(2015) 02 DEL CK 0032

In the Delhi High Court

Case No : Co. App. 2/2015

Ebony Retail Holdings Ltd. APPELLANT

Vs

Shanti Prakash Gupta and Others RESPONDENT

Date of Decision : 20-02-2015

Acts Referred:
Companies Act, 1956 — Section 433(e), 434(1), 439, 449, 450

Citation : (2015) 4 AD 225

Hon'ble Judges : I.S. Mehta, J.;Kailash Gambhir, J.

Bench : Division Bench

Advocate : Ekta Kalra Sikri and Prannoy Dey, for the Appellant; Peeyoosh Kalra, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Kailash Gambhir, J.—This matter is being adjourned for the last three dates at the request of the learned counsel for the appellant for seeking instructions from the appellant as to the amount that could be paid by the appellant towards the arrears of the rent in respect of the ground and the first floor of Crown Plaza Mall, Faridabad (subject property). Ms. Ekta Sikri representing the appellant on instructions from Mr. Rakesh Bhalla, authorised representative of the appellant company - M/s. Ebony Retail Holdings Ltd., submits that the appellant is prepared to pay an amount of Rs. 73,80,653/- by way of 12 post dated cheques of equal amounts towards the entire claim of the respondents, after adjusting Rs. 7,12,320 towards TDS, security amount of Rs. 17,57,204/- paid by the appellant in terms of directions given by the Court. In response to the suggestion given by the Court that whether they would be in a position to clear at least the said outstanding arrears in two equal instalments, learned counsel for the appellant submits that the appellant would not be in a position to pay the said amount in two equal instalments, as the company is not in its best financial position. Learned counsel for the appellant also submits that the amount which the respondents have claimed in the company petition, is seriously disputed by the appellant.

2. Mr. Peeyoosh Kalra, Advocate appearing on behalf of the respondents on the other hand submits that more than Rs. 2 crores is outstanding against the appellant.

3. We have heard the submissions made by the learned counsel for the parties.

4. The respondents have filed the petition under Section 433(e) read with Sections 434(1), 439, 449, 450 of the Companies Act, 1956, seeking direction for winding up of the petitioner Company. The respondents are the landlords/ joint owners of commercial property No.GB-19 and FB-15, Crown Plaza Shopping Mall, Crown International, 29 KM Stone, Sector 15A, Main Mathura Road, Faridabad, Haryana. The petitioner Company was inducted as tenant on the ground floor and the first floor of the said premises and a registered Lease Deed dated 5.3.2010 was duly executed between the parties. As per the respondents the petitioner failed to pay arrears of rent from 1.4.2011 to 30.09.2012 amounting to Rs. 1,00,91,285/-, service tax due till 30.09.2012 amounting to Rs. 24,21,214/- and maintenance charges w.e.f. 1.4.2012 to 30.09.2012 amounting to Rs. 4,06,518/- and thus, in all, a sum of Rs. 1,29,19,017/-. This amount was claimed by the respondent Company alongwith interest @ 18% per annum from the date when the said amount became due till the date of its realisation.

5. As per the respondent, the said amount was claimed by them through legal notice dated 17.12.2011 duly served upon the petitioners but the petitioner failed to pay the said amount despite service of legal notice and therefore as per the respondent, the petitioner company is deemed to be unable to pay its debts within the meaning of provisions of the Companies Act, 1956.

6. The petitioner had contested the said winding up petition filed by the respondents and the stand taken by the petitioner before the Company Court was that there are complicated questions of facts and law and the same cannot be adjudicated in a winding up petition in the absence of a full- fledged trial. On merits, the petitioner denied that they are in arrears of the rent as claimed by the respondents. The petitioner also taken a stand that several meetings were held between the parties, whereafter the respondent vacated the first floor of tenanted premises in March 2012 duly recorded in the minutes of meeting dated 21.1.2012.

