
(1983) 08 CAL CK 0029
In the Calcutta High Court
Case No : Company Petition No. 270 of 1967

Lakshmi Tractors Co.

APPELLANT

Vs

Official Liquidator

RESPONDENT

Date of Decision : 25-08-1983

Acts Referred:

Companies Act, 1956 — Section 446(2)

Citation : (1986) 59 CompCas 362

Hon'ble Judges : Dipak Kumar Sen, J

Bench : Single Bench

Advocate : P.K. Sen Barat, for the Appellant;

Final Decision : Dismissed

Judgement

Dipak Kumar sen, J.—United Provinces Commercial Corporation P. Ltd. Was directed to be wound up by an order passed by this court in Company Petition No. 270 of 1967. In the course of liquidation of the said company, the official liquidator made an application u/s 446(2) of the Companies Act, 1956, for realisation of occupation charges from Lakshmi Tractor Company, Hind Batteries Service Co., Khesh Kumar, Sheel Spin Enterprises and Rita Ice Cream and Refrigerating Company who claimed to be in possession and occupation of premises No. 10, Ashoke Marg, Lucknow.

2. By a judgment and order dated September 6, 1969, passed in the said application, the said five occupiers were directed to pay compensation to the official liquidator for use and occupation of the said premises, amounts of which payable per month were fixed till vacant possession was delivered. The said occupiers were further directed to deliver up vacant possession of the portions of the said premises in their respective occupation, to the official liquidator by October 31, 1979.

3. It was, inter alia, found in the said judgment that the official liquidator had issued receipts to the said persons purportedly for rent but subsequently,

realising his mistake, had issued receipts for occupation charges. It was further held that the official liquidator without leave of court was not entitled and had no jurisdiction to induct tenants or sub-tenants in property in the custody of court and that the acts of the official liquidator in collecting money from the said occupiers purportedly on account of rent was illegal and unauthorised. The said occupiers, it was held, had no legal title whatsoever to the said premises and were in illegal and unauthorised occupation thereof as trespassers. It was also decided that the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "the said Act"), did not apply in the facts of the case. An appeal filed from the said judgment and order was dismissed on June 10, 1982. It has been stated from the Bar that (a) further appeal has since been preferred to the Supreme Court, but no particulars of the same could be furnished.

4. In the present application by Lakshmi Tractors Co., one of the said occupiers, on a summons dated July 14, 1983, it is prayed that leave be given to the applicant to proceed with a suit in the court of the Civil Judge, Lucknow, against the official liquidator.

5. In the affidavit of Bhim Sain Mehta affirmed on July 13, 1983, in support of the said summons it is, inter alia, alleged that on May 30, 1983, the applicant has instituted the said suit against Srikrishna Gaur, Harikrishna Gaur, Sekhar Gaur, Amar Gaur (the owners of the premises) and the company represented by the official liquidator claiming, inter, alia, a prohibitory injunction against the defendants restraining them from interfering with the peaceful possession by the applicant in the said premises and from evicting the applicant therefrom.

6. It is, inter alia, alleged that a part of the said premises was let out to the applicant some time in 1971 on a monthly rent of Rs. 400 and the official liquidator had issued receipts in respect of the said rent to the applicant. It is contended that in the facts, the matter comes within the purview of the said Act.

7. It is alleged that the applicant has obtained an ad interim order against the defendants in an appeal preferred against an order passed in the said suit. It is contended that the applicant is protected by Section 20 of the said Act and Section 446 of the Companies Act, 1956, does not bar the institution of the said suit as the applicant had claimed relief in the said suit against the main landlords, viz., the Gaurs. Inasmuch as the official liquidator has been made a party to the said suit and as it may be contended that leave of this court is necessary u/s 446 of the Companies Act, 1956, such leave has been sought.

8. Karuna Sindhu Chakraborty, an assistant of the official liquidator, has affirmed an affidavit on August 12, 1983, which has been filed in opposition to the said affidavit of Bhim Sain Mehta. It is, inter alia, contended in this affidavit that the suit filed before the Civil Judge, Lucknow, cannot proceed or could not have been commenced without leave of this court, which has already pronounced in the matter by its judgment dated September 6, 1979. It is contended that the Civil

Judge, Lucknow, has no jurisdiction to entertain the said suit, the subject-matter of which has been decided by this court.

9. The Gaurs appeared in this application and opposed the same.

10. At the hearing, learned advocate for the applicant, submitted that the order passed on September 6, 1979, was a nullity and without jurisdiction and, therefore, the said order was no bar to the said suit.

11. It was submitted that the landlords were the main party in the said suit and the official liquidator was only a pro forma party. It was submitted further that such suit should be allowed to be proceeded with in the court where it was filed and this court in its company jurisdiction should not deal with the question arising in the said suit as it involved the rights of a third party, viz., the Gaurs.

