

Dalhousie Properties Ltd. Vs.

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Court : Kolkata

Decided On : Jul-21-2011

Judge : I.P. Mukerji, J.

Acts : [Transfer of Property Act, 1882](#). - Section 116, 108 (q); [Evidence Act, 1872](#) - n Section 116, 91 and 92

Appellant : Dalhousie Properties Ltd. and Exhibitorsâ€™™ Syndicate Ltd. and Lourdes Textiles Pvt. Ltd.

Judgement :

1. Four winding up applications were heard by me for three days, on each day, for sometime. I will deal with the facts of C.P. No. 295 of 2006, one of the four winding up applications where the petitioning creditor is Exhibitors' Syndicate Ltd. and the Company of which winding up is sought, Dalhousie Properties Ltd. The basic facts in all the four winding up applications are identical. Therefore, the judgment in this application will also be the judgment in the other three, as well.

FACTS

The facts are most unusual. I wonder if such unusual facts were ever the subject-matter of another winding up application, in the history of this Court. At one point of time there was a famous cinema house by the name of "Uttara Cinema", in north Calcutta. This cinema was run from properties which were numbered as

premises no. 138/2, Bidhan Sarani and 3, Gurucharan Lane, Calcutta. It is quite sometime now that this cinema house has stopped showing cinema.

3. On 18th July, 1957 these properties were owned by Debi Prasanna Ghosh and Smt. Charusila Dassi. Both of them are long dead. By a registered Deed of Lease they demised these properties from 18th July, 1957 till 17th July, 1997 to one organisation called Cultural Enterprise Corporation. The lessee had a right to sub-lease. By a sublease made on 5th October, 1963, the lessee demised the properties to Exhibitors' Syndicate Ltd. the petitioning creditor, for the whole of the unexpired term of the lease. Therefore, there can be no doubt that the lease and the sub-lease determined by efflux of time on 17th July, 1997. The petitioning creditor did not vacate the properties. The heirs of the deceased owners took no steps for their eviction.

4. At this point of time it may be said that, during the course of hearing of this application, Mr. Ahin Chowdhury, learned Senior Advocate wanted to move an application (C.A. No. 650 of 2011) on behalf of the present owners of these properties, M/s. Round Up Properties Pvt. Ltd. I allowed Mr. Chowdhury to participate in the proceedings for fuller disclosure of all material facts before the Court and for complete adjudication of the issues involved. According to Mr. Chowdhury after expiry of the lease the petitioning creditor was a trespasser. According to Mr. Bimal Kumar Chatterjee, learned senior Advocate appearing for the petitioning creditor the status of the petitioning creditor was that of a tenant holding over under Section 116 of the [Transfer of Property Act, 1882](#).

5. Then came an agreement made on 22nd September, 2004. It was between the petitioning-creditor, one Dilip Chand Kankaria, a director of the petitioning creditor and the respondent Company. The recital said that the petitioning creditor was in possession of the properties for the last 60 years. Another recital said that the respondent Company was interested in purchasing a portion of the properties and that the director was negotiating with the owners for their sale. A part of the agreement stated that till that was done, the petitioning creditor was letting out a

part of the properties to the respondent Company at a monthly rent of Rs. 4.10 lacs. The tenancy would commence on and from 1st October, 2004 for a minimum period of 15 years. After three months the rent would be increased to Rs. 4,30,000/-. A lump sum consideration of Rs.43 lacs was paid by the Company to the petitioning creditor. Furthermore, it was stipulated that if conveyance could not be executed within three months from the date of signing of the agreement, this amount of Rs. 43 lacs would be increased by 5 lacs.

Such grant was paid upto December 2004. Thereafter the respondent Company stopped paying rent. Dispute arose.

