(1997) 09 KL CK 0027

In the High Court Of Kerala

Case No : M.C.A. No. 115 of 1996 in C.P. No. 40 of 1995

Hotel Kandath International (P.) Ltd. APPELLANT

Vs

Official Liquidator and Another RESPONDENT

Date of Decision : 01-09-1997

Acts Referred:
Companies Act, 1956 — Section 392

Citation : (1998) 94 CompCas 859 : (1998) 1 ILR (Ker) 590

Hon'ble Judges : C.S. Rajan, J

Bench : Single Bench

Advocate : Georgekutty Mathew, for the Appellant; K. Moni and S. Sreekumar, for Responent No. 2, for the Respondent

Final Decision : Allowed

Judgement

C.S. Rajan, J.—The prayer in this application is for a direction to the second respondent (hereinafter referred to as "the tenants") to hand over vacant possession of the premises held by them in the premises of Hotel Kandath International (P.) Ltd. in accordance with the scheme sanctioned on April 1, 1996, In order to appreciate the arguments of the parties to decide the dispute involved in this application, it is necessary to refer to the background of the case in detail.

2. This court passed the winding up order in C. P. No. 15 of 1991, winding up the Hotel Kandath International (P.) Ltd. (hereinafter referred to as "the company"). The official liquidator filed applications for a direction to the tenants to vacate the shops occupied by them and to hand over possession to the official liquidator. In this connection, it is worthwhile to mention that the Kerala Financial Corporation (KFC), the Kerala State Industrial Development Corporation (KSIDC), Indian Bank and the Kerala State Co-operative Bank Ltd. are secured creditors of the company, According to Clause 11 of the agreement, between the company and the KFC which financed the construction of the shopping complex and the hotel, prohibited the borrower company from selling, mortgaging, leasing, transferring,

exchanging or otherwise disposing of or creating any lien or charge in respect of the secured property which included the shops which are occupied by the tenants. Therefore, this court, while considering the application of the official liquidator for a direction to vacate the shops, passed an order dated July 7, 1992. This court held that in view of the prohibition mentioned above which binds the official liquidator and the company it was not permissible to approve the draft lease agreement or to permit the official liquidator to create lease or otherwise transfer the shops. It was further held that in view of the prohibition mentioned above this court could not order eviction of these occupants, but directed the official liquidator to treat the occupants as his licensees. This court further observed that this order should not preclude the official liquidator from taking appropriate steps to have the occupants evicted.

3. The official liquidator filed another petition for the following reliefs :

"(i) direct the District Collector, and District Superintendent of Police and also Tahsildar, Palghat, to evict respondents Nos. 1 to 7 who are now in possession of the shop rooms of the shopping complex of Hotel Kandath International (P.) Ltd. (in liquidation), Palakkad, within a period to be fixed by this honourable court ;

(ii) direct the respondent to pay the arrears of rent mentioned in para. 4 of the affidavit ; and

(iii) pass such other order as may be deemed fit and proper in the premises of the case."

4. While considering the above prayers, this court was of the view that the basic question to be decided in this case was whether the alleged tenancies in favour of the respondents were valid or not. According to the official liquidator and the secured creditors, the whole tenancies are void ab initio. The question of eviction ultimately depends upon the decision as to whether the alleged tenancies are valid or not. This court further observed that in view of the delay which is likely to arise to have a permanent decision on this aspect it will be fair to allow the present occupants to continue their business in the premises provided they are prepared to abide by reasonable terms. This court also held that the above arrangement would be subject to further orders that may be passed regarding the eviction of the occupants when arrangements for the sale of the assets of the company were taken up by this court.

5. The tenants later filed an application before this court for a direction to the excise authorities to renew the licence for running the bar in the hotel against the payment of the usual licence fees. While considering the above prayer this court, by order dated April 2, 1996, allowed the above prayer making it clear that such a renewal should not be taken as permission for the tenants to continue and occupy the premises and should not be taken for opposing any eviction that would be passed in the company petition or in any other legal proceedings.

6. This court by order dated April 11, 1996, accepted the revival scheme submitted by the company and sanctioned the arrangements accepted by all the parties. In the revival scheme it was made clear that unless the licensees which include tenancies are evicted it will be difficult for completing the revival scheme. It was further submitted that on condition that the above mentioned licensees are evicted the intending purchaser will clear off the amount due to the secured creditors. This court also observed that it is open to the parties to work out their remedies elsewhere regarding the eviction of the tenants. These are the circumstances under which the present application has been filed by the company. Therefore, this court has now to tackle the question whether the tenants are liable to be evicted from the premises of the company in implementation of the scheme/compromise accepted by the company in these proceedings itself or to direct the company to initiate proceedings under the general law.

