

(2003) 01 BOM CK 0069

In the Bombay High Court

Case No : Notice of Motion No. 2276 of 2002 in Appeal No. 156 of 2002 in
Company Application No. 372 of 2000 in Company Petition No. 895 of
1998

Amritlal Chemaux Ltd.

APPELLANT

Vs

Official Liquidator and Another

RESPONDENT

Date of Decision : 17-01-2003

Acts Referred:

Companies Act, 1956 — Section 446

Citation : (2003) 2 ALLMR 221 : (2003) 4 BomCR 108 : (2003) 114 CompCas
336 : (2003) 48 SCL 26

Hon'ble Judges : S.J. Vazifdar, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : Sanjay Jain, Virag V. Tulzapurkar, Prateek Sakseria and A. Bilawala,
instructed by Bilawala and Co, for the Appellant; J.B. Chinai and B.B. Parekh, for
the Respondent

Final Decision : Allowed

Judgement

H.L. Gokhale, J.—Heard Mr. Virag Tulzapurkar with Mr. Sakseria for the appellants. Mr. Chinai appears for respondent No. 1 and Mr. Jain appears for the interveners and Mr. Rakesh Maradia and Mr. Rasiklal Maradia.

2. This appeal seeks to challenge the order passed by a learned single judge (Karnik J.) on December 21, 2001 below the report of the official liquidator dated October 23, 2001, and further resubmitted report dated November 29, 2001 in Company Petition No. 895 of 1998.

3. The facts leading to the impugned order and this controversy are as follows:

The appellants are owners of property known as "Rang Udyan", which is an industrial estate situated at Mahim, Mumbai. Premises on the second floor in Building No. 1 of this property were given to one Amar Dye-Chem Ltd. (presently in liquidation) on leave and licence basis beginning from September 1, 1960.

These are office premises of the size of 4,850 sq. ft. The appellants have filed a suit in the Court of Small Causes at Bombay for recovery of these premises way back in June 1998. During the pendency of that suit, the said Amar Dye-Chem Ltd. was directed to be wound up by an order passed by a company judge of this court (Lodha J.) on December 9, 1998, in Company Petition No. 895 of 1998. Inasmuch as the appellants' suit for eviction was pending in the Court of Small Causes at Bombay, the appellants took out Company Application (Lodging) No. 64 of 1999 to seek leave u/s 446 of the Companies Act to continue to prosecute that suit. This application was subsequently numbered as Company Application No. 372 of 2000.

4. That application reached before Rebello J. on February 12, 1999. The learned judge asked the official liquidator to inform as to whether he required the premises and wanted to continue in possession thereof and if so, how long. A report was made accordingly thereafter on March 3, 1999. In prayer (a) of that report, it was prayed that the official liquidator may be permitted to retain the said premises. It was submitted in the report that the entire premises were not required but only a part thereof was required to be retained for keeping the record of the company until it was completely wound up. Therefore, it was prayed that the compensation may be appropriately apportioned and he may be permitted to pay accordingly. Prayer (b) was an alternative prayer which sought that in the event prayer (a) was to be granted, the official liquidator may be permitted to take an advance of Rs. 50,000 for paying the compensation to the landlord every month. Prayer (c) sought that the leave application moved by the appellants' landlord may be rejected.

5. The company application was heard by Nijjar J. on April 1, 1999, and by his order, the learned judge recorded the statement of the liquidator that the premises were required for a period of two years. In para. 2 of his order, the learned judge also recorded that the official liquidator had stated before him that the premises will be vacated after two years. Accordingly, the learned judge made the report absolute in terms of prayer (a). He allowed prayer (b) also and therefore he held that prayer (c) was redundant. This order is very crucial and therefore we reproduce this order in its entirety.

"1. Mr. Gupta states that the premises will be required for a period of two years for conducting the winding up proceedings.

2. I have perused the report submitted by the official liquidator. Heard counsel for the applicant. In view of the fact that the official liquidator has stated that the premises will be vacated after two years, no further orders are required in the application at present.

3. Prayer clause (a) of the report is made absolute with the aforesaid observations. Prayer (b) is allowed. Prayer clause (c) is redundant in view of the order passed earlier.

