
(1994) 01 BOM CK 0014

In the Bombay High Court

Case No : Company Petition No. 357 of 1992 in Company Petition No. 389 of 1991

Vaz Forwarding Limited

APPELLANT

Vs

State Bank of India and others

RESPONDENT

Date of Decision : 03-01-1994

Acts Referred:

Banking Regulation Act, 1949 — Section 38, 45B
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28
Companies Act, 1956 — Section 446, 446(2)

Citation : (1995) 3 BomCR 673 : (1996) 85 CompCas 603

Hon'ble Judges : N.D. Vyas, J

Bench : Single Bench

Advocate : S.H. Doctor, D.J. Dalal, Ashok Desai, Anup Shah, H.A. Desai and Ms. Rushna D. Zaiwala, instructed by M/s. Dhruva Liladhar and Co, for the Appellant; I.M. Chagla, J.P. Avasia and A. Munim, instructed by M/s. B. Munim and Co., N.G. Thakkar, R.M. Gandhi, T.G. Vora and D.P. Desai, instructed by M/s. M.K. Ambalal and Co. and S.V. Doijode, instructed by M/s. Crawford Bayley and Co. and Janak Dwarkadas, instructed by M/s. Girish Dave and Co., for the Respondent

Judgement

N.D. Vyas, J.—The petitioners are the owners of the office premises bearing No. 4, Atlanta Building, Nariman Point, Bombay-400 021. The petitioners are praying that the respondents be ordered and directed to forthwith hand over quiet, vacant and peaceful possession of the office premises to the petitioners and that the respondents be ordered and directed to pay to the petitioners a sum of Rs. 20,000 per day as mesne profits from November 24, 1991, till the date of handing over the possession of the said premises along with interest and, lastly, that the respondents be restrained by an order of permanent injunction from selling, assigning, transferring the tenancy rights in the said premises or parting with possession thereof or induction any third party therein.

(a) Some time in the year 1978, a lease was execute for a period of five years between the petitioners and the Bank of Credit and commerce International

(Overseas) Limited, for the said bank's office at Bombay. The said bank was granted a licence by the Reserve Bank of India for carrying on banking business in Bombay. On October 6, 1978, the NOC was obtained from the Controller of Accommodation. The lease was extended in October, 1983, for a further period of five years and lastly again it has been extended by a further period of nine years, i.e., up to October, 1997.

(b) On July 5, 1991, an order was passed by the Governor of Cayman Islands who appointed Ian Wight to assume control of the said bank with the powers of a receiver appointed u/s 18 of the Banking Law as applicable in the Cayman Islands and to assume control and custody of its affairs, premises, assets, books and records wheresoever situated.

(c) On July 6, 1991, the Reserve Bank of India (hereinafter referred to as "the RBI") instructed the Bombay branch of the said bank to suspend its business and on July 15, 1991, the RBI filed Company Petition No. 389 of 1991 in this court for winding up of the Bombay branch of the BCCI u/s 38 of the Banking Regulation Act, 1949 (hereinafter referred to as "the said Banking Act"), and for appointment of the State Bank of India (hereinafter referred to as "the SBI"), the first respondent herein, as provisional liquidator of the Bombay branch of the BCCI. On the same day, the RBI also moved an application, being Company Application No. 203 of 1991 in the said Company Petition No. 389 of 1991 for interim and ad interim orders as prayed for therein.

(d) On July 15, 1991, this court accepted the said Company Petition No. 389 of 1991 and appointed the SBI central office as provisional liquidator of the Bombay branch of the BCCI and directed the provisional liquidator so appointed to take custody, possession and control of the entire assets, properties and affairs of the Bombay branch of the BCCI. The provisional liquidator then took possession, inter alia, of the premises in question.

(e) Pursuant to the said order dated July 15, 1991, the provisional liquidator so appointed on the same day appointed S.M. Parande, the then chief general manager and now deputy managing director of the SBI, as the authorised officer to perform the functions of the provisional liquidator.

