(1986) 07 DEL CK 0006

In the Delhi High Court

S.S. Chawla and Company APPELLANT

Vs

Globe Motors Ltd.(In Liquidation) and another RESPONDENT

Date of Decision : 11-07-1986

Acts Referred:

Citation : (1987) 62 CompCas 815

Hon'ble Judges : T.P.S Chawla, J

Bench : Single Bench

Judgement

T.P.S. Chawla, J.—This application raises a nice question of law. It has arisen in the following circumstances.

2. On December 22, 1975, Globe Motors Limited ("the company") obtained the lease of a hall situated at 21/4, Mathura Road, Ballabhgarh, Haryana. The landlord was S S Chawla and Company, of which Mr S S Chawla says he is the sole proprietor. The rent agreed was Rs.675 a month. It is common ground that the hall was used as a godown for keeping goods pledged by the company to the New Bank of India, "A" Block, Connaught Place, New Delhi. Although the rent was to be paid by the company, the godown was kept under the "lock and key" of the bank. There appears to be no dispute that the rent was paid till October 21, 1976, but not thereafter.

3. On April 15, 1977, I made an order that Globe Motors Ltd. be wound up. In pursuance of that order, the official liquidator took charge of all the property and effects of the company. However, so far as the godown was concerned, he did nothing in the matter. Nor was anything done by the bank. The pledged goods lying in the godown, when the winding up order was made, continued to lie there.

4. About six years afterwards, on February 26, 1983, the landlord moved this present application u/s 535 of the Companies Act, 1956. He sought two reliefs. Firstly, he prayed, that appropriate orders be passed "rescinding/disclaiming the company''s interest in the lease of the demised premises" and that vacant possession of the said premises be handed over to him. Secondly, that the

company be directed to pay to him a sum of Rs.46,575, being the arrears of rent accrued due after April 15, 1977, that is, the date of the winding-up order. It was mentioned in the application that a sum of Rs.4,050 was also due to him on account of arrears of rent for the period from October 22, 1976,till the making of the winding-up order, but no relief was sought in respect of that sum as a claim for the same had already been filed with the official liquidator.

5. Notices of this application were issued to the New Bank of India and the official liquidator. The bank filed a reply to the application in which it said that it had been trying to sell the pledged goods lying in the godown and had recently put an advertisement in a newspaper for that purpose. The sum said to be due to the bank was Rs. 73,171.04 plus interest from July1, 1983. The bank said that it was "not interested in retaining possession of the godown except for such period as may be required to keep the pledged goods therein before their sale is effected". Consequently, it was submitted that "possession of godown should not be delivered to the applicant so long as the pledged goods are not sold out."

6. The official liquidator did not file any reply to the application of the landlord.

7. On September 9, 1983, counsel for the bank gave an undertaking that his clients would sell the goods stored in the godown and hand over possession of the godown to the official liquidator within three months from that day. There was some delay in fulfilling the undertaking, but on March 2, 1984, counsel for the bank stated that the godown had been vacated and he had brought with him the key to the lock affixed thereon. Counsel for the official liquidator said that he had no objection to the key being handed over to the landlord. Consequently, the key was handed over to the landlord and, thus, be obtained possession of the godown. The first relief sought in the application, Therefore, did not survive for adjudication by the court.

8. It is with the relief regarding payment of arrears of rent, accrued due for the period after the making of the winding-up order, that I am now concerned. What I have to decide is whether the landlord is entitled to be paid these arrears of rent in full or must prove the debt in the winding up and be paid pari passu with the other creditors. To find the answer, I turn to the relevant provisions of the Companies Act, 1956.

9. The general principle applicable is stated in section 528 of that Act. The section is entitled : "Debts of all descriptions to be admitted to proof." Omitting words, which are not material, it reads :

"In every winding up...all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company..."

10. The object of the winding-up provisions, as Lindley L.J.explained in Oak Pits Colliery Co., In re [1882] 21 Ch D 322, "is to put all unsecured creditors upon an equality, and to pay them pari passu." Hence, unless the landlord is able to show

some other provision in the Companies Act under which he is entitled to be paid in full, his application must fail.

11. Section 530 of the Companies Act deals with "preferential payments". Sub-section (1) sets out the debts which are to "be paid in priority to all other debts". There are many other sub- sections, but for the present purpose, only sub-section (6) is relevant. It says :

"Subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the forgoing debts shall be discharged forthwith so far as the assets are sufficient to meet them..."

12. It is apparent from this sub-section that "the cost and expenses of the winding up" get precedence even over the debts to which priority is given by sub-section (1). The reason, of course, is that it is only the net assets which are distributable. The landlord, here, contends that the arrears of rent accrued due, after the winding-up order was made, were part of "the costs and expenses of the winding-up" and, Therefore, he is entitled to be paid in full.

