

(2000) 03 BOM CK 0029

In the Bombay High Court

Case No : Company Application No. 517 of 1999 in Company Petition No. 588 of 1991

Shri Chandrakant Maganlal Shah

APPELLANT

Vs

The Official Liquidator appointed as Liquidator in Delmot Engineering Co. Pvt. Ltd. and others

RESPONDENT

Date of Decision : 01-03-2000

Acts Referred:

Companies Act, 1956 — Section 457, 535

Citation : (2000) 3 ALLMR 58 : (2000) 3 BomCR 479 : (2000) 2 BOMLR 226 : (2000) 3 MhLj 423

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : Ms. P.D. Anklesaria and Mrs. S.V. Bharucha, instructed by S.B. Kadam, for the Appellant; B.R. Naik, Y.R. Naik and S.C. Gupta, Dy. Official Liquidator, for the Respondent

Judgement

S.S. Nijjar, J.—This order will dispose of Company Application No. 517 of 1999, the Official Liquidator's Report dated 18th March, 1999 and the resubmitted report dated 7th July, 1999.

This application has been filed with a prayer that the Official Liquidator be ordered and directed to hand over vacant and peaceful possession of the premises viz. Non-agricultural land admeasuring 8343.64 sq. mtrs. (bearing S.No. 472, Hissa 5/6) together with old factory shed admeasuring 5883 sq. mtrs. (bearing Gram Panchayat No. 379 and 379-B) situated, lying and being at Village Navghar of Bhayander. Tal. and Dist. Thane, to the applicant. The application has been filed by an 88 year old man who unfortunately leased the land and the factory shed to the company. He has spent the last 19 years trying to get possession of his property by following the due process of law. Till today he has not been put in possession. In fact, as the situation stands today, it appears that he will probably not get possession of his property during his life time.

2. It is the case of the applicant that the aforesaid premises were given on lease on 27th November, 1975 to the company under liquidation for a period of ten years. The lease was terminated by a notice dated 27th February, 1981 as the company failed to pay the rent. Civil Suit No. 223 of 1981 was filed by the applicant for vacant possession and recovery of arrears of rent. This suit was disposed of on the basis of the consent order dated 20th September, 1983. The company agreed to pay the arrears of rent and also agreed to pay rent in future regularly. The suit was, therefore, withdrawn. The company, however, defaulted in payment of rent. Thus, another notice was given to the company on 3rd October, 1985. Thereafter Suit No. 163 of 1986 was filed. The lease in favour of the company expired in 1985 by efflux of time. The company was using the premises for business/industrial purposes. The Saraswat Co-operative Bank Ltd. (hereinafter referred to as "the Bank") applied to be joined as a party defendant in Suit No. 163 of 1986. This application was rejected on 6th April, 1993. The Bank had also filed an application before the Co-operative Court against the company for various reliefs including appointment of the Court Receiver. It was the case of the Bank that the company was indebted to the Bank in the amount of Rs. 60 lacs which have been advanced to the company by way of loans. It was stated that against the aforesaid loans, the company had pledged its plant, machinery and leasehold rights. By order dated 11th February, 1992, the Co-operative Court appointed one Lele as a Special Recovery Officer. By order dated 11th December, 1992, Lele was also appointed as Court Receiver. The applicant, however, was not impleaded as a party to the proceedings in the Co-operative Court. Thus, the Receiver took possession of the premises from the company on 12th December, 1992. The applicant appealed against the order dated 11th December, 1992 by way of Appeal No. 57 of 1993 to the Co-operative Appellate Court. By order dated 15th June, 1993 the Appeal Court modified the earlier order dated 11th December, 1992 and directed the company to furnish adequate security and appointed Lele as Court Receiver only of the movable property of the company. The Bank filed Writ Petition No. 1913 of 1993 against the order of dismissal of the application for being impleaded as a party defendant in Suit No. 163 of 1986. This writ petition was summarily rejected on 3rd August, 1993. It was specifically held that there was no assignment of the tenancy rights by the company to the Bank. L.P.A. No. 124 of 1993 filed by the Bank was dismissed on 30-8-93. The Bank also filed W.P. No. 2369 of 1993 against the order dated 15th June, 1993. This was dismissed by the learned Single Judge on 4th August, 1993. Against the dismissal of the writ petition, the Bank filed Letters Patent Appeal No. 125 of 1993, which was admitted on 30th August, 1993. In this appeal, the Bank had also filed an application for stay of the order dated 4th August, 1993 in Writ Petition No. 2369 of 1993 and the order dated 15th June, 1993 in Appeal No. 57 of 1993. On 29th September, 1993 the rule was made absolute by the Division Bench of this Court. Thus, it appears that the appointment of the Receiver in the initial order dated 11th December, 1992 continues by virtue of the order of the Division Bench. This order dated 11th December, 1992 clearly states that the Receiver is appointed for the land and

factory premises of the company.

