
(1965) 02 CAL CK 0020
In the Calcutta High Court
Case No : Matter No. 87 of 1958

In Re: Osler Electric Lamp Manufacturing Co. Ltd. (In Liquidation)

Date of Decision : 10-02-1965

Acts Referred:

Companies Act, 1956 — Section 446

Citation : AIR 1967 Cal 61 : (1967) 37 CompCas 306 : 69 CWN 628 : (1966) 1 ILR (Cal) 281

Hon'ble Judges : S.K. Datta, J

Bench : Single Bench

Advocate : Dilip Kumar Chatterjee, for the Appellant; S.C. Sen, for the Respondent

Judgement

S.K. Datta, J.—This application for leave to sue the official liquidator arises in the circumstances mentioned hereinafter.

2. The applicants Nos. 6 to 9 and one Vakchand Hingarani, since deceased, were the owners of the building known as Hingarani House and being premises No. 78, Dr. Annie Besant Road, Worli, Bombay-18. On February 25, 1953, the said owners of the premises leased out flat No. 11 to Messrs. Osier Electric Lamp Manufacturing Company for a period of three years from November 1, 1952, at a monthly rent of Rs. 300 per month.

3. Thereafter, according to the applicants, " on the expiry of the said term, the said M/s. Osier Electric Lamp Manufacturing Co. Ltd. had become a monthly tenant in respect of the said portion of the said premises."

4. On the 4th day of January, 1964, the said Vakchand Hingarani died, leaving his widow and sons and daughters, applicants Nos. 1 to 5.

5. On the 2nd day of December, 1958, the Osier Electric Lamp Manufacturing Company was directed to be wound up and the official liquidator of this hon'ble court became the liquidator of the said company. On the 19th day of September, 1961, the said tenancy was duly determined by serving a notice on the official liquidator. The official liquidator has however not given vacant possession of the

said premises.

6. On or about the 10th day of April, 1964, the applicants applied for an order that leave be granted to the opponents to file the suit in the court of Small Causes, Bombay, against the official liquidator of this hon''ble court as the liquidator of M/s. Osier Electric Lamp Manufacturing Company (in liquidation) (1) for ejectment and for such other reliefs as the applicants in the premises be entitled to. (2) Such further or other order be made as this hon''ble court may deem proper and fit. (3) The costs of and incidental to this application be costs in the suit intended to be filed by the applicants as aforesaid.

7. Promotho Nath Saha filed an affidavit on behalf of the official liquidator, High Court, Calcutta. He admitted that a notice dated 19th day of September, 1961, was received by the official liquidator and further said that the official liquidator was not aware of the tenancy in respect of the premises referred to in the said paragraph and that he was not in occupation of the said premises and, as such, the question of his vacating the premises does not arise at all. He further stated that the applicants have no cause of action to file a suit against the official liquidator of the said company for the reliefs mentioned therein or for any other relief.

8. He further submitted that in any event this hon''ble court has exclusive jurisdiction to try any suit that may be filed by the said applicants against the said official liquidator in view of the provisions of Section 446 of the Companies Act, 1956, and, as such, he submitted that, if leave to file any such suit be granted, the applicants should be directed to file it in this hon''ble court.

9. Mr. Samaren Sen, learned counsel appearing for the official liquidator, primarily submitted that no leave should be given upon the facts stated in the affidavit in support of the application, for the applicants have not annexed thereto a copy of the plaint and what is more important is that the material allegations in the said affidavit are not only vague but disclose no cause of action.

10. A copy of the intended plaint is sometimes annexed to the application for leave but there is no provision either in the Companies Act or the Rules compelling the applicants to do so. Hence, this cannot be a sufficient ground to dismiss the application, though it would have been much satisfactory if the plaint had been annexed.

