

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL [LD.] No. 688 OF 2014
IN
OFFICIAL LIQUIDATOR'S REPORT 5 OF 2013
IN
COMPANY PETITION NO. 423 OF 2010

Omkar Kanegaonkar.

..Appellant.

In the matter between :

International Asset Reconstruction
Company Pvt. Ltd.

..Petitioner.

Versus

Deepak @ Gajanan Kanegaonkar
and Others.

..Respondents.

Mr. Mathews Nedumpara for the Appellant.

Mr. Rohit Gupta with Mr. Nikhil Rajani i/b M/s. M. V. Deshpande &
Co., for the Petitioner.

Mr. Sharan Jagtiani for the Official Liquidator.

Coram : RANJIT MORE &
SMT. ANUJA PRABHUDESSAI, JJ.
Date : **March 31, 2015.**

Oral Order :

1. By this appeal, the Appellant has taken exception to the order dated 22nd August 2014 passed by the learned Single Judge of this Court [Coram : S.J.Kathawala, J.] in Official Liquidator's Report No.5 of 2013. By the said order, the re-submitted OL's Report No.5 was allowed in terms of prayer clause (b) thereof. Consequently, the Ex-directors of the

Company in Liquidation [Respondent Nos.1 & 2 herein] and M/s. German Ink Pvt. Limited [Respondent No.3 herein] have been directed to hand over vacant and peaceful possession of the premises in question to the Official Liquidator.

2. The brief facts are thus :

A] At the instance of International Asset Reconstruction Company Pvt. Ltd, [for short “IARC”], by the order dated 15th June 2012, Phoenix Alchemy Pvt. Limited was ordered to be wound up under section 433(e) and 434(1)(a) of the Companies Act, 1956.

B] On 18th December 2012, the Official Liquidator filed OL Report bearing No.5 of 2013 in respect of Phoenix Alchemy Pvt. Limited, i.e., the Company in Liquidation. The Official Liquidator sought directions as regards the sanction of prosecution of the ex-directors of Company in Liquidation under section 454 of the Companies Act.

C] On 26th November 2013, this report along with Company Application No.188 of 2013, was placed for orders before the learned Single Judge. The learned Single Judge took notice of the assertion made by IARC as regard the

mis-utilisation of company's property and directed the Official Liquidator to investigate the validity of the transaction of lease / license of Flat No.1, Neel Tarang, Ground Floor, Hindi Sahakari Sadan Samaj Ltd, Veer Savarkar Marg, Mahim, Mumbai [for short "*the premises*"], and it was alleged that this premises belongs to the Company in Liquidation. Pursuant to this direction, the Official Liquidator resubmitted the report.

D] On this resubmitted report, learned Single Judge heard the respective parties and directed the Ex-directors of the Company in Liquidation and Respondent No.3 to hand over vacant and peaceful possession of the premises to the Official Liquidator.

E] The Official Liquidator in the resubmitted report has submitted that the Company in Liquidation has purported to lease the premises to the group companies or related companies called M/s. German Ink Productions India Pvt. Ltd [Respondent No.3 herein] by the lease dated 9th June 2006; the lease terms indicated that it is a lease for a period of 21 years at a monthly rent of Rs.5,000/-. The report also revealed that the purported lease is insufficiently stamped

and the same is not registered. Consequently, directions were sought against Respondent No.3 to vacate the premises and hand over the same to the Official Liquidator.

F] The learned Single Judge found that the Company in Liquidation and Respondent No.3 are the related entities. The learned Single Judge having taken note of the fact that period of the lease is 20 years and the rent is only Rs.5,000/- per month, which is significantly lower than the market rate, concluded that the lease is not bonafide transaction and the same is executed in order to keep the premises out of the process of winding up of the company.

3. Mr. Nedumpara, the learned Counsel appearing for the Appellant in order to attack the impugned order challenged the maintainability of the winding up petition. He relied upon the decision in *A.R. Antulay vs. R.A. Nayak [(1988)2 SCC 602]*. He submitted that order under which the company has been wound up is void abinitio and therefore can be challenged in any proceedings, including the present proceeding.

