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

COMPANY PETITION NO. 709 OF 2014

M/s. Mohatta Brothers Property Co.
A Partnership Firm .. Petitioner
Vs.
G.N. Automotive Private Limited .. Respondent

Mr. Sunny Shah i/b Hemant Sethi and Co. for petitioner.

None for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 11TH JANUARY 2018

P.C.

1 This petition is filed for winding up of respondent company G.N. Automotive Private Limited on the ground that it is unable to pay its debt. When the petition was taken up for admission on 21st March 2016, the following order was passed :-

> 1. *By this Company Petition, the Petitioners have sought winding up of the Respondent Company - G.N. Automotive Pvt. Ltd. on the ground that the company is unable to pay its debts. The Petitioners claim that the Respondent Company is indebted to the Petitioners in the sum of Rs.4,06,15,020/-on account of non-payment of license fees under the Leave and License Agreement dated 15th July, 2010 entered into between the Petitioners and the Respondent Company.*
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> 2. *The brief facts are that a Leave and License Agreement was entered into between the Petitioners and the Respondent –Company on 15th July, 2010 under which the Company was allowed to occupy and use Godown No.5 on Plot Nos.G-1093(6) and 9A on the ground floor situate at Manjrekar Lane of Dr. E Moses Road, Worli, Mumbai 400018, admeasuring about 7,800 sq.ft. carpet area (for short, the "said premises"),for a period of 60 months commencing from 2nd April, 2010 till 31st March 2015. The compensation /license fees payable under the said Agreement was a sum of Rs.11,00,000/-per month. It is an admitted position that the Respondent Company paid compensation*

for the months of July, 2010 and August, 2010 and there after did not make any further payment. It is also an admitted position that the Respondent – Company continues to occupy the said premises till date.

3. *It is the case of the Petitioners that since the Respondent – Company did not make payment of the compensation/license fees as stipulated under the Leave and License Agreement, the same was terminated on 22nd November, 2010 and the Respondent – Company was called upon to quit, vacate and handover quiet, vacant and peaceful possession of the said premises to the Petitioners. In response thereto, on 1st December 2010, the Respondent – Company replied to the termination notice and stated that they were in financial difficulty and prayed for time to make payment of the monthly compensation. This is evident from paragraph 4 of the said letter which reads as under :-*

> *"4. Your clients are aware that we have already paid compensation for July and August 2010 and are in the process to make compensation for September, October and November 2010 as discussed with Mr Mohatta."*

4. Since no payment was forthcoming, the Petitioners filed a Suit in the Small Causes Court, Mumbai being L.E.& E. Suit No.72/92 of 2011 for recovery of possession of the licensed premises as well as for mesne profits. The said Suit is pending. In addition thereto, on 23rd December, 2013 the Petitioners also served a statutory notice under section 434 of the Companies Act, 1956 on the Respondent –Company inter alia calling upon them to pay the outstanding amount. In reply thereto, the Respondent Company, by its letter dated 7th January, 2014 for the first time contended the Leave and License Agreement was bogus and not to be acted upon and the same was entered into only to circumvent the provisions of the Rent Act. Be that as it may, thereafter the present Petition has been filed on 21st May 2014.

5. *In this factual background, the learned counsel appearing on behalf of the Petitioners submitted that under the Leave and Respondent Company. Agreement dated 15th July, 2010 the Respondent Company was to pay compensation of Rs.11,00,000/-for use and occupation of the said premises. He submitted that admittedly the monthly compensation paid by the Respondent Company is only for the months of July, 2010 and August, 2010. No further payment is made and the Respondent Company continues to illegally occupy the said premises without paying a farthing. Learned Counsel submitted that approximately Rs.4 crores are due and payable by the Respondent – Company to the Petitioners under the said Leave and License*

Agreement and therefore this is a fit case where this court should exercise its discretionary jurisdiction of winding up and proceed to admit the Company Petition and have the same advertised as per the provisions of the Companies Act, 1956 and the rules framed thereunder.