13. The question, then, is whether, on the facts of the present case, the rents which accrued due, after the winding-up order was made, can be regarded as "the costs and expenses of the winding-up". The test evolved by the English cases is stated in the following passage in Palmer''s Company Law, twenty-third edition, at page 1179 :

"The Lesser can prove for rent due up to the date of the commencement of the liquidation, and he can also prove for the rent as it accrues due after the commencement of the liquidation. If he seeks to claim that rent accruing after the commencement of the winding up is payable in full, the onus is upon him to show that the liquidator has retained possession of the property `for the convenience of the liquidation,'' so that the rent is payable as an expense of the liquidation, or that a special equity exists justifying the claim of the landlord.

If the liquidator takes possession or continues in possession of lease-holds for the purpose of the better realisation of the assets, the Lesser will be entitled to payment of the rent in full as part of the expenses properly incurred by the liquidator..." So, what has to be seen is whether possession of the property was taken or retained by the official liquidator "for the convenience of the liquidation" or "for the purpose of better realisation of the assets."

14. There are two cases which are rather instructive because they resemble the present one and fall on opposite sides of the line. In Oak Pits Colliery Co., In re [1882] 21 Ch D 322, the company in liquidation had a lease of a colliery and of the minerals in adjoining land, excluding the surface. When the winding-up order was made, some plant and machinery belonging to the company were lying on the adjoining land. It was held that the mere facts that the liquidator had left the company''s plant and machinery where he found them until he sold them, that he had them valued with a view to a sale which was not carried out, and that he

took no steps to surrender to the landlord the company''s interest in the colliery and in the adjoining land, were not enough to show that the liquidator had retained the property for the "purpose of the winding-up" so as to entitle the landlord to payment in full of the rent which had accrued after the commencement of the winding- up. In reaching this conclusion, Lindley L.J., who delivered the judgment of the court, said (at page 330) :

"When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to us that the rent for the whole period during which the property is so retained or used ought to be paid in full without reference to the amount which could be realised by a distress. This was the view taken by Lord Justice James in the case of Lundy Granite Co., In re [1871] LR 6 Ch App 462 and by Mr. Justice Fry in In re Brown, Bayley & Dixon [1881] 18 Ch D 649, and Mr. Justice Kay in the present case. But no authority has yet gone the length of deciding that a landlord is entitled to distain for or be paid in full rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstaining from trying to get rid of the property which the company holds as lessee."

15. On the other hand, in ABC Coupler and Engineering Co.Ltd.(No.3), In re [1970] 1 All ER 650 (Ch D), it was found that the "tactics" of the liquidator were directed to retaining the lease of the premises demised to the company, as retention of the premises was essential "until all the company''s effects were disposed of". In these circumstances, it was held that the landlord was entitled to payment in full of the rent accrued after the winding-up as an expenses of the liquidation, because the liquidator had retained the lease "solely for the benefit of the liquidation".

16. On which side of the line does the present case fall ? Looking at the facts emerging from the record, I have not the slightest doubt that the godown was not retained by the official liquidator for the "convenience" or "benefit" or "purpose" of the winding- up. The application filed by the landlord does not even contain any such averment. On the contrary, it says that the "demised hall is onerous property so far as the company is concerned" and "no useful purpose is being served by the company retaining" it, and "it is only unnecessarily increasing the liability of the company." Nor was any reason suggested in the argument why the official liquidator should have at all wanted to retain the godown.

17. The true position is that the official liquidator just left things as he found them. The goods pledged with bank continued to remain in the godown. As a secured creditor, the bank was outside the winding up. Therefore, the official liquidator had no immediate concern with the goods, and it was not necessary for the purpose of winding up that the godown should be retained. The most that

can be said against the official liquidator is that he "abstained from trying to get rid of the property" which the company held as lessee. That, as appears from Oak Pits Colliery Co.''s case [1882] 21 Ch D 322, it is not enough to make the rent accruing after the commencement of the winding up an expense of liquidation so as to entitle the landlord to payment in full.

18. Counsel for the landlord also relied greatly on rule 157 of the Companies (Court) Rules, 1959. That rule reads as follows :

"When any rent or other payment falls due at stated periods, and the order or resolution to wind up is made at any time other than one of those periods, the persons entitled to the rent or payment may prove for a proportionate part thereof up to the date of winding-up order or resolution as if the rent or payment accrued due from day-to-day :

Provided that where the liquidator remains in occupation of the premises demised to a company which is being wound up, nothing herein contained shall prejudice or effect the right of the landlord of such premises to claim payment by the company, or the liquidator, of rent during the period of the company''s or liquidator''s occupation."

19. According to counsel for the landlord, the meaning of the proviso to this rule is that the landlord is entitled to payment in full of rent accrued due after the commencement of winding-up if the liquidator "remains in occupation of the premises demised to a company", and nothing more is necessary to be shown. He relied for this submission on Rameshwar Nath Vs. U.P. Union Bank Ltd., .