. He submitted that the secured creditors having already pursued their remedy under the Securitisation Act, the

petition for winding up could not have been filed. He also submitted that validity or otherwise of the purposed lease falls within the exclusive jurisdiction of the Small Causes Court (or Rent Court) under the Maharashtra Rent Control Act, 1999 and therefore the Company Court could not have entertained and gone into that aspect.

4. Mr. Jagtiani, the learned Counsel appearing for the Official Liquidator, on the contrary, supported the impugned order. He submitted that the purported lease agreement being insufficiently stamped and unregistered is not at all admissible in evidence and therefore cannot be looked into. He relied upon the provisions of sections 446 and 457 of the Companies Act, and submitted that the Company Court has rightly exercised jurisdiction in the matter.

5. Having heard the learned Counsel appearing for the respective parties, and having gone through the impugned order as well as compilation to the petition, we do not find any merit in the appeal. The lease deed in favour of M/s. German Ink Productions is insufficiently stamped and is not registered.

It is not disputed that Respondent No.3 - German Ink Productions India Pvt. Limited of which the Appellant is the director and the Company in Liquidation are the group companies or related entities. It is also not disputed that the Appellant is the son of the Ex-director of the Company in Liquidation.

6. If the area of the premises, the location of the building in which the premises is situated, the period of lease and paltry rent at which the premises are leased out are taken into consideration, the same create serious doubts about the bonafides of the transaction. We agree with the conclusion of the learned Single Judge that transaction of the purported lease is executed only in order to keep the premises out of the reach of winding up process of the Company in Liquidation.

7. That apart, the order of the winding up of the Company in Liquidation was passed on 15th June 2012. The Ex-directors of the company thereafter filed a company application bearing No.26 of 2014 seeking to recall the winding up order. Recall was claimed on the ground that IARC has already

instituted the proceedings under the RDDB Act and also under the Securitisation Act. The learned Single Judge [Coram : G. S. Patel, J.] rejected the argument of the ex-directors of the company and held that the proceedings by IARC before the DRT and under the Securitisation Act are for the recovery however the proceedings under sections 433 and 434 of the Companies Act are not for recovery. The main objection to the maintainability of the winding up petition was overruled and this application came to be rejected.

8. We find that the same objection was again taken up by the Ex-directors of the Company in Liquidation before the learned Single Judge in OL Report No.5 of 2013. However, the same was also negated by the learned Single Judge in its order dated 25th April 2014. These orders are not challenged and have attained finality. In this fact situation, it is now not permissible for the Appellant to challenge the validity of the winding up order in the OL's Report.

9. So far as the objection of Mr. Nedumpara that exclusive jurisdiction to decide the legality or otherwise of the

purported lease agreement is with the Rent Courts constituted under the Maharashtra Rent Control Act is concerned, the same is also without any substance. Firstly, the purported lease agreement is unregistered document. The document of lease is specifically required to be registered in view of the provisions of section 34 of the Maharashtra Stamp Act, 1958 and section 17 read with 49 of the Registration Act, 1908. Non compliance with these provisions, makes the document inadmissible in evidence and obviously the same cannot be relied upon. The document of purported lease is, therefore, rightly ignored by the Company Court. For the purpose of winding up process of the Company in Liquidation, the said premises belong to the Company in Liquidation.

10. Be that as it may, under section 446(2)(d) of the Companies Act, the Company Court has jurisdiction to entertain any question of priorities or any other question whatsoever whether of law or fact, which may relate to or arise in the course of winding up of the company.

. Besides, under section 456 of the Companies Act, all the properties and effects of the company shall be deemed

to be in the custody of the Court as from the date of the order for winding up of the company. In the light of these provisions, the Company Court is justified and has jurisdiction to decide the official liquidator's report and the impugned order cannot be faulted on that ground. The appeal is without merit and same is accordingly dismissed with costs of Rs.10,000/-

11. In view of the disposal of main appeal, application, if any, taken out in this appeal, does not survive and the same is accordingly disposed of.

12. At this stage, Mr. Nedumpara, learned Counsel appearing for the Appellant seeks stay to the effect and operation of this order. There shall be stay to this order for the period of 10 days.

[SMT. ANUJA PRABHUDESSAI, J.]

[RANJIT MORE, J.]