6. *On the other hand, the learned counsel appearing on behalf of the Respondent –Company, contended that a portion of the claim of the Petitioners is time barred in view of the fact that the Leave and License Agreement was terminated way back on 22nd November, 2010 and the present Petition has been filed only on 21st May, 2014. He submitted that the present Petition is nothing but a tactic to exert pressure on the Respondent – Company to succumb to the illegal demands of the Petitioners. He submitted that after the termination of the Leave and License A greement, the Petitioners have put up boards outside the said premises warning the public that the Petitioners have filed a case in the Small Causes Court for recovery and possession of the same. This conduct of the Petitioners has caused grave prejudice and loss of business to the Respondent –Company. The learned counsel for the Respondent – Company further submitted that in addition thereto, the Petitioners have been writing letters to the principals of the Respondent –Company which has resulted in cancellation of their dealership. Looking to all these facts, the learned counsel appear ing on behalf of the Respondent –Company submitted that the Company Petition is not a bonafide one and ought to be dismissed.*

7. Additionally, the learned counsel appearing on behalf of the Respondent Company, submitted that under the Leave and License Agreement dated 15th July, 2010, the Respondent Company had furnished a security deposit to the Petitioners. He submitted that certain clauses of the said Agreement provide that if the security deposit was not returned, the Respondent Company would be entitled to exercise possessory lien on the license premises without having to pay any monthly compensation as set out in the said Agreement. In this view of the matter, he contended that no amounts were due and payable by the Respondent Company to the Petitioners, and therefore, the Company Petition was not a bonafide one.

8. I have heard the learned counsel for the parties at length. I do not find any substance in the arguments advanced on behalf of the Respondent – Company. It is not disputed that the licensed premises are in the possession of the Respondent –company from July, 2010 onwards as per the Leave and License Agreement dated 15th July, 2010. This Agreement has come to an end by the efflux of time on 31st March, 2015. Apart from paying the license fees for the months of July, 2010 *and August, 2010, no further license fees have been paid till date. Even though the Leave and License Agreement was for 60 months (five years) and the said period has expired by the efflux of time, the Respondent – Company continues to be in possession of the licensed premises, purportedly exercising its possessory lien under the Agreement on the ground that the security deposit has not been returned back to the Respondent – Company. I find this argument without any merit in view of the fact that admittedly no demand for return of the security deposit has ever been made by the Respondent Company. In fact, as narrated earlier in reply to the termination notice, the Respondent Company, by its letter dated 1st December, 2010 admitted that it had defaulted in making payment of the monthly compensation and sought time in that regard. This letter itself (along with the fact that the issue of possessory lien was never raised by the Respondent Company before the filing of this Petition), belies the stand of the Respondent Company that they continued to occupy the said premises because their security deposit was not returned to them. As stated earlier, no such demand was ever made and this argument of desperation is canvassed only to somehow justify occupation of of the licensed premises even beyond the period prescribed under the Leave and License Agreement.*

9. Equally, I find the argument that the claim of the Petitioners is time barred, without any substance. Firstly, as mentioned earlier, the Petitioners have adopted proceedings before the Court of Small Causes for recovery of possession and compensation way back in the year 2011. This being the case, I fail to understand how the Respondent Company can contend that the claim of the Respondent Company is barred by the law of limitation. Secondly, even if I were to assume that the filing of the aforesaid suit would not stop the time to run, the facts of the present case would show that a substantial portion of the Petitioners' claim is clearly within limitation. The record indicates that the present Petition has been filed on 21st May, 2014 and therefore the claim for monthly compensation from June, 2011 to May, 2014 is ex-facie within time. This claim is certainly more than Rs.1 lakh as stipulated in Section 434 of the Act. In this view of the matter, I find the argument on the issue of limitation wholly without substance.

