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

OFFICIAL LIQUIDATOR'S REPORT NO. 153 OF 2016/LIQN.I
IN
COMPANY PETITION NO. 450 OF 2013

In the matter of the Companies Act, 1956

And

In the matter of M/s. Around Cable Systems (India) Pvt. Ltd. (In Liqn.)

Lease Plan India Pvt. Ltd. .. Petitioner

Mr.Mahendhar Aithe, company prosecutor for official liquidator present.

Ms.Aditi Pawar, counsel for official liquidator.

Mr.Avinash B. Avhad with Mr.Mahesh V. Rawool for third party-Arya Omnitalk Radio Trunking Services Pvt. Ltd.

Mr.Amrut Joshi a/w Mr.Rajendra Shahasane for Ex-directors.

CORAM : K.R.SHRIRAM, J.
DATE : 9TH AUGUST 2018

P.C.

1 The official liquidator has taken out this report for the following relief :-

> *“(a) Whether in view of para 20 & 21 above this Hon'ble Court may be pleased to direct the Arya Omnitalk Radio Trunking Services Pvt. Ltd. to deposit unpaid rent an amount of Rs.30,75,000/- (Rs.16,75,000/- and the interest due is in excess of Rs.14,00,000 @ 24% per annum) in respect of Shop No.204 situated in Lingfield Plaza, Survey No.66/67, Salunke Vihar Road, Wanowrie, Pune as per the contractual terms entered in the Leave & License Agreement dated 08.02.2012 clause 3(a) (entered between Arya Omnitalk Radio Trunking Services Pvt. Ltd. And Company (in Liqn.) with the Official Liquidator, High Court, Bombay.*
>
> *And*
>
> *(b) Any other and further order as this Hon'ble Court may be deem fit and proper.”*

2 Arya Omnitalk Radio Trunking Services Private Limited (hereinafter referred as 'Arya') had entered into a Leave and License Agreement, dated 23rd November 2011 with the company (in liquidation) with regard to a commercial office premises, viz., Shop No.204 located on 2nd floor, Lingfield Plaza, Survey No.66/67, Salunke Vihar Road, Wanowrie, Pune 411040 admeasuring 670 sq.ft. built up (the said premises).

3 In the Leave and License Agreement, the clauses which are salient for disposal of this OLR, are clauses 3, 5, 11 and 28. The same read as under :-

> *“3 (a) The License fee of the use and occupation of the said premises shall Rs.33500/- (Rupees Thirty Three Thousand Five Hundred Only) per month exclusive of service tax for the first 36 months which shall be effect from 1st September 2011 to 31st August 2014 and thereafter for the next 24 months effective from 1st September 2014 to 31st August 2016 the License fess for the use and occupation for the said premises shall be based on mutually agreed terms and conditions. The Licensee agrees and undertakes to pay the License fee by the 10th of each English calender month by cheque in favour of “Around Cable Systems (India) Pvt. Ltd.”. In the event of Licensee failing to make payment of the License fee then in addition to the other options available to the Licensor agrees and undertakes to pay interest @ 24% per annum and the said interest and License fee will become due and payable thereon till actual payment is made. In addition to the License fees, the Licensee agrees and undertakes to pay directly to Maharashtra State Electricity Board and/or any other supplier of electricity the Electricity usage charges as per separate connection and meter provided by the the Licensor for the said premises.*
>
> *(b) This agreement shall be irrevocable for the period of the first 24 months inclusive of 3 months notice period, i.e., the lock in*

period during which neither of the parties will be entitled to terminate the agreement and in case the Licensee intends to vacate during the lock in period the Licensee shall pay License Fee as agreed in Clause 3(a) herein per month or part thereof for the balance period of the lock-in. Under no circumstances shall the period of this compensation for vacancy exceed 24 months.

..

5. The Licensee has on or before the execution of this agreement hereof paid to the Licensor a sum of Rs.4,50,000/- (Rupees Four Lac Fifty Thousand Only) as and by way of interest free Security Deposit for due observance and performance of this Agreement. On expiration of this License Agreement or earlier termination by the Licensee and on the Licensee offering to hand over quiet, vacant and peaceful possession of the said premises and the furniture, fixtures, fittings and equipments as listed in Annexure "A" hereto in good condition (reasonable wear and tear excepted) and after the Licensee removes its fixtures and equipments from the said premises, the Licensor at the time shall promptly refund to Licensee without any interest and after adjustment of any amounts due and payable by the Licensee to the Licensor in terms of this agreement, thereon the amount of Rs.4,50,000/-(Rupees Four Lac Fifty Thousand Only). In the event of the Licensor failing to return the security deposit in full, interest @ 24% per annum will become due and payable thereon till actual payment is made. In such an event, the Licensee will have the right to continue to be in possession of the said premises without having to make payment under this agreement till the deposit amount along with the interest thereon is received in full.

