of the premises, is not a party to the proceedings where this order is passed and the order is in violation of principles of natural justice. The Applicant claims to be a tenant of premises under the Company in liquidation. The premises consist of land and building at A-53, TTC Industrial Area, MIDC Mahape, Navi Mumbai 400 705 admeasuring a built-up area of about 60000 sq.ft. The Applicant's cause before this Court is espoused by Ex-Directors of the Company in liquidation, who appear through an advocate and canvass the Applicant's case. Later on, in the course of the hearing of the Company Application, Mr. Nedumpara, who commenced arguments on the Company Application as an advocate appearing for the ex-directors, informed the Court that he has also been asked by Mr. Krishnan for the Applicant to appeal as a counsel for the Applicant. The case may be briefly noted as follows :-

2. The Applicant claims to be a tenant of the suit premises by virtue of a leave and licence agreement dated 16 June 2009. The leave and licence agreement is produced with the application. The leave and licence agreement, on the face of it, purports to create a licence in favour of the Applicant but what is submitted at the bar is that it is an agreement for tenancy. In the first place, if this agreement is construed as an agreement of lease or tenancy, the same being for a period of 10 years with effect from 1 July 2009, the agreement needs to be registered. Under Section 107 of the Transfer of Property Act, no lease of immovable property can be created for a period exceeding one year except by a registered instrument of lease. The document relied upon by the Applicant is obviously an unregistered agreement. This agreement cannot create any tenancy beyond the period of one year.

3. It is alternatively submitted by the Applicant that a tenancy can

very well be created under the provisions of Section 107 of the Transfer of Property Act by means of an oral agreement coupled with delivery of possession. This case is not even pleaded before this Court in the pleadings of the Applicant. It is impermissible for this Court to entertain the plea orally sought to be made across the bar.

4. Thirdly, it is submitted further in the alternative that the Applicant's case may be considered from the stand-point of an equitable tenancy. It is submitted that only two essential elements have to be found to support the case of an equitable tenancy - the first, exclusive possession of the purported tenant and the second, payment of rent. None of these elements is made out in the present case as shall be presently noticed.

5. The so called leave and licence agreement relied upon by the Applicant, which is said to be the only source of its rights under this application, clearly does not inspire any confidence of the Court. In the first place, the document itself appears to have been created on an ordinary paper and executed on 16 June 2009. A stamp paper of Rs.100/- is attached to this document with an endorsement that the paper forms part of the attached leave and licence agreement executed between the parties. This circumstance is not explained by the Applicant. Secondly, it needs to be noted that the agreement purportedly executed on 16 June 2009 talks of a lumpsum payment of Rs.65 lacs payable in advance for the tenure of this agreement. This lumpsum payment purports to comprise of a payment of Rs.58 lacs towards the suit premises comprising of Rs.54 lacs by way of deposit and Rs. 4 lacs by way of advance rent. The balance amount of Rs. 7 lacs is said to comprise of Rs. 6 lacs deposit and Rs.1 lac towards the advance rent for another premises, namely, Row House No.6, Shiv Kutir,

situated at Plot 105/106, Sector 29, Vashi, Navi Mumbai - 400 703. There are receipts attached to this leave and licence agreement. The receipts are of the following dates and amounts :

Sr. No.	Date	Amount	Purpose of Payment
1	18 June 2009	Rs. 7,00,000/-	Towards RH6 Shiv Kutir.
2	1 July 2009	Rs.35,00,000/-	Towards advance compensation for the suit premises.
3	2 July 2009	Rs.2,50,000/-	Towards part advance compensation for the subject premises.
4	14 July 2009	Rs.7,50,000/-	Part advance compensation towards substitute premises.
5	15 July 2009	R.8,50,000/-	Part advance compensation towards the suit premises.
6	18 August 2009	Rs.4,50,000/-	Final advance compensation payable for the suit premises.

It is pertinent to note that all these receipts refer to a leave and licence agreement executed on 1 June 2009. The agreement of 1 June 2009 is not produced or referred to in the application. What is instead produced is the agreement of 16 June 2009.

