

ALLAHABAD HIGH COURT

Rameshwar Nath

Vs.

U.P. Union Bank Ltd

Special Appeal No. 20 of 1954. against judgment and decree of Brij Mohan Lall, J.
(Agarwala and Upadhya, JJ.)

10.02.1954. 17.04.1956

JUDGMENT

Agarwala, J.

1. This is an appeal against an order of the learned Company Judge in proceedings arising during the course of liquidation of the U.P. Union Bank Ltd. This Bank prior to its liquidation had rented a building belonging to the appellant in the city of Agra at a monthly rent of Rs. 325/- plus Rs. 10/- as house water tax. A portion of the demised premises was let out by the Bank to the proprietor of a hotel called the Man Mohan Hotel and the rest was occupied by the Bank itself and some of its officials also resided in the premises. The rent was not paid regularly and the appellant brought a suit No. 810 of 1949, in the Court of Munsif at Agra on 3-9-1949 for the recovery of rent for the months of July, August and September 1949 and on 5-9-1949 obtained an order of attachment before judgment of the furniture etc. belonging to the Bank and the same was by the consent of parties kept locked in the Banking Hall of the premises under the seal of the Court. On a petition presented on 30-9-1949, the Bank was wound up by an order dated 16-12-1949 and Official Liquidators were appointed. On 2-12-1949, a decree was passed in favor of the appellant for arrears of rent for the months of July, August and September. After the winding up order the Bank carried on no business in the premises. On the 15th or 16-9-1950 the attached furniture was sold. Two days later, the Official Liquidator asked the appellant to take possession over the building. As a portion of the building was in the occupation of third parties, the landlord refused to take possession of a portion of the building. Thereafter on 30-11-1950, the appellant by means of an application No. 57 of 1950 under Section 171, Companies Act prayed for permission to file a suit against the Bank for arrears of rent accruing after 30-9-1949 up to the date of delivery of possession and for certain other reliefs. The learned Company Judge, Mr. Justice Mootham, as he then was, by an order dated 5-1-1951, rejected the prayer of the appellant for permission to file a suit against the Bank as the claim could very well be decided in the winding up proceedings and thereafter by consent of parties proceeded to decide the claim himself, acting under the powers conferred on him by Section 45B, Banking Companies Act, 1949. This claim was decided on 30-8-1951 and it was held that the appellant was entitled to recover rent from the Official Liquidators at the rate of Rs. 325/- per mensem from 1-10-1949 up

to the date on which the Official Liquidators gave the petitioner such possession of the premises as would in law terminate the Bank's tenancy, that he was also entitled to recover a sum of Rs. 500/- on account of damages to his property, but from this sum, he was by consent, entitled to set off the sum of Rs. 364/- due by him to the Bank. Against this order a special appeal was filed by the Official Liquidators. This was numbered as 17 of 1951 and the appellant filed a cross-objection. These were dismissed by us by an order dated 1-9-1955.

2. While this appeal was pending the appellant applied to the Registrar of this Court to transmit the decree passed by the learned Company Judge on 30-8-1951 to the District Judge, Allahabad for execution. The Registrar considering that this was an ordinary decree granted the certificate of transfer and the appellant applied to the District Judge for execution of his decree against the Bank by attachment of a sum of Rs. 12,644/11/- which was in fixed deposit with the Allahabad Bank Ltd.

3. When the Official Liquidators came to know of this, they applied to the Company Judge by means of an application No. 29 of 1953 dated 21-7-1953 praying that the proceedings in execution pending in the Court of the Civil Judge, Allahabad be declared to be void and further proceedings be stayed and the order of attachment withdrawn.

4. This petition, was allowed by the learned Company Judge, Hon'ble Mr. Justice Brij Mohan Lall, by an order dated 10-2-1954. The learned Judge held that the order of attachment made by the Civil Judge was contrary to law inasmuch as permission for the same had not been obtained under Section 171, Companies Act and Section 232(1) declared any such attachment affected without leave of the Court to be null and void and that the proper method of executing the decree passed by the former Company Judge, was to approach the Official Liquidators and to obtain from them pro rata payment along with other creditors or, if the opposite party claimed preferential payment, to put forward such claim under Section 230, Companies Act.