12. In support of the aforesaid contentions, the learned advocate for the applicant cited the following decisions :

(a) Suresh Chandra Khasnabish v. Bank of Calcutta Ltd. [1951]21 Comp Cas 110. In this case, a Division Bench of this court construed Section 171 of the Indian Companies Act, 1913, which corresponds to Section 446 of the Companies Act, 1956, and held that when a company has been wound up by an order of court, no suit or other legal proceeding should be proceeded or commenced except by leave of the court, to prevent the assets of the company being frittered away in vexatious litigation. The court in granting leave had to consider the entire circumstances and decide whether leave should or should not be granted so that the assets of the company may be preserved for the benefit of the creditors. It was further held that the court had jurisdiction to grant leave to proceed with a suit or other legal proceeding against a company in liquidation, even though such leave was not obtained before its commencement.

(b) Gowra Subraya Setty & Sons v. Yellama Cotton Woollen & Silk Mills Co. Ltd. [1970] 40 Comp Cas 10 (Mys). In this case, a money suit was filed on September 6, 1967, against a company which was directed to be wound up subsequently by an order dated October 5, 1967. After the suit was stayed u/s 446 of the Companies Act, the plaintiff applied before the company judge to proceed with the suit. Such leave was refused by the first court. On appeal, a Division Bench of the Mysore High Court held that leave to proceed with a suit against the company in liquidation was a matter of discretion which had to be exercised in accordance with well-recognised principles.

13. It was found that the plaintiff had also sued the guarantor and had claimed a decree, against the latter. The Division Bench held that the issue in the suit between the plaintiff and the guarantor could not be decided in the winding-up proceeding and the suit against the second defendant could not be proceeded with in the absence of the company. In such circumstances, it was held by the Division Bench that the discretion should have been exercised in favour of the plaintiff. The appeal was allowed and leave was given to the plaintiff to proceed

with the suit.

(c) *Star Engineering Works Ltd. V. Official Liquidator* [1977] 47 Comp Cas 30 (Guj). In this case, a company was directed to be wound up by an Order dated February 7, 1972. A suit was filed by the plaintiff thereafter on March 13, 1972, inter alia, for a money decree with interest and costs, and in the alternative return of certain goods.

14. A Division Bench of the Gujarat High Court on appeal came to the conclusion on an examination of the plaint that the plaintiff had not made out a prima facie case and that leave if granted would expose the company to unnecessary litigation and costs.

15. It was observed that leave to file a suit should ordinarily be granted where the question at issue could not be decided in a winding-up proceeding. Whether such leave should be granted or not would, however, depend on the merits of a particular case of litigation.

16. In the facts, the Division Bench held that the claim of the plaintiff could be dealt with in the liquidation proceeding and leave to proceed with the suit was refused.

17. Learned advocates for the official liquidator and for the Gaurs have contended to the contrary.

18. In the instant case, it appears that the applicant at all material times had full knowledge that the company was in the process of being liquidated by this court. The applicant had appeared in the liquidation proceeding and had contested the application of the official liquidator referred to earlier. No reason has been given in the affidavit filed in support of the summons as to why prior leave was not obtained from this court before filing the said suit.

19. If leave had been sought prior to the institution of the suit, the official liquidator could have appeared in the said suit and filed a caveat therein and opposed the passing of the interim order.

20. From the decisions cited, it appears that the law as laid down is that in allowing a person to commence or proceed with a suit or other legal proceedings against a company in liquidation, the court has to take into account the entire facts and circumstances. The relevant factors are the interest of creditors, preservation of the assets of the company against frivolous litigation and the rights or liabilities of third parties.

21. It is alleged in the affidavit that the real parties in support of the summons in the suit are the landlords, viz., the Gaurs. There is no averment in the said affidavit that the official liquidator is a necessary party thereto or that he had to be impleaded. By the only order obtained in the said suit, the applicant has been allowed to continue in possession of the property in dispute contrary to the order passed by this court.

22. The order dated September 6, 1979, has merged with the order of the court of appeal. The said orders have become perfect. It is nobody's Case that the said orders have been stayed by the Supreme Court. Therefore, the said orders remain binding on the applicant and in the plaint filed, the reliefs sought have been directly contrary to the orders of this court whereby the official liquidator has been directed to obtain vacant possession of the said premises.

23. The suit filed by the applicant appears to me to be prima facie improper and vexatious and if allowed to continue, would expose the company in liquidation to unnecessary litigation and costs leading to the depletion of its assets. I am not otherwise impressed by the conduct of the applicant. Knowing fully well of the pending liquidation proceedings, it has chosen to disregard the provisions of Section 446 of the Companies Act and sought to steal a march by filing a suit without leave and obtaining an ex parte order which has resulted in nullifying an order passed by this court. The applicant has come back to this court with a fait accompli and is calling upon the court to rubber stamp its actions with retrospective leave. Such conduct not only lacks in bona fides but amounts, in my view, to an abuse of the process of court.

24. For the reasons as aforesaid, I dismiss this application. The applicant will pay the costs of the official liquidator assessed at 12 G.Ms.