

(2011) 04 MAD CK 0277
In the Madras High Court
Case No : C.P. No. 33 of 2010

Savitri Leasing and Finance Ltd.

APPELLANT

Vs

Spencer's Retail Limited (Erstwhile Great Wholesale Club Limited)

RESPONDENT

Date of Decision : 05-04-2011

Acts Referred:

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

Citation : (2011) 04 MAD CK 0277

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : S. Krishnan for K.S. Ganesh Babu, for the Appellant; P.S. Raman for A.A. Mohan, for the Respondent

Final Decision : Dismissed

Judgement

Vinod K. Sharma, J.—This company petition has been filed u/s 433(e) r/w. Section 434(1)(a) & (c) r/w. 439(i)(b) of the Companies Act, 1956.

2. It is pleaded that the Petitioner is owner in possession of a commercial complex over a plot No. 3, Indira Palace, Malaviya Nagar, Jaipur. The Respondent was granted lease in the said premises for area measuring around 24,923 sq.ft on the lower ground floor (hereinafter referred to as the "Leased Premises"), and approximately 2750 sq.ft built up area on the basement of Commercial Complex within the permitted service area. Lease was executed on 5th October 2006 and subsequent, lease agreement was executed on 30.07.2007.

3. Lease rent was fixed at Rs. 43.95 per sq.ft per month of the chargeable area of 32,400 sq.ft for the first three years of the lease/term of 12 years subject to an increase of rent by 12% of the last paid rent after expiry of first three years and thereafter, 15% after end of every term of three years. The other charges were payable by the lessee, i.e. Respondent company.

4. The case of the Petitioner in Para 9 of the petition is that Respondent company

failed to pay the following dues:

9. The Petitioner submits that the Respondent company was occupying the Leased Premises of the Petitioner in the terms of the said Lease Agreements and operated its store in the name of Spencer's at Jaipur. However, the Respondent company has failed to make the following payments in respect of Lease Rentals and various charges mentioned in Para 7 hereinabove despite repeated reminders though the same has already become overdue.

Sl. No. Particulars Period for which outstanding Amount

1.	Lease Rentals	May 2009 to Aug. 2009	56,95,920.00
2.	AC Charges	Apr.2009 to Aug.2009	14,88,455.00
3.	Electricity Charges	July 2009 to Aug.2009	2,65,844.00
4.	CAM Charges	Apr.2009 to Aug.2009	14,88,455.00
5.	Security Deposit against Service tax on Lease Rentals	Nov.2008 to Aug.2009	16,50,873.00
6.	Sinking Fund Charges along with service tax	May 2009 to Aug.2009	2,83,230.00
7.	Display Charges (Balance Amount of Invoice dated 01.10.08)		28,169.00
Total			1,09,00,946.00

5. The case set up in the petition is that lease was for a term of 12 years, but lock-in period of the lease was 36 months, before which the lease could not be terminated by any of the parties. After 36 months, the lessee, i.e., Respondent Company was competent to terminate the lease by giving a prior notice of 6 months, whereas, there were no such right with the Petitioner except in the event of default.

6. The case set up by the Petitioner further is that in violation of terms of the lease agreement, the Respondent company sent a premature termination notice to the Petitioner and vacated the Leased Premises on 02.09.2009, without payment of lease rentals for the contractual lock-in period and notice period of 6 months from the rent commencement date.

7. On the pleading referred to above, it is claimed that the Respondent company is indebted to the Petitioner to a sum of Rs. 2,96,76,616.00 (Rupees Two Crores Ninety Six Lakhs Seventy Six Thousand Six Hundred Sixteen only).

8. It is pleaded in the petition that statutory notice was sent to the Respondent, calling it to clear the dues, but no reply was received to the notice.

9. This fact is disputed by the learned Senior Counsel for the Respondent by stating that reply was sent to the notice. One of the contentions raised by the Respondent is that the Petitioner has misled the Court by making false

averments, therefore, not entitled to the relief u/s 433, 434 r/w 439, having not come to the Court with clean hand.

10. Counter has been filed by the Respondent company, wherein, stand taken is that the Respondent company is solvent company, being one of India's largest and fastest growing multi-formate retailer with 220 stores including 30 large format stores across 35 cities in India. This itself shows that the Respondent company is a solvent company, and that the amount claimed by the Petitioner company is bona fide disputed.

11. It is the case of the Respondent in the counter that lease deed was terminated in terms of Clause-2 of the lease deed, which reads as under:

2. Term

The terms of the agreement shall be for a period of 12 (Twelve) years commencing from the expiry of the compensation free period mentioned hereunder subject to an increase of rent by 12% of the last paid rent after the expiry of First Three Years and thereafter 15% after end of every term of three years. The lock-in period shall be of 36 months (inclusive of 6 months of notice period) from the Agreement Date as mentioned hereinabove during which either of the parties shall not be entitled to terminate this Agreement.