11. The affidavit filed by the applicants is vague, for no particulars are given of the more material allegations made in the said affidavit. It is not stated therein as to how the company had become a monthly tenant of the said flat on the expiry of the said term, when the said company on the expiry of the said term of three years had become a monthly tenant and again it is not stated who is in actual possession of the said flat, if there be any.

12. Hence, in my view, the criticisms made on behalf of the official liquidator has considerable force.

13. M/s. Osier Electric Lamp Mfg. Company seems to have been a lessee for three years from the 1st November, 1952. This must have expired on the 30th October, 1955. The company was wound up only on the 2nd day of December, 1958. The said company was in possession of the said flat on the 2nd day of December, 1958, as a tenant if the averments of the said affidavit are correct. Hence, in my view, it cannot be said, upon the facts stated by the applicants, that the allegations do not disclose a cause of action, though it must be conceded that the averments are far from explicit and clear.

14. Mr. Sen, in the alternative, submitted that this court has exclusive jurisdiction to try and hear this suit. Consequently, no leave should be given to file the suit in Bombay.

15. Mr. Ghosh, learned counsel, on the other hand, submitted that, in view of the provisions of Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, as modified up to the 15th November, 1962, the City Civil Court of Bombay has exclusive jurisdiction to try the suit.

16. In order to appreciate these rival contentions, it would be preferable to set out Section 28 of the said Bombay Act and Section 466 of the Companies Act. The relevant portion of Section 28 of the Bombay Act is as follows :

" (1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within the jurisdiction,--

(a) in Greater Bombay, the Court of Small Causes, Bombay, in any area for which a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such court; and

(b) elsewhere, the court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge, the Court of the Civil Judge (Senior Division) having ordinary jurisdiction, shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this part apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and, subject to the provisions of Sub-section (2), no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question....."

17. Section 446 of the Companies Act is as follows :

" Suits stayed on winding up order.--(1) When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the court and subject to such terms as the court may impose.

(2) The court which is winding up the company 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 the 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.

(3) Any suit or proceeding by or against the company which is pending in any court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that court.

(4) Nothing in Sub-section (1) or Sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court. "

18. Section 28(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, contained these significant words in Clause (i) " Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason the suit or proceeding would not, but for this provision, be within the jurisdiction....." and in clause (b) " no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question."

19. Therefore, it is crystal clear that under the said Bombay Act, the Court of Small Causes, Bombay, has exclusive jurisdiction to try this suit.

20. It is now necessary to turn to the Companies Act, 1956.

21. Clauses (1) and (3) of Section 446 formed part of the original Companies Act, 1956. Clauses (2) and (4) thereof, however, were added in 1960. Therefore, not only these provisions have been enacted subsequent to the said Bombay Act but they are also union legislation. Hence, if the Companies (Amendment) Act, 1960, has conferred exclusive jurisdiction to this court, being the winding-up court, then, in my opinion, it is clear that this subsequent Act will prevail over the Bombay Act.

22. The opening words in Clause (2) of Section 446 are " that the court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain or dispose of, inter

alia, any suit or proceeding by or against the company."

23. These words no doubt confer jurisdiction on the winding-up court so that they enable the winding-up court to do what it otherwise could not. These words are capable of taking away the jurisdiction of other competent courts or confer exclusive jurisdiction on the winding-up court in conjunction with other words or provisions of the section. There are no words in this sentence expressly taking away the jurisdiction of other competent courts. The word " jurisdiction " is not preceded by the word " exclusive " or words of similar effect as in the Bombay Act. The words "no other court" or similar words are absent unlike the Bombay Act. Hence, it is necessary to advert to the other provisions of the section.

24. The words " suit has been instituted ", " claim or question has arisen ", in Sub-clause (d) of Clause (2) refer to suit or application or claim or question pending in a court other than the winding-up court. The words " is instituted", " arises " or " is made " in Sub-clause (d) of Clause (2) again suggest that such a suit or claim or application was made after the date of winding up of the company.

