THE HON'BLE SRI JUSTICE B. VIJAYSEN REDDY

COMPANY APPEAL No.29 of 2017

JUDGMENT:

By order dated 05.08.2016, the application of the petitioner for payment Rs.11,00,000/- towards licence fee due for the years 2001 to 2006 was rejected by the Official Liquidator in OL/AP/CLAIMs/F-69/RCC.22/2000/2016/81 in RCC.No.22 of 2000, holding that the appellant herein failed to furnish proof evidencing that the company has used the above building and is in arrears of licence fees for the said period. However, it was held that in the absence of proof, the office of the Official Liquidator has sent a notice in Form No.68 dated 07.08.2015 calling upon the appellant to appear before the office and produce further evidence in support of its claim and that no response was received from the appellant. By concluding that there is no sufficient proof in support of the claim made by the appellant for payment of Rs.11,00,000/- against the company in liquidation, the application of the appellant was rejected.

2. Mr. P.S.S. Kailash Nath, learned counsel for the appellant, submitted that a memorandum of agreement was entered into by the appellant company with M/s. Tungabhadra Industries Limited on 07.12.1962 granting leave and licence to use the plant and machinery, factory building and premises in the schedule property

for carrying its business. Later, the agreement was modified by subsequent agreements dated 25.01.1963, 15.12.1963 and 18.03.1964. The agreement of licence was extended from time to time and the last of the extension was up to 30.09.1997. The company in liquidation agreed to pay an amount of Rs.2,75,000/- per annum as licence fee to the appellant herein. Initially, the company paid the licence fee regularly, later due to financial constraints, the company became insolvent. The company approached the BIFR for restructuring its unit in the year 1991. Subsequently, the company was ordered to be wound up by order dated 09.07.2001. The company is liable to pay Rs.27,50,000/- towards licence fee for the period from 1992 to 09.07.2001 and also an amount of Rs.11,00,000/- towards licence fee for the period 2001 to 2006. Thus, the company in liquidation has to pay an amount of Rs.38,50,000/- to the appellant.

3. It is further stated that thereafter Official Liquidator was appointed by this Court in the winding up proceedings. A claim was made by the appellant company on 16.05.2006 for recovery of Rs.11,00,000/-. The Official Liquidator has issued notice of hearing for adjudication of claims on 25.08.2015. The appellant appeared before the Official Liquidator along with documentary evidence and order dated 05.08.2016 was passed rejecting the claim of the appellant.

4. It is submitted that the licence agreement is part of the record. Orders have been passed in Company Application No.1668 of 2004 inviting tenders for sale of plant and machinery of the company in liquidation. The Official Liquidator has issued letter dated 27.06.2005 informing the appellant that there will be inspection of the intending bidders for the plant and machinery lying in the premises of the appellant, as such permission was sought for inspection. Pursuant to the said request, on 01.07.2005, the appellant informed the Official Liquidator that they would cooperate for inspection and sale of the plant and machinery. Later, on 29.07.2005 a further letter was addressed to the appellant company stating that there is a sale of the plant and machinery lying in the property of the appellant company and the appellant was also asked to participate in the auction.

5. Learned counsel for the appellant submitted that there is no dispute that the plant and machinery of the company in liquidation is lying in the premises owned by the appellant. Thus, the Official Liquidator could not have asked the appellant to produce sufficient proof in support of its claim. It is stated that after the sale of plant and machinery, the Official Liquidator in its letter dated 06.12.2005 addressed to M/s. Gayatri Associates to take possession of the sold plant and machinery and also mentioned that the assets of the

appellant should not be disturbed. The letters have been overlooked by the Official Liquidator while rejecting the claim.

6. Learned counsel for the appellant referred to letters dated 28.12.2005 and 25.07.2006 addressed by the Official Liquidator to the appellant for payment of watch and ward salaries, which are due for the last four years and contended that the same would clearly show that the company in liquidation has taken the premises of the appellant on licence and has fallen in arrears. A further Memorandum of Agreement dated 11.06.1982 submitted by the appellant showing the leave and licence was ignored by the Official Liquidator. In the year 1991, the company made an application to BIFR for reconstruction, but the same could not happen and winding up order was passed by this Court in the year 2001.

