Santosh

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

SANTOSH SUBHASH KULKARNI

Digitally signed by SANTOSH SUBHASH KULKARNI
Date: 2022.12.16 17:24:49 +0530

INTERIM APPLICATION NO. 518 OF 2020
IN
OFFICIAL LIQUIDATOR'S REPORT NO. 18 OF 2020

Ajay Mathur ...Applicant
In the matter between
Varkey Overseas Trading Co. P. Ltd. ...Petitioner
Versus
The Official Liquidator & ors. ...Respondents

Mr. E. S. Asokan, a/w Sachin Pandey, for the Applicant.
Mr. V. G. Sreeram, for Respondent no.2.
Mr. Shanay Shah, for the Official Liquidator.

CORAM: N. J. JAMADAR, J.
DATED : 14th DECEMBER, 2022

ORDER:-

1. The applicant, who is the Ex-Director of M/s. Sumeet Machines Limited (In Liquidation), has preferred this application, *inter alia,* for the following reliefs:

> "(a) That this Hon'ble Court be pleased to hold that the workmen/employees dues have been adjudicated by the Hon'ble Industria Court vide orders dt.3-5-2011 & 9-12-2016 in ULP Nos.295 of 1999 & 108 of 2001, accordingly the Official Liquidator to adjudicate their respective claims;
>
> (b) the Hon'ble Court be pleased to discharge/reject the OLR No.18/2020/Liqn.II, and restrain the Official Liquidator from disbursing any amounts received from DRT-I, Mumbai and/or dealing with the same without further orders of this Hon'ble Court."

2. Pursuant to the order dated 17th June, 2005, M/s. Sumeet Machines Limited (In Liquidation), was ordered to be wound up by this Court in Company Petition No.299 of 1994 preferred under Section 433 and 434 of the Companies Act, 1956. The Official Liquidator, High Court, Bombay, came to be appointed as the Liquidator with a direction to take possession of the assets of the company in liquidation and proceed in accordance with law.

3. In adherence to an order dated 5th March, 2014, the Official Liquidator invited the claims from the workers and creditors in liquidation. In accordance with Rule 148 of the Companies (Court) Rules, 1959, the Official Liquidator received in all 259 claims from workers and other creditors. Post hearing, the Official Liquidator passed an adjudication order on 28th April, 2015.

4. The applicant had participated in the adjudication proceedings before the Official Liquidator. It was the stand of the applicant that the workers of the company (in liquidation) were not entitled to wages from the date of the closure of the company till the date of winding up order. Instead, in accordance with the order passed by the Industrial Court in Complaint (ULP) No.295 of 1999, the applicants were entitled to wages for two months only. The Official Liquidator, however, did not agree with the contention of the applicant and held that workers dues were required to be computed with reference to the date of order of winding up.

5. Being aggrieved, the applicant initially preferred Company Application No.961 of 2016. On 25th June, 2018, the applicant withdrew the said application with liberty to file a fresh application as the official liquidator agreed to reconsider the claims and pass a fresh adjudication order.

6. The applicant avers, on 9th January, 2020, the Official Liquidator filed OLR No.18 of 2020 and, without providing an effective opportunity of hearing, the said OLR which proposed distribution of the assets of the company in liquidation amongst the workers and other creditors, far in excess of the entitlement of the workers, came to be allowed. According to the applicant, judicial determination by the Industrial Court in Complaint (ULP) No.295 of 1999 prevails over the adjudication by the Official Liquidator. In accordance with the determination by the Industrial Court, at best, the total claim of the workmen/employees would not be more than Rs.36,00,000/-. In contrast, the Official Liquidator had admitted the claims of the workmen to the tune of Rs.20 Crore approximately. This has caused serious prejudice to the applicant, who had infused capital of more than Rs.8.4 Crore in the Company (in liquidation). Hence, this application.

7. An affidavit-in-reply is filed on behalf of the Official Liquidator. It is contended that the adjudication of the workers claim by the Official Liquidator is in order. Claims of 233 workmen aggregating to an amount of Rs.8,28,07,838/- have been admitted. In addition, the Official Liquidator has admitted the claims of (i) 26 workers for an amount of Rs.79,13,031/-, (ii) 4 ordinary creditors dues for an amount of Rs.29,09,690/-, (iii) 2 government dues for an amount of Rs.1,07,80,318/- and (iv) 4 employees dues for an amount of Rs.4,03,885. Thus, the Official Liquidator filed a report before DRT-I for disbursement of the amount to satisfy the admitted claim of the workers and creditors. On 26th August, 2019, the immovable assets of the company (in liquidation) were sold by the DRT-I for a sum of Rs.25,50,96,000/-. By a subsequent order dated 30th September, 2019, DRT-I released an amount of Rs.10,56,54,765/- to the Official Liquidator. Thereafter, the Official Liquidator filed OLR/18/2020 seeking orders of the Court for declaration of dividend to 249 workers, four employees and two Government dues. The said OLR came to be allowed by this Court by order dated 9th January, 2020.

