

The Official Liquidators, U. P. Union Bank Ltd

Vs

Shri Rameshwar Nath Aggarwal

Civil Appeal No. 28 of 1958

(P. B. Gajendragadkar, J. C. Shah, K. Subha Rao JJ)

10.11.1959

JUDGEMENT

SHAH J. –

The U.P. Union Bank Ltd. (which will hereinafter be referred to as the Bank) was in occupation as a tenant of a building in Agra town belonging to the respondent at a monthly rental of Rs. 325 and Rs. 10 as municipal taxes. The Bank made default in paying the rent accruing due and the respondent filed suit No. 810 of 1949 in the court of the Munsiff at Agra for a decree for rent for three months and obtained an order of attachment before judgment on the movable property of the Bank. The Munsiff by his decree dated December 2, 1949, decreed the suit and confirmed the order of attachment before judgment. In the meanwhile, on a petition dated September 13, 1949, the Bank was ordered to be wound up by the High Court of Judicature at Allahabad and the appellants were appointed liquidators of the Bank. The employees of the Bank had vacated the premises on September 10, 1949, but the property of the Bank which was attached was with the consent of the respondent stored by the Commissioner appointed by the Munsiff's court in the Banking hall which was sealed by that officer. A part of the premises was, it appears, occupied by some trespassers. The Official Liquidators called upon the respondent to take possession of the premises, but the latter declined to do so unless vacant possession of the entire premises was given to him. On November 30, 1950, the respondent applied to the High Court for permission to file a suit for ejectment and for arrears of rent due since September 30, 1949. Mr. Justice Mootham, who heard the application declined to grant permission holding that the claim which the respondent intended to put forward against the Official Liquidators in the course of the proposed suit may be adjudicated upon in the winding up proceeding, and with the consent of parties, the learned Judge proceeded to decide that claim. By order dated August 30, 1951, Mr. Justice Mootham directed as follows :

"In the result ....., I hold that the petitioner is entitled to recover rent from the Bank at the rate of Rs. 325 per mensem from 1st October, 1949, upto the date on which the Official Liquidators give the petitioner (the landlord) such possession of the premises as will, in law, terminate the Bank's tenancy."

Against this order, the Official Liquidators preferred an appeal being special appeal No. 17 of 1952, to a Division Bench of the High Court.

On April 23, 1953, the respondent applied to the Joint Registrar of the High Court to issue a certificate of non-satisfaction and to transfer the order to the court of the Civil Judge of Allahabad for execution. The Joint Registrar issued a certificate of non-satisfaction of the order and directed that the same be transmitted to the District Judge, Allahabad, for execution. The respondent filed an

application for execution in the court of the Civil Judge, Allahabad, and obtained an order for attachment of an amount of Rs. 12,000 lying to the credit of the Official Liquidators in the Allahabad Bank. The Official Liquidators thereupon applied to the High Court praying that the execution proceedings pending in the court of the Civil Judge, Allahabad, be declared void and the order of attachment of the fund in the account of the Official Liquidators passed by the Civil Judge be quashed. Mr. Justice Brij Mohan Lall, who heard the application held that the proceeding commenced against the Official Liquidators, without the sanction of the court under ss. 171 and 232, cl. 1 of the Indian Companies Act, 1913, and the attachment ordered thereunder were void and directed that the certificate of non-satisfaction be recalled. Against this order, the respondent preferred a special appeal to the High Court being appeal No. 20 of 1954. Appeals Nos. 17 of 1952 and 20 of 1954 were then heard. Appeal No. 17 of 1952 was dismissed and by an order passed on April 17, 1956, the High Court partially modified the order of Mr. Justice Brij Mohan Lall, and directed the Official Liquidators to pay to the respondent in full the amount that had fallen due to him after October 1, 1949.

The High Court was of the view that the Official Liquidators having retained the Bank's premises in their occupation, by virtue of the proviso to r. 97 framed by the High Court, the respondent was entitled to receive the rent due to him in full and was not liable to share the assets of the Bank pro rata with the other ordinary creditors. Against the order passed by the High Court, this appeal has been preferred with the certificate of the High Court.

By his order Mr. Justice Mootham, merely declared the liability of the Bank to pay the rent accrued due since October 1, 1949 : there is no direction for payment of the amount, and it is not necessary to consider the plea raised by counsel for the respondent that the order being virtually one under s. 45-B of the Banking Companies Act, the respondent was entitled to payment according to the tenor of the order. The order in terms declares the liability and does not decide any question of priority between the respondent and other creditors of the Bank.

