
(2021) 06 NCLT CK 0009

In the National Company Law Tribunal

Case No : IA (IB) No.1687/KB Of 2019 in CP (IB) No.432/KB Of 2018

IDBI Bank Limited

APPELLANT

Vs

Leather World India Limited

RESPONDENT

Date of Decision : 14-06-2021

Acts Referred:

Companies Act, 2013 — Section 333

Insolvency and Bankruptcy Code, 2016 — Section 14, 33(5), 52

Citation : (2021) 06 NCLT CK 0009

Hon'ble Judges : Rajasekhara V.K., J; Harish Chander Suri, Member (Technical)

Bench : Division Bench

Advocate : Siddharth Chatterjee, Urmila Chakraborty, Debnath Bhattacharya, Shaunak Mitra, Arun Kumar Gupta, Anil Agarwal

Final Decision : Disposed Of

Judgement

Rajasekhara V.K., Member (Judicial)

1. Preamble

1.1. IA (IB) No.1687/KB/2019 in CP (IB) No.432/KB/2018 sees a battle of the Anils â?" Mr Anil Arora, the applicant who claims tenancy of a shop room at the ground floor of the premises bearing No.15, Lindsay Street, Police Station New Market, Kolkata 700 087, pitted against Mr Anil Agarwal, the liquidator of the first respondent company.

2. The applicantâ??s case

2.1. The applicant is a tenant in respect of a shop room at the ground floor of the premises bearing No.15, Lindsay Street, Police Station New Market, Kolkata 700 087;

2.2. The applicant had entered into a commission agreement with the corporate

debtor on 13.11.2014 for a period of nine years, whereby the corporate debtor would utilise the premises for its leather business and shall pay the applicant as the commission agent, commission at 3% of the total sale on a monthly basis, subject to a minimum guaranteed return of ₹ 2.00 lakh.

2.3. The monthly commission as above was required to be paid within the 10th day of every month, in default of which the corporate debtor was liable to pay interest @12% per annum.

2.4. From April 2016 onwards, the corporate debtor starting defaulting in making payments to the applicant. Between April 2016 and February 2017, the corporate debtor made part payments of ₹ 8,10,000/-, leaving a total of ₹ 30,19,513/- upto November 2017 inclusive of interest, as unpaid.

2.5. On 13.06.2016, the corporate debtor sought to reduce the monthly guaranteed return of ₹ 2.00 lakh to ₹ 1.10 lakh on grounds of losses sustained in its business. The applicant has, therefore, filed a civil suit bearing CS No.12/2018 before the Hon'ble Calcutta High Court for the said sum of ₹ 30,19,513/- in January 2018. Subsequently, several interlocutory applications bearing GA No.349/2018 and GA No.1604/2018 were also filed before the Hon'ble Calcutta High Court, which are pending adjudication. In GA No.349/2018, the Hon'ble Calcutta High Court passed an order restraining the corporate debtor from creating any third party interest over the subject premises.

2.6. The premises were taken on rent by the applicant's father, late Hiralal Arora, to run his business in the name and style of M/s H. Lal & Co, a sole proprietorship, in the year 1950 from one Peter Basil, being joint owner with his sister, Pamela Basil. In 1970, Peter Basil left India and settled in Australia. His sister Pamela continued to stay in her half portion of the premises till her death. After Peter Basil shifted to Australia, the applicant has been paying rent to the Rent Controller, Govt of West Bengal. Following the death of Peter Basil, his sister Pamela became the absolute owner of the said premises. However, she never claimed any rent for the said premises, which continued to be in enjoyment and occupation of M/s H Lal & Co as tenant.

2.7. That the applicant is a tenant in the said premises is known to the corporate debtor, and the corporate debtor has accepted the applicant as the tenant in respect of the said premises, by virtue of the commission agreement dated 13.11.2014.

2.8. The applicant has given only right of user in respect of the said premises to the corporate debtor, and the latter is neither the owner nor a tenant in the said premises.

2.9. The applicant has come to know that the corporate debtor has unlawfully transferred the premises to a third party, which is now carrying on business and operations under the name and style of Prince Majestic wherein one Vidhan Fashions is claiming franchise thereof from March 2018, before the order of admission dated 13.06.2018 passed by this Adjudicating Authority.

2.10. The applicant's information is that the corporate debtor has already transferred the premises to Vidhan Fashion for a sum of ₹ 20.00 lakh and that the corporate debtor is earning a whopping sum of ₹ 4.00 lakh per month from the said premises, despite having no right, title or interest in respect thereof.

2.11. The applicant had sent an email dated 26.08.2018 to the Respondent No.2/ Liquidator, asking for refund of the amount collected from third party and also for giving back vacant and peaceful possession of the premises. However, the liquidator has not acted in accordance with the requests.

