

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

**COMPANY APPLICATION NO. 453 OF 2017
IN
OFFICIAL LIQUIDATOR NO. 21 OF 2016
IN
COMPANY APPLICATION NO. 265 OF 2015
IN
COMPANY PETITION NO. 352 OF 1996**

M/s. Woodlands Garden Cafe **... Applicant**

IN THE MATTER BETWEEN

Raksha Kirit Goshier **... Petitioner**

V/s.

Official Liquidator of M/s. Woodlands Garden
Cafe, Bombay High Court, Mumbai **... Respondent**

Mr. Viraz Tulzapurkar, Senior Advocate a/w Mr. Pratik Sakseria, Mr. Sanjay Dube and Mr. Chirag Chanani i/b Dewani and Associates for Applicant.
Mr. Atul Damle, Senior Advocate i/b Vivek Phadke for Ori. Petitioner.
Mr. Rakesh Agarwal for Respondent Nos. 7 and 8.
Mr. Suhas Sawant, Dy. Official Liquidator present.

**CORAM : K.R. SHRIRAM, J.
DATE : 03rd OCTOBER, 2018**

P.C.:

. This application has been taken out in view of order dated 06.12.2016 passed by this Court in OLR No. 21 of 2016 in Company Application No. 265 of 2015. The said order reads as under:

“ P.C.:

. This OLR is in respect of a certain property belonging to a partnership firm. According to the OLR, the property belongs to an unregistered partnership firm, which is wound up by this court.

2 Learned Counsel appearing for a firm by the same name, which claims to be a registered partnership firm and owning the subject property as such firm, submits that his clients would like to show cause. He submits that he ought to have been joined as a party to this Company Application No. 265/2015. There is also another company application, namely, Company Application (Lodging) No. 763/2016, which is not on board today, but which is filed by the Applicant in Company Application No. 265/2015 for similar and further reliefs. The registered firm is not a party even to this application. The Applicant in Company Application (Lodging) No. 763/2016 is directed to join the registered firm “Woodlands Garden Cafe” as Respondent to the company application. Such amendment to be carried out within one week from today. The OLR along with company application, namely, Company Application (Lodging) No. 763/2016, to come up on board for hearing on 26 December 2016 at 3.00 p.m. In the meanwhile, the registered firm, which is said to be carrying on some renovation work of the premises of the restaurant, is directed not to start any business at the place without seeking appropriate orders from this court.

3 The Official Liquidator is also permitted to amend the OLR in terms of the draft, which is handed in. The draft is taken on record, marked “X” for identification. Such amendment also to be carried out within one week from today.”

2 Applicant, the registered firm who was not a party to the Liquidator's Report or the Company Application but happened to be in the Court has, pursuant to the said order dated 06.12.2016 taken out this application seeking an order to allow the Applicant to restart and conduct its restaurant at Nalanda Shopping Center, Vaikunthlal Mehta Raod, JVPD Scheme, Vile Parle (W), Mumbai – 400 049 ('the said premises').

3 The original Petitioner had filed the petition under Section 582 of the Companies Act, 1956 to wind up an unregistered partnership firm by the name Woodlands Garden Cafe. The petition was allowed pursuant to which the Official Liquidator came to be appointed and on 17.06.2005 took symbolic possession of the said premises. On 24.08.2005, the Official Liquidator issued a public notice calling for bids to run the restaurant at the said premises.

4 The case of the original Petitioner is that the firm in liquidation was started as an unregistered partnership firm on 01.04.1989. From 01.04.1989 till 01.01.1993, the said firm was conducting restaurant business from the said premises which was taken on leave and licence basis from Aviation Travels Pvt. Ltd. It is stated that on 01.01.1993, Aviation Travels Pvt. Ltd., who was the licensor, was made a partner in the firm and the said premises was brought into the firm by Aviation Travels Pvt. Ltd. as its capital/contribution and thereby the said premises became the property of the firm. It is also stated that on 01.07.1993 Aviation Travels Pvt. Ltd. executed a Deed of retirement and thereby resigned from the firm, leaving the said property to the firm. On 04.07.1996, the Company Petition No. 352 of 1996 came to be presented.

5 It is the case of Applicant that Applicant was started as a registered partnership firm on 01.04.1989 and since then the principal place of business was the said premises. A copy of the Registration Certificate issued by the Registrar of Firms is at Exh.'J' to the application. It is also the case of Applicant

that the said premises was purchased by Applicant from Aviation Travels Pvt. Ltd. sometime in 1993 for approximately Rs.45,00,000/- which sale was regularised by a registered Sale Deed dated 08.12.2017. A copy of the registered Sale Deed is annexed to an affidavit of John Curien Mathew sworn on 06.01.2018. Mr. Tulzapurkar appearing for Applicant also relied upon an order passed by a learned Single Judge of this Court on 17.03.2011 in Company Application No. 42 of 2011 in which, the Court was pleased to direct the Applicant in that application (Mr. Ravi Shetty) to prove, prima facie, that the said premises sought to be attached belonged to the unregistered partnership firm. The order reads as under :

