IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO. 809 OF 2015
IN
COMPANY APPLICATION (L) NO. 98 OF 2015
IN
COMPANY PETITION NO. 28 OF 2012
WITH
NOTICE OF MOTION (L) NO. 3008 OF 2015
IN
APPEAL (L) NO. 809 OF 2015

The Bank of New York Mellon, London .. Appellant
versus
M/s. Eleganza Furnishings Pvt. Ltd. & Anr. .. Respondents

Mr. Rohan Rajadhyaksha with Priyanka Shetty, Gargi Vyas and Sukanya Bhoumik i/b. M/s. AZB & Partners for Appellant.
Ms Sujata Melekar i/b. Rita Yadav for Respondent No. 1.
Mr. Rakesh Reddy for Official Liquidator.

CORAM: DR. MANJULA CHELLUR, C. J. AND
M. S. SONAK, J.
DATE : 29 SEPTEMBER 2016

P.C.:

1] Heard learned counsel for the parties.

2] Admit. With the consent of and at the request of the learned counsel for the parties, we proceed to dispose of this appeal finally.

3] This appeal is directed against a portion of the order dated 26 August 2015 made in company application (l) no. 98 of 2015 in company petition no. 28 of 2012 to the extent it directs the Official

Liquidator to pay licence fees to the respondent no. 1 herein in respect of the premises in question for the period between 2 September 2014 till the date of handing over possession thereof to the said respondent no. 1.

4] The issue involved in this appeal is whether the licence fees claimed by respondent No.1 for the period during which the Official Liquidator retained the possession of the premises in-question can, in the facts and circumstances of the present case, be ultimately regarded as "*sums as may be necessary for the costs and expenses of the winding up*" for the purposes of Section 530 (6) of the Companies Act 1956 (said Act).

5] The facts and circumstances in which, such issue arises for determination are as follows:

(a) The appellant alleging that the company Zenith Infotech Limited (ZIL) was due and payable a sum of Rs.755.50 Crores applied for it to be wound up vide Company Petition No. 28 of 2012. Such petition was admitted by the Company Court on 30 July 2013. The material on record establishes that the petition was advertised and even otherwise, the factum of such admission was sufficiently publicised;

(b) Thereafter, by order dated 13 December 2013, the Company Court ordered the actual winding up of ZIL. Again, there was sufficient publicity given to this order and there is material produced on record to substantiate such publicity;

(c) The Official Liquidator of this Court (respondent No.2) took possession of premises being Gala No. 7, Building No. A-9, Harihar Corporation, Dapode, Dist : Thane (said premises) on 19 September 2014. This was on the basis of statement made by one of the Directors of ZIL, that the said premises were owned by ZIL;

(d) On 29 January 2015, the respondent No.1 who claims to be the owner of the said premises filed a Company Application (L) No. 98 of 2015 seeking directions to the Official Liquidator to lift the attachment in respect of the said premises; handing over vacant and peaceful possession of the said premises; and for payment of outstanding amount of Rs.1,23,547/- being five months rent alongwith interest at the rate of 18% per annum in respect of said premises;

(e) By the impugned order dated 26 August 2015, the learned Company Judge has disposed of the aforesaid Application (L) No. 98 of 2015 in the following terms:

> "9. In the premises, the application deserves to be allowed. Accordingly, the following order is passed:
>
> (i) The Official Liquidator is permitted to shift the furniture, fixtures and records lying in the premises, described in prayer clause (a) of the Company Application, to Zenith House, 30 MIDC, Central Road, Andheri (East), Mumbai 400 093;
>
> (ii) Such shifting of movables shall be accomplished within a period of four weeks from today.
>
> (iii) After shifting the movables lying within the premises, the Official Liquidator shall handover vacant

and peaceful possession of the premises to the Applicant forthwith.

(iv) The Official Liquidator shall pay the licence fees to the Applicant for the period between 2 September 2014 to the date of handing over possession of the premises at the rate provided in the Leave and Licence Agreement dated 30 July 2014, after adjusting the security deposit held by the Applicant towards the arrears of licence fees.

(v) The Company Application is disposed of accordingly.”.

