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

COMPANY PETITION NO.930 OF 2015

The Loot India Private Limited ….Petitioner

Vs.

Houseful International Limited ….Respondent

Mr. Subhash Jha, Advocate a/w. Ms. Sanjana Pardeshi i/b. Law Global for petitioner.
Mr. Cyrus Ardeshir, Advocate a/w. Mr. Chetan R. Shah i/b. Mr. Rakesh Agrawal for respondent.

CORAM : K.R.SHRIRAM, J.
DATE : 26th MARCH, 2018

P.C.:

1 Petitioner has approached this Court to wind up the company on the basis that the company is unable to discharge its debts and hence is commercially insolvent.

2 Petitioner and the company had entered into a leave and license agreement dated 27th July, 2011. The leave and license was relating to commercial premises being Unit No.001/A admeasuring 6000 sq. ft. or carpet area in the basement and three specified car parking spaces on ground floor in the compound in the building known as Poonam Chambers, situated at B-Wing, Dr. Annie Besant Road, Worli, Mumbai – 400 018 (the said premises). The duration of the agreement was for five years. Clause 29 provided that "*there will be a lock-in-period of 36 months*". Clause 27 provides that "*there being no breach on the part of the licensee, the licensor*

shall not be entitled to terminate this agreement for the entire period of sixty months……….". Clause 31, on which the whole issue circumducts, reads as under :

> *"31. Any notice intended to be given by any party hereto to the other, shall be deemed to be properly and validity given if it is given or sent by registered post to the licensor's address as hereinabove and to the licensee to its licensed premises address."*

3 Several disputes came up between the parties and the company filed a suit in City Civil Court on 11th July, 2013. On 26th December, 2013 petitioner issued a notice of termination. The dispute was referred to mediation and based on consent terms filed on 11th April, 2014, the Mediator submitted a report to the City Civil Court. As per the consent terms filed, the company admitted that a sum of Rs.67,74,820/- was payable by the company to petitioner in respect of the license fees of the said premises till the date of the consent terms and the company agreed to pay the said amount of Rs.67,74,820/- in three equal installments of Rs.22,58,273/-. Three cheques were issued, two of which were post dated cheques. Admittedly, these cheques were honoured. The company also gave an undertaking to pay petitioner regularly the license fees of Rs.6 lakhs from May, 2014 and strictly in compliance with the terms of the leave and license agreement dated 27th July, 2011. Petitioner also agreed to furnish copies of certain documents mentioned in paragraph 7 of the consent terms. Ofcourse, the company states these were never given and petitioner states it

was given on more than one occasion.

4 It is petitioner's case that after these three cheques were paid, the company did not make any payment for the period beginning 1st May, 2014. It is petitioner's case that due to certain disputes with Reliance Capital, Court Receiver came to be appointed for the said premises and Court Receiver took possession on 26th November, 2015 and therefore, the company has to pay license fees for the period 1st May, 2014 to 25th November, 2015 at Rs.6 lakhs per month plus other outgoings which the company was to pay under the agreement. In addition, petitioner is also claiming that the company is liable to pay damages in the sum of Rs.50,000/- per day as provided in the leave and license agreement, without indicating the period.

5 Petition is based on the simple point that as per the consent terms, the company agreed to pay Rs.6 lakhs per month and from 1st May, 2014 till 25th November, 2015 when Court Receiver took possession, the company was in possession but still has not paid any license fees and therefore, the amount is liquidated amount and a debt which the company is unable to discharge and hence the company be wound up.

6 Company admits having entered into consent terms and that it paid Rs.67,74,820/-. But it is the company's case that it issued a notice of

termination dated 26th May, 2014 giving three months notice which was required to complete the lock-in-period of three years and therefore, the company was only bound to pay license fees for the said period which is much less than Rs.36 lakhs security deposit that petitioner had and after adjusting the amounts payable, petitioner has to pay back to the company a sum of Rs.12,15,331/-. If the termination notice has been given perhaps the company may have a very good case but if the termination notice has not been given, perhaps petitioner will be entitled to the entire amount which is claimed but the issue is whether termination notice has been given.