2.12. The applicant is not only entitled to the premises, but also to the sums collected from the third party. Additionally, it is also entitled to the minimum commission guarantee of ₹ 2.00 lakh per month in terms of the commission agreement dated 13.11.2014.

2.13. The applicant had filed CA (IB) No.981/KB/2018 in CP (IB) 432/KB/2018, for an order directing the respondents to give back vacant and peaceful possession of the premises to the applicant. The annual accounts of the corporate debtor for the year 2014-15 would reveal that the said premises are not the asset of the corporate debtor. When the said application was taken up on 21.01.2019, the Adjudicating Authority did not consider the submissions made and instead directed the applicant to file its claim with the liquidator, who was to consider the claim on its own merit. The Adjudicating Authority passed the order for liquidation of the corporate debtor on 29.01.2019. Now, therefore, the order dated 21.01.2019 has merged with the order dated 29.01.2019.

2.14. Being aggrieved by both the orders, the applicant preferred Company Appeal (AT) (Insolvency) Nos.295/2019 and 296/2019 before the Hon'ble

NCLAT, New Delhi. By an order dated 27.01.2019, the appeals were dismissed. Civil Appeals Nos.6592/2019 & 6593/2019 to the Hon'ble Supreme Court were also dismissed.

2.15. In the meantime, the applicant lodged proof of claim with the liquidator, claiming a sum of ₹ 67,07,118, which has been duly admitted by the liquidator under communication dated 01.04.2019.

2.16. The said premises is burdened with onerous covenants for the corporate debtor as the corporate debtor has to pay a sum of ₹ 2.00 lakh on monthly basis to the applicant. Therefore, the premises should be disclaimed in favour of the applicant. The applicant is entitled to a vesting order, especially since there are no other claimants in respect of the said premises.

2.17. The liquidator has filed CA (IB) No.1415/2019, seeking direction upon the respondents therein to provide vacant possession of the shop-room in the said premises. Since the applicant has not been made a party to this application, the applicant asked for a copy of the application from the liquidator vide his email dated 13.11.2019, but the liquidator refused to provide the same vide his reply email dated 13.11.2019.

2.18. The applicant also seeks disbursement of the amount admitted in his favour by the liquidator.

2.19. In these circumstances, the applicant seeks the following prayers: -

(a) An order of disclaimer of the premises at No.15, Lindsay Street, Police Station-New Market, Kolkata 700 087 in favour of the applicant herein;

(b) Alternatively, an order declaring that the premises at No.15, Lindsay Street, Police Station-New Market, Kolkata 700 087, is outside the scope of the moratorium of the corporate debtor;

(c) Direction on the liquidator for disbursement of ₹ 67,07,118 admitted by the liquidator, in favour of the applicant;

(d) Order directing the respondents to refund the amount collected from Vidhan Fashions each and every month;

(e) Order directing the respondents to pay commission fee to the applicant at the rate of 3% of the total sale on a monthly basis, subject to the

minimum guarantee of ₹ 2.00 lakh under the commission agreement dated 13.11.2014, till the actual physical possession of the property is handed back to the applicant;

(f) An order directing the respondents to give back vacant, peaceful and actual possession of the said premises to the applicant;

(g) Direction on the liquidator for serving a copy of the application in CA (IB) No.1415/KB/2019 filed by the liquidator, and an opportunity be given for filing a reply thereto.

3. The liquidator's reply

3.1. The liquidator has filed a reply, wherein he has questioned the maintainability of the application, which has been filed under section 333 of the Companies Act, 2013. The liquidator states that the application is filed on a mere apprehension, and that cannot be the basis for maintaining an application. He has also drawn attention to the order dated 27.03.2019 passed by the Hon'ble NCLAT, dismissing the appeals filed by the applicant.

The order of dismissal has also been sustained by the Hon'ble Supreme Court.

3.2. The liquidator has also received the claim of the applicant to the tune of ₹ 67,07,118/-, which has been duly verified and admitted.

3.3. The liquidator has also referred to the fact that the applicant has filed a Title Suit in a city civil court praying for permanent injunction. The suit is still pending for adjudication. The applicant filed for winding up of the corporate debtor before the Hon'ble Calcutta High Court, whose proceedings

have been stayed since moratorium has kicked in following the order of admission dated 13.06.2018

3.4. The liquidator has also received a letter dated 14.12.2020 from Lloyd Erectors Pvt Ltd, wherein it was informed for the very first time that Lloyd

Erectors Pvt Ltd had purchased the premises No.15, Lindsay Street (previous numbered as 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15I, 15J, 15K

15L) known as Lindsay Mansion from Peter Alan Basil by way of a registered deed of conveyance dated 30.04.1988, registered as Document

No.4708/1988, Book I, Vol.137, pages 52 to 68 before the Registrar of Assurances, Kolkata. It was also mentioned that shop no.15D was tenanted to

Hiralal Arora, sole proprietor of M/s H. Lal & Co. The applicant herein is the legal heir to Hiralal Arora who is claiming back the premises even

though he has no legal right over the property.