7. Section 391 of the Companies Act gives power to the company court to compromise or make arrangements with creditors and members. Section 392 gives power to the High Court to enforce compromises and arrangements in the following words :

"(1) Where a High Court makes an order u/s 391 sanctioning a compromise or an arrangement in respect of a company, it-

(a) shall have power to supervise the carrying out of the compromise or arrangement ; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement."

8. Shri C. M. Devan, learned senior counsel appearing for the petitioner, relied on the decision of the Supreme Court in J. K. (Bombay) P. Ltd. v. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. [1970] 40 Comp Cas 689. In the above ruling, the Supreme Court has held as follows (page 706) :

"Under Section 392 of the Act the High Court which has sanctioned the scheme has the power to supervise the carrying out of it and to give directions in regard to any matter or to make modifications in it as it may consider necessary for its proper working. But if the court is satisfied that the scheme cannot be worked satisfactorily with or without modifications, it can either suo motu or on an application by any person interested in the company''s affairs order its winding up. Both Mr. Sen and the learned Attorney-General contended that the company judge was right in holding that the scheme could have been worked but for the defaults of Jalans, that the company judge was right in giving directions u/s 392(1) compelling the Jalans and the company to implement their obligations and that no winding up order in exercise of power u/s 392(2) should have been passed."

9. With regard to the power of the court to enforce the scheme of compromise the Supreme Court further observed as follows (page 711) :

"The principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties : it becomes binding on the company, the creditors and the shareholders and has statutory force, and therefore, the joint-debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of Section 391 of the Act, a scheme is statutorily binding even on creditors and shareholders who dissented from or are opposed to its being sanctioned. It has statutory force in that sense, and therefore, cannot be altered except with the sanction of the court even if the shareholders and the creditors acquiesce in such alteration (cf. Premila Devi v. Peoples Bank [1939] 9 Comp Cas 1 (PC)). The effect of the scheme is ''to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity'' (Palmer''s Company Law, 20th Edition, page 664). Sub-section (2) of Section 391 of the Act allows the decision of the majority prescribed therein to bind the minority of creditors and shareholders and it is for that reason that a scheme is said to have statutory operation and cannot be varied by the shareholders or the creditors unless such variation is sanctioned by the court."

10. The Supreme Court had occasion to consider the scope and ambit of Section 392 of the Companies Act in the ruling in S.K. Gupta and Another Vs. K.P. Jain and Another, It is useful to refer to the following observation of the Supreme Court which is as fallows (page 351) :

"When a scheme is being considered by the court, in all its ramifications, for according its sanction, it would not be possible to comprehend all situations, eventualities and exigencies that may arise while implementing the scheme. When a detailed compromise and/or arrangement is worked out, hitches and impediments may arise and if there was no provision like the one in Section 392, the only obvious alternative would be to follow the cumbersome procedure as provided in Section 391(1), viz., again by approaching the class of creditors or members to whom the compromise and/or arrangement was offered to accord their sanction to the steps to be taken for removing such hitches and impediments. This would be unduly cumbersome and time consuming and, therefore, the Legislature in its wisdom conferred power of widest amplitude on the High Court u/s 392 not only to give directions but to make such modification in the compromise and/or arrangement as the court may consider necessary, the only limit on the power of the court being that such directions can be given and modifications can be made for the proper working of the compromise and/or arrangement. The purpose underlying Section 392 is to provide for effective working of the compromise and/or arrangement once sanctioned and over which the court must exercise continuous supervision (see Section 392(1)) and if over a period there may arise obstacles, difficulties or impediments, to remove them, again, not for any other purpose but for the proper working of the compromise and/or arrangement. This power either to give directions to overcome the difficulties or if the provisions of the scheme themselves create an impediment, to modify the provision to the extent necessary, can only be exercised so as to provide for smooth working of the compromise and/or arrangement. To effectuate this purpose the power of widest amplitude has been conferred on the High Court and this is a basic departure from the scheme of the U. K. Act in which provision analogous to Section 392 is absent,"

11. Learned senior counsel also relied on a judgment of the Bombay High Court in Kamani Tubes Ltd. v. Official Liquidator and Liquidator, Kam-ani Bros. P. Ltd. [1985] 58 Comp Cas 233. A Division Bench of the Bombay High Court in the above ruling observed as follows (page 240) :

