
(2011) 09 CAL CK 0106

In the Calcutta High Court

Case No : A.C.O. No. 8 of 2008, A.P.O. No. 19 of 2008 and C.P. No. 217 of 2001

Globex Travel and Exchange Ltd.

APPELLANT

Vs

Official Liquidator, High Court, Calcutta

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Companies Act, 1956 — Section 441, 446, 446(2), 447, 456

Penal Code, 1860 (IPC) — Section 199, 21

Reserve Bank of India Act, 1934 — Section 45I, 45MB(2), 45MC

Citation : (2012) 2 CALLT 135 : (2012) 4 CHN 664 : (2011) 168 CompCas 425

Hon'ble Judges : Syamal Kanti Chakrabarti, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Pratap Chatterjee, for the Appellant; P.C. Sen, for the Official Liquidator, for the Respondent

Final Decision : Dismissed

Judgement

Kalyan Jyoti Sengupta ,J.

1. The above appeal has been preferred by the appellant, above named, against the judgment and order passed by the learned company judge, sitting singly, dated October 8, 2007 (Prudential Capital Markets Ltd. (in liquidation), In re [2007] 140 Comp Cas 754 (Cal)). By the impugned judgment and order the learned trial judge directed the appellant herein to deliver vacant possession of the shop rooms in question to the official liquidator or his duly authorised representative within seven weeks from the date of passing the order. By the same order the appellant was prohibited from parting with possession in respect of the shop rooms or either of them or creating any interest in respect of the same in favour of any person other than the official liquidator till it hands over the same, to the official liquidator. The aforesaid order was passed in the context of the filing of letter for obtaining direction of the court for eviction of the appellant claiming to be a lessee of the property of the company (in liquidation) in Hyderabad, admittedly the said two shop rooms in question are part and parcel

of the assets of the company, namely, Prudential Capital Marketing Ltd. (company in liquidation), 26 and 27 Amarda Mall Samigudda, Hyderabad (hereinafter referred to as the said property).

2. The short fact leading to preferring this appeal as projected by the appellant is as follows :

In or about 1997 the said company (in liquidation) applied to the Reserve Bank of India (hereinafter in short "the RBI") for issuance of certificate of registration as non-banking financial company defined u/s 45-I(f) of the Reserve Bank of India Act, 1934. In July 1997, the company gave an undertaking to the RBI that it would not alienate any of its assets without the prior approval of the RBI except for the purpose of return of deposit obligation. In September 29, 1997, the RBI prohibited the company from accepting any deposit from the public or selling or transferring or creating any charge on its assets and properties for six months. On May 14, 1998, the RBI passed an order restraining the company from selling, transferring or creating any charge over its assets in any manner for a further period of six months. On October 30, 1998, the RBI rejected the application of the company for grant of certificate of registration as non-banking financial institution. On November 24, 1998, the deed of lease was executed by the said company in favour of the appellant for three years with an option for three renewals in respect of the said property. The appellant thereafter obtained necessary license wherein it was mentioned that the appellant was carrying on business from the said property. The Government of Andhra Pradesh issued a certificate of registration to the appellant to carry on business from the said property. On April 7, 2001, Company Petition No. 217 of 2001 was filed by the creditor of the company for its winding up. On November 23, 2001, in pursuance of renewal clause contained in the deed of November 24, 1998, an option being exercised second lease was executed by the company in favour of the appellant for a period of 50 years. On December 5, 2001, an order was passed in Company Petition No. 217 of 2001 for winding up of the said company. On January 25, 2002, notification was issued following the order of winding up. On February 25, 2002, an application being C. A. No. 99 of 2002 was filed for recalling of the order of winding up and an order was passed requiring the company to deposit a sum of Rs. 40,000 with the official liquidator after which the official liquidator was directed to stay its hands. On May 15, 2002, the RBI filed complaint u/s 45MC of the Act of 1934 being C. P. No. 342 of 2002. On July 11, 2003, the said company was directed to be wound up on the petition of the RBI, and the official liquidator was directed to take charge of the company.

3. In December, 2003 the appellant came to know about the order of winding up of the company after the official liquidator had gone to take possession of the said property. Subsequently, the appellant on coming to know about the order of winding up tendered the rent by demand draft, and also at the same time on behalf of the company (in liquidation) paid proportionate maintenance charges and property tax to the appropriate authorities. The official liquidator however

returned the demand draft of Rs. 29,594 being the amount of rent to the appellant. On February 11, 2005, the official liquidator asked the appellant through the learned lawyer to make over vacant possession of the property to him. The appellant on February 27, 2005, requested the official liquidator informing all the relevant facts, in support of its claim of tenancy to accept the rent. On May 13, 2005, letter was written by the official liquidator to the Assistant Registrar of Companies seeking direction upon the appellant to make over vacant possession of the said property to the official liquidator.