3. It was sought to be urged on behalf of the applicant that the order of the Division Bench would now limit the powers of the Receiver only to movable assets and will not apply to immovable properties. This position was, in fact, also accepted by Mr. Naik whilst arguing the matter before the learned Single Judge in Writ Petition No. 2369 of 1993. In paragraph 9 of the judgment, the learned Single Judge has noted that "Dr. Naik for the petitioner conceded that there has been an error in stating that the immovable property is also mortgaged with the Bank and he averred that apart from movable property belonging to respondent No. 2 there are no other security except promissory notes." Thereafter the learned Single Judge has observed that "It appears that due to that annexure, the trial Court while passing the order also ordered attachment of the tenancy rights over the land & building of the factory of respondent No. 2 company." These observations would certainly give credence to the submission of the learned Counsel for the applicant to the effect that the Receiver continues only of the movable properties. However, the Court is bound by the orders passed by the Division Bench on 29-9-93 in the Letters Patent Appeal in which it is categorically stated that rule is made absolute in terms of prayer (a) of the application. But, the effect of this order has to be seen in the context it was passed. All the aforesaid orders have been passed prior to the order of winding up of the company passed by this Court of 11th October, 1994. It is not the case of the Bank that the land and the factory had been mortgaged by the company with the Bank. The claim of the Bank was also restricted to tenancy rights of the company. By an order dated 4th December, 1992, the Co-operative Court had ordered attachment before judgment in respect of the goodwill interest and tenancy, rights of the company in respect of the land and factory premises. Thus, it is apparent that the ownership rights of the applicant was not attached. Order dated 11th December, 1992 had appointed Receiver for land and factory premises of the company. If this order is read in conjunction with the order dated 4th December, 1992, it becomes clear that the Receiver has been appointed only of the tenancy rights of the company in the land and the factory. Thus when the Receiver took possession of the land and the factory, it was only to protect the tenancy rights of the company. The order did not in any manner affect the ownership rights of the applicant. It was in these circumstances that the order dated 11th December, 1992 was clarified by the Appellate Court on 15-6-1993. The Appellate Court clearly observed that the trial Judge had not considered the aspect that the immovable property does not belong to the company. The writ petition against this order was dismissed on 3rd August, 1993. Thus the order dated 29th September, 1993 passed by the Division Bench in Civil Application No. 4151 of 1993 in Letters Patent Appeal No. 125 of 1993 would clearly mean that the Receiver is appointed of the tenancy rights in the immovable property of the applicant. Now, the Bank did not grant a loan to the company till the year 1986. The lease had already expired in the year 1985 by efflux of time. Therefore, in 1986 the company did not enjoy any leasehold right which could have been

assigned to the Bank. Even at this stage it is not the case of the Bank that the tenancy rights have been assigned. The Receiver has merely stepped into the shoes of the company. It cannot have any more rights than the company. The order of Receiver in terms of the tenancy rights can, therefore, have no effect on the ownership rights of the applicant. It has already been held by the Division Bench in Letters Patent Appeal No. 125 of 1993 that the Bank who claims to be the creditor of the company cannot be considered as a proper or necessary party in the eviction suit pending in the Court of Civil Judge (S.D), Thane. This order clearly lays down that by virtue of being a creditor, the Bank cannot claim any interest in the tenancy rights of the company. Viewed in this manner, it has to be held that the order of the Division Bench in Civil Application No. 4151 of 1993 in Letters Patent Appeal No. 125 of 1993 have no effect whatsoever on the ownership rights of the applicant. On the expiry of the lease by efflux of time the company did not even hold the tenancy rights as an asset of the company. On the order of winding up being passed on 11th October, 1994, the property had to be returned to its rightful owner, subject to the provisions of section 457 of the Companies Act, 1956.

4. I, therefore find force in the submission of the learned Counsel for the applicant to the effect that whether or not the premises are in possession of the Receiver, it would not affect the merits of the application u/s 457 of the Companies Act. The learned Counsel submits that all that the applicant is required to establish u/s 457 of the Companies Act, is that the Official Liquidator does not require the premises to carry on any business of the company for its beneficial winding up. Admittedly, no business is being carried on from the premises. The premises are, in fact, locked since 1992. The lease which was granted to the company expired on 27th November, 1985. Thereafter the company had no legal right to remain on the premises, on the basis of the lease. At best the company could claim to be a statutory tenant. It is, however, submitted by Mr. Naik that whether the premises were occupied as a statutory tenant or not, does not make any difference to the claim of the Bank for protection of its rights. The learned Counsel submits that the premises being commercial premises are capable of being attached and sold. A Division Bench of this Court in the case of Union Bank of India Vs. M/s. Mittersain Rupchand and others, has held that leasehold interests can be attached and sold. On facts, however, it is to be noticed that the lease has expired. There is no mortgage of the tenancy rights in favour of the Bank.. Excepting for the movables and promissory notes there is no other security which is available to the Bank. The company, therefore, had no legal or proprietary rights in the land and the factory at the time when the winding up order was passed. The law with regard to the power of the Official Liquidator u/s 457 of the Companies Act, 1956 has been clearly laid down by the Supreme Court in the case of Ravindra Ishwardas Sethna and Another Vs. Official Liquidator, High Court, Bombay and Another, . In that case, the Supreme Court was dealing with a situation where the premises which had been taken by the company under liquidation, were ordered by the

