(2011) 07 KAR CK 0243

In the Karnataka High Court

Case No : Company Petition No. 196 of 2010

M/s. Machinery Sales Corporation APPELLANT

Vs

M/s. TNT India Pvt. Ltd. RESPONDENT

Date of Decision : 22-07-2011

Acts Referred:

Companies Act, 1956 — Section 433 (e), 433 (f), 434 (1) (a), 439

Citation : (2011) 07 KAR CK 0243

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : L.M. Chidanandayya, for the Appellant; Saji P. John, for the Respondent

Final Decision : Dismissed

Judgement

Aravind Kumar

1. Petitioner seeks for winding up of the respondent -Company by invoking Section 433(e) and (f) and Section 434 (1)(a) and (c) read with Section 439 of The Companies Act, 1956. Petitioner contends that respondent is a company incorporated under the Companies Act having its registered office at Bangalore and petitioner is the absolute owner of property bearing No. 3, measuring 759 sq.ft. carpet area equivalent to 1,150 sq.ft. built up area situated at Ground Floor, Marine Chambers, 43, New Marine Lines, Mumbai-400 020. It is contended that petitioner was in possession and enjoyment of the property and was intending to let-out the said premises on rental basis and respondent - Company which is a US based company, had established its base at Bangalore and in order to carry on its business, approached the petitioner to create a licence in its favour and accordingly, an agreement came to be entered into namely Leave and Licence agreement was entered into on 5.10.2005 agreeing thereunder to pay a licence fee of Rs. 97,750/- per month with an understanding that licence fee would be enhanced at the rate of 5%, every year. It is contended that under the said agreement of leave and licence which is produced at Annexure "B", it was

agreed between the parties that in the event of increase in municipal tax rate at a future date, the Licensee shall, subject to production of documentary proof by the licensor, reimburse the licensor the amount equivalent to the difference between the tax as applicable at present and the enhanced rate. As such it is contended that, during the subsistence of the said agreement, the respondent as a licencee, is required to pay to the licensor any increase in the property tax by the Municipal Corporation of Greater Mumbai namely the difference of the property tax which was existing as on the date of execution of the agreement and the subsequent increase thereof.

2. It is contended by the petitioner that Marine Chambers Premises Co-operative Society Ltd. is managing the day-to-day affairs of the Society''s building namely ''Marine Chambers'' wherein the premises in question has been given to the respondent and the said society received a letter from Municipal Corporation of Greater Mumbai assessing the property tax at Rs. 4,45,373/- for half yearly from 1.4.2006 to 30.09.2006 and as such, the Society raised a bill on the petitioner to pay the difference of enhanced property tax from 1.4.2006 to 31.12.2007 which amounts to Rs. 15,33.304/-. It is also contended that Municipal Corporation of Greater Mumbai has levied the property tax for the said period of Rs. 15.58.805/- and same was added for the month of January to March 2008 as arrears. If is contended that in view of the said demand, respondent, as agreed to under the Leave and Licence Agreement, was required to pay the demand raised by the Municipal Corporation of Greater Mumbai under which it has enhanced the municipal tax. It is also contended that the revision of the property tax by the Municipal Corporation of Greater Mumbai has resulted in petitioner receiving a demand notice and said fact having been intimated to the respondent by communication dated 20.07.2006, did not yield any-positive result and as such, petitioner has got issued a statutory notice on 10.11.2008 (Annexure-"H") to comply with the demand made therein and there was no compliance with the demand made m the said notice, and the reply sent thereof was on untenable grounds and hence petition in question has been filed seeking for winding up of the respondent under the provisions of The Companies Act, 1956.

3. Notice of this petition was ordered on the respondent and respondent having entered appearance, has filed detailed Statement of objections denying the claim made in the petition. It is contended by the respondent that respondent is a sound company and its net worth as on 31.03.2010 is at Rs. 95.56.26,000/- and its annual turnover as on 31.03.2009 was Rs. 453,12,09,000/- and as on 31.03.2010, it was Rs. 517,13,13,000/-. It is also contended that there are no claims of whatsoever nature against the respondent. -Company. It is also stated that there are no secured creditors in the respondent - Company as on 31.03.2010. The execution of the leave and licence agreement is admitted. However, it is contended that said agreement provides that the licensor has to pay the municipal tax, water charges as mentioned in Clause 7.1. It is contended that agreement was entered into between the petitioner and respondent with consensus ad idem on the term that in the event of ''increase in municipal tax

rate at a future date'', the licensee shall, subject to production of documentary proof by the licensor, reimburse the licensor the amount equivalent to the difference between the tax as applicable at present and the enhanced rate and as such it was contended, only in the event of the Municipality increasing the rate of tax, the same was agreed to be paid by the respondent - licensee under the said clause 7.1 and not on account of increase on tax liability due to assessment and as such, it is contended that interpretation sought to be put forward by the petitioner/licensor is contrary to the agreement and it is contended that the clause therein is to interpreted as understood between the parties.

4. It is contended that after entering into leave and licence agreement, petitioner did not inform the Municipal Corporation about entering into such agreement and suppressed the same at the time of assessment to avoid liability of being assessed for commercial purposes, ''However, on the Municipal Corporation becoming aware about the same, it had called the petitioner for assessment for the second time. As such it is contended that increase in tax was due to change of assessment and same was not due to increase in the rate of tax and hence respondent has denied its liability to pay the said difference amount. On these grounds amongst others, respondent in its detailed statement of objections filed has denied the averments made in the winding up petition.