“PC:

1. *Heard learned counsel for the applicants.*
2. *By this application, applicants are seeking an order and direction to be issued to the Official Liquidator to attach the property of M/s. Woodlands Garden Cafe situated at Nalanda Shopping Center, Vaikunthlal Mehata Raod, Juhu, Mumba. For the purpose of effecting an attachment of the property the applicants would have to show to this court prima facie that the property sought to be attached belongs to M/s. Woodlands Garden Cafe. This is so as otherwise property of a stranger could be attached if prima facie proof of the ownership is not insisted upon. Applicants are therefore directed to produce before the court a prima facie material to show that the property for which attachment is sought belongs to M/s. Woodlands Garden Cafe.”*

6 The said application No. 42 of 2011 was subsequently withdrawn pursuant to an order dated 20.08.2011. In the meanwhile, the Applicant had mortgaged

the said premises to Union Bank of India. Union Bank of India under SARFAESI proceeding attached the said premises in view of non-payment of amounts under the loan agreement. The Applicant paid off Union Bank of India the entire claim of Union Bank of India in full and final settlement and by a letter dated 30.04.2016 Union Bank of India issued a full and final settlement of loan certificate which reads as under :

“ 30.04.2016

*To
M/s. Woodlands Garden Cafe
(Reg. No. BA 38931)
JVPD Scheme
Vaikunthlal Mehta Road,
Vile Parle (West),
Mumbai – 400 049*

*Dear Sir,
Sub: Full and final settlement of Your loan a/c 315506410000030*

This is to confirm that the Bank has further received Rs.10,50,000/- (Rupees Ten Lakhs Fifty Thousand only) on 30th April 2016 towards the full and final settlement of dues and in future the Bank will not raise any sort of claims in respect of the abovementioned loan account. We hereby confirm that the Bank has withdrawn its security personals and handed over vacant and peaceful possession of the mortgaged property to the partners of the Woodlands Garden Cafe (Reg. No. BA 38931). The Bank shall execute the deed of release as and when required by the firm.

For Union Bank of India

Asst. General Manager”

7 Union Bank of India also entered into a Deed of Re-conveyance dated

11.09.2017 of the said premises with the Applicant. In the Deed of Re-conveyance which is entered into between Union Bank of India and Applicant, in the recital it is stated that said premises is released from the security created thereon and from all claims and demands in respect thereof.

8 Admittedly, the original petitioner has not been able to produce the original of the documents based on which the Petitioner claims the said property belonged to the unregistered firm, viz, reconstituted partnership deed dated 01.01.1993 and retirement deed dated 01.07.1993 of Aviation Travels Private Limited. It has to be noted that in the order dated 08.02.2017, it is noted that one of the partners Ravi A. Shetty who has been taking out all applications informed the Court that the Partnership Deeds dated 01.01.1993 and 01.07.1993 are with Saraswat Co-operative Bank Limited. Saraswat Co-operative Bank Limited in its affidavit dated 27.03.2017 has categorically stated that the said property was not mortgaged to Saraswat Co-operative Bank Limited and there is no question of a Bank having Partnership Deeds. Therefore, it does appear that the said Ravi Shetty has been making statements which are not true. Further, against the action taken by Union Bank of India under SARFAESI, Applicant had filed a Writ Petition no. 1595 of 2014 before it entered into settlement with Union Bank of India. The original Petitioner and Ravi Shetty had taken out notices of motion seeking to be impleaded as parties in the Writ Petition. Those applications were rejected with the Court observing that whoever states the said

premises belongs to the unregistered firm shall adopt substantial proceedings to prove their independent right. The order dated 03.07.2015 reads as under :

“P.C.:

1. *Having heard the parties, we are of the opinion that the remedy of the applicants is not to get themselves impleaded in the Writ Petition. If any of their rights and which they apprehend are prejudiced because of any impending settlement, then that would definitely enable them to adopt their substantive proceedings. They can protect their independent right in such substantive proceedings by seeking appropriate relief. Surely, in this Writ Petition such relief cannot be granted. The Writ Petition is disposed of. The Notices of Motion are disposed of.”*

9 Therefore, prima facie what is on record are documents which persuades this Court to lean in favour of Applicant. The Court will not be wrong in presuming that Union Bank of India would not have lent money and accepted the mortgage of the said premises, if the Applicant was not the owner of the said premises. I must hasten to add that I have not come to a conclusion as to who is the rightful owner of the said premises and I am only making a prima facie observation to decide this present application, not conclusive finding.

10 Mr. Tulzapurkar for Applicant stated that the original Petitioner and others, who are with the original Petitioner, may file substantive proceedings to prove the said premises belonged to the unregistered firm. Mr. Tulzapurkar was also open to those persons, including original Petitioner, to file evidence affidavit and claim their title before this Court which can be considered in the winding up proceeding of the said unregistered firm because Section 446(2) gave jurisdiction to this Court to decide the said ownership issue.