25. The words "made before or after the order for the winding-up of the company" again clearly suggest that it contemplates not only suits, claims or applications made before but also after the winding-up of the company in a court other than the winding-up court. The words " before or after the commencement of the Companies (Amendment) Act, 1960 " make it crystal clear that suits, claims and applications may be made, even after the amendment in 1960, in courts other than the winding-up court.

26. Hence, Sub-clause (d) of Clause (2) proceeding as it does, that suits, claims, questions and applications may be filed or raised in a court other than the winding-up court even after the commencement of the Companies (Amendment) Act, 1960, presupposes concurrent jurisdiction of the winding-up court and any other competent court. That this is so is made patent by Clause (3) which confers discretionary power or jurisdiction to the winding-up court to transfer ,such claim, question and application pending in a court other than the winding-up court. Therefore, in my opinion, the winding-up court has concurrent jurisdiction and not exclusive jurisdiction.

27. The Legislature has evidently enacted Section 446 in order to keep down the costs of winding up and for early disposal of the matters. The Bombay Act again has been enacted to reduce the expenses of the litigants of suits of certain nature and also expedite the hearing of such suits.

28. Therefore, in granting leave, the objects of both the Acts must be kept in view.

29. It is now necessary to consider whether the order should be an unconditional order or a conditional order. The property is situate in Bombay, the lease was given in Bombay and the monthly tenancy was created in Bombay after the

expiry of the lease. The notice to quit was given from Bombay and possibly, the actual occupant, if any, is also an ordinary resident of Bombay. Hence, prima facie, it would be onerous upon the applicants to direct them to file the suit in Calcutta, for such a suit would entail, inter alia, considerable extra expenses to the applicants who were intended to be relieved by the Bombay Act.

30. The applicants have not, however, stated whether they had received any rents from the company after the expiry of the lease and if so, up to what time. The applicants have suggested that they have not received any rents from the official liquidator after the winding-up order and yet, the applicants did not move in the matter by giving the notice to quit to the official liquidator until September, 1961.

31. The official liquidator states that he is not in possession and there is no cause of action against him. The official liquidator may have to send his representative from Calcutta to Bombay. The extra costs, if so occasioned, will be an additional burden on the winding-up proceedings if the defence is found to be well founded. Hence, keeping in view the objects of both the Acts, I will allow leave to the applicant to file the suit for recovery of possession in Bombay subject to the conditions mentioned hereinafter.

32. Leave is given to the applicant to file a suit for recovery of possession in Bombay subject to the conditions hereinafter mentioned.

33. The applicant will deposit a sum of Rs. 300 with the official liquidator within four weeks from date, which will be held by the official liquidator, subject to further orders of the court as indicated hereinafter.

34. If the plaintiff's suit fails against the official liquidator and the costs awarded to the official liquidator in the suit is not sufficient to cover the expenses of travelling and residence in Bombay by the official liquidator and/ or his agent, the official liquidator be at liberty to appropriate the entire sum of Rs. 300, if such cost is Rs. 300 or is in excess of the same. If there is a shortfall or difference between his actual expenses and the costs awarded by the court in Bombay, the official liquidator will be entitled to appropriate the short-fall or difference out of this sum of Rs. 300 to be deposited with him.

35. In case, however, the official liquidator fails, the official liquidator will return the said sum to the person or persons directed by the applicant when depositing the money or if no such direction is given to the solicitor of the applicant or in such other manner as the official liquidator thinks fit and proper.

36. The above directions will, however, have no effect if the court, in case the plaintiff fails as against the official liquidator, and the Small Cause Court, Bombay, assess the costs of travelling and residence of the official liquidator and/ or his representative. In that event, the official liquidator will be entitled to set off this amount pro tanto against costs awarded to him in that suit and refund the balance, if there is any, to the applicants, whether it be above or below Rs.

300. Costs of this application is costs in the proposed suit. In case, the proposed suit is not filed, the official liquidator will get the costs of this application.

Leave to file suit in Bombay granted.