Court to be given on caretaker basis to another person. The landlords of the premises challenged the direction. Whilst dealing with the various submissions, the Supreme Court observed that section 457 enables the Liquidator in a winding-up by the Court, with the sanction of the Court, amongst others, to carry on the business of the company so far as may be necessary for the beneficial winding-up of the company. In that case, the company under liquidation was doing the business of floating chit fund schemes. This business had come to a standstill. The Supreme Court found that the Liquidator would obviously not be doing the business of floating chit funds. Thus it was held that the premises were not required for the beneficial winding-up of the company. In para 6 of the judgment the Supreme Court laid down the law as follows:

"6. Section 457 enables the Liquidator in a winding-up by the Court, with the sanction of the Court, amongst others, to carry on the business of the company so far as may be necessary for the beneficial winding-up of the company. If the floating of the schemes for prize chits came to a standstill, the moment the company was ordered to be wound up, there was no question of the business of the company to be carried on by the Liquidator and that too for the beneficial winding up of the company. Whether to carry on the business of the company which is ordered to be wound up is not a matter left to the uncontrolled discretion of the Liquidator. The Liquidator undoubtedly has the power u/s 457 to carry on the business of the Company, if it is necessary for the beneficial winding up of the company. And this power can be exercised not at the discretion of the Liquidator but with the sanction of the Court. Reliance was placed on in *Re. Batey: Ex parte Emmanuel* (1881) 17 Ch.D. 35 wherein it was observed that the power to carry on the business can only be exercised for the purpose of the beneficial winding up of the company not because the creditors may think that the business will be a very profitable one and that the longer it is carried on the better it will be, and that they will make a profit from it. Reliance was also placed on *Panchmahals Steel Ltd. v. Universal Steel Traders* 1976 (46) Comp. Cas. 706 : 1976 TL.R. 1666 wherein it was held that amongst others the Liquidator with the sanction of the Court has the power to carry on business of the company so far as may be necessary for the beneficial winding up of the company, It is true that the Liquidator cannot carry on business for any other purpose except the purpose for which the power is conferred upon him, namely, for the beneficial winding up of the company. He cannot carry on any business on the ground that it would be beneficial to the creditors or the contributors. The jurisdictional fact which must be ascertained and established for the exercise of the power by the Liquidator to carry on business of a company, is that carrying on of the business of the company is necessary for the beneficial winding-up of the company. However, the language of the section being unambiguous and clear, one does not need the assistance of precedents to come to a conclusion that the Liquidator with the sanction of the Court can carry on the business of the company only to the extent that such carrying on of the business is necessary for the beneficial winding-up of the company."

In my view, the aforesaid observations of the Supreme Court squarely cover the present situation.