11 Mr. Tulzapurkar also stated that if the Court directs, the Applicant will deposit a reasonable amount with the Prothonotary and Senior Master, High Court Bombay every month until the original Petitioner, and those who are with the original Petitioner prove that the said premises belonged to unregistered firm in liquidation.

12 Considering the balance of convenience and in view of observations made above, I am inclined to allow the application in terms of prayer clause (a), subject to conditions mentioned below. Prayer clause (a) reads as under.

“a) This this Hon'ble Court be pleased to order and allow the applicant to restart and conduct its business at Nalanda Shopping Centre, Vaikunthlal Mehta Marg, J.V.P.D. Scheme, Vile Parle West, Mumbai 400 049, in view of the order dated 06.12.2016 passed by this Hon'ble Court.”

A) Applicant or any of its partner shall not encumber or part with possession or create third party rights or mortgage the said premises without leave of the Court. This would also include that no person can be added as partner to the firm and existing partners also cannot retire from the firm.

B) Applicant shall pay all taxes of whatsoever nature payable and bills of all utilities including electricity charges, water charges etc. without default and shall ensure that the property does not get attached for their default.

C) Applicant shall deposit with the Prothonotary and Senior Master, High Court, Bombay a sum which will be determined after receiving an opinion

from the Property Agent as defined in (E) below as to what would be the market rent for the said premises if it was unfurnished.

D) Applicant shall give a bank guarantee towards 5 months rent in favour of the Prothonotary and Senior Master, High Court, Bombay which bank guarantee will be returned in 6th month when the Applicant will pay the amount to be determined for the entire six months in the 6th month.

E) Official Liquidator to appoint Best Mulyankan Consultants Ltd, 307-A, BEST Commercial Complex, Opp. Andheri Railway Station, Andheri (W), Mumbai – 400 058, Tel: 26285662 (property agent) to inspect the said premises and to indicate the market rent payable, if the said premises was unfurnished.

F) Property Agent will also opine whether the said premises, i.e., ownership premises situated at Nalanda Shopping Centre, Vaikunthlal Mehta Marg, Juhu, Mumbai 400 056 admeasuring 2,000 sq. ft. in the basement; entire first floor with the attached terrace and the entire southern side of the compound;

AND

All the structures comprising Basement, Car Parking, 1st Floor and open terraces admeasuring 11,100 sq.ft. in “Nalanda Shopping Centre” on the land admeasuring 1352.62 Sq. Mtrs being Sub Plot No. 3 of U8 of J.V.P.D. Scheme, Vaikunthalal Mehta Road, Vile Parle (West), Taluka Andheri, Mumbai Suburban District, in the Registration district and Sub District of Mumbai City and Mumbai

Suburban

are one and the same and if not, what are the differences and what would be the market rent for both premises.

G) The Official Liquidator shall address a communication to Best Mulyankan Consultants Ltd during the course of this week and Best Mulyankan Consultants Ltd is requested to give its report by 20.10.2018. Fees of Best Mulyankan Consultants Ltd shall be shared equally, i.e., 50% by Applicant and 50% by the others.

13 At this stage Mr. Tulzapurkar states that towards this rent to be fixed, the Applicant will deposit an ad-hoc amount of Rs. 50 lakhs by demand draft, which can be adjusted subsequently and this amount will be deposited with the Prothonotary and Senior Master, High Court, Bombay on or before 06.10.2018, so that the applicant can start the restaurant immediately. In my view, it is not an unfair request and nobody expressed any opposition. Therefore, upon depositing this amount Rs. 50,00,000/- the Applicant, subject to further orders of this Court, is permitted to start business from the said premises.

14 It is made clear that if the Applicant does not furnish Bank Guarantee as provided in para 12(D) above within two weeks of the Court fixing the rent payable, then the Applicant shall forthwith handover possession of the said premises back to Official Liquidator.

15 The Applicant shall pay the rent to be fixed to Official Liquidator, on the 5th

of every month in advance and in case of even one default, interest at 21% p.a. shall be payable on the defaulted amount and Applicant shall, on day after default, vacate the premises and handover peaceful premises to Official Liquidator.

16 OLR along with the report of the property agent be listed for directions on 24.10.2018. The Official Liquidator may share/provide copy of Report with the parties.

17 Company Application is accordingly disposed.

GENERAL

18 Original Petitioner and all Respondents to the petition and Applicant herein shall on or before 24.10.2018, file their respective affidavits of documents and also give inspection to each other and exchange statement of admission and denial with reason for denial.

19 On or before 24.11.2018, the original Petitioner and the Respondents to the original petition shall file list of witnesses, affidavit in lieu of Examination-in-Chief together with compilation of documents and also serve a copy thereof upon the Applicant.

20 Stand over to 29.11.2018 for marking of documents/recording evidence at which time the witness of original Petitioner and Respondents to the original petition shall remain present in Court.

(K.R. SHRIRAM, J.)