6. At this stage, Round Up Properties Pvt. Ltd. on 14th January, 2005, entered into an agreement with the owners for sale of the said properties. Round Up had the power to take steps against any occupants. By a plaint verified on 10th June, 2005 Round Up instituted a suit in the learned City Civil Court (Title Suit No. 881 of 2005) against Cultural Enterprise Corporation, the petitioning creditor and Dilip Chand Kankaria. The legal owners of the properties were made proforma defendants. It claimed inter alia a decree of eviction, from the above properties, against the above parties. In or about September, 2005 the Company instituted a suit in the same Court (Title Suit No. 1389 of 2005) against the petitioning creditor and Dilip Chand Kankaria where the legal owners were made proforma defendants. They claimed in this suit inter alia for a declaration that the Company was liable to pay rent to the legal owners only and not to the petitioning creditor or Dilip Chand Kankaria.

7. What is of considerable importance is that from June 2005 the respondent Company started paying rent to Round up.

On 27th September, 2008 the legal owners conveyed these properties to Round up.

8. The petitioning creditor has filed this winding up application on the cause of action that they were entitled to payment of rent from the Company from January, 2005 which the Company had not paid and that on those circumstances the Company should be wound up.

9. ARGUMENTS IN A NUTSHELL:

Petitioning Creditor:

10. The petitioning creditor was in occupation of the properties and had the right to let it out. The status of the petitioning creditor was of a lessee holding over under Section 116 of the [Transfer of Property Act, 1882](#).

11. Once the Company had entered into the agreement dated 22nd September, 2004 acknowledging the right of the petitioning creditor to let out the property, it cannot turn around and deny the authority of the petitioning creditor. Mr. Bimal Kumar Chatterjee, learned senior Advocate appearing for the petitioning creditor relied on Section 116 of the [Evidence Act, 1872](#) to further strengthen the above contention that a tenant or licensee cannot turn around and deny the title of the landlord licensor. The following cases were cited on behalf of the petitioning creditor: VASHU DEO v. BALKISHAN reported in (2002) 2 SCC 50, M/S. RAPTAKOS BRETT & CO. LTD. VS. GANESH PROPERTY reported in AIR 1998 SC 3085 and PRAMOD KUMAR JAISWAL AND OTHERS v. BIBI HUSN BANO AND OTHERS reported in (2005) 5 SCC 492 (Para 29).

12. Moreover he relied on Section 91 and 92 of the [Evidence Act, 1872](#) to submit that the Company could not now alter the terms of its occupation as provided by the agreement dated 22nd September, 2004, by acknowledging Round Up Property Ltd as its landlord.

13. COMPANY AND ROUND UP PROPERTIES:

The petitioning creditor was an absolute trespasser from 1997. It had no power or authority to enter into the agreement for sale or tenancy dated 22nd September, 2004. They narrated the facts recited above by me regarding devolution of property to Round Up and payment of rent by the Company to Round Up from June 2005, institution of proceedings before the learned City Civil Court and so on. The following cases were cited on behalf of them: MEDIQUP SYSTEMS PVT. LTD. vs. PROXIMA MEDICAL SYSTEM GMBH reported in 124 CC 473 and IBA HEALTH (INDIA) PRIVATE LIMITED vs. INFODRIVE SYSTEMS SDN. BHD. reported in (2010) 10 SCC 553 (Para 20 and 33).

14. Discussion and Conclusions:

I have little doubt in my mind that the owners and the head lessee of the properties had full knowledge of and concurred in its alleged letting out by the petitioning creditor but, since the lease and the sub-lease had expired in 1997 and there being no evidence whatsoever of any rent being accepted from the petitioning creditor, I do not think that they could be called lessee or sub-lessee holding over. On the available evidence the position of the petitioning creditor was that of a sublessee whose lease had expired and who could only be evicted by due process of law. Therefore, the petitioning creditor did not have the title to enter into the agreement dated 22nd September, 2004 with the Company. The agreement could have had some legal sanctity had the owners of the properties counter signed the agreement showing their concurrence or been a confirming party to it. I do not think that any support or concurrence of the owners or the head lessee could convert the petitioning creditor into a lessor. To my mind the case of VASHU DEO v. BALKISHAN reported in (2002) 2 SCC 50 arose from the issue formulated by the Court: "whether a sub-tenant inducted by a tenant in the premises governed by the provisions of the rent control law can, during the continuance of sub-tenancy and without vacating the premises, attorn in favour of the owner of the premises and thereby refused to discharge his obligations towards the tenant who admittedly inducted him in the premises."