5. Petitioner has filed a rejoinder to the said statement of objections by reiterating its contentions raised in the petition and further contending that the respondent has taken an untenable plea and the letter received from Marine Chambers Premises Co-operative Society Ltd., would go to show there is a demand for enhanced tax by the Mumbai Municipal Corporation Act, and society has a statutory duty to collect the property tax and non payment of same amounts to non payment of the admitted debt by the respondent. Contentions raised by the respondent in the statement of objections have been denied in the rejoinder filed.

6. Heard learned counsel Sri. Chidanandayya, appearing for petitioner and Sri. Saji P John learned counsel for respondent. The only question that arises for consideration is:

Whether the petitioner due and has proved that there is admitted debt payable by respondent; and if so, whether petition deserves to be admitted?

7. In order to answer the above formulated question, it would be necessary to extract the clause in the leave and licence agreement dated 5.10.2005 which has been pressed into service by both the learned advocates appearing for parties namely clause 7.1, and same reads as under:

7.1 TAXES, ELECTRICITY, WATER CHARGES ETC.

The Licensor shall bear and pay the taxes, water charges both present and future, payable in respect of the Schedule Premises to the concerned Society/ authority. In the event of increase in the municipal tax rate at a future date the

Licensee shall subject to production of documentary proof by the Licensor, reimburse to the Licensor the amount equivalent to the difference between the tax as applicable at present and the enhanced rate.

(Emphasis supplied by me)

8. Said leave and licence agreement came to be entered into between petitioner and respondent on 05.10.2005. At the time of entering into such agreement, a refundable deposit of Rs. 11,73,000/-(Rupees Eleven Lakhs Seventy Three Thousand Only) has been paid by the licensee (respondent) to the licensor (petitioner) and same is not in dispute. A reading of clause 7.1 as extracted hereinabove, it wouldclearly emerge that licensor has agreed to bear and pay "tax, water charges" both present, and future payable in respect of schedule premises to the concerned society/authority. There is no dispute on this issue.The second limb of the clause casts an obligation on the licensee to pay difference of tax if enhanced by Municipal body that too when there is only a statutory demand made by statutory authority and to that extent only said clause would apply and not otherwise. What has been agreed by the licensee as seen from the above clause is the event of increase in rate of municipal tax by the statutory authority and it would become payable on production of such proof by the licensor. These three ingredients namely (i) Increase in rate of tax, (ii) Future date a and (iii) Production of documentary proof which the licensor has to satisfy in order to stake a claim against licensee for payment of said difference amount and not otherwise. From the perusal of records it does not disclose as to what the statutory authority had fixed the rate of tax payable or the rate of tax at the time of entering into Agreement. As seen from receipt dated 27.12.2005 within a period of two months, a receipt for Rs. 3,14,295/- has been issued by the society managing the said property namely Annexure-C dated 27.12.2005 to the premises in question.

9. The cause of action for the licensor to claim the said amount as debt receivable from the respondent is based on the notice issued by Municipal Corporation of Greater Mumbai dated 20.07.2006 at Annexure-D. A perusal of the same would go to show that it is a notice issued to respondent herein u/s 155 of the Mumbai Municipal Corporation Act to determine ratable value of the premises and as such respondent has been called upon to furnish a written return giving the dimension, rent of the premises, copy of the Agreement and on its failure to furnish the same, it has been stated non-furnishing of the same will be an offence. Licensor has not produced before this court any order passed by Mumbai Municipal Corporation, or an order of Municipal Corporation determining ratable value and rate of tax and payment thereon as determined by it on the basis or on the strength of leave and licence agreement or immediately preceding the said date. Petitioner has not produced the said documents before the statutory authorities for reasons best known to it and it has not disclosed the agreement of leave and license that it has entered into with the respondent for obvious reasons. Petitioner cannot now contend that by virtue of any order

passed by Municipal Corporation determining property tax due to assessment on account of its either suppression of facts or non-furnishing of Information, respondent/licensee has to pay said tax. Under what circumstances and under what terms and conditions, said order determining tax liability came to be passed has to be demonstrated by petitioner to prove that it amounts to admitted debt, and it is for the petitioner to establish the same before appropriate forum in accordance with law. Thus, petitioner has not been able to demonstrate before this court that there is admitted enforceable debt to invoke the provisions of Section 433 (e) and (f) of the Companies Act and seek for winding-up of respondent-company.

10. It also requires to be noticed from the statement of objections filed by respondent that it is a company which is solvent having a surplus and reserves to the extent of 350 crores (as evidenced from balance sheet and auditors report at Annexure-R-1 appended to statement: of objections) and having a total turnover of 547 crores for the year ending 31.03.2010 and without there being any claim against respondent company, it cannot be construed or held that the respondent company is not solvent or incapable of paying any amount due to its creditors. Even on this ground, petitioner has not been able to demonstrate that it is just and equitable to order winding up of respondent-company or it is just and equitable in the facts of the case. As such the point formulated herein above deserves to be answered in the negative, i.e., against the petitioner and in favour of respondent.

11. In view of the discussion made herein above, petition is hereby dismissed. No costs.

12. Any observations made during the course of this order shall not come in the way of petitioner pursuing its claim against the respondent in the proceedings that is said to have been already filed and pending adjudication. In view of the dismissal of the company petition, C.A. No. 778/2010 is also dismissed.