

(2000) 09 CAL CK 0040
In the Calcutta High Court

Case No : Appeal from Original Order No. 235 of 1992 and C.P. No. 53 of 1990

Usharani Devi

APPELLANT

Vs

Hindustan Development Corporation Ltd.

RESPONDENT

Date of Decision : 11-09-2000

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 230
Companies Act, 1956 — Section 433

Citation : (2003) 115 CompCas 201 : (2004) 50 SCL 381

Hon'ble Judges : Tarun Chatterjee, J; Amitava Lala, J

Bench : Division Bench

Advocate : Pramatha Nath Chatterjee and Kinjal Kumar Baral, for the Appellant; Ashim Kumar Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This appeal is arising out of a judgment and/or order passed by a single Bench of this court on April 10, 1991, whereby a Company Petition No. 53 of 1990 made under Sections 433, 434 and 439 of the Companies Act, 1956, was dismissed.

2. The case of the appellant/petitioner was that in 1976 the petitioner let out a flat being Flat No. 19F in premises No. 46C, Jawaharlal Nehru Road, Calcutta 700 071 to the company at a rental of Rs. 1,400 per month payable according to the English calendar month from March, 1987.

3. According to the appellant, the entire amount of surcharge on account of consolidated rates and taxes u/s 230(b) of the Calcutta Municipal Act, 1980, was recoverable from the company as the said premises were used for commercial and for non-residential purpose. In the said company petition, it was further alleged that the company after payment of surcharge of consolidated rate of municipal taxes started deducting the same from the rent payable by the company to the appellant. Subsequently, the company informed the appellant that the surcharge with regard to corporation taxes for the quarter ending

September 20, 1988, and November 30, 1988, was Rs. 4,920 each and that the surcharge in respect of the said premises was Rs. 1680 which was the share of the appellant as owner thereof. The appellant caused a notice to the company on May 6, 1989, demanding a sum of Rs. 36,400 being the rent payable by the company from March, 1986, to August, 1989, that is for a period of 30 months at the rate of Rs. 1,400 per month. The notice was replied by the company denying that the said rent was outstanding from March, 1987, to August, 1989, at the aforesaid rate of rent. According to the appellant, it was specifically agreed by and between the appellant and the company that the company would be responsible and liable for payment of monthly rent to the appellant and the appellant in turn would be liable for payment of other taxes, imposition of other levies including municipal rates and taxes as well as surcharge levied by the Calcutta Municipal Corporation (hereinafter referred to as "CMC") being part and parcel of the same.

4. It was further alleged that the company paid a sum of Rs. 29, 162.40 for and on behalf of the appellant which ought to be paid by the appellant directly. After adjustment of the same, the balance amount was duly paid by the company to the appellant from March, 1987 to May, 1989.

5. The appellant being the petitioner took a stand that no valid bona fide or substantial defence was raised by the company and the company was indebted for the same as aforesaid to the appellant at the rate as above. The company had taken a further defence that in the event of non-payment of rent, the specific provisions of the West Bengal Premises Tenancy Act would be applicable in respect of the disputes between the parties. According to the company, the monthly rent of Rs. 1,400 was inclusive of the share of rates and taxes and surcharge and statutory deduction and, therefore, the company was not liable to pay municipal rates and taxes and statutory dues. Further, according to the company, in December, 1986, the company received a consolidated bill for Rs. 46,002 from the administrator Everest Building (the building in which the premises of the company is situated) calling upon the company to pay surcharge and corporation taxes from April, 1984, to December, 1984. The company also alleged that the quantum in respect of the premises occupied by it amounted to Rs. 7,854. It was further contended by the company that they had brought this fact to the notice of the administrator and pleaded that the surcharge under the provisions of the Calcutta Municipal Corporation Act was to be paid by the appellant being the landlord who had threatened to disrupt the facilities to the company and, therefore, the company had no option but to pay the said bill for the appellant and claim the same amount from the appellant by way of reimbursement. According to the appellant, the company had deducted the said amount from the monthly rent payable by the company to the appellant because of the fact that the appellant had wilfully failed and neglected to reimburse the said amount. In any view of the matter, according to the appellant, the company was liable to pay the surcharge and that being a debt not bona fide disputed by the company, the appellant was entitled to an order as prayed for in the petition

for winding up.

6. The learned judge held on the petition for winding up that the liability sought to be fastened by the appellant upon the company was bona fide and seriously disputed and in that view of the matter, it could not be said that there was no bona fide dispute between the parties. It was further held by the learned judge that a question had arisen as to whether there was any agreement between the parties as to the payment of surcharge or other taxes by the petitioner-landlord. According to the learned judge, this question also was not available to be gone into by the company court. Therefore, the learned judge on the above findings rejected the application for winding up of the company. Feeling aggrieved by the said order, this appeal has been preferred which was heard in the presence of learned counsel for both the parties.

7. The only question that was argued by the learned senior counsel for the appellant, Mr. Promotha Nath Chatterjee was whether there was any bona fide dispute on the part of the company or there was a debt without defence as alleged. Mr. Chatterjee, appearing on behalf of the appellant first cited in support of the aforesaid contention a decision of the Supreme Court in the case of *Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd.*, . In that decision, the Supreme Court laid down the principle that the defence of the company must be (i) in good faith and of substance, (ii) the defence was likely to succeed on the point of law, and (iii) the company must adduce prima facie proof on which the defence depends.