(f) On November 24, 1991, the petitioners terminated the lease.

(g) On January 14, 1992, an order was passed by the Grand Court of the Cayman Islands and certain persons were appointed as official liquidators of the BCCI(O) with powers, inter alia, to take possession, collect and get in all properties and assets to which the BCCI(O) was or appeared to be entitled and to do all things as might be necessary or expedient for the protection of the BCCI(O) assets and to do all things as might be necessary and expedient for the beneficial realisation of the properties and assets of BCCI(O).

(h) A memorandum of understanding (hereinafter referred to as "MOU") dated January 16, 1992, was entered into by and between the official liquidator and the

RBI for the disposal of the Bombay branch of the BCCI and the same was agreed to be sold to one of the buyers to be approved by the RBI on the terms and conditions mentioned therein. By the said MOU, the purchaser was, inter alia, required to assume full responsibility for meeting 100 per cent. dues of the depositors and other creditors of the Bombay branch of the BCCI including the liabilities of the staff of the Bombay branch of BCCI and all liabilities of the Bombay branch of the BCCI to BCCI(O) and other BCCI(O) group entities.

(i) On January 22, 1992, this court admitted the said Company Petition No. 389 of 1991 and confirmed the ad interim order passed on July 15, 1991, appointing the SBI central office as provisional liquidator of the Bombay branch of the BCCI.

(j) In February, 1992, the then provisional liquidator of the Bombay branch of the BCCI submitted its report No. 29 to this court, inter alia, seeking directions from this court for approval of the proposal contained in the said MOU. By its order dated February 14, 1992, this court gave directions to the then provisional liquidator of the Bombay branch of the BCCI approving the said MOU subject to certain conditions and safeguards stipulated therein.

(k) On July 20, 1992, the present petition was filed by the petitioners.

(l) In pursuance of the said MOU as approved by this court, the official liquidator of the BCCI(O) invited offers for sale of the Bombay branch of the BCCI "as a going concern" on "as is where in" basis and for a slump consideration. On December 26, 1992, the first respondent offered to purchase the business and undertaking of the Bombay branch of the BCCI as a going concern for a slump consideration and forwarded a draft agreement for sale containing terms and conditions on which the first respondent intended to purchase the same along therewith.

(m) By an order passed on February 12, 1993, the Grand Court of the Cayman Islands approved the said offer of the first respondent and the said draft agreement and authorised the official liquidator of the BCCI(O) to enter into the said agreement. The RBI had recommended to the then provisional liquidator of the Bombay branch of the BCCI that subject to the permission and orders of this court, the then provisional liquidator of the Bombay branch of the BCCI may sell the business and undertaking of the Bombay branch of the BCCI to the first respondent and/or its subsidiary to be formed in accordance with the terms of the said draft agreement.

(n) On March 1, 1993, the RBI filed Company Petition No. 123 of 1993 praying that the offer of the SBI for purchase of the Bombay branch of the BCCI on the terms and conditions as contained in the draft agreement annexure "G" to that petition be approved and the then provisional liquidator be directed to sell the undertaking of the Bombay branch of the BCCI to the State Bank of India and/or to its subsidiary to be formed as stated in the draft agreements on the terms and conditions contained therein.