4. The learned trial judge after hearing the parties came to a conclusion amongst others that the document executed by the company (in liquidation) in favour of the appellant allowing to take possession is void, illegal and inoperative and as such it has no locus standi to remain in possession.

5. Mr. Pratap Chatterjee, learned senior counsel appearing for the appellant contends that the impugned order passed by the learned trial judge by which the direction for eviction, has been given without due process of law. His client is a lawful monthly tenant and no notice for terminating its tenancy was even served upon the appellant.

6. He contends that no order could be passed against the appellant either for its eviction or otherwise on the basis of a letter for direction which was filed by the official liquidator addressing the same to the Assistant Registrar of Companies for obtaining direction in respect of the company in liquidation. On the basis of such letter only an administrative order could have been passed, not a judicial order.

7. He drawing our attention to the said letter for direction contained in page 1 of the paper book, submits that even from an apparent perusal of the same it would not appear that while filing the said letter for direction the official liquidator had relied on sections 531, 531A, 536 of the Companies Act, 1956. In the said letter there was no allegation of the creation of the tenancy in favour of the appellant not being in good faith nor without valuable consideration.

8. He submits that it is not in dispute that the tenancy in favour of the appellant was created on November 24, 1998, whereas the first application for winding up of the company being C. P. No. 217 of 2001 was filed on April 17, 2001. Under the circumstances section 531 of the Act had and has no application in the facts of the case. Moreover as stated above in the said letter for direction, it is well-settled that to succeed in an application u/s 531 of the said Act the official liquidator is to aver and prove that the transaction was not in good faith.

9. He submits above with reference to the two decisions one of which is Supreme Court and another of the Madras High Court, reported in N. Subramania Iyer Vs. The Official Receiver, Quilon, and N. Babu Janardhanam v. Official Liquidator, Golden Cine Studios P. Ltd. [1993] 78 Comp Cas 490, respectively. Even the learned trial judge has accepted the aforesaid legal position, in principle, but failed to apply the same to grant relief.

10. His further contention is that section 530 would show that the same did not and could not have any application in the facts and circumstances of this case. It is nobody's case that transfer took place after commencement of the winding up proceeding against the company. The learned trial judge had passed order on the ground which was never alleged by either of the parties. The court cannot make out a new case while passing the impugned order and the learned trial judge has totally ignored such principle. He contends further that undertaking to the RBI has no legal effect. Violation of the undertaking given to the RBI cannot make a transaction void and as such creation of tenancy in alleged breach of undertaking given to the RBI could not be challenged nor avoided.

11. He urges that while passing the impugned order the learned trial judge failed to consider that in spite of undertaking given by the company on April 1, 1997, the RBI had passed orders against the company u/s 45MB(2) of the Reserve Bank of India Act, 1934, on November 29, 1997 and thereafter on May 14, 1998, thereby it clearly shows that the RBI never relied on such undertaking as it fully knew that that such undertaking has no legal effect and as such the very basis of the judgment is absent.

12. Mr. P. C. Sen, learned senior advocate appearing for the official liquidator, the respondent, submits while supporting the judgment and order of the learned trial judge that the appellant's claim of tenancy by unregistered lease agreement dated November 23, 2001, is legally untenable. Its further claim of monthly tenancy under the Andhra Pradesh Building (Lease, Rent and Eviction) Control Act, 1960, is also not tenable at all in view of section 32(c) of the said Act. The court heard the matter not only taking note of the letter for direction but on affidavits of the parties filed in response thereto, hence such proceedings is a judicial one.

13. He submits that the RBI prohibited the company from transferring its property seeking an undertaking of the company. Later, the RBI also cancelled the certificate of registration of the company (in liquidation). The company undertook not to alienate assets without approval of RBI.

14. He submits that provisions of sections 441, 446(2), 447, 456, 457, 531, 531A, 536(2) and 537 of the Companies Act, 1956, have combined application in the instant case. The lease agreement dated November 23, 2001, admittedly made after the presentation of the winding up petition being C.P. No. 217 of 2001 is void under the provisions of the Companies Act, 1956 under sections 531A and 536(2) of the said Act of 1956. Moreover, he submits, that the said transfer of property in breach of undertaking shows, mala fide intention to take the property out of the hands of the company. Thus the lease deed dated November 24, 1998 and November 23, 2001 are illegal and void.