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11 The Licensee can terminate this agreement by giving 3 (Three) months written notice to the Licensor. In case the Licensee fails to give three months clear notice, they will be liable to compensate the rent for the period of short notice to the Licensor.

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28 In the event of Licensee willfully failing and for neglecting to remove themselves from the licensed premises on the expiry of this license or prior termination /revocation of this

> *License as the case may be, the Licensees shall pay Rs.2500/- (Rupees Two Thousand Five Hundred Only) per day for every day that, the Licensee, shall continue to remain in wrongful use and occupation of the licensed premises."*

4 As per the agreement, the license fees payable was Rs.33,500/- per month exclusive of service tax for the first 36 months effective from 1st September 2011 to 31st August 2014 and thereafter for the next 24 months effective from 1st September 2014 to 31st August 2016 on mutually agreed terms and conditions. The license fees was to be paid by the 10th of each English calender month and if the license fees is not paid on the due date, Arya was to pay interest @24% per annum until the license fees was paid. The agreement also provided that there will be an irrevocable lock-in period for the first 24 months inclusive of 3 months lock-in period during which neither of the parties will be entitled to terminate the agreement and in case the Licensee intends to vacate during the lock-in period, the Licensee shall pay License Fee for the balance period of the lock-in.

5 Admittedly, the licensee gave an interest-free deposit of Rs.4,50,000/- which amount was to be returned on expiration of the License Agreement or earlier termination by the Licensee and on the Licensee offering **to hand over quiet, vacant and peaceful possession of the said premises** and the furniture, fixtures, fittings and equipments in good condition (reasonable wear and tear excepted) and **after the**

Licensee removes its fixtures and equipments from the said premises. Therefore, on the expiration of the license or earlier termination, the licensee has to offer to hand over quiet, vacant and peaceful possession and after the licensee removes fixtures and other equipments from the said premises, the licensor, 'at the time', which means, simultaneously with offering to hand over quiet, vacant and peaceful possession and after the licensee removes its fixtures and equipments, shall promptly refund the amount of Rs.4,50,000/- without any interest and after adjustment of any amounts due and payable by the Licensee to the Licensor in terms of the agreement. The consequences of not returning Rs.4,50,000/- is also provided, i.e., licensee shall be entitled to receive interest on that amount @ 24% per annum until actual payment is made and the Licensee shall have the right to continue to be in possession of the said premises without having to make payment under the agreement till the security deposit amount along with the interest thereon is received in full.

6 Arya removed its fixtures and equipments only on 19th March 2016 when the official liquidator's representative made a second visit to take possession. It should be noted that on 9th January 2016, when the official liquidator went to take possession, Arya refused to hand over possession on the ground that they have not received any orders from the Court.

7 It is the case of Arya that sometime in September 2012, a notice was received from Cosmos Co-operative Bank Limited under Section 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) wherein Cosmos Bank alleged that the company availed various credit facilities from the bank and as security had mortgaged the said premises to the Bank and as the Company (in liquidation) had failed to repay the dues to the Bank, the notice has been issued and Cosmos Bank would take physical possession of the said premises. Arya alleges that the company (in liquidation) did not disclose to them that the said premises was mortgaged, induced Arya to take the premises on the Leave and License, give interest free security deposit and spend large amounts on the interior work of the said premises. Therefore, Arya issued a notice dated 1st October 2012 calling upon the company to satisfactorily settle all issues with the bank and confirm within 30 days, failing which Arya did not wish to continue the license arrangement and called upon the company (in liquidation) to return interest free deposit by 11th November 2012 with interest thereon @ 24% per annum. By the said letter, Arya also demanded Rs.3,32,651/- which was a depreciated amount which they had incurred on the said premises without prejudice to Arya's rights to seek compensation and damages. According to Shri Avhad, this is the final letter of termination, at which

time the interest free security deposit became payable promptly and as this interest free security deposit was not paid, Arya was entitled to continue in possession, not pay any amount to Company (in liquidation) and in addition also entitled to interest @ 24% per annum.