(o) On August 3, 1993, by an order passed on the said Company Petition No. 123 of 1993 by my brother Jhunjhunwala J., the said company petition was allowed on certain conditions thereby approving the draft agreement being exhibit "G" to the said petition for purchase of the Bombay branch of the BCCI as a going concern on an "as is where is" basis on the conditions contained in the said exhibit "G" and the then provisional liquidator was directed to sell the undertaking of the Bombay branch of the BCCI to the first respondent and/or its subsidiary to be formed. Further, the then provisional liquidator was authorised to execute the agreement in terms of the draft agreement, exhibit "G", to that petition. As far as the present petition is concerned, the undertakings given by the RBI and the first respondent through their counsel as recorded in the said order dated March 1, 1993, were accepted and it was ordered that the rights and claims of the present petitioners in the said premises being the subject-matter of the present company petition including those taken in the present company petition and in the affidavit of Mario Vaz affirmed on March 11, 1993, as also the question of the power of the then provisional liquidator of the Bombay branch of the BCCI to assign the said premises and the validity of the assignment were not and will not be affected by the said order dated August 3, 1993, and the same would be determined in the present petition which was pending at that time. Lastly, it was ordered that any new company to be formed by the first respondent as per the terms and conditions contained in the draft agreement, exhibit "G", would also be bound by the undertakings given by the RBI to the first respondent through their counsel as recorded in the said order.

(p) On October 7, 1993, the fourth respondent-company was incorporated and the certificate of commencement of business was given to the fourth respondent on October 18, 1993, and the agreement as per exhibit "G" to Petition No. 123 of 1993 was signed by the fourth respondent on October 24, 1993, to take over the business and undertaking of the Bombay branch of the BCCI. On November 12, 1993, the main petition, viz., Company Petition No. 389 of 1991, was made absolute by my brother Rane. J. granting prayers (a) and (b) of the main petition and ordering winding up of the BCCI(O), Bombay, and the first respondents were appointed as liquidators of BCCI(O), Ltd., Bombay, with all necessary powers under the provisions of the said Banking Act read with the Companies Act, 1956. On November 25, 1993, the present petition reached hearing before me and remained part heard. On that day it was pointed out by Mr. Thakkar, appearing on behalf of the first respondent, that the company having been ordered to be wound up necessary amendments have not been carried out. However, on behalf of the petitioners it was submitted that although the order was passed on November 12, 1993, the same not having been signed, amendments were not applied for. However, on December 10, 1993, an application for amendment of the present petition was made in view of the order, viz., the order of winding up passed on November 12, 1993, and the same was allowed.

2. Before I deal with the various contentions raised by counsel appearing for the parties before me, it is necessary to deal with the submission raised on behalf of

the respondents that the present petition is not maintainable and that this court has no jurisdiction to entertain and try the present petition. As the said jurisdictional submission goes to the very root of the matter, the same is required to be considered at the outset. On behalf of the respondents, it was submitted that in effect, the petitioners being the landlords, were seeking possession of the premises and as the relationship being that of landlord and tenant, under the provisions of section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Rent Act"), the only court which can have jurisdiction would be the Small Causes Court, Bombay. It was further contended that the present petition was filed prior to the winding up order of BCCI(O) Ltd., Bombay, and, therefore, the same was not maintainable. In support of the said contention, it was submitted that the said section 28 contains a non-obstante clause and, therefore, the said court alone can have jurisdiction. Further, it was submitted that the present company petition has been filed under the said Banking Act and the present application seems to have been made u/s 45B of Part III-A of the said Banking Act which in terms provides that the application can be made in respect of "a banking company which is being wound up". Thus, admittedly the present petition having been filed before the winding up order, the same is not maintainable. However, on behalf of the petitioners it was contended, and in my opinion rightly, that despite the non-obstante clause contained in section 28 of the Rent Act, the Banking Act being a special Act, would apply and u/s 45B of the said Banking Act, this court alone would have jurisdiction in the matter, and, therefore, the petition is maintainable. Support was sought from various authorities cited on behalf of the petitioners.

