(2006) 12 CAL CK 0004

Calcutta High Court

Case No: C.P. No. 485 of 2004

In Re : West Bengal Electronics Industry Development Corporation Ltd. and Calcutta Investors		APPELLANT
	Vs	
		RESPONDENT

Date of Decision: Dec. 20, 2006

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: S. Talukdar, Mr. J. Chowdhury and Mr. A. Sen, for the Appellant; S.N. Mukherjee, S.S. Bose and Mr. R. Basu, for the Respondent

Judgement

S. Banerjee, J.
This winding up petition is founded on the claim of unpaid rents and allied charges.

2. As the mandatory prelude to the winding up petition, a notice was issued on April 15, 2004 claiming a sum of Rs. 4,95,000/- on account of arrear rents from April 1999 to October 2003 at the rate of Rs. 9,000/- per month. Rent for the period November 2003 to April 2004 was claimed at the enhanced rate of Rs. 54,000/- per month totaling to Rs. 2,70,000/-. The enhanced rent for the period beginning November 2003 was claimed on the strength of section 17(4A) of the West Bengal Premises Tenancy Act, 1977 (the said Act) that came into effect immediately prior thereto. Maintenance charges were sought at the rate of 10% of the rent in terms of section 5(7) of the said Act for the period of November, 2003 to March 2004 amounting to Rs. 27,000/-. A further claim u/s 5(8) of the said Act towards municipal tax and commercial surcharge was made for a sum of Rs. 3,06,000/-.

3. The petitioner''s total claim of Rs. 10,98,000/- was denied in the company''s reply of May 20, 2004 to the statutory notice. The company asserted that rent from August 1999 had been deposited with the rent controller upon the petitioner''s refusal to accept two money orders of Rs. 4,500/- each that had been tendered on

account of rent for the month of August 1999. The enhancement of rent was disputed. The company argued that inasmuch as the composite amount payable by the company was in excess of Rs. 10,000/-, the provisions of the said Act were inapplicable and, consequently, there could be no enhancement sought in terms of the said Act. Section 3(f)(i) of the said Act was cited in support of such argument. The claim of commercial surcharge was denied on the ground that the money on such account was being paid regularly by the company to the superior lessor on the strength of the company having permitted the same.

4. The substance of the statutory notice was made the basis of the winding up petition. Learned counsel for the petitioner, however, fairly conceded that in view of the Division Bench decision of this Court reported at 2002(2) CHN 384, enhancement of rent under the said Act had to be adjudged and could not be suo motu claimed by the landlord. Since no process of adjudication had been initiated for enhancing the rent, it was submitted on behalf of the petitioner, the claim on account of enhanced rent for the period beginning November 2003 was not being pressed in these proceedings. Learned counsel, however, submitted that the claims in the statutory notice pursuant to section 5(7) and section 5(8) of the said Act were being pressed.

5. In respect of the first head of claim, that of arrears rent for the period April, 1999 to July 1999, it was submitted on behalf of the petitioner that there was no suggestion by the company that rent for such period had either been paid or had been deposited with the rent controller. In furtherance of the claims relating to maintenance charge and municipal tax and commercial surcharge, it was submitted that sub-sections (7) and (8) of section 5 of the said Act statutorily ordained that landlord was entitled to the same. The company''s defence, both in the statutory notice and in the affidavit used in these proceedings, that the relationship between the parties would not be governed by the provisions of the said Act, was dealt with by citing the decisions reported at Mayank Poddar and Others and Magma Leasing Limited and Others Vs. Development Consultant Ltd., . In the first of these two cases, the Court was called upon to adjudicate whether the tenant was in default in paying rent. That was a suit for eviction founded, inter alia, on default in payment of rent. In such context, the loose definition of ''rent'' was relied upon and it was held that non-payment of rent. In the second case it has been held that municipal rates cannot form part of the monthly rent inasmuch as the periodicity of liability in respect of municipal taxes was not on monthly basis.

6. In addition, the expression "monthly rent" used in section 3(f)(i) of the said Act was sought to be distinguished from the expression "rent" on the strength of sections 4, 5 and 7 of the said Act by learned counsel for the petitioner. The substance of this submission was that the relationship between a landlord and a tenant in respect of premises covered by the geographical limit set in the said Act could be governed by the said Act if, prior to the enhancement of rent as permitted by the said Act, the core rent payable by a tenant did not exceed the limit prescribed

by section 3(f)(i). It was urged that in ascertaining such core rent, other payments that the tenant was obliged to make should not be considered.

