(1999) 07 BOM CK 0059

In the Bombay High Court

Case No : Notice of Motion No. 59 of 1998 in Suit No. 1287 of 1987

Central Bank of India APPELLANT

Vs

The Official Liquidator and others RESPONDENT

Date of Decision : 16-07-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Companies Act, 1956 — Section 446

Citation : (1999) 4 BomCR 743

Hon'ble Judges : Pratibha Upasani, J

Bench : Single Bench

Advocate : Ajay Panikar, Ms. Vidya Udas instructed by Haresh Mehta and Co., for workers, Mallapurkar, representative of the Court Receiver, P.M. Pradhan, for Jalgaon Municipal Council, Sanjay Kothari, Avinash Joshi instructed by Mulla and Mulla, for the Appellant; G.P. Yadav, Company Prosecutor, U.G. Mahajan instructed by . Divekar and Co., I.A. Nasikwala instructed by Majumdar and Co., for the Respondent

Judgement

Dr. PRATIBHA UPASANI, J.—This Notice of Motion is taken out by the plaintiffs, praying that the Court Receiver, High Court, Bombay be directed to sell the immovable property described in Exhibit "A-1" to the plaint and the plant and machinery described in Exhibit "B" to the plaint with all powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908 either by public auction or private treaty as the Court Receiver may deem fit and proper and pay over to the plaintiffs the net sale proceeds thereof in or towards the suit claim.

2. The suit is a usual bank suit, failed by the plaintiffs bank, namely, Central Bank of India, having its Heads Office at Nariman Point, Bombay and inter alia, having a Branch Office at Jalgaon, against the defendants for various reliefs which are usually claimed in a Bank suit. Defendant No. 1, The Khandesh Spinning & Weaving Mills Co. Ltd., is a company registered under the Companies Act, having its registered office at Jalgaon and a Branch Office at Bombay. Defendant Nos. 2 to 5 are its Directors, while defendant Nos. 6, 7, and 8 are the

guarantors, who have promised repayment of the loan availed by defendant No. 1 and granted by the plaintiffs Bank with respect to diverse credit facilities like Cash Credit Facility, Bills Discounting Facility, Working Capital Term Loan Facility etc.

3. It appears that by an order dated 9th September, 1984 in Company Petition No. 59 of 1984, the 1st defendant company was ordered to be wound up and Official Liquidator, High Court, Bombay was appointed as Liquidator. The plaintiffs were allowed to continue the above suit against defendant No. 1 u/s 446 of the Companies Act, 1956 by bringing on record the Official Liquidator as Liquidator of the 1st defendant company. The total claim of the plaintiffs bank against defendant No. 1 is to the tune of Rs. 7,34,04,496.22.

4. In the affidavit in support of the Notice of Motion, the plaintiffs have narrated the chronology of relevant events. It is stated by them that by an ad-interim order dated 9th July 1984 passed by Mr. Pendse, J., (as he then was). Court Receiver, High Court. Bombay, was appointed Receiver of the suit immovable properties described in Exhibit "A-I" to the plaint, machineries, stocks etc. described in Exhibits "B, E, J, O, and S" to the plaint with all powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908 with further directions to appoint defendant No. 1, namely The Khandesh Spinning & Weaving Mills as agents of the Court Receiver for the purpose of running the Mills, provided defendant No. 1 agreed to act as agent of the Court Receiver on the terms and conditions to be settled by the Court Receiver.

5. Pursuant to this order, the Court Receiver took physical possession of all the movable and immovable suit properties of defendant No. 1 situated at Jalgaon, as the agency of running of Mills of the 1st defendant could not be materialised.

6. By subsequent order dated 1st August, 1995, passed by Mr. A.P. Shah, J., in Notice of Motion No. 894 of 1992, taken out by the Khandesh Mills Workers Industrial Co-operative Society Ltd., the Court Receiver was directed to appoint the said Workers'' Society as his agent in respect of the factory premises and the machinery, on the yearly royalty of Rs. 69,00,000/ -. The Court Receiver was directed not to insist for security. It was directed that the said Workers'' Society would execute requisite agency agreement in favour of the Court Receiver and appropriate undertakings for safety of the factory and the machinery that may be directed by the Court Receiver. It was clarified in the said order that the Shopping Complex and the Godown would not be covered by the agency which would be restricted to main factory premises and the machinery.