3. The position to my mind seems to be clear. The phraseology "being wound up" cannot mean that such an application has to be made only after the winding up order is passed. The legislative intent is very clear from the words used. Otherwise, it would have been easier to provide that only after a winding up order is passed the powers given to the High Court could be exercised as is provided in section 45C of the Banking Act, where the section starts with such a specific pre-requisite of a winding up order having been made. Section 446(2) of the Companies Act, deals with a somewhat similar situation. In *Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others*, , the Supreme Court, while dealing with the said provision, inter alia, held that if a winding up petition is pending, meaning thereby that an official liquidator is appointed as provisional liquidator which is a stage in the process of winding up, the court before which such proceeding is pending can be styled as a court winding up the company and ipso facto it would have jurisdiction to entertain the proceedings enumerated in clauses (a) to (d) of sub-section (2) of section 446 of the Companies Act. Part III-A of the said Banking Act has as its object speedy disposal of winding up proceedings, the same object as the provisions of section 446(2) of the Companies Act. Section 45B clearly provides that the only court which will have jurisdiction in respect of a banking company would be the High Court. Thus on a

winding up petition in respect of a banking company being filed, the only court in seisin of the winding up proceedings is the High Court and questions and claims in respect of the banking company which is thus "being wound up" can be entertained and disposed of by the High Court alone. One has to bear in mind the fact that the said Banking Act is a special Act dealing with banking companies and Part III-A thereof provides for special provision for speedy disposal of winding up proceedings. In view of this, I see no substance in the objection taken on behalf of the respondents. However, in any view of the matter since the amendments have been allowed and since the defect, if any, assuming there was one, has been now cured, this court is certainly having jurisdiction and that too exclusive and the petition is maintainable.

4. Mr. Doctor, learned counsel appearing for the petitioners, submitted that the lease having been terminated, the lessee had thus become a statutory tenant and the tenancy rights cannot be assigned in view of the provisions of section 15 of the Rent Act. However, on behalf of the respondents it was submitted, firstly, that the lease has not been validly terminated and, therefore, the contractual tenancy was still subsisting and under the terms of the lease in question the lessee had power to assign. It was further submitted that assuming the termination of lease was valid in law there was no distinction between contractual and statutory tenancies, their incidence being same, and, therefore, even as a statutory tenant leasehold rights can be assigned and the prohibition contained in section 15 of the Rent Act against, inter alia, assignments would not be applicable as there is a contract to the contrary, viz., a covenant authorising lessee to assign.

5. Before embarking upon the consideration of authorities cited by both the sides, which may not even become necessary, the basic controversy has to be resolved by first determining whether there is a valid termination of lease or not. In *Gian Devi Anand Vs. Jeevan Kumar and Others*, , the Supreme Court has, inter alia, held that a valid termination of the contractual tenancy puts an end to the contractual relationship. Let us see whether in fact the lease itself has been validly terminated or not. The petitioners have relied on the notice of termination dated November 24, 1991. In the said termination notice the grounds which are taken are that the bank has violated the terms of the agreement of lease dated October 12, 1988, by conducting themselves in business contrary to the terms and the spirit of the lease agreement and the provisions of law and that the business has been suspended from July 6, 1991, and the premises remained unused and vacant since July 6, 1991. Further, the petitioners, without prejudice to the earlier contentions contained in the termination notice, called upon the bank also to pay rent and outgoings due till date within 30 days of receipt thereof by the bank. Therefore, basically the main ground that emerges from the termination notice is that of business having been suspended and no banking business having been carried out. As far as rent and outgoings are concerned, no specific allegation is made in the notice of termination. Taking the first ground first, it is necessary to see what has been provided in the indenture of lease. The

indenture of lease in clause 2(d) provides that the demised premises are to be used by the bank for the purpose of its business of banking and financial and other activities of itself and of affiliate and subsidiary companies only. It was sought to be argued that this would mean that it has to be used for banking and if the banking activities came to a standstill, it would amount to a breach of the said condition. The clause does not require any detailed scrutiny. It is unambiguously worded and it is clear from the clause that what is provided is that the premises are to be used for banking and financial and other activities of the bank and subsidiary companies only and not for any other purpose. By no stretch of imagination can this be read to mean that if the banking business came to a standstill it would amount to a breach of the said condition. If that were the intention of the parties, a clear provision would have been made in the lease to the effect that on the banking business coming to a standstill, the petitioners would be entitled to determine the lease and re-enter.