8 Shri Avhad also submitted that Arya was compelled to terminate the Leave and License Agreement because of harassment of the bank so the question of paying any rent from September 2012 does not arise and the company (in liquidation) cannot insist upon payment of any license fee for the remaining of the lock-in period; Arya had to terminate because of the breach committed by the company (in liquidation) and hence the question of paying Rs.2,500/- per day as penal compensation under Clause 28 of the agreement also does not arise; and at no point of time, the company (in liquidation) offered to refund the amount of security deposit. The other point that Shri Avhad laid emphasis was that Arya shifted to another premises in January 2013 and was conducting business from that premises and Arya did not conduct business from the said premises though it was in possession and therefore no license fees or penal amount per day was payable. Shri Avhad relied upon electricity bills to show either NIL consumption or very small consumption.

9 Ms.Pawar for the official liquidator submitted :-

(a) that under Clause 5 of the Agreement, there is a precondition to be met before Arya becomes entitled to receive Rs.4,50,000/- interest free security deposit;

(b) Arya had to first offer to hand over quiet, vacant and peaceful possession and remove its fixtures and equipments from the said premises. Unless Arya offers, which according to official liquidator, Arya never did, to hand over quiet, vacant and peaceful possession and did not remove its fixtures and equipments, demand for refund of interest free security deposit was premature. Hence, Arya was not entitled to refund of interest free security deposit and was not entitled to continue to be in possession without making any payment under the agreement;

(c) Therefore, (a) Arya was liable to pay Rs.33,500/- plus taxes per month from 1st September 2012 upto 31st August 2014 which was the end of 36 months period [1st September 2011 to 31st August 2014 and Arya had paid upto 31st August 2012] contemplated under Clause 3 of the License Agreement and from 1st September 2014 until 19th March 2016 when Arya removed its fixtures and equipments, Arya was to pay at Rs.2,500/- per day;

(d) though in the OLR, the liquidator has claimed only upto

9th January 2016, because that is the date on which the official liquidator sealed the premises, in fact, the official liquidator is entitled to Rs.2,500/- per day upto 19th March 2016 on which date Arya, admittedly, removed its fixtures and equipments; Arya could have shifted its fixtures and equipments on 9th January 2016 and handed over the keys and possession to the official liquidator but Arya refused to co-operate and did not hand over possession or the keys of the said premises or remove its fixtures and equipments and therefore, should pay Rs.2,500/- per day upto 19th March 2016.

10 Shri Joshi for ex-directors submitted that the stand of Arya that it was not carrying on business in the said premises from January 2013 till March 2016 is incorrect. Shri Joshi, relying on Paragraphs 6, 13 and 14 of an affidavit of one Rajesh Deepak Pawar, submitted that Arya, in its affidavit in reply, has admitted that it was conducting its business from the said premises till the premises was sealed by the official liquidator on 9th January 2016. The said paragraphs read as under :-

> *6 I say that from the date of both the above referred leave and license agreements; Objector company was conducting its business from shop nos.204 and 205 which are amalgamated and have common entrances, till the same were sealed by the official liquidator on 9.1.2016. I seek to emphasize here that applicant company had continued to remain in possession of shop Nos.204 and 205 even after expiry of license period because company under liquidation and said Ms.Supriya Dasgupta*

respectively have till date not returned refundable deposit amount and interest thereon to Objector company.

………

13 I say that subsequent to the termination notices issued by Objector company, the Objector company shifted its office from shop No.204 and 205 to shop no.203 & 210 on the same fllor in January 2013 retaining shop Nos.204 and 205 as per the terms of Agreeement.

14 I say that Objector company vide notices dated 1.10.2012 had terminated leave and license agreements dated 23.11.2011 and called upon company under liquidation and Ms.Supriya Dasgupta to return the refundable security deposits by 01.11.2012. However, company under liquidation and Ms.Supriya Dasgupta failed to refund security deposits to Objector company by the said date. Therefore, pursuant to leave and license agreements dated 23.11.2011, Objector Company continued to remain in possession of shop no.204 and 205, whereby Objector company was not required to pay any rent. Hence, I say that claim stated by Official Liquidator in affidavit dated 12.4.2016 is disputed by Objector company and hence Official Liquidator cannot seek any direction from this Hon'ble Court against Objector Company in the present proceedings.

11 Shri Joshi also submitted that in an affidavit of the said Rajesh Deepak Pawar, authorized signatory of Arya, affirmed on 12th September 2017, at Paragraph 14, Arya has admitted that it was entitled to retain possession even though Arya claimed to have shifted its office from January 2013 onwards. Paragraph 14 reads as under :-

"14 I say and submit that at the costs of repetition that as the evident from the facts and circumstances mentioned by me in the affidavit in reply filed in this Hon'ble Court it is seen that as per clause 5 of the Leave and License Agreement dated 23/11/2011 the objector company had right to continue in possession of the licensed premises if there is failure on the part of the licensor to repay return the amount of security deposit. By virtue of clause 5 of the said agreement, the objector company

retained the possession of the licensed premises even though the objector company shifted its office from January, 2013 onwards. It is also an admitted fact that the licensor, i.e., the Ex-Director/s of the company under liquidation have not repaid the amount of security deposit till today and hence the objector company was within its legal right to hold on to the possession of the shop No.204 and 205."