5. An argument had been advanced on behalf of the appellant to the effect that the decree in question having been passed by the Company Judge himself was executable under Section 199, Companies Act and no permission under Section 171 of the Act was necessary, and the decree could be executed in the ordinary manner. This plea was rejected by the learned Judge.

6. Against this order the appellant has filed the present special appeal and the points urged by him before us are: Lastly that the decree in execution being a decree of the Company Court itself was executable in the same manner as any order or decree of the Company Court under Section 199, Companies Act, and that therefore no permission under Section 171, Companies Act was required for the purpose.

2ndly that the decree represented a debt which was incurred by the Official Liquidators after the date of winding up and as such was not liable to be paid pro rata along with the debts due from the Bank to the other creditors before the date of winding up. Lastly that this was a debt which

should be treated as costs of the winding up and was therefore payable before any other debt under Section 230(3), Companies Act.

7. As regards the first point, it may be conceded that the order of the learned Company Judge awarding rent and damages to the appellant must be treated as an order to which Section 199, Companies Act applies and that therefore its could be "enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced" as provided for by the Section. But this does not prevent the operation of Section 171 as regards the execution of the order. Section 171 lays down that

"when a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose."

8. Section 171 makes no distinction between a suit or legal proceeding decided by the Court itself or by some other Court. In the present case the appellant's claim for rent was, by consent of parties, decided by the Company Court itself. It will be assumed that the leave of the Court was implicit so far as the proceeding in this Court was concerned. But no such implied leave can be inferred for the initiation of the execution proceedings in the Court of the District Judge. Before the execution proceedings could be instituted, leave of the Company Court was necessary under Section 171. The object of Section 171 is invest the control of all suits or legal proceedings against a Company under liquidation in the Court in which winding up proceedings are pending, so that the creditors of the Company may not be deprived of their just dues upon a pro rata distribution, by one creditor taking away the whole or a portion of the assets of the Company, without submitting himself to the pro rata distribution. After the passing of the order of winding up or of the appointment of the provisional liquidator, all the property and effects of the Company are deemed to be in the custody of the Court as from the date of the order of winding up of the Company (Section 178(2)) and the Official Liquidator is directed to take into custody or in his control all such property for the purposes of winding up. It would be very anomalous therefore if the property and effects of the Company which is being wound up by the Court are to be taken away without leave of the Court by a claimant who does not come forward to prove his claim in the winding up. The law, therefore, provides that all suits or legal proceedings shall not be commenced or proceeded with against the Company except by leave of the Court in which winding up proceedings are pending. Section 171 does, therefore, apply even to the order of the Court which is sought to be enforced not by a petition in the winding up but by instituting execution proceedings in some other Court. It is immaterial in such cases that the claim or debt which is the subject-matter of the suit or other legal proceeding came into existence after the date of winding up.

9. The execution proceedings initiated by the appellant in the Civil Judge's Court, therefore, were void, being in contravention of Section 171. It was not disputed before us that the word 'proceedings' used in Section 171 includes execution proceedings also. According to the provisions of Section 232, Companies Act the attachment made under the orders of the learned Civil Judge not having been effected with the leave of the Court, must be held to be void.

10. As regards the second point raised on behalf of the appellant, the position is this Section 228, Companies Act and R. 98 of the Company Rules made by this Court, vide Ch. XXVIII of the Rules of the Court at p. 251, contemplate that all the debts and claims against the Company shall, so far as may be, be estimated according to the value thereof at the date of the order of winding up of the company and under Section 229, they are to be paid pro rata as insolvency proceedings. Rule 97 of the Company Rules, "however, provides 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 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."

The proviso to the rule is clear. The landlord's right to claim payment of the rent which falls due after the date of winding up on account of the Official Liquidator remaining in occupation of the premises demised to the Company which is being wound up, is not affected or prejudiced by anything in the Company Rules. This clearly means that such rent is not to be classed with the debts due from the Company up to the date of winding up, and instead of being paid pro rata along with such debts, is to be paid in full. The reason appears to be obvious. The Official Liquidator is empowered to disclaim a property which he does not wish to retain because it is onerous and not profitable or not necessary for the purposes of winding up, see Section 230A, Companies Act. If he neglects to do so, the landlord should not be made to suffer loss. This rule appears to be based upon the observations of Fry, J. in *In re. Brown, Bailey and Dixon; Ex. parte Roberts and Wright*, (1881) 18 Ch. D. 649 (A) said the learned Judge.