By s. 647 of the Companies Act No. 1 of 1957, the winding up of the Bank having commenced before that Act was enacted, the provisions with respect to the winding up contained in the Indian Companies Act No. VII of 1913, continue to apply to the Bank in the same manner and in the same circumstances as if Act 1 of 1957 had not been passed. By s. 230 of the Indian Companies Act, 1913, provision is made for payment of specified categories of debts in the winding up in priority to all other debts; but rent due to the landlord is not one of such debts to which priority is given by s. 230. The High Court held that in as much as by r. 97 of the Company Rules, it was provided.

"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 such periods the persons entitled to the rent or payment may prove for a proportionate part thereof up to the date of the winding up order or resolution as if the rent or payment grew due from day to day :

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

for the rent accruing due in respect of the premises which remained in the occupation of the Official

Liquidators, the respondent was entitled to preferential payment. 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. By s. 246 of the Indian Companies Act, 1913, power is conferred upon the High Court to make rules consistent with the Act and the code of Civil Procedure concerning the mode of proceedings to be had for winding up of the company and certain other matters. The legislature has by s. 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. By s. 193 of the Act, the court has, in the event of the assets being insufficient to satisfy the liabilities, indisputably power to make an order for payment out of the assets, of the costs, charges and expenses incurred in the winding up in such order of priority as the court thinks fit, and in exercise of the power conferred by s. 230 sub-cl. 3, the court may direct the company to retain such sums as may be necessary for the costs and expenses of the winding up of the company before discharging even the debts in respect of which priority is prescribed by s. 230. If therefore, there is a debt which may reasonably fall within the description of costs and expenses of winding up of the company, the court may provide for priority in payment of that debt as it thinks just.

In the winding up of the company, it is open to the liquidators to disclaim land burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable or not readily saleable. The disclaimer operates to determine as from the date of disclaimer the rights, interests and liabilities of the company and the property of the company, in or in respect of the property disclaimed. By s. 230-A, cl. 4, liberty is reserved to persons interested in the property requiring the liquidator to decide whether he will or will not disclaim. It is also open to the court under sub-s. 5 of s. 230-A on the application of any person entitled to the benefit or subject to the burden of a contract made with the company to make an order rescinding the contract on such terms as to payment of damages for non-performance of contracts. It is evident that on the winding up outstanding contracts of the company do not become ipso facto inoperative. The contracts remain binding until disclaimed or rescinded in the manner provided by s. 230-A; but the liability incurred under these contracts is merely an ordinary debt which ranks for claim to payment pro rata along with other creditors. If the debt be regarded reasonably as falling within the description of costs and expenses of winding up of the company, it is open to the court to direct that preferential payment in respect thereof be made; otherwise the debt will be claimable out of the assets of the company pro rata with other ordinary creditors.

Distinction has been made by the courts in England where the relevant provisions of the Companies Act are substantially the same that if the liquidator continues in possession of leaseholds for the purpose of the better realization of assets, the lessor will be entitled to payment of the rent in full, as part of the expenses properly incurred by the liquidator; but as observed by Lord Justice Lindley, in *re Oak Pits Colliery Company* (1882 Ch. D. 321, 331).

"No authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee."

Evidently a distinction is made between property which remains in the occupation of the liquidator

after the winding up when the occupation is shown to be for the purpose of liquidation and property which merely remain with the liquidator, he having abstained from trying to get rid of the same and it does not appear or is not shown that the property was used for the purpose of winding up.

The High Court held on the fact that the liquidators had remained in occupation of the premises not for the purpose of winding up but "because they could not think of any suitable method of getting rid of the premises in spite of all their desire to do so." It was pointed out that the Bank had closed its business and the liquidators were not carrying on any business after the winding up and the properties were not used by the liquidators for the purpose of liquidation. This conclusion of the High Court on the evidence has not been challenged. 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 cannot be claimed in priority over other ordinary debts.

We are therefore unable to agree with the High Court that under r. 97 of the Company Rules, if the premises remained in the occupation of the liquidators, not for the purpose of winding up, the landlord is entitled to priority in respect of payment of rent. On the view taken by us, the appeal will be allowed, the order passed by the High Court set aside and the order passed by Mr. Justice Brij Mohan Lall restored with costs in this Court and in the High Court.

Appeal allowed.

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