6] The challenge in this appeal is restricted to direction No.9 (iv) as aforesaid.

7] Mr. Rajadhyaksha, learned counsel for the appellant i.e. original petitioning creditor submitted that winding up process is deemed to have commenced from 30 July 2013, i.e., the date of institution of winding up petition. In such circumstances, he submits that it is inconceivable that respondent no.1 had indeed licensed the said premises to ZIL, particularly since sufficient publicity had been accorded to the orders made in the course of winding up proceedings. In any case, Mr. Rajadhyaksha submitted that if the affidavit in support of the company application is perused, it is evident that there is not even an averment that the said premises were retained for the period of five months by the Official Liquidator for the convenience of liquidation or for the purpose of better realization of assets. In absence of such basic pleadings, it could never have been regarded that the sums now ordered to be paid to respondent No.1 were necessary for the costs and expenses of winding up.

8] Mr. Rajadhyaksha pointed out that the Official Liquidator has already taken possession of a seven storeyed building from ZIL and in these circumstances, it can never be said that the possession of the said premises was taken or retained by the Official Liquidator for the convenience of the liquidation. Mr. Rajadhyaksha submitted that the impugned direction amounts to grant of a preferential payment, when in fact, respondent No.1 is only an unsecured creditor disentitled to any priority in the matter of payments from out of the assets of the ZIL.

9] Ms. Sujata Melekar, learned counsel for the respondent no. 1, by adverting to the affidavit filed by the Official Liquidator (respondent no.2) submitted that the respondent No.2 had posted security guards at the said premises and further expressed inability to immediately hand over the possession of the said premises, since it housed documents and material belonging to ZIL. Ms Melekar submitted that from this, it was quite clear that the Official Liquidator had retained the said premises for the convenience of the liquidation and the license fees now ordered to be paid, are nothing but costs and expenses of the winding up. For these reasons, Ms Melekar submitted that there is no case made out to fault the impugned direction.

10] The rival contentions now fall for our determination.

11] The normal rules in matters of proof and ranking of claims are set out in Sections 528 and 529 of the said Act. These sections, *inter alia,* provide that in every winding up, all debts payable on contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company. The normal rule is to place all unsecured creditors upon an equal plane and to pay them *pari passu.*

12] Section 529-A of the said Act is concerned with overriding preferential payments in certain circumstances. However, since no claim is made on the basis of such provision in the present matter, we do not deem it necessary to advert to the said provision. Section 530 of the Act, including in particular, sub- section (6) thereof, which deals with '*preferential payments'* is relevant and the same reads thus:

> *"(6) Subject to the retention of such sums as may be necessary* ***for the costs and expenses of the winding up,*** *the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given by clause (d) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed."*
>
> *(emphasis supplied)*

13] In order to sustain the claim for preferential payments under Section 530 (6) of the said Act, the appellant is required to at least plead that the sums, which it seeks to recover preferentially are sums necessary for the costs and expenses of the winding up. A Company Court is then required to enquire into and satisfy itself that the sums so claimed, are indeed sums necessary for the costs and expenses of the winding up. It is only then that the claim for preferential payments under Section 530(6) of the said Act can be granted.

14] If the affidavit in support of the Company Application (L) No. 98 of 2015 taken out by respondent No.1 is perused, there is no statement made therein to the effect that the sum claimed, constitutes sum necessary for the costs and expenses of the winding up. In paragraph 11 of the affidavit, there is reference to suppression of material facts by ZIL and the fraudulently and deliberately execution of leave and licence agreement, dated 30 July 2014, in respect of said premises. In paragraph 12 of the affidavit, there is reference to correspondence with the Official Liquidator, including, reference to the letter dated 19 January 2015, by which, the Official Liquidator is stated to have informed respondent No.1 that he is unable to hand over the possession of the said property to respondent No.1 without order of the Company Court. At least these statements in the affidavit, cannot be said to constitute any pleadings in support of the case of respondent No.1 that the sums claimed, were sums necessary for costs and expenses of winding up. The only other statement, upon which, reliance was placed by learned counsel for respondent No.1 is the one in paragraph 16 of the affidavit, which reads thus:

> *“16] In view of the above circumstances, I say and submit that this Hon'ble Court may be pleased to issue direction to Official Liquidator to raise/lift the attachment in respect of the said property, and shift all goods and materials if any lying in the said property and handover the vacate and peaceful possession of the said property to the Applicant. The Applicant further states and submits that this Hon'ble Court may be pleased outstanding amount of Rs.1,23,547/- alongwith interest at the rate of 18% p.a. towards 5 months outstanding rent of the said property payable by the said company as per leave and license Agreement dated 30th July 2014 and to file report to that effect within fixed time frame.”*

15] The aforesaid statement, cannot even remotely be regarded as some sort of pleadings or assertion that the outstanding rent claimed constitutes a sum necessary for the costs and expenses of the winding up. In fact, upon perusal of the entire affidavit in support of the application, it is quite clear that respondent No.1 was mainly interested in lifting the order attachment and securing possession of the said premises. The prayer for recovery of outstanding rent/licence fees was made in a casual manner without any expectation of preferential payments. On basis of such pleadings/statements, we are satisfied that there was no case made out for entitlement of any preferential payments to respondent No.1.

16] In case of ***S.S. Chawla and Company Vs. Globe Motors Ltd. (In Liquidation) and anr. - 1987 (62) Company Cases 815***, the learned Single Judge of the Delhi High Court has made a reference to the following passage in *Palmer's Company Law, twenty-third edition, at page 1179:*

> *"The lessor can prove for rent due up to the date of the commencement of the liquidation, and he can also prove for the rent as it accrues due after the commencement of the liquidation. If he seeks to claim that rent accruing after the commencement of the winding up is payable in full, the onus is upon him to show that the liquidator has retained possession of the property 'for the convenience of the liquidation', so that the rent is payable as an expense of the liquidation, or that a special equity exists justifying the claim of the landlord.*
>
> *If the liquidator takes possession or continues in possession of the lease-holds for the purpose of the better realisation of the assets, the lessor will be entitled to payment of the rent in full as per of the expenses properly incurred by the liquidator...."*
>
> *So, what has to be seen is whether possession of the property was taken or retained by the official liquidator " for the convenience of the liquidation" or "for the purpose of better realization of the assets"*.

17] In absence of any proper statements or pleadings by respondent No.1, it cannot be said that respondent No.1 has discharged onus of showing that the Official Liquidator has retained the possession of the said premises for the convenience of the liquidation so as to claim licence fee as an expenses of liquidation or that there is any special equity to justify the payment of such claim on preferential basis. The letter dated 19 January 2015, addressed by the Official Liquidator to the respondent No.1 or for that matter certain statements in the affidavit filed by respondent No.1 do not lead to any inference that the retention of the said premises by the Official Liquidator was for the convenience of the liquidation and therefore, the licence fees ought to be regarded as the sums necessary for the costs and expenses of the winding up.

18] Learned counsel for respondent No.1 did not dispute before this Court that the Official Liquidator was already possessed of a seven storeyed building owned by ZIL. If this be so, it cannot be said that the retention of the said premises by the Official Liquidator was either for the convenience of the liquidation or for the purpose of better realisation of ZIL assets. Posting of security guards or seeking some reasonable time to vacate, cannot, *ipso facto,* be circumstances sufficient to conclude that the retention of the said premises by the Official Liquidator for some time, was for the convenience of the liquidation or for the purposes of better realisation of the assets of the company under liquidation.

19] We note that relief in terms of paragraph 9(iv) , is in fact, much in excess of what was prayed for by respondent No.1 in its application and the affidavit in support thereof.

20] For the aforesaid reasons, we allow the appeal and set aside the direction No.9 (iv) in the impugned order. However, we clarify that respondent No.1 shall be entitled to lodge its claim in accordance with provisions of the said Act towards rent/licence fees and such claim, if lodged, can always be considered in accordance with law alongwith claims of other unsecured creditors P*ari Passu.*

21] In view of disposal of the disposal, Notice of Motion (L) No. 3008 of 2015 does not survive and is disposed of accordingly.

(M. S. SONAK, J.) **CHIEF JUSTICE**