12 The issues, therefore, are :

(a) Whether Arya validly terminated the contract?;

(b) Whether Arya was justified in stating that it is entitled to refund of interest free security deposit of Rs.4,50,000/-?; and

(c) Whether Arya was entitled to retain possession without making payment?

13 Termination notice, according to Arya is dated 1st October 2012. First of all in that notice Arya is not offering to hand over quiet, vacant and peaceful possession of the said premises. Secondly, in that notice, Arya does not state that it has removed its fixtures and equipments from the said premises. Further, even after the letter of 1st October 2012, Arya has filed an application on 3rd December 2012 before the Debt Recovery Tribunal, Pune for leave to continue in the possession of the said premises. After the SARFAESI proceedings was commenced by Cosmos Co-operative Bank Limited, it is Arya's case that it filed Security Application No.156 of 2012 before the Debt Recover Tribunal, Pune. It was the case of Arya that it spent money in maintaining the premises and therefore should be

continued to be in the premises during the entire period of three years, i.e., upto 31st August 2014. The Debt Recovery Tribunal dismissed the application saying that it had no jurisdiction. Therefore, in my view, Arya has not given a valid termination notice because in December 2012, i.e., two months after the notice of 1st October 2012 was sent, Arya's intention was not to vacate the premises but to still continue therein which it did admittedly until 19th March 2016.

14 Shri Avhad's submission that in January 2013, Arya vacated the premises and did not carry on business from the said premises and therefore, no compensation is payable also is not acceptable. First of all it is immaterial whether Arya carried on business in the said premises. Admittedly, Arya was in possession and Shri Avhad, in fairness, said that Arya was in possession till 19th March 2016, when it finally removed its furnitures, fixtures and equipments etc. Shri Avhad submitted that the electricity bills show very minimum consumption. Again I have to state it is immaterial whether they carried on business and hence minimum or NIL electricity consumption does not make any difference. Pursuant to an order passed by this Court, Mahavitaran submitted a month-wise chart of the Consumer Personal Ledger for the said premises for the period January 2014 to March 2016. Shri Avhad submitted that the electricity bills for the

period from January 2014 to March 2016, for some months show very low consumption like 4 units or 3 units or 7 units, certain months show consumption of 177 units to 687 units. Strangely for the period May 2015 and June 2015, consumption of 286 units and 2222 units are shown. Possibly, the bills for the previous months were on estimated consumption basis and 2222 units was the actual reading. Shri Avhad also submitted that Arya was paying the bills until January 2016. In any event, as stated earlier, these are immaterial.

15 As noted above, termination was not valid. In effect Arya had not offered to hand over quiet, vacant and peaceful possession and factually did not hand over possession. Arya removed its fixtures and equipments only on 19th March 2016. In Clause 5, Arya was entitled to refund of interest free security deposit **"at the time"** after removing its fixtures and equipments from the said premises. Shri Avhad submitted that the company (in liquidation) never wrote to Arya offering refund of interest free security deposit. In my view, agreement does not require the company (in liquidation) to do that. It was Arya's obligation to first offer to hand over quiet, vacant and peaceful possession, then remove its fixtures and equipments and only thereafter the obligation of the company (in liquidation) to promptly refund, subject to deduction of any amounts due and payable, will arise. Therefore, to conclude, Arya not having become

entitled to refund of interest free security deposit cannot claim a right to be in possession without having to make any payments under the agreement dated 23rd November 2011.

16 In the circumstances, Arya is directed to pay license fees of Rs.33,500/- plus taxes from 1st September 2011 to 31st August 2014 together with interest thereon @ 24% per annum and from 1st September 2014 to 19th March 2016 at Rs.2,500/- per day. It is clarified that the interest @ 24% per annum on Rs.33,500/- will accrue on monthly basis.

17 Arya is given four weeks time to pay these amounts to the official liquidator. If these amounts are not paid, the official liquidator may take such steps as available, in accordance with law.

18 OLR accordingly disposed.

(K.R. SHRIRAM, J.)

Shraddha Kamlesh Talekar

Digitally signed by Shraddha Kamlesh Talekar
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