5. Mr. Naik, however, submitted that the aforesaid Judgment has not been followed by the Supreme Court in a later judgment in the case of United Bank of India Vs. Official Liquidator and Others, . A perusal of paragraphs, 2,4 and 10 of aforesaid Judgment would clearly show that the same is not applicable to the facts and circumstances of this case. Firstly, in that case the lease was for 99 years and there was an option for renewal on the same terms for another 99 years. The rent under the lease was a meagre Rs. 1200/- per annum. Thus, virtually it was an out and out sale of the property, as the value of the reversionary interest would be negligible. In the present case, the lease was only for 10 years which expired in 1985. Secondly, in that case the lease was subsisting at the time when the winding up order was passed. Thirdly, it is to be noticed that the case was decided u/s 535 of the Companies Act and did not have any relation to section 457 of the Companies Act. In that case, the High Court, in the winding up proceedings, had directed the sale of the property and assets of the company in liquidation. The leasehold property was owned by a Trust, which apposed the sale. The Trust made an application to the Official Liquidator to disclaim the land and surrender it to the Trust on the ground that it was burdened with onerous covenants. The Official Liquidator did not disclaim the land. Thus, the Trust took out a Judge's Summons asking the High Court to direct the Official Liquidator u/s 535 of the Companies Act, to disclaim the land because it was burdened with onerous covenants. In that case also Union Bank of India had filed a suit against the company in liquidation, after obtaining necessary leave of the Court. The Bank, therefore, opposed the Judge's Summons and pleaded that the land was security for the loan that had been advanced to the company in liquidation. Therefore, it was urged that it should be available to the secured and unsecured creditors. It was also stated that the covenants were not onerous and there was a salable interest in the said land. On the basis of the above, the Supreme Court held that the High Court did not appreciate the purpose of the provisions of section 535 of the Companies Act. It was held that the intention of section 535 is to protect the creditors of the company in liquidation and not mulct them by reason of onerous covenants. It was cautioned that the power u/s 535 is not to be lightly exercised. It is to be noticed that in the aforesaid judgment, the ratio of Sethna's case (supra) was not under consideration. The judgment was not even cited. It is also evident that the provisions of section 457 were not under consideration. Mr. Naik had also cited another Judgment of the Supreme Court in the case of Smt. Nirmala R. Bafna/Kershi Shivax Cambatta and others Vs. Khandesh Spinning and Weaving Mills Co. Ltd., and another/Official Liquidator and others, . The learned Counsel relied on paragraph 22 of the Judgment to argue that the aforesaid judgement in the case of Sethana (supra) has not been followed by the Supreme Court. A perusal of paragraph 22 of the Judgment would show that in that case the appellant- petitioner was a Trust which owned the flat which was in question. The

Trust made an application to the Court for a direction to the Official Liquidator to surrender possession of portion of the flat. In para 5 of the judgment it is noticed that the flat admeasured 3500 sq.ft. Out of this only a small area of 150 sq.ft. was in possession of the company. The ground on which the possession was asked for was that the Official Liquidator does not require the flat. The Single Judge whilst deciding the application had held that the decision in Sethna's case (supra) had no application to the facts in that case. The Single Judge had also come to the conclusion that the Liquidator requires the portion for storing the company records at Bombay. The Division Bench affirmed the findings of the Single Judge. The Supreme Court also dismissed the Appeal with the observations that the Official Liquidator requires the portion of the flat for storing the company goods, which is a relevant consideration.

6. I do not see how the aforesaid observations are of any assistance to Mr. Naik. Clearly both, the High Court and the Supreme Court, have come to the conclusion that the premises were required for the beneficial winding up of the company. The Official Liquidator had taken a stand that the premises were so required. In the present case, the Official Liquidator is quite prepared to hand over the possession of the premises to the applicant. Thus, in my view, the case is squarely covered by the earlier judgment of the Supreme Court in Sethna's case (supra).

7. The Official Liquidator had, in fact, submitted a report on 18th March, 1999 to this Court, seeking a direction to the Receiver to hand over the possession of the premises to the Official Liquidator. The Official Liquidator also submitted another report on 7th July, 1999, making the same request. On this report an order came to be passed on 23rd July, 1999 which is as follows :

"Shri Naik states that one Godrej cup-board will be provided to the Official Liquidator to keep all relevant papers, documents at site at Mira Road. The Official Liquidator or representative of the Official Liquidator will visit the site on 2nd August, 1999 at 11.30 a.m. The Saraswat Cooperative Bank is directed to deposit a sum of Rs. 20,000/- within a period of one week from today with the Official Liquidator."

8. Mr. Naik has submitted that this is the final order passed on the report and therefore, the Court cannot now pass any further orders. He has also submitted that no appeal has been filed against the aforesaid order. Therefore, the same has become final and binding between the parties. Ms. Anklesaria has, however, submitted that this is only an interim order and the report is yet to be finally adjudicated upon. Mr. Gupta has also taken the stand that the aforesaid order is only an interim order. I am also of the considered opinion that this cannot be treated to be a final order and this is only an interim order. There is no specific direction to the effect that the prayer Clause (a) of the report dated 18th March, 1999 or the request made in Clause 10 of the report dated 7th July, 1999 have been rejected. It is, therefore, necessary to dispose of the Official Liquidator's Report also. Mr. Gupta has pointed out that the premises have been locked by

the Receiver as well as the Official Liquidator. Since the premises are locked up, obviously no business, which is necessary for the beneficial winding up of the company, can be conducted from there, following the directions given in the case of Sethana (supra) by the Supreme Court, the application has to be allowed.

9. In view of the above, the application is made absolute in terms of prayer Clause (a). Since the premises are in the possession of the Receiver, the Receiver Lele is directed to hand over the possession of the same after removing the movable property of the company to the Official Liquidator within a period of four weeks from today.

10. The Official Liquidator's Report is also made absolute in the aforesaid terms.

On the request of Mr. Naik, the learned Counsel for the Bank, the operation of this order is stayed for a period of 8 weeks.

Certified copy expedited.

11. Rule made absolute.