S. O. for further orders in first week of April 2001."

6. It so happened that respondent No. 1 liquidator was not regular in paying the compensation. The appellants therefore took out Company Application No. 691 of 1999 and thereon orders were passed on October 25, 1999, and June 22, 2000, directing respondent No. 1 to make regular payment. In the order dated October 25, 1999, the statement of respondent No. 1 was recorded that he had not taken possession of the entire premises. Respondent No. 1 was therefore directed to pay compensation proportionately for the part of the premises in his possession. The appellants were permitted to take possession of the premises which were stated to be not in the possession of respondent No. 1. It is not disputed that the appellants have therefore taken possession of the particular part and it is only a part of the premises which is in the possession of respondent No. 1 now with which we are presently concerned. After the expiry of two years under the order passed by Nijjar J. dated January 1, 1999, possession of this remaining part of the premises was not returned to the appellants which was also expected to be returned after two years, Nijjar J. had adjourned the company application to the first week of April, 2001. It reached before Kochar J. on June 14, 2001, when it was submitted on behalf of the official liquidator by filing a reply that the remaining part of the premises could not be handed over since certain movables were lying therein and which were to be auctioned and sold. The learned judge observed that though he appreciated the difficulties expressed by the official liquidator, yet the appellants could not be asked to wait indefinitely to get possession of the premises which they were lawfully entitled to get. It was submitted before the learned judge that the official liquidator needed three months time to auction the goods and to hand over the possession. The learned judge therefore in para. 3 of his order dated June 14, 2001, directed as follows :

The official liquidator shall hand over the possession of the suit premises on or before September 30, 2001, "irrespective of the fact that the movables are disposed of or not."

7. The learned judge disposed of Company Application No. 372 of 2000.

8. Respondent No. 1 official liquidator had made reports on July 31, 2001 and October 23, 2001 seeking extension of time to hand over the premises by December 31, 2001. In the meanwhile, in November 2001, respondent No. 1 conducted the auction sale of the movables lying in the premises. The appellants were basically interested in the premises and not in the movables, yet with a view to see to it that this objection does not remain any further, the appellants participated in that auction and gave the highest bid which came to be accepted by the liquidator. This bid was for Rs. 3,40,000. The official liquidator accordingly resubmitted his report on November 29, 2001, seeking confirmation of the sale in respect of the movables in favour of the appellants.

9. When this report came up for consideration before another single judge (Karnik J.) on December 21, 2001, two former directors of the company in liquidation Mr. Rakesh Maradia and Mr. Raskilal Maradia appeared through their counsel and submitted that they were prepared to give a higher bid. Counsel

appearing on their behalf submitted that his clients were willing to increase the bid to Rs. 4,00,000. The learned judge recorded this statement in para. 10 of his order and therefore declined to confirm the sale of the movables. In para. 9 of his order, the learned judge also recorded that when the first of the above-referred orders came to be passed on April 1, 1999, the Bombay Rent Lodging House Control Act, 1947, was applicable. Now that the Bombay Rent Act, 1947 had come to be repealed and replaced by the Maharashtra Rent Control Act, 1999, and in view of the changed legal position, the official liquidator is now entitled to claim consideration for surrendering possession. The learned judge therefore directed the official liquidator not to hand over possession of the said office premises. It is this order which is under challenge in the present appeal.

10. It is material to note that in this appeal, a notice of motion was moved earlier which came up before another Division Bench (A. P. Shah and Mrs. V.K. Tahilramani JJ.) on March 18, 2002, and the motion was made absolute in terms of prayer (a). This prayer (a) stayed the operation of the impugned order and therefore it is submitted that in view thereof, the liquidator was bound to hand over possession of the remaining part of the premises to the appellants, yet the same was not done. That apart, in the meanwhile, another difficulty cropped up for the appellants, namely that the suit filed by the appellants in the Court of Small Causes at Bombay was being taken up for hearing and therefore the appellants apprehended that the suit will be dismissed for want of leave u/s 446 of the Companies Act. An order was therefore passed on August 22, 2002, and again on August 29, 2002, directing that the Court of Small Causes will not dismiss the suit for want of leave. Although the motion in this appeal was to be heard first, it was agreed amongst counsel appearing for the appellants as well as for the official liquidator that the appeal itself be heard first and accordingly the appeal is being heard finally.

11. Mr. Tulzapurkar, learned counsel appearing for the appellants, submitted that the learned judge (Karnik J.) has clearly gone beyond the report that was made by the official liquidator to the learned judge. The report made by the official liquidator on November 29, 2001, had two prayers. Prayer (a) was whether after perusing the valuation report, the highest offer of Rs. 3,40,000 given by the appellants for the movables should be accepted and then consequential prayer (b) namely in the event answer to prayer (a) was in the affirmative, whether to deliver the said movables to the highest offerer. Mr. Tulzapurkar submitted that if this was the report made by the liquidator, an order was expected accordingly. The report was clearly in line with the orders passed earlier by Nijjar J. and Kochar J. Both the learned judges had recorded clearly that the liquidator was to hand over the remaining part of the premises after two years. That period had elapsed. Further extension granted was also over. The difficulty raised was that there were movables in the property and they were to be sold. It was only for this limited purpose that extension was granted. Now the auction sale had also been conducted and the order that was sought was acceptance of the bid given by the highest bidder. Mr. Tulzapurkar submitted that the orders of Nijjar J. and