8. The Official Liquidator contends that the adjudication order dated 28th April, 2015 and the order dated 9th January, 2020 in OLR/18/2020 have attained finality and the amounts have been disbursed. Since the applicant had not assailed the adjudication order, at this stage, it is not open to the applicant to seek re-adjudication of the workmen/employees dues. Nor the order passed in OLR/18/2020 can be varied, as it is has already been implemented.

9. Sumeet Machine Employees Union, respondent no.2, has also filed an affidavit-in-reply and resisted the application. Respondent no.2 has also questioned the tenability of the application. It is contended that pursuant to the order passed by this Court on 9th January, 2020, the Official Liquidator has disbursed money to almost all the workers. Therefore, the application does not deserve to be entertained.

10. I have heard Mr. Asokan, the learned Counsel for the applicant, Mr. Shah, the learned Counsel for the Official Liquidator and Mr. Sreeram, the learned Counsel for respondent no.2.

11. The learned Counsel for the applicant submitted that the company (in liquidation) had suffered a closure of its business on account of the misfeasance of the workmen and their representatives, almost five and half years prior to the winding up order. In the circumstances, the cut off date for determination of the entitlement of the workmen ought to be the date of the closure of the operations of the company in liquidation and not the date of the winding up order.

12. Mr. Asokan strenuously submitted that on the principle of "no work, no pay", the workmen were not entitled to claim wages for the period the company was closed. In the case at hand, according to Mr. Asokan, the issue is beyond cavil and settled by a judicial determination by the judgment and order passed by the Industrial Court in Complaint (ULP) No.295 of 1999, which was filed by respondent no.2 Union. In the said judgment, the learned Judge, Industrial Court, had recorded a categorical finding that the workmen were not entitled for full wages from 1st January, 1997 till they resumed duties. The Industrial Court recorded a further finding that there was no lockout or lay off in the company (in liquidation) with effect from 1st January, 1997.

13. Though the Industrial Court came to the conclusion that the company (in liquidation) had engaged in unfair labour practices under Item Nos.9 & 10 of Schedule-IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("The M.R.T.U. & P.U.L.P. Act") by not paying the wages to the workers for the months of November and December, 1996, yet, the company was directed to pay wages for the said months only. This implied that the workmen were not entitled to wages beyond the said period. Therefore, computation of wages by reckoning the date of winding up order as the cut off date, by the Official Liquidator, according to Mr. Asokan, is in teeth of the judicial determination.

14. In opposition to this, Mr. Shah, the learned Counsel for the Official Liquidator, would urge that the application is wholly misconceived. Mr. Shah submitted that the challenge to the adjudication order on behalf of the applicant remained abortive. Though, the applicant had filed Company Application No.961 of 2015 challenging the adjudication, the same was withdrawn on 25th June, 2018 with liberty to file a fresh application. The adjudication was, however, not assailed till this Court accepted the OLR/18/2020 and approved the distribution of the dividend in accordance with the adjudication order.

15. Mr. Shah also invited the attention of the Court to the order dated 10th February, 2017, whereby the applications preferred by respondent no.2 and Sumeet Employees Welfare Association assailing the adjudication orders were disposed of with a direction to the Official Liquidator to comply with the orders of adjudication read with the clarification issued in the additional affidavit dated 30th November, 2016 filed by the Official Liquidator. Mr. Shah would urge that the Official Liquidator adjudicated the claims and proposed the disbursement of the dividend in conformity with the aforesaid adjudication order of the Court dated 10th February, 2017 in Company Application No.884/2015 and Company Application No.23/2016. Eventually, pursuant to the order dated 9th January, 2020, the Official Liquidator disbursed the dividend. In this view of the matter, at this stage, the direction sought by the applicant for re-adjudication is wholly misconceived, submitted Mr. Shah.

16. I have extracted the prayers in the instant application on purpose. From a bare perusal of the prayers, in the instant application, it does not appear that the applicant assails the order of adjudication. Nor the order passed by this Court dated 9th January, 2020 in OLR/18/2020 is sought to be recalled or varied. Even if the prayers in the application are considered generously to construe as the challenge to the adjudication order and the consequent disbursal of dividend, the crucial question which wrenches to the fore is, whether a case for re-adjudication is made out?

17. To start with, from the perusal of the adjudication order dated 28th April, 2015, it becomes abundantly clear that the applicant participated in the adjudication proceedings before the Official Liquidator and had raised the contentions which are taken in the instant application as regards the entitlement of the workmen. The Official Liquidator, however, did not accede to the contention of the applicant and proceeded to adjudicate the workmen's dues with reference to the date of winding up order.