6. An agreement, such as the one produced in support of the application, as noted above, cannot be relied on as an agreement of tenancy. Even if it were to be read as an agreement of licence for a period of 10 years, it obviously needs to be registered under the provisions of Section 55 of the Maharashtra Rent Control Act, 1999. Though non-registration under

the provisions of Section 55 of the Maharashtra Rent Control Act, 1999 does not attract disability under Section 49 of the Registration Act for leading the document in evidence, the very fact that the document is not registered amounts at least to a strange circumstance which needs to be explained, particularly having regard to the other circumstances noted above. There is no explanation for this circumstance.

7. There is nothing to show any exclusive possession, besides the document of leave and licence relied upon by the Applicant. The document not being acceptable in evidence and also not appearing to be genuine *prima facie*, there is no *prima facie* case made out of an exclusive possession on the part of the Applicant. Same is the case with the so called payment of rent. *Prima facie* there is nothing besides the document of leave and licence in support of the Applicant's case that these payments were actually made towards payment of rent.

8. The manner in which the original company petition and thereafter the company application herein are prosecuted lends support to the Official Liquidator's case that this is a collusive action between the ex-directors and the Applicant. The following may be noticed in this behalf :

(i) When the company petition was filed an opportunity was given to the Respondent Company to deposit an amount of Rs.1.70 lacs and in the event of failure to so deposit, the petition was ordered to be admitted. Upon the company's failure to deposit the amount, the petition, accordingly, stood admitted.

(ii) When the petition came up for final hearing, the defence of the Respondent Company was heard by this Court. This Court noted that the Company, as an acceptor of bills of exchange, had dishonoured the bills by non-payment upon presentment; that its cheques towards payment were dishonoured on the ground of insufficiency of funds; and that the Company has not responded to the statutory notice. Having noted that the Company had even refused to comply with the order of deposit, leading to the admission of the Company Petition, whereupon there was not even a reply filed in response to the Company Petition though the Company was represented by the Advocate since 2011, by its order dated 2 March 2012, this Court allowed the Company Petition and ordered the Company to be wound up.

(iii) An application was thereupon moved by an Ex-Director of the Company in liquidation, Rajini Brian Castellino, for recall of the winding up order. When the application was taken up for hearing, learned Advocate for the Applicant Ex-Director, who continues to appear for the Ex-Director even before this Court, submitted to the Court that due to economic recession, the Respondent Company had suffered a loss; that the Ex-Director was not served with the notice of the petition and that possibly some employee of the Company had accepted the service; and that the order may be recalled on the ground that it was an ex-parte order, of which the Ex-Director had gained knowledge only on 18 January 2015. The learned Judge noted that the Official Liquidator had taken possession of the registered office of the Company situated at A-53 TTC Industrial Area, MIDC, Mahape, Navi Mumbai – 4000 705 on 30 June 2012, though the security guard present at the site, who was employed by the Ex-Directors of the Company, continued to guard the site. The learned Judge, however, noted that there was no substance in the Applicant's contention that the order needed to be recalled as an ex-parte order, as one of the Directors present was not given notice of the winding up petition. The learned Judge also noted the Official Liquidator's case placed on record that when the Official Liquidator deputed his representative to carry out the valuation work, the security guard employed by the Ex-Director obstructed the Liquidator's representative from entering the premises. It was placed on record before the learned Single Judge by the Official Liquidator that the security guard had contacted one Adrian D'souza, a relative of the Ex-Director and thereafter threatened the representative of the Official Liquidator. The learned Single Judge *inter alia* made following observations:

> "As stated earlier, considering the conduct of the ex-director in not co-operating with the Official Liquidator and threatening the representative of the Official Liquidator, the application filed does not appear to be bona fide. The application deserves to be rejected with exemplary costs."

(iv) Thereafter, pursuant to correspondence between the Official Liquidator and the Secured Creditor of the Respondent Company, Corporation Bank, a date was fixed for completing the valuation of the premises and appointing security guards, namely, 6 December 2013. On 6 December 2013, once again Mr. Adrian D'souza obstructed the Official Liquidator's Representatives from entering the premises.

(v) On 17 December 2013, under the cover of an Advocate's letter, three further Company Applications for recall of the winding up order were served on the office of the Official Liquidator. It appears that these applications were disposed of by an order of the Prothonotary and Senior

Master of this Court on account of non-removal of the office objections.

(vi) On the application of Abhyudaya Bank, (Company Application No.266 of 2014) by an order passed by the Company Court on 23 June 2014 and modified on 8 July 2014, Abhyudaya Bank was allowed to sell the assets of the Company in association with the Official Liquidator.