The contention of the Respondent company is that the amount in terms of Clause-2, already stands paid and no amount is due and payable.

12. Whereas the case of the Petitioner is that as per Clause 17.4, 6 months notice was to be given after expiry of lock-in period, therefore, the Respondent company is in arrears of the rent of 6 months, which admittedly not paid.

13. Clause 17.4 of the lease reads as under:

17.4 Notwithstanding anything herein contained herewith, the LESSEE shall be entitled to terminate this agreeent of by giving the LESSOR a prior notice of 6 months after the expiry of lock-in period of 36 months.

14. The contention of the learned Counsel for the Petitioner is, that even if for the sake of arguments the claim of rent is taken to be disputed, still, the liability towards the electricity charges and other maintenance charges is admitted. This contention is based on the fact, that the Petitioner in the statutory notice had claimed the amount of electricity charges and other maintenance charges and this fact was not specifically denied as the stand taken by the Respondent Company was all amounts due can be adjusted out of the advance of rent paid by the Respondent Company as security.

15. The learned Counsel for the Petitioner vehemently contended that in any case liability of Rs. 32,42,754/- is an admitted liability.

16. In support of his contention, the learned Counsel for the Petitioner placed reliance on the judgment of the Hon''ble Bombay High Court in the case of Tata

Finance Ltd. Vs. Kanoria Sugar and General Manufacturing Company Ltd., , wherein, it is held as under:

11. Applying now, the law as above, to the case in hand, can it be said that the defence raised by the company is legitimate and the debt of company is bona fide disputed. In the instant case, the Company's case is that the total amount of more than Rupees Two Crores is payable by the company. It is true that there is some dispute about the claim of enhanced lease rentals on account of disallowance of claim of depreciation by the Income Tax department. There is, however, absolutely no dispute for the outstanding lease rentals which are in the range of nearly Rupees Thirty Lakhs. The terms of agreement are also very clear and in case of default, the company is liable to pay the service charges. When a part of claim made by the creditor is seriously disputed but the remaining portion is prima facie appear to exceed the limit of Rs. 500/- indicated in Section 434 of the Act, it would be unjust to refuse wind up order on the ground that there is dispute as to precise amount owned. In re Tweeds Garages Limited. (1962) 1 Ch. 406; it was clearly held that it would be unjust to refuse a winding up order to the Petitioner who has admittedly owned moneys which have not been paid merely because there is a dispute as to the precise amount owing. Almost to the same effect are the observations in Cardiff Preserved Coal and Coke Co. v. Norton (1867) 2 Ch. App. 405.

17. On consideration, I do not find any force in the contention of the learned Counsel for the Petitioner, as there is a genuine bona fide dispute, with regard to the interpretation of different clauses of Lease Deed to determine the rent.

18. A reading of the petition further shows that with regard to electricity and other maintenance charges, parties had agreed to enter into a separate agreement. No such agreement has been placed on record. The stand of the Respondent-Company is that electricity and other maintenance charges were only payable as per the usage, and till the time the Respondent Company remained in possession, it had paid all the charges. In reply to statutory notice taken by the Respondent Company that if any amount is found to be due and payable by the Respondent Company, the same could be adjusted from the security deposit of the Respondent Company. This cannot be said to be an admission of debt, as contended by the Senior Counsel for the Petitioner.

19. The judgment of the Hon'ble Bombay High Court has therefore no application to the case on hand, as amount, if any due to the Petitioner Company is yet to establish. It will be question for adjudication as to, whether the electricity and other maintenance charges were payable by the Respondent Company, even for the period when they were not in possession. The question can be answered on interpretation of the terms of agreement, and after parties are allowed to lead evidence and not in summary trial. The defence by the Respondent Company cannot be said to be moonshine, but in fact is bona fide. The stand taken in counter shows that the amount claimed, or any part thereof cannot be said to be admitted liability. Even otherwise Respondent company is

solvent running company with huge turnover.

20. It may also be noticed, that inspite of the reply to the statutory notice by the Respondent Company, a wrong stand was taken in this petition u/s 433(e) r/w. Section 434(1)(a) & (c) r/w. 439(i)(b) of the Companies Act, pleading therein that no reply to the statutory notice was received. Therefore, the liability stand admitted. The Petitioner Company has not come to Court with clean hands, as deliberate mis-statement has been made, with regard to the reply to the statutory notice. This act disentitles it to equitable relief under Sections 433, 434 r/w. 439 of the Companies Act.

21. For the reasons stated above, I find that Petitioner Company has failed to make out a case, to invoke jurisdiction under Sections 433, 434 r/w. Section 439 of the Companies Act. The Company Petition is accordingly dismissed. However, this shall not be bar for the Petitioner Company to avail appropriate legal remedies in accordance with law.

22. Consequently, connected Company Application Nos. 380 and 381 of 2010 are closed.