15. Under the concerned rent law a tenant would be treated to be so till there was a decree for his eviction. The Hon'ble Supreme Court observed that such a tenant continued to be so until a decree of eviction was passed against him. Thereafter the Hon'ble Supreme Court discussed Section 108 (q) of the Transfer of Property Act and said that upon determination of the lease it was the duty of the tenant to put the lessor into possession. The Court also analysed Section 116 of the Evidence Act, which embodies a rule of estoppel that a tenant cannot deny the title of the landlord at the time of creation of tenancy. The Hon'ble Supreme Court went on to hold that the position of the tenant remained intact till an order for his eviction was passed. In those circumstances the Supreme Court dismissed the appeal by the sub-tenant who had attorned the tenancy in favour of the owner.

16. The decision in the case of PRAMOD KUMAR JAISWAL AND OTHERS v. BIBI HUSN BANO AND OTHERS reported in (2005) 5 SCC 492 enunciates the principle that creation of successive estates in land like lease and sub-lease results in an estate existing independently of the other.

17. Therefore, the sale by the owners to Round Up did not destroy the estate of the petitioning creditor sub-lessee.

18. Before I come to a decision in this application I should be reminded about the limitation of a Court exercising the jurisdiction to wind up a Company. In the case of MEDIQUP SYSTEMS PVT. LTD. vs. PROXIMA MEDICAL SYSTEM GMBH reported in 124 COMPANY CASES 473 the Hon'ble Supreme Court said the following:

“16..... This court in catena of decisions held that an order under section 433(e) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be

a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression “unable to pay its dues” in section 433(e) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realising debts due from a company.

25. The Bombay High Court has laid down the following principles in *Soft-sule (P) Ltd. , In re* [1977] 47 Com Cas 438 (Bom) (page 443): “Firstly, it is well settled that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order.

Secondly, if the debt is bona fide disputed, there cannot be ‘neglect to pay’ within the meaning of section 434(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.

Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not ‘due’ within the meaning of section 434(1)(a) and non-payment of the amount of such bona fide disputed debt cannot be termed as ‘neglect to pay’ the same so as to incur the liability under section 433(e) read with section 434(1)(a) of the Companies Act, 1956.

Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should in a

position to meet its liabilities as and when they arise.”

19. The Madras High Court in *Tube Investments of India Ltd. v. Rim and Accessories (P) Ltd.* [1990] 3 Comp LJ 322, 326 has evolved the following principles relating to bona fide disputes:

“(i) If there is a dispute as regards the payment of the sum towards principal however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between parties is a civil court;

(ii) The existence of a dispute with regard to payment of interest cannot at all be construed as existence of a bona fide dispute relegating the parties to decide such a dispute before the civil court and in such an eventuality, the company court itself is competent to decide such a dispute in the winding up proceedings; and

(iii) If there is no bona fide dispute with regard to the sum payable towards the principal, it is open to the creditor to resort to both the remedies of filing a civil suit as well as filing a petition for winding up of the company.”

20. The rules as regards the disposal of winding up petition based on disputed claims are thus stated by this court in *Madhusudan Gordhandas and Co. v. Madhu Wollen Industries Pvt. Ltd.*, AIR 1971 SC 2600; [1972] 42 Comp Cas 125. This court has held that if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The principles on which the court acts are:

- (i) that the defence of the company is in good faith and one of substance;
- (ii) the defence is likely to succeed in point of law; and
- (iii) the company adduces, prima facie proof of the facts on which the defence depends.