7. In the common counter filed by the Official Liquidator, it is stated that the appellant has not filed all the documents such as MOU dated 07.12.1962, subsequent agreements dated 25.01.1963, 15.12.1963 and 18.03.1964, licence renewal agreement, renewal of licence etc. in support of its contentions. The appellant has not furnished any information whether they have taken any legal steps against the respondent company for recovery of their dues towards licence fee from the year 1992; that upon invitation of claims of the company in liquidation, the appellant has

submitted two claims against the company in liquidation by submitting a copy of MOU dated 11.06.1982. However, the appellant failed to submit sufficient documentary proof evidencing the respondent company in liquidation has not paid the licence fee from the year 1992 onwards. The respondent company issued a notice under Form No.68 dated 07.08.2015 advising the appellant to appear before the Official Liquidator and produce further evidence in support of its claim.

8. Mr. J. Srinadha Reddy, learned counsel for the Official Liquidator, submitted that on the ground of non-submission of proof, the claim of the appellant was rejected.

9. It is not in dispute that the company in liquidation was the licencee of the appellant herein. The plant and machinery was owned by the appellant company. The MOU dated 11.06.1982, which is filed along with the appeal, is not in dispute. Further, it is not in dispute that the company was referred to BIFR in 1991 and the company petition was admitted by this Court in 2001 and winding up order was passed on 09.07.2001. Thus, it cannot be said that the company in liquidation has not used the building, plant and machinery of the appellant company. When the licence of the company in liquidation pursuant to MOU dated 11.06.1982 is not in dispute, the burden is on the company in liquidation to prove that

licence fee has been paid. It is not the case of the company in liquidation and the Official Liquidator that the plant and machinery and the property was not owned by the appellant company and the company in liquidation was not the licencee of the appellant company. In fact, several correspondences have been exchanged between the appellant and the Official Liquidator wherein it is acknowledged that the appellant is the owner of the plant and machinery. As pointed out by the learned counsel for the appellant, the letters dated 27.06.2005, 16.12.2005 and 28.12.2005 clearly establish that the company in liquidation has set up its plant and machinery by taking the premises on licence from the appellant company. To the letter of the Official Liquidator dated 28.12.2005 for remitting 70% of the expenditure for watch and ward salaries totalling to Rs.1,80,134/-, the appellant company issued reply dated 16.05.2006 that the licence fee to the tune of Rs.38,50,000/- for the period of 14 years i.e. from 1992 is due and payable by the company in liquidation at the rate of Rs.2,75,000/- per year and requested for adjustment of watch and ward salaries and pay the balance licence fee. The licencee or the tenant, as the case may be, is bound to pay the licence fee/lease amount until expiration of the lease or determination of lease in accordance with law.

10. It is not the case of the Official Liquidator that the licence agreement has come to an end and there was eviction of the

company in liquidation/licencee by following due process of law. The licence of the company in liquidation continued until the assets were sold to M/s. Gayatri Industries and possession was taken. Thus, the question of the appellant furnishing proof of usage of plant and machinery by the company in liquidation does not arise. The contention of the Official Liquidator that the appellant has to prove non-payment of licence fees and that documents of proof are not submitted is unsustainable. The company in liquidation made application for reconstruction before BIFR in the year 1991 and eventually was wound up by the High Court in the year 2001. The possession of the plant and machinery was handed over to the purchaser – M/s. Gayathri Industries in the year 2006. Thus, when the assets of the company in liquidation were in the premises of the appellant company, it cannot be said that the premises was not used. The impugned order holding that the appellant company failed to furnish proof of usage of building by the company in liquidation and arrears of licence is perverse and absurd.

In view of the above observations, the company appeal is allowed. Pending miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

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B. VIJAYSEN REDDY, J

November 11, 2022
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