7. It appears from the proceedings that the said Workers'' Society, however, failed to execute the agency agreement in favour of the Court Receiver; Nor could it deposit with the Receiver, the yearly royalty of Rs. 69,00,000/- and thus, forfeited its right to act as agent of the Court Receiver in respect of the factory premises or the machinery. The 1st defendant also failed to act as agent of the Court Receiver in respect of the suit property.

8. Industrial Development Bank of India, who are defendant No. 6 in this suit and who were the plaintiffs in Suit No. 2248 of 1984 filed by them against the present defendants viz.. The Khandesh Spinning & Weaving Mills Co. had taken out Notice of Motion No. 1763 of 1991, praying inter alia for appointment of Receiver appointed in the above suit in respect of the suit securities also in their suit, seeking directions against the Court Receiver to demarcate the Shopping Complex and Godown from the main Mills property of the 1st defendant. There was also a prayer that the Court Receiver be directed to sell the segregated properties comprising of Shopping Complex and the Godown in such lot or lots as may be feasible and/or convenient on such terms and conditions as the Court Receiver might deem fit and that the net amount realised be credited to the said suit and to the above suit. By an order dated 21st February, 1992, Mr. Jhunjhunuwala, J., made the said Notice of Motion absolute in terms of prayers (a), (b) and (c).

9. In spite of the above mentioned order, the Court Receiver, however, could not sell the said Shopping Complex because of the proceedings adopted by the Workers'' Society. Defendant No. 1 Mill was closed in the year 1984 and the machinery was lying idle right from that time. The company was ordered to be wound up. Defendant No. 1 and the Workers'' Society both had failed to carry out agency agreement and carry out further orders of the Court. The plaintiffs'' contention, therefore, is that in view of all these, it was not worth-while to keep the said machinery and suit property idle when there are huge claims against the defendants. It is also submitted by them that the plaintiffs are incurring huge expenses for insuring the huge suit properties and that they have to incur monsoon repairs every year and that this is going on for last 15 years. They have stated that they are required to incur heavy security charges for guarding the said huge suit-property. It is, therefore, prayed that it is in the interest of all the concerned parties that no further expenses be incurred and the suit property be sold either by public auction or private treaty as the Court Receiver may deem fit and proper and pay over to the plaintiffs, the net sale proceeds thereof in or towards the satisfaction of the plaintiffs'' claim in the suit. Hence the Notice of Motion.

10. It is pertinent to note that almost all the defendants are supporting this Notice of Motion and they have stated so very, specifically in their respective affidavits in reply.

11. Defendant No. 4 has filed affidavit in reply dated 24th July, 1998, wherein he has stated in no uncertain terms that he is supporting the plaintiffs'' Notice of Motion for reasons mentioned by the plaintiffs in their affidavit in support. Defendant No. 4 has also reiterated that defendant No. 1 so also the workers'' society have failed to execute or comply the order of the Court, no agency agreement has been executed, no payment of royalty has been made by them and that it is not at all feasible to restart the Mill when there are huge claims pending against defendant No. 1 and, therefore, Court Receiver be directed to

proceed with the sale as per the order dated 21st February, 1992 passed by Mr. Jhunjhunuwala, J., in Notice of Motion No. 1763 of 1991. He has stated that he is fully in agreement with what is stated by the plaintiffs and has agreed that in the interest of all the parties in the suit, no further expenses be incurred and the property be sold as expeditiously as possible in terms of prayer (a) of the present Notice of Motion. 11-A.The Company Prosecutor, who was present also stated that he was submitting to the orders of the Court, while Mr. Nasikwala appearing for defendant Nos. 6 and 7 also has supported the plaintiffs. Mr. Pradhan, who was representing the Jalgaon Municipal Council, though he was not parry to the suit, submitted that there are huge claims by the Jalgaon Municipal Council against defendant No. 1 and the Municipal dues should be paid first.