20. That case certainly supports him. It was concerned with the interpretation of rule 97 of the Company Rules made by the Allahabad High Court under the Indian Companies Act of 1913. That rule was verbatim the same as rule 157 of the Companies (Court) Rules, 1959, which I have quoted. A Division Bench of the Allahabad High Court held, in that case, that "the liquidator remained in occupation of the premises not for the purposes of winding up". Whilst recognising that "the current of authority in England" would, on that finding, have led to a different conclusion, they held that (at page 339 of 26 Comp Cas) :

"......under the proviso to rule 97, it is immaterial whether the premises were retained in occupation by the liquidator for the purposes of winding up or not. If they remained in occupation of the official liquidator, the landlord is entitled to receive the rent in full and is not liable to share pro rata along with other creditors."

21. However, on appeal, that judgment was reversed by the Supreme Court in The Official Liquidators, U.P. Union Bank Ltd. (In Liquidation) Vs. Sh. Rameshwar Nath Agarwal, . The Supreme Court explained the meaning of rule 97 as follows :

"The operative part of the rule deals with the rent or other payment in arrears till the date of winding up. By the proviso it is declared that the right of the landlord to claim payment by the company of the rent accruing due thereafter is not to be prejudiced. The proviso merely affirms the right of the landlord to claim payment of rent accruing due since the date of winding up. It does not deal with any question of priority in payment of debts."

22. The Supreme Court further said (at page 117 of 30 Comp Case and at page 334 of AIR 1960 SC) :

"The Legislature has by section 230 prescribed that certain specified categories of debts shall rank for priority over other debts due by the company and it is not within the competence of the High Court to prescribe by rule a category for priority in payment which is not included in that section."

23. Section 530 of the Companies Act, 1956, is similar to section 230 of the Indian Companies Act, 1913. Therefore, the same reasoning will apply to the interpretation of rule 157 of the Companies (Court) Rules, 1959.

24. The Supreme Court then referred to Oak Pits Colliery Co,''s case [1882] 21 Ch D 322 and approved the passage which9ch I have already quoted. They went on to apply the test laid down in the English cases. Since the Allahabad High Court had itself held that the property had not remained with the liquidator for the "purposes of winding up", which finding was not assailed, the Supreme Court held (at page 119 of 30 Comp Case and at page 334 of AIR 1960 SC):

"The property not having remained with the liquidators for the purpose of liquidation, unless the court passes an order holding that the debt incurred was part of the costs and expenses of liquidation, the rent accruing due since the date of the winding- up cannot be claimed in priority over other ordinary debts."

25. To my mind, the judgment of the Supreme Court is conclusive against the contention of counsel for the landlord.

26. The only other authority on which counsel for the landlord relied was Sarode Vithoba v. Madanlal Lalchand and Co. AIR 1955 Mys 29, In that case, while an insolvency petition was pending, an interim receiver was directed by the court to take charge of the properties of the debtor. Some machinery belonging to the debtor was kept in a rented house, and in pursuance of that order, the interim receiver locked and sealed the premises. An order of adjudication was made some time later, and, thereafter, the machinery was sold. It was held that the rent of the premises, which accrued both before and after the order of adjudication, could be treated as "expenses of administration or otherwise" within the meaning of section 61(3) of the Provincial Insolvency Act, 1920, which corresponds to section 530(6) of the Companies Act, 1956.

27. I doubt whether this judgment is correct as regards the rent which accrued due before the order of adjudication, but I need not dwell on that point as, in the case before me, the landlord has himself conceded that the rent accrued due before the winding-up order was made is a provable debt. With respect to the rent which accrued due after the order of adjudication, I would accept the judgment as correct because the premises were obviously retained for keeping

the machinery till it was sold, and so the rent was an expense necessary for the "purpose" of administration. It, thus, conforms to the test I have earlier stated. In any event, this case can be of no avail if it be in a manner inconsistent with the judgment of the Supreme Court in The Official Liquidators, U.P. Union Bank Ltd. (In Liquidation) Vs. Sh. Rameshwar Nath Agarwal, .

28. For these reasons, I hold that the rent accrued due for the godown after the order to wind up the company was made cannot be treated as part of the "costs and expenses of the winding up". The landlord is not, Therefore, entitled to payment in full of the same. He must prove his debt in the winding-up and be paid pari passu with the other creditors of the company. Accordingly, this application is dismissed, but having regard to all the circumstances of the case, I make no order as to costs.

29. I should mention that the further question whether the company or the bank was liable to pay the arrears of rent to the landlord, was also argued before me. But, in view of the conclusion which I had reached, this question does not arise for determination at the present stage and I express no opinion thereon. It must remain for consideration later when there is need for a decision.