4. Analysis of the contentions & orders on each of the prayers

4.1. We have perused the application and the reply of the liquidator, and heard the learned counsel appearing for each of them.

4.2. At the outset, we note that there are discrete causes of action combined in a single application. We can think of no reason other than saving of

application fees for such a move. Let us examine the prayers once by one.

Prayer (a)

4.3. Prayer (a) is for an order of disclaimer of the premises at No.15, Lindsay Street, Police Station-New Market, Kolkata 700 087 in favour of the

applicant.

4.4. This is ostensibly on the ground that onerous covenants supposedly are attached to the property. We are not required to go into the veracity of the

commission agreement dated 13.11.2014. However, even from a bare reading of the commission agreement of 13.11.2014, which is the basis of such

claim, there is nothing that can be attributed to the property itself, even if the commission agreement is taken at face value. It only casts a burden on

the corporate debtor to make payments- that too if the commission agreement is otherwise sustainable in law. Therefore, this prayer of the applicant

for disclaimer of onerous covenants is hereby rejected.

Prayer (b)

4.5. Prayer (b) is for an order declaring that the premises at No.15, Lindsay Street, Police Station-New Market, Kolkata 700 087, is outside the scope

of moratorium of the corporate debtor.

4.6. The CIRP has come to an end with the order dated 29.01.2019 ordering the liquidation of the corporate debtor. With this, the moratorium that

kicked in with the order of admission dated 13.06.2018 has also run its course. Since the corporate debtor is in liquidation, the provision that now

govern initiation or continuation of legal proceedings is section 33(5), which reads as follows: -

â??(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating

Authority.â??

4.7. While section 14 of the Insolvency & Bankruptcy Code, 2016, is a broad-spectrum moratorium prohibiting all kinds of action against the corporate

debtor, section 33(5) confines itself only to initiation of legal proceedings by or

against the corporate debtor. The proviso to section 33(5) makes it clear that the liquidator may institute a suit or legal proceeding for and on behalf of the corporate debtor, after obtaining the prior approval of the

Adjudicating Authority. There is no bar engrafted into section 33(5) which prohibits continuation of any pending suits or legal proceedings.

4.8. In the present case, since the applicant has also instituted civil proceedings for various reliefs both in the Hon'ble Calcutta High Court as well as in

the city civil court, there is no need for this Adjudicating Authority for grant of prayer (b), and the same is hereby rejected.

Prayer (c)

4.9. Prayer (c) is for disbursement of claim admitted by the liquidator, which is not permissible until the liquidator process itself comes to an end.

Therefore, this prayer is rejected.

Prayer (d)

4.10. Prayer (d) is for an order directing the respondents to refund the amount collected from Vidhan Fashions on each and every month.

4.11. This prayer cannot be granted without determining the issue of ownership and possession of the property. Since that issue is sub judice before

the Hon'ble Calcutta High Court and the city civil court, this prayer is rejected.

Prayer (e)

4.12. Prayer (e) is for an order directing the respondents to pay commission fee to the applicant in terms of agreement dated 13.11.2014.

4.13. Since the claim of the applicant has already been adjudicated and admitted in full, all that is required to be done at this stage is to sit back and

wait for the liquidation process to be completed, at the end of which disbursement will take place in accordance with law. Therefore, this prayer is

rejected as premature at this stage.

Prayer (f)

4.14. This is for an order directing the respondents to give back vacant peaceful and actual khas possession of the said premises.

4.15. This Adjudicating Authority had considered application bearing IA No.138/2021, in which an order dated 12.04.2021 was passed. It was directed

that in view of contesting claims made regarding ownership and possession, the liquidator shall hand over physical possession of the premises to the

person from whom the corporate debtor took possession, since the corporate debtor was not the owner of the premises. Accordingly, the liquidator has since handed over possession to Mr Anil Arora, the applicant herein.

4.16. In view of this, prayer (f) has become infructuous.

Prayer (g)

4.17. This is for a direction to the liquidator for service of a copy of the application being CA (IB) No.1415/KB/2019 filed by the liquidator, and for an opportunity to be given to the applicant to file appropriate reply therein.

4.18. The liquidator is the applicant in that application, and therefore, the dominus litus. If at all the applicant feels that he is entitled to be heard, he ought to file an intervention petition in IA No.1415/KB/2019. This prayer in the present application is, therefore, refused.

5. Orders

5.1. IA No.1687/KB/2020 stands disposed of in accordance with the above directions.

5.2. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

5.3. A certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.