(2007) 11 DEL CK 0067

In the Delhi High Court

Case No : F.A.O. (OS) No.: 435 of 2007 and C.M. Nos.: 14852 of 2007 and 14850 of 2007

Arun Sahay APPELLANT

Vs

Sunila Wadhwan and Others RESPONDENT

Date of Decision : 02-11-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Companies Act, 1956 — Section 446, 446(1), 446(2)(a), 446(2)(b), 466
Constitution of India, 1950 — Article 137

Citation : (2007) 9 ILR Delhi 120 Supp

Hon'ble Judges : Dr. M.K. Sharma, C.J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Sidharth Yadav with Mr. R.P. Pandey, for the Appellant;

Final Decision : Dismissed

Judgement

M.K. Sharma, C.J.

CM No. 14851/2007

Allowed, subject to all just exceptions.

FAO(OS) No. 435/2007 and CM Nos. 14852/2007 and 14850/2007

1. This appeal is directed against the order dated 17th August, 2007 passed by the learned Single Judge dismissing the application of the appellant-defendant No. 2 under Order VII Rule 11 of the Code of Civil Procedure, 1908. Learned counsel for the appellant submits that in view of provisions of Section 446 of the Companies Act, 1956 (hereinafter referred to as the, Act for short), the suit filed by respondents 1 to 4-plaintiffs for recovery of possession, permanent injunction, arrears of rent, mesne profits etc. is not maintainable and is liable to be dismissed on the ground that M/s Perfect Drugs Limited, respondent No. 5-defendant No. 1 is now under liquidation. The appellant-Mr. Arun Sahay claims that he was Managing Director of M/s Perfect Drugs Limited and the said

company had taken on rent property No. M-15, Green Park, New Delhi from respondents 1 to 4-plaintiffs. The appellant also admits that there was default in payment of rent and M/s Perfect Drugs Limited became a sick industrial units under the Sick Industrial Companies (Special Provisions) Act, 1985. It is stated that subsequently a winding up petition was filed in this Court against M/s Perfect Drugs Limited and vide order dated 22nd January, 2001 an order of winding up and appointment of Liquidator was passed.

2. We have examined the application under Order VII Rule 11 being IA No. 3566/2004. In the said application, the appellant has not relied upon and specifically referred to Section 446 of the Act. On the other hand, his entire edifice for rejecting the plaint was that in July, 2002 there was an oral agreement between the appellant-defendant No. 2 and the respondent-plaintiff No. 1 for renting out the property of the appellant @ Rs. 20,000/- per month. It is further alleged that for various reasons, the rent was agreed to be reduced from what was being paid by M/s Perfect Drugs Limited and there was further reduction from Rs. 20,000/- to Rs. 16,000/- per month with effect from 1st September, 2003 on account of substantial repairs carried out by the appellant. The appellant further submits that he has made payment of Rs. 3,39,000/- on various dates pursuant to the oral agreement.

3. The application under Order VII Rule 11 does not disclose any ground for dismissal of the plaint at the initial stage. Various disputed questions of facts have been raised in the application. It cannot be said that the plaint does not disclose cause of action. To be fair to the learned counsel for the appellant, he did not press the ground and facts raised and stated by him in IA No. 3566/2004 We may, however, note that as per respondents 1 to 4-plaintiffs, ground floor of the aforesaid property and the garage was rented out to M/s Perfect Drugs Limited under two separate lease deeds on monthly rent of Rs. 30,000/- and Rs. 10,000/-respectively. M/s Perfect Drugs Limited failed to pay rent after May, 1999 and Rs. 5,60,000/- it is claimed is payable towards arrears of rent upto 14th September, 2000 and further sum of Rs. 4,00,000/- is payable towards arrears of rent @ Rs. 40,000/- per month from 15th September, 2000 to 14th July, 2001. Respondents 1 to 4-plaintiffs have also claimed damages for the period after 15th July, 2001 to 31st December, 2003 @ Rs. 40,000/- per month amounting to Rs. 11,80,000/-. Respondents 1 to 4-plaintiffs have accounted for payment of Rs. 3,39,000/- and accordingly have prayed for recovery of the balance amount of Rs. 18,01,000/-. The appellant-defendant No. 2 is made a party to the suit and decrees both against M/s Perfect Drugs Limited and defendant No. 2 have been prayed for.

4. As has been rightly pointed out by the learned Single Judge, appellant-defendant No. 2 cannot claim any protection u/s 446 of the Act. The appellant is admittedly in occupation of the property and it is the case of the respondents 1 to 4-plaintiffs that his occupation is unauthorised. Respondents 1 to 4-plaintiffs claim possession of the property and other reliefs. The suit against the appellant-

defendant No. 2 is certainly maintainable.