15. He has advanced his legal argument with the support of the judgment reported in In Re: Sakow Industries P. Ltd. (In Liquidation), , that the adjudication of the rights of the parties herein can be made u/s 446(2) of the

said Act and the appellant can be evicted if it is found to be trespassers. Even all questions can be determined u/s 446(2) of the Companies Act, 1956 and no further specific procedure is required to be followed.

16. He continues referring to the decision of this court reported in Rajratna Naranbhai Mills Co. Ltd. Vs. New Quality Bobbin Works, that it is the duty of the official liquidator to collect all assets of the said company and all questions can be decided u/s 446 of the Companies Act, 1956, without requiring any comprehensive suit to be filed.

17. Lastly he contends with the support of the authority, namely, the decision of the court reported in Kanchan Kumar Dhar, Official Liquidator (As Liquidator of Star of Cochin Chit Schemes P. Ltd.) Vs. Dr. L.M. Visarai and others, , that transaction entered into after presentation of winding up petition is deemed to be void. The order of the learned trial judge in the facts and circumstances of this case does not call for interference. Hence the appeal should be dismissed with costs.

18. We have heard respective submissions of both learned counsels and we have read the papers before us. Considering the submissions made and examining the papers we find basically there are two issues involved in this appeal :

(i) Whether the procedure adopted by the learned trial judge is in due process of law for passing an order of eviction or not ?

(ii) Whether decision of the learned trial judge that letting out of the said properties of the company (in liquidation) is void under the provisions of the Companies Act, 1956, is correct or not ?

19. While addressing to the first issue we notice that the first point was never agitated before the learned trial judge and it is urged before us for the first time. Admittedly the letter was written by the official liquidator in the usual course of business to the Assistant Registrar of Companies for obtaining suitable direction from the hon''ble court, so that the possession of the assets of the properties of the company could be ensured. Thereafter it was placed before the learned trial judge who had accepted the said letter being an application for direction. The learned trial judge asked the appellant in response to the said letter to file an affidavit and the appellant duly filed the same defending its claim of tenancy as well as possession. After considering the contention made in the affidavit and examining the provision of law the learned trial judge passed an order. According to us finding force in the argument of Mr. Sen, after having participated in the said proceeding the appellant is estopped from raising the aforesaid technical point before us. Under the provisions of section 446 of the Act once the order of winding up of companies is passed and the official liquidator takes possession of the assets, properties and affairs of the company it is the company court and company court alone decides all disputes. This would be apparent from sub-section (2) of section 446 of the said Act.

446. Suits stayed on winding up order.--.. (2) The court shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made u/s 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

20. Thus it is clear from the aforesaid sub-section the claim of the company made by the official liquidator and also defence of the appellant are adjudicable under clause (b) sub-section (2) of the said Act. It is manifestly clear that no regular suit is required to be filed and the learned trial judge can pass an order on the application in any form. The above procedure is now well firmly applied and established with the judicial pronouncement and it would be found as appropriately urged by Mr. Sen, in the case of Vidyadhar Upadhyay Vs. Sree Sree Madan Gopal Jew and Others, while examining the scope of sub-section (2) of the said Act, the Division Bench of this court at page 403 held as follows :

In our opinion, the language of sub-section (2) is clear, it was the intention of learned judge that all questions which come within the scope of sub-section (2) of the said section should be dealt with by the company court in order to avoid unnecessary delay and multiplicity of proceedings. In an application being made to that effect, leave is given to the liquidator or appropriate party to institute or continue such proceedings in any other court or Tribunal. In this case, there was an application u/s 446(2). It comes under clause (b) which relates to any claim made by or against the company and in any event it is certainly covered by clause (d) which includes any question whatsoever whether of law or fact which may relate to or arise in the course of the winding up of the company.

21. Then again at page 404 it is observed by their Lordships that going by the interpretation of the said section given by the Division Bench judgment in the case of Indramoni v. Shriram Jute Mills P. Ltd. (Appeal No. 154 of 1976) we are of the opinion that this application is certainly maintainable and the question raised in this application comes within the scope of section 446(2) of the Companies Act.