7. On appreciation of the pleadings filed by the parties and the material produced on record, the Company Court categorised the claims of the respondents in three categories, i.e., (1) for arrears of rent/use and occupation charges; (2) for payment of interest and (3) for payment of service tax. With regard to the claim for arrears of rent/occupation charges, the Court found that there is no dispute of relationship of landlord and tenant between the parties and also the agreed rate of rent of Rs. 5,93,605/- per month for both ground and first floor. The Court also found that it was also not in dispute that the lease deed dated 5.3.2010 was executed between the parties and that no rent was paid by the

petitioners after 7.5.2011 for either of the floors. The Court further recorded that the vacant possession of the first floor was delivered to the respondents on 30.03.2013 and that of the ground floor on 19.03.2013 under the orders of the Court. The Court also held that the plea raised by the petitioner that it agreed in the meetings held on 21.1.2012 that it would vacate the first floor in March 2012 and that thereafter, it handed over the vacant possession of the first floor on 19.03.2012 and therefore it is not liable to pay any rent thereafter, is not sustainable. The Hon''ble Company Court also held that neither any document was produced nor was relied upon by the petitioners evidencing the fact that the possession of the first floor was actually vacated and delivered to the respondents in March 2012 and this fact was duly conceded by counsel representing the petitioners before the Court. The Company Court thus was convinced in arriving at a conclusion that the petitioners have admittedly not paid any rent of the tenanted premises from 7.5.2011 and their liability to pay the rent is clear and ambiguous till the date of handing over the possession and the defence raised by the petitioner is clearly moonshine.

8. With regard to the claim of the respondents in respect of the interest on the arrears of rent/use and occupation charges @ 18% per annum and service tax with interest, the Court found that the same was a disputed question of fact and law and as such the same cannot be adjudicated in a summary manner in a winding up petition. In so far as the claim of the respondents with regard to the arrears of rent/use and occupation charges at the agreed rent of Rs. 5,93,605/- w.e.f. 01.04.2011 till the date of handing over the possession till 19.03.2012 for the first floor and till 26.04.2012for the ground floor was concerned, the Court found that the petitioners have failed to pay the same without any plausible reasons. Therefore, to that extent the winding up petition is liable to be admitted. With regard to the claim of the respondents for arrears of service tax and interest thereon, the Court found that the claim requires adjudication and therefore cannot be tried in a summary manner before the Company Court.

9. To test the bonafides of the petitioner, whether they are prepared to pay the arrears of the admitted amount of rent after calculating the rent of the first floor premises till March 2012, the matter was adjourned at the request of the learned counsel for the petitioner to seek instructions from the petitioner in this regard. Today, the stand taken by the appellant is that they are prepared to pay an amount of Rs. 73, 80,653/- by way of twelve post dated cheques of equal amounts after having adjusted a sum of Rs. 7,12,320 towards TDS, security amount of Rs. 17,57,204/- and an amount of Rs. 8,21,168/- towards the amount paid by the appellant in terms of directions given by the Court. When asked as to whether the petitioner would be in a position to clear the said amount in two equal instalments, the appellant expressed its inability to do so because of the bad financial condition of the appellant company.

10. The aforesaid calculation was although disputed by counsel representing the respondent and as per the respondents, more than Rs. 2 crores is outstanding

against the appellant towards the arrears of rent and other dues. From the record we find that on 21.01.2012 the message was sent by Mr. Rakesh Bhalla, authorised representative of the appellant company to the respondent which is also referred to in the minutes of the meeting held at their office in respect of their overdue rent payments and in this meeting the petitioners had agreed to clear unpaid rent up to March 2012 in instalments by April 2012 after adjusting the security deposit. There is a reference to certain other decisions but suffice to notice that the petitioner failed to clear payment of their outstanding liability towards payment of arrears of rent till this date.

11. There is a clear liability of the petitioners towards payment of arrears of rent in respect of the ground floor and first floor of the premises and possibly the petitioner has no bonafide dispute or any substantial defence to counter the same. The only defence raised by the petitioners is that they had vacated the first floor of the tenanted premises in March 2012. The bonafides of the petitioners have already been tested by this Court by giving them a chance to clear their outstanding liability towards the arrears of rent in two equal instalments, but they have failed to show their bonafides. The appellants have also admitted that their financial conditions of the appellant company is not good and due to this reason they require at least one year time to pay the arrears in equal monthly instalments to liquidate their liability towards payment of arrears of rent.

12. In the background of the aforesaid facts, we do not find that the appellants have been able to dispute the payment of rent of the said premises. The defence raised by the appellant is clearly illusory and moonshine. We find no merit in the present appeal filed by the appellant. The same is hereby dismissed.