In view of the judgment now passed, the appellant will be entitled for refund of the sum of Rs. 2 lakhs deposited by them in compliance with the direction given by the High Court is directed to refund the same to the appellant on production of a certified copy of this judgment.

In view of all these, there is no prima facie dispute as to the debt. Thus we find no justification whatsoever for admitting the winding up petition. Accordingly, the judgment passed by the learned single judge and of the Division Bench are set aside. The civil appeal stands allowed. No cost.”

21. It has also said the following in the case of IBA HEALTH (INDIA) PRIVATE LIMITED vs. INFO-DRIVE SYSTEMS SDN. BHD. reported in (2010) 10 SCC 553 (Para 20 and 33):

“20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The

grounds of the dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.

23. The principles laid down in the abovementioned cases indicate that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956."

22. Principles for grant or refusal of Summary Judgment as stated in paragraph 8 of *Mechalec Engineers & Manufacturers - v - M/s. Basic Equipment Corporation*, reported in AIR 1977 SC 577 are also to be applied in considering claims in winding up. I read paragraph 8 of that judgment:

“ “ 8. In *Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee, J.*, (1945) 49 Cal WN 246 at p. 253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37, C.P.C. in the form of the following

propositions (at p. 253):

“(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff’s claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the

plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence.” ”

23. These facts of this case are substantially different from the case of VASHU DEO v. BALKISHAN reported in (2002) 2 SCC 50 (Supra). In that case the lessee had the right to sub-lease and the sublease was created during the subsistence of the lease. The sub-lessee tried to become a lessee directly under the lessor during continuance of a suit between the lessor and the lessee. In the lease in question where the petitioning creditor was the sub-lessee, I do not find any provision which enables the sub-lessee to further sub-lease. Moreover the sublessee has long expired. Therefore, the position of the petitioning creditor from 1997 is very precarious. In my opinion he did not have any legal right to let out and hence could not create any tenancy. I have no doubt that such alleged letting out was done with the concurrence of the owners and the head lessee. There is nevertheless substantial evidence to suggest that the company was a licensee of the petitioning creditor, with the concurrence of the owners and head lessee. Therefore, the principles of estoppel in Section 116 of the Indian Evidence Act will come in the way of the Company challenging the petitioning creditor's title. But I was not shown any principle by which the petitioning creditor on the existing facts can claim rent from the company.

24. The petitioning creditor parted with the possession he had in favour of the Company. Another Company Round Up entered into an agreement with the owners and started collecting rent from the Company with June, 2005. Suits have been initiated in the learned City Civil Court. The facts of this case are extremely complex. It is true that the petitioning creditor could not get things going its way and there is some injustice in the way it has been treated by the Company, but I find myself helpless.

25. But there is one equity in favour of the petitioning creditor. It was in possession of the properties, in whatever way it enjoyed it before it parted with it in favour of the Company. Now, in any action concerning the rights of the owner, head lessee, sub-lessee etc., the question of mesne profit earned by use of the said properties from January, 2005 is likely to arise. I may only make this observation that whatever rents are being collected from the properties from 1st January, 2005 are to be set off against the claim for mesne profit that any person may bring against the petitioning creditor. That is so because the owners, present or past cannot be allowed to unjustly enrich themselves by collecting rent from the Company as well as claiming mesne profit against the petitioning creditor.

26. As is usual in these winding up applications, at this stage, the above findings and observations are to be taken as prima facie.

27. Applying the principles of the above Supreme Court judgments in winding up, the claim of the petitioning creditor is seriously disputed, cannot be entertained in this winding up application and is to be properly adjudged in an appropriate civil proceeding decided by trial on evidence. All the winding up applications are dismissed. C.A. No. 650 of 2011 is disposed of accordingly. However, there is no order for costs.

28. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.

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