Kochar J. had clearly recorded that the liquidator was to hand over the possession of the premises. The order of Nijjar J. dated April 1, 1999, had recorded the statement of the official liquidator that he required the premises for a period of two years. The order also recorded that the premises will be vacated after two years. It is therefore that the learned judge had directed that prayer (c) for leave u/s 446 of the Companies Act was redundant and made the report absolute in terms of prayers (a) and (b). The order passed by Kochar J. was also in line with this earlier order. That being the position, there was no occasion for the learned judge (Karnik J.) to go anywhere beyond the report which was made by the liquidator and beyond the period of two years which was provided by the predecessor judges.

12. Mr. Tulzapurkar submitted that in fact what the learned judge had done was to review the orders passed by the two predecessor judges, for which he did not have the jurisdiction. Besides, as stated above, the prayer of the liquidator was also not with respect to the premises in any manner whatsoever. It was sought to be contended by Mr. Chinai, learned counsel appearing for the official liquidator, across the Bar that the submission on the change in the legal position on the Maharashtra Rent Controlling Act, 1999 having come into force could be canvassed. Mr. Tulzapurkar appearing for the appellants submitted that firstly the submission was not tenable in law. This is because u/s 3(l)(b) of the Maharashtra Rent Control Act, 1999, the premises of companies with paid up capital over Rs. 1 crore were outside the coverage of the Act, and the company in liquidation was one such. Besides, u/s 58(2)(a) of the new Act, pending proceedings were not covered thereunder. Therefore, even after the new Act coming into force, it was not permissible for the official liquidator to seek consideration for surrendering tenancy. But that apart, it was a serious submission as such and if the liquidator wanted to canvass it, surely he would have made the submission in his report and a prayer accordingly to the learned judge. There was no such report or a submission or a prayer by the liquidator to the learned judge and that was quite correct and that was in consonance with the submissions which were made in the earlier reports and the liquidator could not have made a report contrary to what were the reports made earlier. That being so, the only, prayer of the official liquidator before the learned judge was to confirm the auction sale and the learned judge ought to have confined to that.

13. The learned judge (Karnik J.) in para. 7 of his order, while dealing with the order passed by Kochar J. has observed that it appeared to him that Kochar J. was led to believe that by an order dated April 1, 1999 (of Nijjar J.) the official liquidator was allowed to retain the possession of the concerned premises for a period of two years only. The learned judge (Karnik J.) indicated that this interpretation (of Kochar J.) was wrong and on account of this "misbelieve" that the official liquidator was allowed to retain the possession only for two years that the subsequent order had been passed by Kochar J, Now as we have seen from the reports made by the official liquidator from time to time as also from the order passed by Nijjar J., it was clear that the liquidator had represented to Nijjar

J. and which is what Nijjar J. has recorded in his order that the premises were required for a period of two years and also that the premises will be vacated after two years. No attempt was made to move Nijjar J. seeking review of that order nor any review of that order was sought any time thereafter. A statement made to the court binds the particular party more so when the party is a public officer. The record to the court with respect to what transpired at the time of hearing as recorded in the judgment of the court is conclusive and that has been held by the apex court in the case of State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, . This being the position, one cannot read anything other than what is recorded by Nijjar J. in his order of April 1, 1999, and which is what Kochar J. has done while passing his order subsequently. There was no question of the learned judge (Kochar J.) being led to believe anything erroneously or forming any misbelieve as observed in the order of Karnik J. The observations of the learned judge (Karnik J.) on the resubmitted report of November 29, 2001, were clearly in excess of his jurisdiction and uncalled for. As stated earlier, it was not a review of the order passed by the earlier judges nor was he sitting in appeal and hence it was not open to Karnik J. to have drawn such an inference that his predecessor (Kochar J.) was misled to believe or had formed a misbelieve. This being the position, as far as the submission with respect to the return of the premises is concerned, there was no prayer objecting to the return of the premises to the landlord on behalf of the official liquidator and there was no occasion for the learned judge (Karnik J.) to refer to the change in the legal position. The observation of the learned judge (Karnik J.) in the opening sentence of his impugned order that there was something more than what meets the eye ex facie in these reports of the official liquidator was equally uncalled for.