7 Mr. Jha, counsel for petitioner, submitted that Clause 31 of the leave and license agreement expressly provides how the termination notice has to be served. Mr. Jha further submitted that any notice to be given by a party to the other has to be sent or given to the address mentioned in the leave and license agreement and admittedly, the alleged notice of termination has been sent to a address which is not the address to which the notice was to be sent and therefore, even if a notice has been sent, the Court should not even accept that as valid notice.

8 On the contrary, Mr. Ardeshir, counsel for respondent submitted that Clause 31 provides two modes of service, i.e., if it has to given other than by RPAD then to any address but if the notice is to be sent by RPAD and hence deemed be given, then it should be sent to the licensor's address

mentioned in the agreement. Mr. Ardeshir further submitted that notice has been given to petitioner and in any event, whether notice has been given or not is a disputed question of fact for which evidence has to be lead and therefore, the company petition is not maintainable. Mr. Ardeshir submitted that before the petition came to be filed, the company had on 7th April, 2015, already filed a suit against petitioner in the Small Causes Court being LD/83/2015 whereby the company is claiming a sum of Rs.12,15,331/- from petitioner. Mr. Ardeshir submitted that after the petition was filed even petitioner has filed suit in the Small Cause Court on 29th February, 2016 being LD/62/2016 for recovery of license fees of Rs.1,48,24,047/-.

9 In the reply dated 18th May, 2015 to the statutory notice dated 5th May, 2015, at paragraph 3 the company has expressly stated as under :

> *3. With reference to paragraph no.3 and 4 of said letter, suffice to say that clause 5 and 6 of said consent terms is to be read with leave and license agreement and not in isolation. Moreover, it is necessary to record that your client failed to follow undertaking given in clause 7 of said consent terms. <u>It is matter of record that by letter dated 26.5.2014 and in exercise of rights so conferred by virtue of said clause 28 on internal page no.8 of said leave and license agreement, my client had given to your three (3) months due notice in writing and duly terminated said leave and license agreement.</u> In said notice of termination, my client in no terms of ambiguity recorded that said period of 3 months shall start reckon from date of said notice dated 26.5.2014.”*
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> (emphasis supplied)

10 Petitioner has responded to the reply to the statutory notice in which petitioner has not denied the fact that the letter of termination dated 26th May, 2014 was received. Mr. Jha submitted that in response to the reply,

petitioner's advocates have stated “our client repeats, reiterates and confirms ……..”. In my view that does not suffice because in reply to the statutory notice, the clear stand of the company is, by virtue of the termination dated 26th May, 2014, they were liable to pay license fees only to such period which would complete the lock-in-period and no other amount is payable. Infact in the reply to the statutory notice, the company has also sought refund of Rs.12,15,331/. In my view, petitioner should have atleast denied that it ever received the statutory notice. It should also be noted that though in the petition, reply to the statutory notice has been referred to and copy annexed, even in the petition there is no reference to or denial of receipt of this termination notice. Petitioner has also not referred to the suit filed by the company against petitioner in the Small Causes Court on 7th April, 2015 which is perhaps more than two months before this petition was lodged. It is settled law that where disputed questions of facts are involved and the Court cannot conclude that the defence raised is moonshine, petition has to be dismissed. In view of the two suits pending, i.e., suit filed by petitioner and suit filed by respondent, there is no admitted arrears of rent for any particular period. What is the arrears of rent is something that has to be ascertained. Moreover, whether notice of termination dated 26th May, 2014 was issued is also a fact which is disputed and evidence has to be led. Whether the company has to pay compensation for the period 1st May, 2014 to 25th November, 2015 or has to refund

Rs.12,15,331/- is also dependent on the said letter of termination.

11 In view of the above, I am unable to hold that the defence of the company is moonshine or a clever camouflage to avoid payment of a debt. I cannot gather myself to say there is a debt payable and that the company is unable to discharge its debt.

12 Petition dismissed.

(K.R. SHRIRAM, J.)