8. These principles as laid down in the aforesaid decision of the Supreme Court are now well settled. But the applicability of such principles no doubt are dependent upon the facts of situation in each case. Mr. Chatterjee also in this contention relied on a single Bench decision of this court in *Siddhartha Apparels Pvt. Ltd.*, In re [1986] 59 Comp Cas 435 to establish the fact that the company was unable to pay lawful dues of the landlord and in fact had admitted in the legal proceedings to the court of law its inability to pay all arrears of rent at a time and prayed that the company should be allowed to make such payment by easy instalments. Mr. Chatterjee also contended that it is well settled that the proceedings in the civil court for ejectment and those in the company court for winding up could not be considered to be parallel proceedings and the fact that the suit was filed in the civil court for ejectment could not be a ground for rejection of the petition. According to Mr. Chatterjee, although no such statutory notice was served on the company, the petitioning creditor may still prove that the company was otherwise unable to pay its dues that is to say the creditor must show that the company was unable to pay its dues. Therefore, according to Mr. Chatterjee, this being the position in this case and since the claim of the petitioner was not disputed and as it is an admitted fact that the company had defaulted in payment of arrears of rent of the municipal taxes, the petition for winding up cannot be said to be an abuse of the process of the court. Therefore, according to Mr. Chatterjee, the learned company judge had erred in rejecting

the petition for winding up.

9. The submission of Mr. Chatterjee was hotly contested by Mr. Ashim Banerjee appearing on behalf of the respondent. In our view, the facts upon which the aforesaid single Bench decision was rendered were not at all similar to the facts of our case. Here the claim itself is disputed. But there the claim was not disputed. It is well known that the jurisdiction of the company court cannot be similar to the jurisdiction of the civil court. Therefore, it is well settled that two jurisdictions cannot be similar. One is a process of entertaining claims while, the other is a process of entertaining the winding up of the company. By the process of winding up if the company comes out to pay any claim of the petitioning creditor and for the sake of equity if a court, instead of passing the order of winding up, settles the issue on payment, that does not necessarily mean that the same is a process of recovery of the claim parallel to the civil suits and proceedings. Therefore, in coming to an appropriate conclusion for such payment to avoid the winding up in a company petition, the court is to confirm that there was a clear admission on the part of the company in respect of the sum due and payable to the petitioner. Moreover, the provisions of winding up of a company are to be governed by the provisions of the Companies Act whereas the determination of the rent payable is governed by the special enactment, namely, West Bengal Premises Tenancy Act, 1956, Therefore, in view of the special statute enacted to settle the dispute between the landlord and tenant regarding the rent payable by one to the other cannot be made under the Companies Act. Therefore, until and unless the dispute as to the rent payable is settled by the appropriate forum under the special enactment, the same cannot be treated as an admitted claim for the petitioning creditor in a company petition. Therefore, in this case, a valid defence subsists and accordingly, the judgment of the learned judge as referred to above cannot be applied to the facts of this case.

10. Mr. Chatterjee also relied on a decision in the case of King's Cross Industrial Dwellings Company, In re [1870-71] XI Law Reports (Equity cases) 149, wherein it was held that where a petition of the creditor to wind up a company is based on the ground that the debt of the petitioning creditor is disputed, the court will not, as a matter of course direct the petition to stand over, with leave to bring an action; but is bound, before doing so, to see that the debt is disputed on some substantial ground. This decision as cited by Mr. Chatterjee may not be dealt with in detail in view of the fact that we do not see any reason to interfere with the reasoning of the learned company judge in the matter of holding that there was a substantial defence against the claim of the petitioning creditor. Lastly, Mr. Chatterjee relied on a decision of the Full Bench of this court reported in Land and Brick Entertainment v. Calcutta Municipal Corporation [2000] 1 CHN 595. In our view, the aforesaid Full Bench decision had no manner of application to the facts and circumstances of this case. In the said judgment, it was primarily held about the responsibility of payment of commercial charges by the lessor or the lessee. That is not the question at issue before us. We have not been asked to decide in this case whether the levying of commercial surcharge under the

Calcutta Municipal Act can be construed to be ultra vires the Constitution of India. In any view of the matter, this court in the company jurisdiction is not deciding whether the commercial surcharge under the provisions of the Calcutta Municipal Corporation Act is payable either by the lessor or by the lessee. The only question that can be decided in a petition for winding up as observed earlier, is whether there is any bona fide dispute as to the claim of the petitioning creditor or not. Even assuming that the payment of commercial surcharge is a primary responsibility of the tenant being the company/respondent herein, even then the question whether the company has already paid or whether there is any question of any adjustment or whether any sum is due or payable by the appellant to the company would be adjudged by the provisions of the special enactment, viz., the West Bengal Premises Tenancy Act, 1956, which has an overriding effect over and above the provisions of the Companies Act. Therefore, this is not the forum of such adjudication. The company court in its discretion has come to a conclusion on the facts alleged that a bona fide dispute was raised by the company and, therefore, no order for winding up could be made. In this connection, a decision cited by Mr. Ashim Banerjee in the case of The Printers (Mysore) Private Ltd. Vs. Pothan Joseph, may be relied on. In that decision, the Supreme Court clearly held that the appellate court was only to consider whether discretion used by the trial court was used by it reasonably or the court had ignored relevant factors and adopted an unjudicial approach, only then it would certainly be open to the appellate court to interfere with the order of the trial court but not otherwise.

11. Accordingly, we do not find any substance in the appeal. Therefore, the appeal stands dismissed,

12. There will be no order as to costs.

13. However, this order will not prevent the appellant/petitioner from proceeding against the company/respondent in accordance with law before any appropriate forum in respect of the claim, if any thereof.

14. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of, putting requisites for drawing up and completion of the order and certified copies of the judgment and order.

15. All parties are to act on a signed copy of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the court in respect as above.

Tarun Chatterjee, J.

16. I agree.