12. On these scenario, the only person opposing the plaintiffs'' Notice of Motion was Mr. Panikar, who was representing the workers society. According to him, the State Government had sanctioned Rs. 5 crores towards the share in the working capital of defendant No. 1 in the year 1990. It is further submitted by Mr. Panikar that the workers had decided to sacrifice on their part, and to raise Rs. 1 crore from their own sources as their capital. He further stated that the workers would not claim wages from the Society for the closure period and that they would also agree for 15% wage cut for the first five years after the restarting of the Mill. He also stated that the workers would not claim any bonus for the first five years and that there would be freezing of D.A. at the point index of 803 as on March 1989. He admitted that the workers society had failed to comply with the order passed by Mr. A. P. Shah, J., dated 1st August, 1995. He also conceded that the amount of Rs. 69 lakhs could not be deposited with the Court Receiver as directed by Mr. A.P. Shah, J., and no agency agreement could be executed. He also admitted that an amount of Rs. 5 crore sanctioned by the State Government was not released by the Government so far during this period of 9 years. He stated that, however, the workers were hopeful that in spite of all these drawbacks and dark picture, if the shopping complex and the Godowns were sold, the Mill could be restarted.

13. Mr. Kothari appearing for the plaintiffs drew attention of the Court to the Court Receiver''s Report dated 28th June, 1999. It appears that pursuant to the order dated 5th March, 1999. the Court Receiver was directed to consider the proposal of selling of Shopping Complex and the Godowns. It also appears that the Court Receiver appointed M/s. Nadkarni & Co., Architects, who by their letter dated 31st March, 1999 submitted their report. In the said report, they have submitted that while segregating the Shopping Complex from the rest of the suit property, certain concessions in the requirements of the relevant building regulations will have to be sought from the Corporation. It was further slated in the said report that the Godown and Shopping Complex and the Mills were likely to have some of the servicemens, such as drains with septic tank, water supply pipes with suction tanks and pumps etc. in common and such common services would have to be identified and segregated. It was further stated that unless the aforesaid suggestions were implemented and the portions of Godown Complex

and Shopping Complex were duly sub-divided in the Municipal and Revenue records, it would not be possible to ascertain the area of the land appurtenant thereto and prepare the valuation. This report of M/s. Nadkarni & Co. remitted on 31st March, 1999, is annexed by the Court Receiver to her report dated 28th June, 1999.

14. It was thus, clear that segregating the Godown and the Shopping Complex was not an easy task and for the difficulties mentioned by the Architects in his report, selling the Shopping Complex and Godown was not at all possible or feasible.

15. I have heard Mr. Kothari, appearing for the plaintiffs, Mr. Mahajan i/b. M/s. Divekar 8s Co. for defendant No. 4 and Mr. Nasikwala, appearing for defendant Nos. 6 and 7, who were supporting the plaintiffs and Mr. Panikar, who was appearing for the Workers'' Society. I have also heard Mr. Mallapurkar, representative of the Court Receiver, so also Mr. Yadav, Company Prosecutor.

16. Mr. Panikar was banking very much on the sale of the Godown and Shopping Complex, which according to the Receiver''s Report was not possible and feasible to sell. I have also gone through the entire proceedings. The Government Pleader has also filed his affidavit in reply, wherein he has stated that the amount of Rs. 5 crore, which was sanctioned by the Government in the year 1990 has not been released ant! it has now lapsed and that the Workers'' Society cannot, after a period of 7 to 9 years, ask for the same grant. In fact, it appears that in view of the price escalation, the cost of modernisation, repairs, replacement etc. the workers'' society made a demand that the Government should pay Rs. 10 crores towards the share in the working capital, instead of Rs. 5 crores. The Government Pleader in his affidavit dated 16th April, 1999 has categorically stated that the demand of the Workers'' Society for Rs. 10 crores was not acceptable and that there was no such scheme of the Government to sanction such amount to the sick or closed Textile Mills and, therefore, Government took such a policy decision.

17. It means that even Rs. 5 crore which was at one time sanctioned by the Government is not being released by the Government though the workers'' Society is very much looking forward to get that amount. The scenario is, therefore, very disappointing and dark. Firstly, the Government is not releasing the amount which once it had sanctioned, is not at all prepared to meet the demand of the Workers'' Society to/sanction a raised amount of Rs. 10 crores. Thirdly, as per the Court Receiver''s report, Godown and Shopping Complex of defendant No. 1 cannot be possibly sold. The workers might be willing to sacrifice their bonus etc. for five years, once the Mill is restarted, but the restarting itself is a problem. The workers'' Society has also not kept its words of executing the agency agreement as per the order passed by Mr. A.P. Shah, J., dated 1st August, 1995.