"We have been told by the official liquidator that a scheme by one of the creditors for taking the company out of liquidation is being mooted and has already been submitted in court. According to learned counsel for the official liquidator, if the company is revived in accordance with the said scheme, then the company should not be prejudiced by being deprived of the premises which the company would then be lawfully entitled to occupy and continue to be lessees thereof. The question about the validity of the scheme as well as with regard to the capacity of the alleged creditor to present the scheme is sub judice. Today it is not possible to say what would be the result of those proceedings. However, having regard to the fact that the present premises, which are the subject-matter of those proceedings, will be a valuable asset of the company in case it is revived, we think that the interest of everybody concerned and interested in the well being of the company will be sufficiently safeguarded if we make the order that the official liquidator will hand over possession of the premises to the appellants in case an order for reviving the company and for taking the company out of liquidation is not passed on or before December 31, 1984,"

12. On the other hand, Shri Ramachandran, learned senior counsel appearing for the tenants forcibly argued that this court cannot order eviction of the tenants from the premises in these proceedings. The petitioner is to approach the Rent Control Court for eviction of the tenants on the grounds mentioned in the Rent Control Act. Learned senior counsel also relied on the following sentence in the order of this court dated April 11, 1996 :

"... I make it clear that it is open to the parties to work out their remedies elsewhere."

13. Therefore, according to learned senior counsel, the petitioner is not entitled to invoke the jurisdiction of this court for eviction of the tenants. Learned senior counsel relied on the following decisions to drive home the point that the petitioner must seek his remedy under the Rent Control Act : Ravindra Ishwardas Sethna and Another Vs. Official Liquidator, High Court, Bombay and Another, , General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., , and Virendra Singh Bhandari Vs. Nandlal Bhandari and Sons Pvt. Ltd. (In

liquidation), . In Ravindra Ishwardas Sethna and Another Vs. Official Liquidator, High Court, Bombay and Another, , the company was a tenant of the premises of which the appellants therein were the landlords, The company court directed the official liquidator to give the premises to a third party under a caretaker''s agreement. Dealing with the above decision, the Supreme Court held that it is impermissible to part with possession of the premises of the company to a caretaker when the company does not any more require the use of the premises. The Supreme Court negatived the claim of the liquidator conscious of the law that the Rent Control Act is enacted for protecting the tenants and the provisions of the Act must receive a benevolent interpretation in favour of the tenants. Therefore, I do not think the above ruling will advance the case of the tenant. In General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., , the company was a tenant which transferred its interest to another company under the High Court''s order sanctioning the scheme of amalgamation without the consent of the landlord. Dealing with the above question the Supreme Court held that in view of the prohibition contained in the agreement between the landlord and the company as tenant against subletting the tenanted premises without the express consent of the landlord the transferee-company was liable to be evicted from the tenanted premises. Thus, it can be seen that the above ruling is also not in favour of the tenant. In Virendra Singh Bhandari Vs. Nandlal Bhandari and Sons Pvt. Ltd. (In liquidation), , the tenants were inducted by the official liquidator long back and they were paying the rent and it was deposited in the account of the company without any objection. Under those circumstances, the High Court held that it was not proper to oust the tenants from the tenancy treating them as trespassers and directed the official liquidator to execute fresh lease deeds. The facts of the above case are also different from those of the present case.

14. Learned counsel appearing for the financial institutions submitted that the present lease in favour of the tenant by the company is against covenant of mortgage executed between the company and the financial institutions which contained a total prohibition of alienation either in the form of sub-mortgage, lease, licence, etc. Therefore, it was argued that the above lease in favour of the tenant is void ab initio. This court also held that the contention of the financial institutions that the lease in favour of the tenants is void ab initio has to be considered by this court.

15. Now, this court has approved the scheme for reviving the company. The revival of the company cannot be effectively implemented without getting vacant possession from the tenants. Section 392 of the Companies Act gives ample powers to the court to give such directions as it may consider necessary for the proper working of the compromise. The purpose of the provision of Section 392 is to provide for effective working of the compromise or scheme or arrangement and the court has got ample power to exercise continuous supervision. If any obstacles, difficulties or impediments arise the court is also empowered to remove them for the proper working of the compromise or arrangement or

scheme. To effectuate this purpose the High Court has got the widest power as held by the Supreme Court in the rulings referred to above. Under these circumstances, the contention of the tenant is unsustainable and only to be rejected. The petition is, therefore, allowed. The official liquidator is directed to give vacant possession of the tenanted premises to the company. The tenant is given three months time from September 1, 1997, to surrender the premises either to the official liquidator or to the company.