(vii) Pursuant to the above, Abhyudaya Bank fixed 20 August 2014 as a date for taking over possession of the subject premises. The Ex-Director opposed taking of any steps by Abhyudaya Bank. The Bank thereupon sought leave to withdraw Company Application No.266 of 2013 so that Official Liquidator would be free to take possession in accordance with the provisions of the Companies Act. In the premises, on 20 August 2014, this Court recalled the orders on 23 June 2014 and 8 July 2014 and granted liberty to the Official Liquidator to take steps in accordance with the law.

(viii) On 17 September 2014, Official Liquidator presented a report to this Court seeking permission to seek police help for taking possession of the assets of the Company in liquidation, including the subject premises and also carry out valuation work and deploy security guards at the property. This Court noted in its order dated 20 March 2015 the Official Liquidator's contention that police protection was necessary because of the resistance and obstructions encountered by him in the past when attempts were made to take possession of or gain access to the premises for the purposes of carrying out the valuation exercise. This Court considered various legal submissions on the part of the Ex-Directors and found no merit in them. This Court was of the opinion that given the background facts of obstruction and resistance by a person that was said to be related to the Ex-Director, and coupled with the need to take effective possession of the premises and protect the same, a case was made out for grant of relief to the Official Liquidator. Accordingly, this Court directed the Official Liquidator to take physical possession of the premises on or before 8 May 2014 and issued directions to the local police station to render assistance to the representatives of the Official Liquidator in that behalf.

(ix) This order was carried in appeal by the Ex-Director. The Appeal Court noted that Ex-Directors of the Company in liquidation had been obstructing the Official Liquidator. The Appeal Court agreed with the reasoning of the Company Judge and found no merit in the appeal and summarily dismissed the same.

(x) In the meantime, in a Writ Petition filed by the Ex-Directors against Abhyudaya Bank and others, arising out of the SARFAESI proceeding, an ad-interim injunction was granted by the Supreme Court on condition that 25% of the amount payable as on 1 January 2015 was paid to the Respondent Bank within six weeks and a further sum of 25% within six weeks thereafter. The Court directed that if these amounts were not paid, the ad-interim relief granted by the Court would stand vacated forthwith.

(xi) It is pertinent to note that just before the Supreme Court order was passed on 6 May 2015, the present Company Application was moved by the Applicant claiming tenancy of the subject premises. The application was directed to be placed on 8 May 2015. On 8 May 2015, none appeared for the Applicant and the matter was stood over to 9 June 2015. (It suited the Applicant at that time not to appear, since ad-interim relief was already granted to the Ex-Director by the Supreme Court on 6 May 2015, as noted above.)

(xii) On the next date, i.e. on 15 May 2015, when the Petitioner's writ petition was called out before the Supreme Court, the ad-interim relief granted earlier was modified to the extent that the Official Liquidator was permitted to proceed with the liquidation proceedings.

(xiii2) After the Supreme Court modified its ad-interim relief, the Applicant has been pressing the present application.

The above narration shows that firstly, when the ex-directors of the company were presenting their applications either for recalling the winding up order or for stalling securitization of the assets of the company, there was no suggestion of any tenancy in respect of the subject premises. The Official Liquidator had put his seal and lock on the main door of the premises. It was the security guard appointed by the ex-directors who was obstructing the physical entry of the Liquidator's representatives into the premises. When these attempts failed, the Applicant came forward to deny physical possession to the Official Liquidator. Even this application was not diligently prosecuted whilst the interim relief of the Supreme Court operated in the matter. The moment that relief was modified and liquidation proceedings were allowed to be continued further, the application was pressed. And it so happens that the cause of the Applicant is espoused by the Advocate of the ex-directors, who says there is no conflict of interest between the ex-directors and the Applicant. That is really the last straw. What to talk of lack of conflict of interest, there appears to be an active co-ordination between the two to stall any attempt on the part of the Liquidator to take possession of the subject premises.