18. In fact, the order of Mr. Kapadia, J., dated 5th March, 1999 observes that,

"prima fade, there is nothing to indicate that the Government is in a position to finance the revival of the Mill. There is no financial institution which has come forward till today. There is no feasibility report of the competent authority indicating the manner in which the resources will be raised...... Delay of each day increases the liability." In spite of these observations, the learned Judge was kind enough to allow the Workers'' Society to make attempt towards the selling of the Godowns and Shopping Complex. However, that also appears to be difficult. Objections were filed by Mr. Panikar to the Court Receiver''s report. According to him, the Court Receiver was not correct in relying upon the report of M/s. Nadkarni & Co. In my opinion, this is not proper. Firstly, there was no direction for the Court Receiver herself to inspect the premises and come to her own conclusion about the feasibility of selling of the Godowns and Shopping Complex. As such, the Court Receiver cannot be expected to know the technical know-how as to the feasibility of selling those premises and the Court Receiver''s office was bound to avail of the Services of the technical experts in the field. Accordingly, this was done by the Court Receiver by availing the services of M/s. Nadkarni & Co., Architects on the Court Receiver''s Panel. Therefore, there was nothing wrong to rely upon the said report of the technical expert.

19. Mr. Kothari appearing for the plaintiffs Bank also pointed out that when the order was passed by Mr. Jhunjhunuwala, J., ordering sale of the Shopping Complex and Godowns, the Workers'' Society went in appeal against that order and secured an order from the Appellate Court staying the operation of the order passed by Mr. Jhunjhunuwala, J. This is not denied by Mr. Panikar. If this be so, then this is a double-standard and double-talk adopted by the Workers'' Society. On the one hand they are insisting that the Shopping Complex and Godowns be sold and the sale proceeds be utilised for restarting of the Mills, and on the other hand, when the order was passed by the Court precisely to sell the Shopping Complex and Godowns, they went in appeal against the said order and obtained stay. Mr. Kothari drew my attention to order dated 5th March, 1999 passed by Mr. Kapadia, J., wherein this is specifically mentioned. I have perused the said order wherein the learned Counsel appearing for the Workers'' Society stated that they would withdraw the appeal within one week. Mr. Kothari, on this, made a statement that to this date, the said appeal has not been withdrawn. Mr. Panikar conceded to this position also.

20. Under these circumstances, the Workers'' Society is not likely to get any sympathy from the Court, because their intention to restart the Mill does not appear to be bona fide. It appears that they only want to put spoke in the wheels. The claim of the plaintiffs Bank when the suit was filed in the year 1984 was more than Rs. 7 crores, which as of today has increased by leaps and bounds. The workers might be having high hopes to restart the Mill, but all rhetoric apart, this appears to be a distant dream in" view of the huge claim against defendant No. 1 and that too when no help is forthcoming from any one else. In these circumstances, the plaintiffs Bank should not be left to suffer. After all it is a question of public money. Hence prayer (a) of the plaintiffs Bank to

allow the Court Receiver to sell the immovable property described in Exhibit "A-1" to the plaint and the plant and machinery described in Exhibit "8" to the plaint by public auction appears to be proper. The only direction that can be given is that the sale proceeds may not be paid to the plaintiffs Bank, right now, but the sale proceeds can be invested by the Court Receiver in any Nationalised Bank, initially for a period of one year. Appropriate portion, therefore, will have to be bracketed in the said prayer (a) viz., "or private treaty" and "and pay over to the plaintiffs the net sale proceeds thereof in or towards the suit claim". Normally speaking, during the pendency of the suit, such a prayer might not have been granted in any other circumstances. However, in the peculiar facts and circumstances of the present case, when all the defendants are supporting the plaintiffs'' Motion, in the interest of all concerned parties, the prayer of the plaintiffs will have to be granted. Hence the following order :

Notice of Motion is made absolute in terms of prayer Clause (a) of the Notice of Motion, except the bracketed portions, viz., "or private treaty" and "and pay over to the plaintiffs the net sale proceeds thereof in or towards the suit claim."

Sale proceeds to be invested by the Court Receiver in the Nationalised Bank, initially for a period of one year.

Notice of Motion is disposed of accordingly. No order as to costs.

Court Receiver to act on the certified copy of this order.

Certified copy expedited.

21. Order accordingly.