"In like manner, a lessor is for many purposes an independent person. His rights ought not to be interfered with, more than is necessary, by reason of his lessee having become insolvent, and, having chosen (to use the Lord Justice's expression) to have a winding up A mortgagee and a lessor, although in one sense independent persons, are nevertheless creditors of the company in respect of any amount due on the mortgage or on the lease at the date of the winding up, and, as such creditors, they ought, in my judgment,

to have neither preference nor priority.

In respect of any rights arising after the Winding up by reason of the company or the liquidators remaining in possession of the demised or of the mortgaged premises, they ought, in my judgment, to be treated as independent persons, and if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument; just as any other person must observe those terms. In that way, then, I draw the line at the commencement of the winding up; and I hold that all claims of creditors before that date should be dealt with upon the principle of equality; but that with regard to the rights after that, the company is in no better position because it has become insolvent and has had a winding up. That appears to me to be consistent with the current on decision which has drawn the line with regard to the exercise of the power of distress in respect of rent after the winding up; but with respect to rent before the winding up, to allow him only his right to compete with the other creditors by proving in the winding up."

11. I may, however, point out that the current of authority in England appears to be that the lessor is entitled to recover his full rent which became due alter time order of winding up only if the premises are occupied by the Official Liquidator for the purposes of the winding up and not otherwise. In *In re Silkstone and Dodworth Coal and Iron Co., Ex parte Perkins*¹, with reference to the liquidator remaining in occupation of a colliery which had been taken on lease by the Company prior to the winding up, it was observed :

"If he (the liquidator) continued in the possession of the property he could only do so upon the terms of the lease, and it is only equitable, if he keeps the lease as an asset of the company 'and for the purposes'of the liquidation, that he should satisfy those conditions upon which the asset remains his; in other words, he should pay the rent in full," (Italics here in mine),

12. Mr. Justice Kay in *In re Oak Pits Colliery Co*²., pointed out that :

"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. If the landlord had endeavoured to re-enter and the liquidator had objected, the case might be different."

The facts found in that case were that the liquidator left the company's plant and machinery where he found them until he sold in July 1881; that he had them valued in May, 1880, with a view to a sale which was not carried out; and that he took no steps to surrender the company's interest in the Oak Pits Colliery and 133 acres to the landlord. On these facts it was held that they were not sufficient to entitle the landlord either to distrain or to be paid in full. This decision was

followed in *In re Levi and Co. Ltd*³,

13. If I were to apply the principle laid down in the case of Oak Pits Colliery Co., I would have held that in the present case the liquidator remained in occupation of the premises not for the purposes of winding up but because he could not think of any suitable method of getting rid of the premises in spite of all his desire to do so. It has

¹(1881) 17 Ch. D. 158 ³(1919) 1 Ch. 416

²(1882) 21 Ch. D. 322

been noted above that he asked the landlord to take over possession of the premises on 10-9-1950 but the landlord refused to do that. He was making no use of the premises. Some persons were occupying some portions of the building forcibly. He attempted to dislodge them. In one instance he did ask one of such persons not to pay rent to the landlord after the landlord refused to take over possession from him.

But this appears only because he was not sure what the legal position was. In any case the Bank had closed its business and the liquidator was not carrying on the business after winding up and the property was not used by him for the purposes of liquidation.

14. But it appears to me that under the proviso to R. 97 it is immaterial whether the pie-raises were retained in his 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.

15. As regards the third point, in view of what has been observed above, the rent in dispute can be claimed in full on the same footing as costs of winding up under Section 230(3), Companies Act.

16. In the result I would allow this appeal in part, modify the order of the learned Single Judge and direct the Official Liquidators to pay to the appellant in full the amount that has fallen due to him from 1-10-1949. In other respects the order of the learned Single Judge will stand.

Upadhya, J.

17. I agree.

BY THE COURT:

18. We allow this appeal in part, modify the order of the learned single Judge and direct the Official Liquidators to pay to the appellant in full the amount of arrears of rent due to him from 1-10-1949 till the date on which the tenancy was terminated. In other respects the order of the learned single Judge will stand. The appellant is entitled to his costs of this appeal.

Order accordingly.