7. In the context of the decision that I am required to make in these proceedings, such matters as to the exact interpretation of section would not be necessary. As I see it, in a creditor''s application for winding up of the company on the ground of the company being unable to pay its debts, negligence on the part of the company to pay without just cause has to be established. If the cause proffered by the company is arguable, whether on facts or in law, the company Court will not assume inability on the part of the company to pay.

8. In support of the company''s defence, learned counsel submitted that the entitlement of the petitioner to receive maintenance charge u/s 5(7) or municipal tax and commercial surcharge u/s 5(8) of the said Act were vexed questions. A landlord and a tenant may choose to provide for maintenance charge and municipal tax and commercial surcharge in the agreement between them. It was not impermissible for such agreement to dilute the statutory liability of the tenant.

9. Learned counsel on behalf of the company referred to a decision reported at Calcutta Gujrati Education Society and Another Vs. Calcutta Municipal Corporation and Others, and the interpretation of "rent" therein to suggest that despite the Division Bench Judgments of this Court cited on behalf of the petitioner, as to what constituted rent was still open to argument. The old authority of this Court reported at Pannalal Mukherjee Vs. Union of India (UOI), was placed in support of the proposition that parties to an agreement could waive provisions of statute or the benefits conferred by a statute on either of the parties.

10. These authorities, I believe, were not cited for me to arrive at a definite conclusion as to what constitutes rent or as to whether parties by agreement could waive benefits conferred on them by statutes. I look at these authorities to ascertain whether a plausible case can be run by the company in defence to the petitioner''s claim.

11. On the petitioner''s claims on account of maintenance charges and municipal tax and commercial surcharge, an arguable case has been made out, to go to trial. The agreement between the parties contains several clauses that provide for maintenance not only of the tenanted premises, but also of the common areas and amenities. The agreement provides that the landlord (petitioner) would pay both the owner''s and the occupier''s shares of municipal taxes in respect of the tenanted premises. These matters call for a more detailed interpretation of the agreement and examination of the clauses thereof in the context of the said Act and the rights and obligations of landlords and tenants thereunder. The defence in such regard is neither sham nor moonshine. It is a defence that may fail, but it is not a defence which is demurrable, The claim of the petitioner on three of the four heads detailed in the statutory notice, therefore, remains inconclusive and will require to be tested

elsewhere.

12. The company has submitted that not only were rents for the months of April to July 1999 not paid, but deposits have been made with the rent controller of rents beginning October 1999. The company has offered to make immediate payment of the rent for the six months beginning April 1999, amounting to Rs. 54,000/-.

13. The company has also offered to make over copies of documents evidencing due deposit of rent for the period beginning October 1999 to the advocate-on-record of the petitioner.

14. It was urged on behalf of the petitioner that if, according to the company, the provisions of the said Act were not applicable, the company could not have made deposit with the rent controller. Apart from the fact that I am not required to conclusively pronounce on the issue as to whether the provisions of the said Act apply to the relationship between the parties herein, the fact that the company has made payment, even if to an authority not sanctioned to receive it, there is no presumption arising of the company''s inability to pay or any conclusion being drawn that the company had refused to pay without sufficient cause. The money remains secured and even if the provisions of the said Act were not to apply, the money lying deposited with the rent controller can be withdrawn.

15. I, therefore, admit to winding up petition for the sum of Rs. 54,000/- being the rent admitted to be due for the months of April to September 1999. The petitioner will be entitled to interest at the rate of 8.33% per annum from the respective due dates of the rents till payment. If the company pays off both the principal amount and the interest within a period of four weeks from date, the petition shall remain permanently stayed. In default of payment, the petition will be advertised once in The Telegraph and once in the Bartamaan. The advertisements should indicate that the matter would be returnable on the next Court date four weeks after the date of publication of thereof. In such event publication in the Official Gazette shall stand dispensed with.

Urgent Photostat copy be issued to the parties, if all formalities in that regard are complied with.

Application accordingly disposed of.