14. We may also mention that according to Mr. Tulzapurkar, at the highest the premises were required for continuing to retain the movables until they were disposed of. He submitted that now the auction sale has been conducted and even for this purpose also, the premises were required at the highest until December 31, 2001, which period is also over long back. The retention of the premises for any such purpose would be beyond the provision of Section 457 of the Companies Act. Mr. Tulzapurkar, learned counsel for the appellants, relies upon a judgment of the apex court in the case of Ravindra Ishwardas Sethna and Another Vs. Official Liquidator, High Court, Bombay and Another, , wherein the apex court has held that after the winding up order, the liquidator was not supposed to carry on the business of the company in liquidation and utilisation of the premises of the company by letting out the premises, etc., were clearly outside the scope and powers of Section 457 of the Companies Act. He also relied upon a Division Bench judgment of this court, which is in line with the aforesaid judgment, in the case of Saraswat Co-operative Bank Ltd., Mumbai Vs. Chandrakant Maganlal Shah and Others, . The operative directions are in paras. 26 and 27 of that judgment. However, in the light of the view that we have taken earlier with respect to the scope of the matter before the learned judge (Karnik J.) a further deliberation on this aspect is not necessary .

15. Mr. Chinai, learned counsel appearing for the official liquidator, although raised the plea with respect to the change in the rent control law and earlier contended that there was no undertaking to vacate, later on fairly accepted that this plea was not raised in the report of the liquidator and therefore there was no reason for the learned judge to go into that aspect and therefore there is no need for us to go into the same once over. The only other submission of Mr. Chinai was that as far as the movables are concerned, a better offer, if available, should always be considered. Inasmuch as the two interveners had given a better offer before the learned single judge, we asked Mr. Jain counsel appearing for the interveners, as to whether they were maintaining the offer of buying the movables for Rs. 4,00,000 in that auction. However, on taking instructions, Mr. Jain made a statement that his clients were not inclined to buy the movables. In view of this conduct of these two interveners, it is clear that their conduct is not bona fide. They appeared before the learned judge at the last moment. The learned judge was in fact made to believe that they were seriously interested in buying those movables and it is therefore only due to their intervention that the learned judge did not confirm the sale of movables in favour of the appellants. Now when these interveners are asked to maintain their offer, they have declined to do so. In fact, it is these interveners who are responsible for leading the learned judge to pass the order that he has passed. It is also stated that the submission with respect to the change in the rent control law was advanced on their behalf before the learned judge though it is very much disputed by counsel appearing for the appellants. However, even if that be so on both these counts, namely with respect to the movables as well as with respect to the premises, it is these interveners who led the learned judge (Karnik J.) to pass the order which he has passed and it has led to this appeal. This entire exercise has become necessary only because of these two interveners who were former directors of the company in liquidation and we do not find it to be a bona fide exercise. It is because of their intervention that the appellants were required to file this appeal and therefore they will have to bear the costs of this appeal.

16. In the circumstances, we allow this appeal and set aside the order dated December 21, 2001, passed by the learned single judge (Karnik J.) which is impugned in this appeal. As far as the report dated November 29, 2001, made to the learned judge on which he has passed the impugned order is concerned, we accept that report and confirm the sale of the movables in favour of the appellants for the amount of Rs. 3,40,000 as reported in the liquidator's report. As stated earlier and accepted by Mr. Chinai also, the premises were required to retain the movables only up to December 31, 2001. More than one year has gone thereafter and in view of this appeal being allowed, the official liquidator is directed to hand over the possession of the part of the premises which he presently retains. The official liquidator will hand over possession of balance part of the premises within four days on receipt of the amount from the appellants as per the report.

17. While paying the purchase price, the appellants will be entitled to deduct Rs.

43,656 which are arrears of unpaid compensation due to them at the rate of Rs. 3,638 per month from February 2002, till the end of January 2003. This figure of Rs. 3,638 is seen in the report of the official liquidator dated March 25, 2000, and this is as per the direction of Smt. Baam J. in her order dated June 22, 2000, passed in these proceedings. Thus the balance to be paid by the appellants comes to Rs. 2,96,344.

18. The two interveners, Mr. Rakesh Maradia and Mr. Rasiklal Maradia, to pay Rs. 10,000 each to the appellants by way of cost of this appeal.

19. Appeal is accordingly allowed with costs.

20. The official liquidator and the parties to act on the authenticated copy of this order.

21. Certified copy expedited.

22. P. C. Notice of Motion No. 2276 of 2002 in Appeal No. 156 of 2002 :

Although the official liquidator is directed to hand over the possession of the part of the premises remaining with him, Mr. Tulzapurkar points out that still it will be necessary to continue the suit filed in the Court of Small Causes at Bombay and that will be for the purposes of the arrears of rent/compensation.

23. In view of this, motion is made absolute in terms of prayer (a).