6. As far as the second condition, viz., regarding arrears of rent and outgoings is concerned, clause 2(a) of the lease provides for payment of rent and clause 2(b) provides for payment of outgoings. As far as the rent is concerned, the petitioners have given an authority in writing to the lessee authorising the bank to adjust the recurring rent against the credit facilities enjoyed by the petitioners. Soon after the execution of the lease on October 10, 1988, the petitioners addressed a letter dated October 11, 1988, enclosing therewith a stamped receipt for an amount of Rs. 4,13,852.28 being the difference in the deposit amount. The petitioners further requested the bank to pay the rental for the period October 12, 1988, to October 31, 1988, and asked the bank to credit the lease rentals that would become due from November 1, 1988, to their current account with the bank. The bank, under cover of their letter dated October 12, 1988, sent payment of Rs. 66,274 being the rental for the period October 12, 1988, to October 31, 1988, and recorded that future lease rent would be paid by crediting the petitioners' account. The official liquidator, while acting as provisional liquidator, after seeking necessary directions from this court on his report No. 3, dated July 18, 1991, continued to pay rent by crediting the petitioners' account. As far as outgoings are concerned, clause 2(b) of the lease requires bills to be sent to the bank on the same being received from the society. Under cover of its letter dated July 29, 1991, the bank sent its cheque for Rs. 37,018.60 being maintenance charges for the period July, 1991, to September, 1991, in response to the society's bills sent by the petitioners to the bank. The petitioners could not show their having sent further bills. There is no substance in this grievance also. The petitioners have completely suppressed from this court the arrangement regarding rent and being fully aware of the same have deliberately chosen to be vague not only in the termination notice, but also in the petition wherein in para 15 after averring that the bank was in arrears of rent, in para 17 averred that they "believed" that the bank had failed and neglected to pay the rents and outgoings. Regarding "outgoings" also no particulars are given in the petition also. There is not any prayer for payment of any amount towards

arrears of rent and/or outgoings. There is no material whatsoever pointing out that there are either arrears of rent or outgoings. In view of this, this ground also does not survive. Thus, the petitioners fail to make out any ground for terminating the lease. Moreover, the right of re-entry which is reserved is provided for in clause 4(a) of the indenture. The same is not complied with at all inasmuch as the notice purporting to terminate the lease did not give the stipulated time to rectify the alleged breaches. Since no ground whatsoever for terminating the lease is made out, there is no question of the bank having committed any breach whereby the petitioners had become entitled to terminate the lease. In view of the above, I am of the opinion that there is no valid termination.

7. In these circumstances, the termination itself is not valid. With the result that the lease is subsisting. Now, the lease itself provides for right of assignment in clause 3(e) which specifically gives the right to assign, sub-lease, transfer or part with possession of the demised premises or any part thereof to any third party to use and occupy the demised premises or any part thereof on such terms and conditions as it may deem fit provided that the same shall not be inconsistent with or contrary to the terms and conditions of the other clauses. In view of the fact that there is no valid termination and in view of the fact that the lease is still subsisting and would come to an end by efflux of time only in October, 1997, I see no reason why the bank, now the official liquidator, cannot assign the same. Section 15 of the Rent Act although prohibits transfer, assignment, subletting and giving on licence the whole or part of the premises, however, provides that the prohibition is subject to any contract to the contrary. The said clause 3(e) of the lease specifically permits the bank to assign and is to my mind, the contract to the contrary whereby the petitioners have given specific permission, and the lease being subsisting as not having been validly terminated, the bank and now the official liquidator, would be within their right to assign in favour of the fourth respondent. Thus, I see no substance in the argument that the assignment is hit by the prohibition contained in section 15 of the Rent Act.

