(2002) 10 GAU CK 0027

In the Gauhati High Court

Case No : Application No. 5 of 2002 in Company Petition No. 3 of 2000

In Re: Board of Trustees for the Port of Kolkata

Date of Decision : 11-10-2002

Acts Referred:
Companies Act, 1956 — Section 446, 446(2), 535

Citation : (2003) 44 SCL 81

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : S. Roy Choudhary, S. Saikia and P.C. Deka, for the Appellant;

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—The applicant, the Board of Trustees for the Port of Kolkata, has filed the instant Company application for appropriate orders from this Court directing the Official Liquidator to disclaim all interests in the property covered by lease dated May 2, 1983 made between the applicant and Him Containers Limited (Company in liquidation). Details of the said leased property has been mentioned in the Schedule annexed to the application and marked as Annexure-''A''. Consequential orders directing the Official Liquidator to remove all movable assets, furniture and fixtures on the leased land and for delivery of possession to the applicant have also been prayed for.

2. According to the applicant, land measuring about 40460.450 sq. meters situated within the Haldia Dock Complex (West Bengal) was leased out for a period of 30 years w.e.f. 22-12-1982 by a Lease Deed dated 2-5-1983 executed by and between the applicant on one part and the Company in liquidation on the other part. The salient features of the aforesaid Lease Deed which would have a relevant bearing to the present case may be conveniently set out hereunder :

"(a) The lease to pay monthly rent of Rs. 6,069.07 calculated @ Rs. 15 per 100 sq. mtrs per month plus service charge per month @ Rs. 50 per 100 sq. meters for the 1st 2 acres and at Rs. 2 per 100 sq. mtrs per month for the balance area subject to service charge being revised from time to time and subject to the right of the applicant to enhance the rent every 10 years upto 25% or the Schedule Rent then in force whichever is higher.

(b) The lease will during the continuance of the term of the lease pay the said rent preserved and made payable or the revised rent as may be fixed hereafter at the times and in the manner at and in which the same are hereinbefore reserved and made payable without any deduction.

(c) The lease will not assign transfer, underlet or part with the possession of the demised land or any part thereof without the prior consent in writing of the Trustees. In case of permission is granted it may be on such terms and conditions as the Trustees may think fit. If permission is refused should not be called upon to assign any reason for such refusal.

(d) Lessee will at the expiration or sooner determination of the said term quietly and peacefully yield up vacant possession of the demised land as a whole upto the Trustees with all factories and buildings and structures or erections and other structures, if any, erected thereon that shall not have been previously removed by the lessee.

(e) If the monthly rent etc. reserved or any part thereof shall, at any time, be in arrear and unpaid for 21 days if the same shall have become due or if the lessee shall make any breach or fail or neglect to perform or observe any covenants or if the lessee being a company shall go into liquidation or be wound up whether compul-sorily or voluntarily it shall be lawful for the Trustees without notice and any time may re-enter the demised land and to re-possesses the same as if the lessee had not been made but without prejudice to any right action or remedies of the Trustees for the same.

(f) The lessee may at any time prior to the expiration of the term of 30 years or provisions for determination thereof remove at their own cost all factories or buildings or structures etc., if any, set up by the lessee on the demised land and all factories, building etc. not so removed shall at the expiration or previous determination of the said term of 30 years, as the case may be, become the absolute property of the Trustees without payment of any compensation whatsoever."

3. According to the applicant, the leased land was utilised by the Company in connection with manufacture of Marine Freight Containers. In terms of the Lease Deed, the monthly rent payable was revised with the sanction of the Central Government u/s 52 of the Major Port Trust Act, 1963, by notification dated 14-5-92. The rent, according to the applicant, was enhanced to Rs. 1,76,003 per month. The applicant has alleged that default in payment of rent had occurred on the part of the Company and as on March, 2001, a total sum of Rs. 1,71,37,286 had become due and payable by the Company to the applicant. It is further stated by the applicant that the matter of recovery of the aforesaid dues is pending before the Estate Officer under the Public Premises (Eviction of unauthorised occupants) Act, 1971 (Hereinafter referred to as the Act).

4. According to the applicant, the lease was terminated by the applicant by serving an ejectment notice dated 25-9-2000 requiring the Company to deliver peaceful possession of the Lease Deed to the applicant on or before 31-3-2001. As the Company had failed to deliver possession of the Leased land to the applicant, the applicant took appropriate legal steps for eviction of the Company from the land in question under the provisions of the Act. Notice u/s 4 of the said Act, was issued by the Estate Officer to the Company. According to the applicant, while affixing the said notice issued by the Estate Officer in the Company''s office at Haldia, the applicant could come to know that the Company had been wounded up by order dated 1-9-2000 passed by this Court and that the Official Liquidator had been appointed as a Liquidator of the Company for the purposes of winding up. Coming to know of the aforesaid development, the applicant issued notice dated 9-8-2001 through its Legal Advisers informing the Official Liquidator of the applicant''s claim to title over the leased land and total outstanding dues, amounting to Rs. 1,71,37,286.00 along with interest payable, on account of lease rent. According to the applicant, the Lease in question stood determined in accordance with the terms of the Lease Deed on account of default in payment of rent that had occurred and also by reason of the Company being wound up. According to the applicant, in view of huge liability that had accrued in respect of the leases rent amounting to over Rs. 2.00 crores, the leased property has become onerous, burdensome and prejudicial to the interest of the Company in liquidation. Consequently, the applicant while reserving its right to claim all amounts outstanding on account of rent as may be due before the Official Liquidator, has prayed for appropriate orders from this Court directing the Official Liquidator to forthwith disclaim the lease property.