22. Prior to the above decision in the case of Rajratna Naranbhai Mills Co. Ltd. (in liquidation) v. New Quality Bobbin Works reported in [1973] 43 Comp Cas 131

(at page 141) the single judge of the Gujarat High Court held amongst other as follows :

It is a statutory duty cast upon the liquidator that on a winding up order being made, he must collect all the assets, properties, effects and chooses-in-action of the company. Section 456(2) again enacts a deeming fiction by which all those properties collected by the liquidator shall be deemed to be in custody of the court. If the liquidator fails to collect the assets of the company he would be charged for negligence in performance of duty. Therefore, while performing this duty if he comes across any sale of property of the company which would be void under any of the provisions of the Companies Act or any other law for the time being in force and which would not be binding on him as liquidator of the company, it would be equally his duty to take action to collect that asset. If this is the duty cast on the liquidator, simultaneously power was conferred upon him u/s 457(1) to institute or defend any legal proceedings. If he has power to institute or defend legal proceedings and if in performance of his duty he comes across a transaction which is void against him, the transaction becoming void because of the winding up proceedings, it would be a question of fact arising in the course of winding up of the company and this court will have jurisdiction to decide that question. This appears to me to be the scope and ambit of jurisdiction conferred upon the High Court u/s 446(2). It is necessary to put liberal construction on section 446(2) so as to widen the jurisdiction of the High Court in dealing with all questions arising in winding up. Under the Companies Act, 1956, jurisdiction is conferred upon the High Court alone to entertain winding up proceeding.

23. Respectfully following observation of the above Division Bench judgments we are of the view that section 446 is a special provision with a summary procedure and it enables the company court through the official liquidator to take all legal measures so that the affairs of the company is not involved in multiplicity of judicial proceedings before different for a and further do not face possible conflicting decisions. Therefore, all that is necessary under the said section is to give an opportunity of being heard to the third party before any judicial step is taken by the court.

24. Under those circumstances we are unable to accept the contention of Mr. Chatterjee in relation to the first question that the procedure which was adopted by the learned trial judge is not in due process of law.

25. While advertng to the second question, we think findings of the learned trial judge that the creation of two leases by the company being void, is legally flawless. We endorse the reasons recorded by the learned trial judge. Admittedly the first lease was executed on November 24, 1998, when the prohibitory order of the Reserve Bank of India was not in force. But in July, 1997 the company then being not in liquidation, gave an undertaking to the Reserve Bank of India that it would not alienate its assets without due approval of the Reserve Bank of India except for the purpose of repayment-deposit-obligation. We are unable to

accept the contention of Mr. Chatterjee that above undertaking has no legal effect as it is not statutory one. We think this undertaking tantamounts to making a solemn declaration before a public servant within the meaning of section 21 of the Indian Penal Code, 1860, not to do something. If such declaration subsequently appears to be false, it becomes punishable offence within the meaning of section 199 of the IPC. Undertaking in our view was given to avoid any prohibitory action being taken and the Reserve Bank of India while acting upon such an undertaking did not pass any prohibitory order. Hence the company was estopped from committing breach of such undertaking or taking advantage of the same. Such breach in our considered view amounts to betraying the confidence of the statutory authority reposed in the company on good faith. It was patently wrong and with ill motive to breach the undertaking. It is settled position of law a wrong doer cannot be allowed to take advantage of its own wrong. This undertaking in our view continued even during the subsistence of prohibitory order or thereafter so long it is not withdrawn. This undertaking does not appear to have been withdrawn. We cannot accept the contention of Mr. Chatterjee that prohibitory order of injunction passed on September 29, 1997, has taken away the effect of undertaking. Even if it is assumed initial lease was held to be valid, renewal thereof cannot be termed to be lawful as it was obtained on November 23, 2001, after the winding up Petition No. 217 of 2001 was presented by the creditor.

26. We find considerable substance in the submission of Mr. Sen that the learned trial judge has correctly recorded this renewal is void as it is well-settled that u/s 536(2) this sort of transaction or act is void by virtue of the said section 536, sub-section (2). The said section is as follows :

536. Avoiding of transfers, etc., after commencement of winding up.--... (2) In the case of a winding up by the court, any disposition of the property of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.

27. It is feebly contended that even if the said second lease being declared to be void then on expiry of three years from the date of initial lease the company has become monthly tenant under the Andhra Pradesh Rent Act, 1960. We have examined this aspect of the matter, Mr. Sen has appropriately pointed out that the Andhra Pradesh Rent Act, 1960, has no application in this case. In view of section 32(c) of the said Act for the reasons correctly recorded by the learned trial judge at page 478 of the paper book that the said Andhra Pradesh Act in the year 2001 received the assent of the Governor, and on April 2005, it was published in the Andhra Pradesh Gazette on the following date, hence at the time of creation of first lease or renewal of the lease the aforesaid protective umbrella under the law was not in the statute book.

28. In view of the discussion as above we hold that there is no substance in the appeal, accordingly the same is dismissed and there will be no order as to costs.

Syamal Kanti Chakrabarti, J.

29. I agree.