8. It was also argued that the proviso to section 15 permits transfer of interest in the premises on certain conditions being that the transfer or assignment can be only of a running business with goodwill and stock-in-trade where transfer of tenancy rights is incidental. This was the contention which was taken by the respondents in their affidavit as the alternative to their submission that the prohibition contained in section 15(1) of the Rent Act would not affect assignment. In view of the fact that I am clearly of the opinion that it is not hit by section 15(1) of the Rent Act and that the assignment can be validly made in view of specific provision in the lease deed granting permission to the bank to assign or transfer and the lease not having been validly terminated and, therefore, still subsisting, there is no necessity for dealing with the alternative submission advanced on behalf of the respondents. Although it was vehemently argued on behalf of the petitioners that neither the bank was a going concern, nor there was any goodwill nor there was any stock-in-trade, I see no reason

why the same should be examined.

9. Next, it was argued that the assignment is hit by the provisions of the Bombay Land Requisition Act, 1948 (hereinafter referred to as "the Requisition Act"), in view of the fact that the same would violate the provisions of section 6 of the Requisition Act. This is the contention advanced on behalf of the petitioners. Examining the provisions of the said section 6 it is clear to my mind that in the event of the premises becoming vacant on the tenant ceasing to occupy the premises, an intimation has to be given to the Controller of Accommodation. Failure on the part of the landlord entails prosecution and punishment. Thus a statutory obligation is cast on the landlord. The landlord is also prohibited without a written permission of the State Government from letting, occupying or permitting to be occupied the premises which have become vacant. There is nothing in the provision to render the assignment invalid. The assignee would be occupying the premises at the risk of the same being requisitioned. In these circumstances, I see no substance in the submission.

10. Lastly, it was submitted that in any view of the matter as laid down in *Ravindra Ishwardas Sethna and Another Vs. Official Liquidator*, High Court, Bombay and Another, , as the official liquidator was not carrying on the business of the bank, and as the premises were not required for the beneficial winding up of the company, the same should be disclaimed by the official liquidator and returned to the petitioners. Reliance was placed on *Kailash Financiers (Cal) P. Ltd., In re* [1982] 1 Comp LJ 100 on behalf of the respondents, and it was submitted that unlike *Ravindra Ishwardas Sethna and Another Vs. Official Liquidator*, High Court, Bombay and Another, , in the present case the lease is not validly terminated, whereas in *Ravindra Ishwardas Sethna's* case, a suit for eviction was pending in the Small Causes Court and the company which was being wound up was a statutory tenant; that in the present case the lease is still subsisting in view of the termination not being valid and is in operation till October, 1997, and than in the present case as provided in section 39A of the Banking Regulation Act, the official liquidator is having all powers as official liquidator would have under the Companies Act and in exercise of such powers the scheme to assign the running business was presented and approved by this court. It was also further submitted, relying on *Kailash Financiers (Cal) P. Ltd., In re* [1982] 1 Comp LJ 100 that the court has to look to the larger interests of the creditors and the depositors.

11. It is settled law that till the company is dissolved, it retains its corporate existence though administration of the affairs of the company passes to the liquidator. All the properties of the company in liquidation are deemed to be in the custody of the court winding up the company and the official liquidator becomes the custodian thereof. His act is that of the company and, therefore, in the present case also he acts on behalf of the lessee-bank. It cannot be denied that the monthly tenancy rights or leasehold rights of a company are valuable assets and if the bank had not been subjected to winding up proceedings, the

bank, under the lease would have been free to assign. As discussed above, I see no legal impediment in the assignment qua the leasehold rights in the premises. Moreover, this court has sanctioned the assignment of course, without prejudice to the petitioner's contentions in the present petition, which contentions are rejected as discussed above. In view of this position, I see no substance in the last contention.

12. In the result, the company petition is dismissed with costs.

13. At Mr. Doctor's request status quo with regard to the premises in question to be maintained for a period of three weeks.