18. Indisputably, the adjudication was initially assailed by the applicant in Company Application No.961/2015. The said application was withdrawn with liberty to file a fresh application. As the said order dated 25th June, 2018 bears upon the prayers in the instant application, it is extracted below:

> "1. Mr. Mahimkar states that in view of the order dated 10.02.2017 passed in Company Application No.884 of 2015 and Company Application No.23 of 2016 in Company Petition No.299 of 1994, he would withdraw this application, consider the affidavit and order passed and if necessary, file a fresh application.
>
> 2. Application dismissed as withdrawn with liberty as sought."

19. It would be contextually relevant to note the order dated 10th February, 2017, passed in Company Application

No.884/2015 and Company Application No.23 of 2016, which find reference in the aforesaid order.

20. The said order dated 10th February, 2017 in Company Application No.884/2015 and Company Application No.23/2016, reads as under:-

> "By these applications, the applicants have impugned the adjudication orders dated 4th March, 2015 and 28th April, 2015 passed by the official liquidator to the extent of the calculation of variable Dearness Allowances, Bonus and Notice Pay.
>
> 2. Mr. Reddy, learned counsel appearing for the official liquidator invited my attention to the additional affidavit dated 30th November, 2016 filed by the official liquidator in these company applications and more particularly paragraph 8 thereof.
>
> 3. Learned counsel appearing for both the applicants submits that in view of the stand of the official liquidator now taken in paragraph 8 in the additional affidavit dated 30th November, 2016 if it is implemented by the official liquidator, the grievance of the applicant would be met with. Statement is accepted.
>
> 4. The official liquidator is accordingly directed to comply with the aforesaid orders of adjudication read with the clarification issued in the additional affidavit dated 30th November, 2016 expeditiously."

21. It is imperative to note that after the aforesaid orders, the Official Liquidator adjudicated the claims of workmen and other creditors and admitted the following claims:

Sr. No.	Details of the Creditors	Amount Admitted
1.	223 Workers	8,28,07838/-
2.	Supplementary list consisting of: (i) 26 workers for an amount of Rs.79,13,031/-, (ii) 4 ordinary creditors due for an amount of Rs.29,09,690/-, (iii) 2 government dues for an amount of	

	Rs.1,07,80,318/-, (iv) 4 employees dues for an amount of Rs.4,03,885/-.	2,20,06,924/-
	Total Admitted Claim	**10,48,14,762/-**

22. Post adjudication, the Official Liquidator filed OLR/18/2020. By an order dated 9th January, 2020, the said OLR was accepted by this Court in the following terms:

> "I have heard learned counsel for the Official Liquidator and have perused the averments made in the report.
>
> 2. The reasons recorded in the report are accepted. The report is made absolute in terms of prayer clauses (a) to (d). No order as to costs."

23. The applicant is essentially aggrieved by the disbursement of the dividend in conformity with the aforesaid order of the Court. In this context, I find substance in the submission of Mr. Shah, the learned Counsel for the Official Liquidator and Mr. Sreeram, the learned Counsel for respondent no.2 Union that the adjudication order and consequent disbursal have attained finality as the aforesaid order dated 9th January, 2020 was not called in question by the applicant. The application proceeds on the premise as if the adjudication and disbursement are still underway. The material on record shows to the contrary.

24. Having obtained the liberty to file a fresh application to assail the adjudication order, the inaction on the part of the applicant to do so till the admission of the claims by the Official Liquidator and acceptance of the report by this Court by order dated 9th January, 2020 can be said to be at peril of the applicant. The challenge to the instant application, on this count, cannot be said to be purely technical as the Official Liquidator has acted upon the adjudication order pursuant to the approval to the disbursement of dividend by order dated 9th January, 2020.

25. The submission on behalf of the applicant that the order of the Industrial Court seals the issue of entitlement of the workmen for wages cannot be accepted unreservedly. In fact, the Industrial Court recorded a finding that the company (in liquidation) had engaged in unfair labour practices. It is true that the company (in liquidation) was directed to pay wages for the period of November and December, 1996, which were unjustifiably withheld. However, the said finding can not be construed as foreclosing the claim of the workmen for the wages for all intent and purpose. Under Sub-section (3) of Section 445 of the Companies Act, an order of winding up shall be deemed to be notice of discharge to the officers and employees of the company, except when the business of the company is continued. In the circumstances, the Official Liquidator was justified in reckoning the date of winding up as the date upto which the workmen were entitled to claim wages.

26. In any event, in the absence of challenge to the adjudication order and the acceptance of OLR/18/2020 by order dated 9th January, 2020, at this length of time, especially when the dividend has been disbursed to the body of workmen pursuant to the order dated 9th January, 2020, I am not inclined to accede to the prayers in the instant application.

27. Hence, the following order:

: O R D E R :

The application stands rejected.

[N. J. JAMADAR, J.]