5. Mr. S. Roy Choudhary, learned counsel has appeared on behalf of the applicant If the secured Creditors, to whom the notices of the application were directed to be issued, only ICICI is represented in the present proceeding by Mr. P.C. Deka, learned Sr. Counsel. The Official Liquidator has filed a report objecting to the claims made in the present application. The learned counsels for the contesting parties have been duly heard and the report of the Official Liquidator has also been perused and considered.

6. Before addressing to the merits of the controversy regarding the entitlement of the applicant to obtain the reliefs claimed, a preliminary primary tussle that had developed between the parties need to be answered. The maintainability of the present application has been questioned by the Secured Creditor i.e., ICICI on the ground that under the provisions of section 535 of the Companies Act, the only person competent to file an application for disclaimer is the Official Liquidator. In support thereof reliance has been placed on the Judgment of the Apex Court in the case of United Bank of India Vs. Official Liquidator and Others, The objection must be overruled, it is contended on behalf of the applicant as section 535 of the Companies Act is not exhaustive of the powers of the Court to order disclaimer. Mr. Roy Choudhury, learned counsel for the applicant, by relying on a Judgment of the Calcutta High Court in Ritz Continental Hotels Ltd., In re

[1986] 60 Comp.Cas. 526 has contended that though under the provisions of section 535 of the Companies Act, leave to disclaim is to be sought by the Official Liquidator, it cannot be understood that no such application for disclaimer can be filed by an affected party.

7. The submissions advanced on behalf of the rival parties and the case laws cited to fortify the respective arguments have been duly considered. Leave to disclaim any part of the property of the Company in liquidation is to be sought by the Official Liquidator under the provisions of section 535 of the Companies Act and the core ground on which such relief is to be sought is that the property sought to be disclaimed has become onerous and has ceased to be beneficial to the interests of the Company being wound up. Hence such property should be allowed to be disclaimed. Keeping in mind the principal object behind a claim of disclaimer, it is possible to conceive of a situation where a part of the property of the Company in liquidation has proved to be onerous and burdensome and yet no leave to disclaim is sought by the Official Liquidator. In such a situation, the Court cannot be understood to be powerless to direct the Official Liquidator to disclaim such onerous property on an application made by an interested/ aggrieved party. This is perhaps the principle on which the Division Bench of the Calcutta High Court in the case of Ritz Continental Hotels Ltd. (supra) has proceeded. The judgment cited by the learned counsel appearing for the ICICI in the case of United Bank of India (supra) would hardly be applicable to the present case, as in that case, the Apex Court held that in view of long period of lease remaining and the low rent payable, the property could not be said to have become onerous and burdensome.

8. The essence of the very elaborate arguments advanced by the learned counsel on behalf of the applicant in support of the present prayer for disclaimer is that default in the matter of payment of rent having occurred and the Company having been ordered to be wound up, the right to re-enter the leased property, in terms of the Lease Deed has accrued in favour of the applicant which has to be enforced in law. In view of the provisions of Section 446(2) of the Companies Act, 1956, it is the Company Court alone which will decide the aforesaid claim of the applicant, it is contended. Two thirds of the period of the lease as already expired and a huge liability running into several crores of rupees has occurred on account of arrear rent. It is unlikely that any third party would come forward to carry on the business of the Company in Liquidation, even assuming that the applicant is willing to recognise such a right. The property, therefore, has become onerous and a direction to the Official Liquidator to disclaim the said property would, therefore, be in the beneficial interest of the Company in liquidation, it is argued.

9. u/s 446(2) of the Companies Act, it is undoubtedly the Company Court which will have the jurisdiction to entertain and to dispose of a suit or any claim by or against the Company in liquidation. The claim for eviction and enforcement of the right to re-enter the lease property in terms of the Lease Deed, therefore, would

be a matter clearly within the competence and jurisdiction of this Court. There is no denial of the default by the Company in liquidation and thereafter, by the Official Liquidator in the matter of payment of the lease rent. The fact that the Company has been ordered to be wound up and presently is in the process of liquidation is a matter of record so is the relevant Clause of the Lease Deed vesting in the lessor as right to re-enter, in the event of the Company being wound up. However, unlike the Civil court wherein a decree has to follow upon a right being established, the Company Court in the exercise of its jurisdiction to direct a disclaimer, is duty bound to take into account several additional factors, all of which would be primarily connected with the interest of the Company in liquidation and those of the Secured Creditors. A disclaimer ought to be ordered by the Court only if it is essentially in the interest of the Company being wound up. If retention of such property is required to effectively carry out the winding up proceeding, no disclaimer would be ordered.

10. Adverting to the facts of the present case, this Court has noticed that the lease-hold land in respect of which disclaimer has been sought, houses the factory building and other moveable plant and machinery, furniture, fixture etc. of the Company. According to the report of the Official Liquidator hundreds of Containers, as finished products are lying on the land. If at this stage, the disclaimer, as prayed for is allowed, the same may cause serious hindrance in the winding up proceeding. Judged from the aforesaid stand point, the property in question cannot be said to have become onerous, unprofitable and burdensome to the Company in liquidation. The preservation of such properties in the hands of the Official Liquidator on the other hand is necessary to bring the winding up proceeding to a successful conclusion. The applicant, undoubtedly would be entitled to claim rent for the period of such possession of the leased property by the Official Liquidator till the liquidation proceedings come to an end, a claim which can always be raised before the Official Liquidator in the proceedings before the said authority.

11. For the reasons aforesaid, I am inclined to hold that for the present, the applicant is not entitled to the reliefs prayed for in the present application. The same, therefore, shall stand refused. The application is accordingly dismissed. No costs.