10. One must also take note of the fact that in the suit filed in the Small Causes Court, the Petitioners herein had taken out an application for injunction and mesne profits. By order dated 10th December, 2012, the Small Causes Court granted interim injunction in favour of the Petitioners but rejected the prayer for mesne profits. Being aggrieved by the said rejection, the Petitioners preferred Revision Application No.51 of 2013 before the Division Bench of the Small

Causes Court. By an order dated 8th December, 2014 the Division Bench of the Small Causes Court set aside the order of rejection of mesne profits passed by the learned Single Judge and directed the Respondent Company to pay interim monthly compensation of Rs.11 lakhs from the date of institution of the suit. The arrears and compensation were to be paid in a lump sum or in five equal monthly installments. Since, the Respondent Company did not comply with the aforesaid order, by a further order dated 24th August, 2015 the defense of the Respondent Company was struck off. Thus, these facts would further indicate that the Respondent Company is heavily indebted to the Petitioners. Despite orders of the Small Causes Court, no payment has been made by the Respondent Company.

11. Looking to these facts and to give one more opportunity to the Respondent Company, during the course of arguments, I had inquired with the learned counsel for the Respondent – Company whether it was in a position to deposit in this Court the arrears of license fees. The learned counsel appearing on behalf of the Respondent –Company very candidly stated that the Respondent –Company was not in a financial position to do so. Looking to the totality of the facts of the case and the fact that huge amounts are due and payable by the Respondent – Company, the following order is passed :-

(A) The Company Petition is admitted and made returnable on 13th June, 2016.

(B) The Counsel for the Respondent waives service of the Petition under rule 28 of the Company (Court) Rules, 1959.

(C) The Company Petition shall be advertised in two local newspapers viz. Free Press Journal (in English) and Navshakti (in Marathi). In addition thereto, it shall also be advertised/published in the Maharashtra Government Gazette. Any delay in publication of the advertisement in the Maharashtra Government Gazette and any resultant inadequacy of the notice period shall not constitute non-compliance with this direction or with the Company (Court) Rules, 1959.

(D) The Petitioners shall, on or before 4th April 2016, deposit a sum of Rs.10,000/- towards publication charges with the Prothonotary and Sr. Master of this Court under intimation to the Company Registrar, failing which the Company Petition shall stand dismissed for non-prosecution without further reference to the Court. After advertisement is issued, the balance amount, if any, shall be refunded to the Petitioners.

> *12. The learned counsel appearing on behalf of the Respondent – Company prays for a stay of the operation of this order in order to enable to the Respondent Company to test this order in appeal. In view of the facts narrated above, stay is refused.*

2 Subsequent to the order of admission, respondent has not filed any further affidavit in reply. While admitting the petition, all grounds of defence raised by respondent-company have been considered and the Court came to a finding that the company is unable to discharge its debt. In fact in paragraph 11 of the order, it is also noted the learned counsel for the Respondent – Company categorically stated that the respondent-company was not in a position to deposit in this Court the arrears of license fees. On record is the affidavit of one Mahesh Shimpi affirmed on 9th June 2016 confirming advertising the petition in Free Press Journal and Navshakti on 7th April 2016 and also in Maharashtra Government Gazette for the period 21st April 2016 to 27th April 2016. Notice under Rule 28 of the Companies (Court) Rules, 1959 was waived at the time of hearing the petition.

3 I have also heard the counsel for petitioner, considered the petition, documents annexed thereto, affidavit in reply and rejoinder with documents annexed thereto. I am also satisfied that the company-G.N. Automotive Private Limited is unable to pay its debt, is commercially insolvent and requires to be wound up. Hence the company petition is allowed in terms of prayer clauses (a) and (b) which read as under :

> *"(a) That the Company, G.N. Automotive Private Limited be ordered to be wound up by and under the orders and directions of this Hon'ble Court, under the provisions of Companies Act, 1956;*
>
> *(b) That the Official Liquidator, High Court, Bombay or some other fit and proper person be appointed as Liquidator of the said Company, viz., G.N. Automotive Private Limited."*

4 The Official liquidator to take immediate steps without waiting for notification.

5 Company Petition accordingly disposed.

(K.R. SHRIRAM, J.)