5. We may also note that respondents 1 to 4-plaintiffs have already filed an application before the learned Company Judge and have also moved an application before the learned Single Judge for issue of notice to the Official Liquidator. It is apparent that appropriate orders in due course shall be passed by the learned Company Judge and the learned Single Judge on these applications and we need not express any final opinion in this regard.

6. We may, however, note that Section 446 of the Act has been interpreted and examined by the Supreme Court in Harihar Nath and Others Vs. State Bank of India and Others, , wherein it has been held that the Company Court has jurisdiction to grant leave to file suit and proceedings against the company even if such leave was not obtained before commencement of the suit or legal proceedings. Further Company Court has jurisdiction to grant leave with retrospective effect also. The object of Section 446 is not to cancel or nullify any claim against the company but to ensure that the assets of the company under liquidation/provisional liquidation are equally distributed amongst the creditors and shareholders and to avoid multiplicity of litigation. In this case Supreme Court has observed as under:-

16. This Court in Bansidhar Shankarlal vs. Mohd. Ibrahim indirectly affirmed the position that the limitation is to be considered only with reference to the suit or proceedings, while considering the position of suit/proceeding initiated after an order of winding up, without obtaining leave of the Company Court. This Court held thus: (SCC p., 903, para 7)

[We do not think that there is anything in the Act which makes the leave a condition precedent to the institution of a proceeding in execution of a decree against the company and failure to obtain leave before institution of the proceeding entails dismissal of the proceeding. The suit or proceeding instituted without leave of the court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed instituted on the date granting leave.

(emphasis supplied)

17. When there is no period of limitation for an application under the first category of cases u/s 446(1) of the Act, it is inconceivable and illogical to apply the period of limitation prescribed under Article 137, to an application seeking leave falling under the second category.

18. The object of Section 446 of the Act is not to cancel, nullify or abate any claim against the company. Its object is to save the company which has been ordered to be wound up, from unnecessary litigation and from multiplicity of proceedings and protect the assets for equitable distribution among its creditors and shareholders. This object is achieved by compelling the creditors and others to come to the court which is winding up the company and prove their claims in

the winding up. For this purpose, all suits and proceedings pending against the company are also stayed subject to the discretion of the winding-up court to allow such suits and proceedings to proceed. When a winding-up order is passed, the effect is that all the affairs pertaining to the company in liquidation, including all suits/proceedings by or against the company, come within the control and supervision of the winding-up court. The winding-up court has to decide whether it will let the suit/proceeding to continue in the court where it is pending, or it will itself adjudicate the suit/proceeding. Thus, u/s 446(1), the winding-up court only decides about the forum where the suit has to be tried and disposed of. The Limitation Act which prescribes the periods within which a party can approach a court seeking remedies for various causes of action, is not attracted to such applications u/s 446(1) of the Act. However, as elaborate arguments were advanced on this issue, we will deal with them in some more detail.

20. It is now well settled that if any winding-up order is passed during the pendency of a suit against the company, and if the suit is continued without obtaining leave in spite of that bar contained in Section 446(1), the decree passed is only voidable at the instance of the liquidator, and not void ab initio. In fact, where such decree has been passed against the company and others, the only person who can avoid the decree on the ground of non-compliance with Section 446(1) of the Act, is the Official Liquidator of the company and not the other defendants. A suit/proceeding filed against a company, prior to the order of its winding up, does not come to an end on the passing of an order of winding up. The order of winding up merely stays further proceedings in the suit/ proceeding. The suit/proceeding becomes dormant. Various alternatives are possible when a suit gets so stayed. The plaintiff in the suit can move an application u/s 446(1) of the Act, and when leave is granted, proceed with the suit. If the leave is refused, the suit may be transferred to the Company Court for being tried and disposed of u/s 446(2)(a) of the Act. The plaintiff may also file an application for transfer of the suit to the Company Court for disposal u/s 446(2)(a). Alternatively, the plaintiff may get the suit dismissed with liberty to make a claim u/s 446(2)(b) of the Act. Even if the suit is proceeded with, without obtaining leave of the Company Court, either not being aware of the order of winding up or ignoring the provisions of Section 446(1), the resultant decree will not be void, but only be voidable at the instance and option of the Official Liquidator of the company. It is also possible that the court passing the winding-up order may at any time, on the application either of the liquidator or of any creditor or contributory, make an order staying the winding up either altogether or for a limited time on such terms and conditions as the court deems fit, u/s 466 of the Act. When the winding up is so stayed, a suit against the company (filed before the winding-up order) which stood stayed u/s 446(1) could be proceeded with, even though leave had not been obtained to proceed with the suit. We have referred to these alternative possibilities to show that having regard to the nature of an application u/s 446(1) of the Act, it does not attract Article 137.

7. Similar view has been taken by the Supreme Court in the case of State of JandK vs. UCO Bank, reported in (2005) 10 SCC 331. In view of the above, we do not find any merit in the present appeal and the same is dismissed. Consequently, all pending applications are also dismissed.