9. Learned Counsel for the Ex-Directors relies upon the judgment of **Anthony vs K.C. Ittoop And Sons**[1]. That judgement deals with a dispute between a landlord and a tenant. The judgement holds that the question of intention of the parties to create a tenancy must be gathered from the facts and circumstances of the case and that even if payments made by transferee in possession were really not in terms of the contract but independent of it, such payments may justify an inference of tenancy and that the question is ultimately one of fact. There is no quarrel with the proposition. The proposition, however, has no application to the facts of our case. In our case, the express pleading of the Applicant is that the tenancy is created under the document of 16 June 2009 and payments made are under that document. There is no case of any payment independent of that contract. The case of **Anthony C. Leo vs. Nandial Bal Krishnan**[2] concern the power of the Officer of the Court to seek eviction of tenants. The proposition laid down is that as much as a party, even an Officer of a Court is bound to follow due process of law in the matter of eviction of tenants. Once again, there is no quarrel with the proposition. The point is that there is no *prima facie* case of tenancy or of independent payment of rent made out in the instant case, which would require the Official Liquidator to adopt appropriate proceedings for eviction. As noted above, the document relied upon by the Applicant does not inspire any confidence and cannot merit grant of any relief in his favour. It rather appears to be created subsequent to the winding up order only with a view to obstruct administration of the company's assets by the Official Liquidator.

1 (2000) 6 SCC 394

2 Supreme Court of India dtd. 24 Oct. 1996

10. It is next submitted by learned Counsel for the Ex-Directors that the Company Court is not the appropriate Court for the consideration of the issues raised in the matter. It is submitted that the jurisdiction to go into the issues raised by the Applicant rests with a Civil Court. It is submitted that the Applicant has already filed a suit in this behalf before the Court of Civil Judge, Junior Division at Thane. A xerox copy of a document purporting to be a plaint lodged before that Court is submitted across the bar. It appears from this copy that there is some suit lodged on 23 June 2015 before the Court of Civil Judge, Junior Division, Thane. Be that as it may, it is an admitted position that there is no order passed by the Civil Judge, Junior Division at Thane granting any interim relief to the Applicant. The Applicant has today come before the Company Court pleading his case of tenancy. He must himself make out at least a *prima facie* case of such tenancy, before any relief can be sought from this Court restraining the Official Liquidator from taking possession of the property in accordance with the order passed by this Court on 20 March 2015. As noted above, there is no such *prima facie* case made out before this Court.

11. It is lastly submitted that the Liquidator acts under Section 456 of the Companies Act for taking custody of the Company's property. It is submitted that under Sub-Section (1A) of Section 456, the Liquidator ought to make an application to the Chief Presidency Magistrate or District Magistrate within whose jurisdiction such property may be found, with a view to seek possession thereof and it is only the Chief Presidency Magistrate or District Magistrate, as the case may be, who may, after such notice as he may think fit to give, seek possession of the property or make the same over to the Liquidator. In the first place, the directions to the Official Liquidator to seek possession of the property, if necessary, with the

police force are passed by this Court on 20 March 2015. The matter was carried in appeal before the Division Bench of this Court, which has since confirmed that order. It is not open to the Applicant to challenge that order before this Court. It is submitted that, in any event, the order being contrary to a provision of law, is void and ought to be disregarded and that this Court may pass an order granting suitable relief to the Applicant. I am afraid that is not a permissible course to take. Even otherwise, Section 456 gives an option to the Official Liquidator to apply to the Chief Presidency Magistrate or the District Magistrate, as the case may be, for seeking possession of the property through the Chief Presidency Magistrate or District Magistrate. This the Official Liquidator may or may not do. The order of the Company Court, confirmed by the Appeal Court, cannot be faulted on the ground of non-compliance with any provision of law.

12. The case of **Indo Burma Wood Products**[3], which deals with the procedure under Section 456 of the Companies Act, also does not assist the Applicant. In fact, the judgment proceeds to hold that procedure under sub-section (1A) and (1B) of Section 456 of the Companies Act does not override the jurisdiction of the Company Court under the Act in the matter of legal custody of all property, effects and proceeds of administration of winding up.

13. In that view of the matter, there is no merit in the application. The application is dismissed.

14. It is clarified that the observations made by this Court are only for the purposes of determining the application before the Court. The question of tenancy claimed in the suit filed by the Applicant before the

3 AIR 1968 Cal 198

Court of Civil Judge, Junior Division at Thane is not decided one way or the other in this order.

15. Learned Counsel for the Applicant applies for stay of the order. The application for stay is refused.

(S.C. Gupte, J.)