

(2019) 03 CAL CK 0105

In the Calcutta High Court

Case No : Company Application (CA) No 286, 325 Of 2017 With Company
Petitions (CP) No 245 Of 1985

Ramswarup Upadhyay

APPELLANT

Vs

Of ficial Liquidator

RESPONDENT

Date of Decision : 28-03-2019

Acts Referred:

Companies Act, 1956 — Section 446, 456, 456(1A), 456(1B), 457, 477, 477(6), 477(7)

Citation : (2019) 03 CAL CK 0105

Hon'ble Judges : Arindam Sinha, J

Bench : Single Bench

Advocate : Prantik Garai, S. Fasih, Ronojit Chowdhury

Final Decision : Partly Allowed

Judgement

The Court : This application by Judge's Summons (CA 286 of 2017) carries prayers for recall of order dated 5th May, 2017 passed by a coordinate Bench and consequential directions upon Official Liquidator to remove lock and seal put on the flat in question and hand over possession thereof to applicant. The order is extracted below.

"The Official Liquidator seeks the assistance of this Court to take possession of the subject property in Worli, Mumbai.

This letter for direction (CA no.182 of 2017) is allowed in terms of prayers (a), (b) and (c).

The choice of an empanelled valuer is left to the Official Liquidator. He is permitted to break open the seal or lock of the flat in the presence of and with the assistance of the local police in Mumbai.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities."

The order was made on a letter for direction filed by Official Liquidator, registered

and numbered as CA 182 of 2017 per a practice direction issued by another coordinate Bench. Since it was not a summons for directions, as provided for by Companies (Court) Rules, 1959, Official Liquidator obtained the direction, *ex parte*.

Mr. Garai, learned advocate appears on behalf of applicant and submits, his client was an employee of the company (in liquidation). As such the flat in question was occupied by his client on the company having had purchased it, upon clear understanding that on retirement, the flat would be conveyed to his client at reasonable consideration to be paid out of his retiral benefits. Consideration was paid, only transfer document remained to be executed. Unfortunately, the company went into liquidation. His client continued to reside in the flat and applied for membership with the cooperative society of the apartment, in which the flat is situate. According to him, pursuant to order dated 5th May, 2017, Official Liquidator took possession of the flat. His client having had obtained membership of the cooperative, said order should be recalled and other prayers made in the Judge's Summons, allowed.

On query from Court regarding his client having had possession of the flat and notice of ongoing liquidation, he draws attention to order dated 1st August, 2008 made by yet another coordinate Bench. It appears from said order, there was even earlier order dated 4th February, 2005, by which leave was granted to Official Liquidator to take possession of the flat. CA 220 of 2005 made by applicant was for recall of said earlier order dated 4th February, 2005 and was dealt with by order dated 1st August, 2008. The application was dismissed. Now, applicant has again come up on contention of having obtained membership of the cooperative. Mr. Chowdhury, learned advocate appears on behalf of Official Liquidator and points out, applicant had preferred appeal against order dated 1st August, 2008 but the appeal was dismissed for non-prosecution on 28th April, 2014.

On further query from Court Mr. Garai submits, statements have been made in the affidavit in support of the Judge's Summons that at about 3:30 p.m. on 1st June, 2017, representatives of Official Liquidator along with police from Worli Police Station visited the flat in question and demanded possession. Applicant, under legal advice, moved out of the flat and thereupon it was locked and sealed by representatives of Official Liquidator.

Applicant's contention of title to the flat, by obtaining membership of the cooperative, is of no aid to him in adjudicating this application. The membership was granted in revision of order of refusal, on execution of a bond. Applicant, by bond dated 3rd December, 2004 indemnified the society that in case the company, now in liquidation, either claims the flat or raises objection for transfer of it in favour of applicant, he shall bear all legal expenses for contesting claim of the party. Applicant is out of possession. If this membership, on having furnished indemnity to effect recorded above, gives him title to the flat, applicant must have adjudication on such claim of title before he can claim possession, he

having given it away on an order made for breaking open lock and seal in the flat. The order, recall of which has been prayed, did not direct forceful eviction as made in execution proceeding. It was made on a 'letter for direction'.

The order gave permission to Official Liquidator to take possession of the flat, which, from the direction issued, it is apparent Court was under impression it was locked and sealed. Applicant, it appears from the application, was advised to give possession. Nothing has been brought to notice of Court regarding Official Liquidator having initiated any action, of approaching or against the society.

