(2015) 08 BOM CK 0291

In the Bombay High Court

Case No : Company Application (L) No. 98 of 2015 in Company Petition No. 28 of 2012

In Re: Eleganza Furnishings P. Ltd.

Date of Decision : 26-08-2015

Acts Referred:
Provincial Insolvency Act, 1920 — Section 46

Citation : (2015) 192 CompCas 321

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

Bench : Single Bench

Advocate : Rita Yadav, for the Appellant

Final Decision : Disposed Off

Judgement

S.C. Gupte, J.—The company application is for direction to the official liquidator to vacate and/or shift goods and materials of the respondent-company, if any, lying in, Gala No. 17, Building No. A9, Harihar Corporation, Village Dapode, Bhiwandi, District Thane and to handover physical and vacant possession of the premises to the applicant. The applicant is the owner of the premises. Under an agreement of leave and licence dated July 30, 2014, the applicant gave the premises on licence to the respondent-company. The licence period was three years from August 1, 2014 to July 31, 2017. The licence fee was Rs. 24,425 per month. The respondent-company kept a deposit of Rs. 72,675 with the applicant as and by way of security deposit for fulfillment of the terms and conditions of the licence agreement. It is the applicant''s case that the official liquidator, who is in possession of the premises as a liquidator of the respondent-company, does not require the premises for beneficial winding up and should be asked to handover vacant and peaceful possession thereof to the applicant after removing the goods, if any, lying within the premises. The official liquidator has filed a reply to the company application submitting, inter alia, that the official liquidator may either dispose of the movables lying in the premises by public auction or, in the alternative, shift the furniture, fixtures and records lying within the premises to another property of the company in liquidation, which is already in possession of the official liquidator.

2. The only debatable question is of payment of licence fees to the applicant. Learned counsel for the petitioning-creditor opposes the applicant''s prayer for payment of arrears of licence fee. He submits that as far as the arrears are concerned, the applicant, as unpaid licensor of the company in liquidation, is really in the position of an unsecured creditor and cannot get any priority in payment over the secured creditors and workmen. Learned counsel relies upon the judgments of the Supreme Court in the case of Official Liquidator, High Court of Official Liquidator of High Court of Karnataka Vs. Smt. V. Lakshmikutty, and of the Delhi High Court in Amersey Industries and Exports v. CRB Capital Markets Ltd., , ILR 2004 II Delhi 782 , in support of his submissions.

3. As far as the arrears of licence fees for the period prior to the order of winding up are concerned, it is no doubt correct that the applicant, as a licensor of the company, can at the most adjust the security deposit held by it against unpaid licence fee, but for the balance, if any, after such adjustment, it is an unsecured creditor and must avail its turn in liquidation for recovery of its dues in accordance with the law of priorities of debts in liquidation. But if, in the course of winding up, that is to say, after the passing of the winding up order but before the company is actually wound up, the official liquidator requires and uses the premises for beneficial winding up, the licence fees payable during the period of such beneficial use must rank as liquidation expenses and be accorded top priority, i.e., even over the priority claims under sections 529, 529A and 530 of the Companies Act, 1956.

4. In the present case, the company was ordered to be wound up and the official liquidator was appointed as its liquidator on September 2, 2014. The licence agreement was executed before this order. The licence fees claimed to be due are from September 2014 till the filing of this application and thereafter till delivery of possession of the premises, that is to say, entirely for a period after the winding up order. It is not disputed by the official liquidator that all throughout this period, during which the liquidator was in possession thereof, the premises were required to store the movable assets of the company so as to enable the liquidator to make a valuation and bring the same to sale with a view to accomplish administration of assets in winding up. In other words, it is not in dispute that for the period for which the licence fees are claimed, the premises were required and used for beneficial winding up. In that case, licence fees are clearly payable as expenses of winding up.

5. In the case of Official Liquidator, High Court of Official Liquidator of High Court of Karnataka Vs. Smt. V. Lakshmikutty, cited by learned counsel for the petitioner, the Supreme Court has held that under section 529 of the Companies Act, 1956, in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the provable debts as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; that the rule enacted in section 46 of the Provincial Insolvency Act, 1920, thus, should apply, and when there are mutual dealings

between the creditor and the company, only that amount which is due at the foot of the account of such mutual dealings would be recoverable. It cannot be said that the amount due from the creditor to the company should be recovered in full, whilst the amount due to him should rank in payment after the preferential claims provided under section 530. What this means is that the applicant licensor, in the present case, is entitled to adjust the security deposit held by it towards unpaid arrears even prior to the period of winding up, though it is an unsecured creditor in respect of such arrears.

6. We are really not concerned with this situation in the present case, since the entire arrears claimed are for the post-winding up order period. As for that period, since the applicant is anyway entitled to preferential payment which comes under liquidation expenses, there is no difficulty in allowing the applicant to retain the deposit and adjust it towards the arrears and pay the balance of arrears to the applicant.

7. Learned counsel for the petitioner relies on the decision of the Delhi High Court in Amersey Industries and Exports v. CRB Capital Markets Ltd., , ILR 2004 II Delhi 782 . Relying on this decision, learned counsel submits that as far as the security deposit is concerned, since there is no case for adjustment of it towards arrears arising for a pre-winding up order period, the applicant should be asked to make over the same to the liquidator and then wait in the queue for the arrears for the post-winding up order period. There is no substance in this contention. The Delhi High Court in Amersey Industries and Exports v. CRB Capital Markets Ltd., , ILR 2004 II Delhi 782 holds exactly to the contrary. The Delhi High Court, relying, inter alia, on Official Liquidator, High Court of Official Liquidator of High Court of Karnataka Vs. Smt. V. Lakshmikutty, , holds that the landlord has the right to adjust the outstanding amount of rental from the security lying with him and it would not make any difference whether the arrears of rent are for the period before or after the winding up order. In the premises, the application deserves to be allowed. Accordingly, the following order is passed:

(i) The official liquidator is permitted to shift the furniture, fixtures and records lying in the premises, described in prayer clause (a) of the Company Application, to Zenith House, 30 MIDC, Central Road, Andheri (East), Mumbai-400093.

(ii) Such shifting of movables shall be accomplished within a period of four weeks from today.

(iii) After shifting the movables lying within the premises, the official liquidator shall handover vacant and peaceful possession of the premises to the applicant forthwith.

(iv) The official liquidator shall pay the licence fees to the applicant for the period between September 2, 2014, to the date of handing over possession of the premises at the rate provided in the leave and licence agreement dated July 30, 2014, after adjusting the security deposit held by the applicant towards the arrears of licence fees.

(v) The company application is disposed of accordingly.