For reasons aforesaid, Court is distressed and constrained to hold that where applicant had given possession, he, in consequence, does not have entitlement, as prayed for in the application, to have order for restoration of possession. Distressed and constrained because Companies Act, 1956, under sections 456, 457 and 477 provide for custody of property of company in liquidation, powers of liquidator in respect of property of company in liquidation and Court's power to summon persons suspected of having property of the company in liquidation, which provisions were not invoked nor applied in Official Liquidator taking possession of the flat pursuant to approaching coordinate Bench on a 'letter for direction', to obtain ex parte permission to break into the flat as granted by order dated 5th May, 2017. Inserted by amendment sub-sections (1A) and (1B) in section 456 require Official Liquidator to request in writing concerned Chief Presidency Magistrate or District Magistrate to take possession and the authority may thereupon, after such notice as may be thought fit to be given to any party, take possession of the property and deliver it to Official Liquidator. So far as sanction under section 457 is concerned, there is no provision for Official Liquidator to obtain sanction to take possession of property of company in liquidation upon evicting occupant therein. Sub-sections (6) and (7) in section 477 provide for Court to order a person suspected of being in possession of property belonging to a company in liquidation, upon him being examined, to deliver the same to Official Liquidator and execution of such order is to be in same manner as a decree for delivery of property under Code of Civil Procedure, 1908.

Supreme Court in *Raptakos Brett & Co. Ltd. vs. Ganesh Property* reported in (1998) 7 SCC 184 as also AIR 1998 SC 3085 said, inter alia,

"In view of the aforesaid settled legal position, it must be held that on the expiry of the period of lease, the erstwhile lessee continues in possession because of the law of the land, namely that the original landlord cannot physically throw out such an erstwhile tenant by force. He must get his claim for possession adjudicated by a competent court as per the relevant provisions of law. The status of an erstwhile tenant has to be treated as a tenant at sufferance akin to a trespasser having no independent right to continue in possession." (emphasis supplied)

There was no adjudication, as appears from ex parte order dated 5th May, 2017,

it not being an order passed in execution proceeding. It cannot also be said there was adjudication of applicant's claim to possession as by order dated 1st August, 2008. That was order made dismissing application of recall of earlier order. Adjudication was the application did not merit order of recall as necessarily that grounds for recall or review had not been made out. In this context following extract from said order, on submission made and a view taken, are relevant.

"Mr. Saha next submitted that the question of rights of ownership and/or possessory rights could not be decided in summary proceedings. The question of whether the company had any subsisting ownership right or could claim any ownership right as on the date of winding up is a question of fact and law which cannot be decided in a summary proceedings on affidavits alone. The direction to recover possession was given in the Chamber of the Hon'ble Company Judge on the basis of a letter for direction, a copy of which was never served on the applicant.

....

The feeble argument of Mr. Saha that the applicant had acquired title by adverse possession is legally unsustainable. The ingredients of ownership by adverse possession are wholly absent. The applicant was, as officer of the company permitted to use and occupy the said flat as part of his perquisites. Admittedly, after his retirement, various eviction proceedings were instituted, during the pendency whereof the company was directed to be wound up. The proceedings were pending when the order of winding up was passed and could not have been disposed of without leave of Company Court. The attention of the Official Liquidator had not been drawn to the proceedings. In any case on and from the date of the order of winding up, the Official Liquidator is in deemed possession of the flat."

Earlier order for possession was also exparte on a 'letter for direction'. Due process of law for eviction by adjudication on eviction proceedings, with leave obtained under section 446, was not resorted to by Official Liquidator.

There was no dispute raised by Mr. Chowdhury regarding manner in which Official Liquidator obtained possession of the flat except submission that notices issued prior thereto by the office, addressed to applicant at his address of the flat, went unserved. As such the application for, inter alia, recall of order dated 5th May, 2017 is allowed in part as the order was obtained exparte and there appears error of fact apparent on face of it, the flat being occupied and not locked. However, as aforesaid, applicant having had thereafter relinquished possession, other prayers in the application cannot be granted.

CA 286 of 2017 is thus allowed in part. Company Matters Department is directed to henceforth only register and number company applications as are made in accordance with the rules.

List CA 325 of 2017 on 25th April, 2019.