
(1983) 09 BOM CK 0061

Bombay High Court

Case No: O.O.C.J. Appeal No. 241 of 1978 in Insolvency No. 192 of 1972

D. Vasantrai and Co.

APPELLANT

Vs

The Official Assignee,
High Court of
Judicature at Bombay
and Others

RESPONDENT

Date of Decision: Sept. 8, 1983

Citation: AIR 1985 Bom 1

Hon'ble Judges: M.N. Chandurkar, Acting C.J.; D.M. Rege, J

Bench: Division Bench

Advocate: H.K. Shah and V.J. Jhaveri, for the Appellant; A.V. Dalvi and C.K. Shah, for the Respondent

Judgement

Rege, J.

This is an appeal by an applicant-appellants one M/s.D.Vasantrai & Co. against the judgement and order of Mrs. Sujata Manohar, J. dated 20th September 1978.

2. By an order of adjudication dated 6-3-1973 by the Insolvency Court, on the petition dated 6-3-1973 by the Petitioning creditors, the firm of M/s. Bhavanidas and its partners were adjudicated insolvents (hereinafter called the Insolvents.). At the relevant time the said insolvents were the tenants of the premises at the ground floor, Sethna Building, opposite Parsee Fire Temple, Princess Street, Bombay 400002, where they were carrying on business in cloth. By an agreement of subtenancy dated 11-10-1971 made between the insolvent firm and its partners of one part and one Messrs. D.Vasantrai and Co. the appellants herein of the other, the insolvents sublet the said premises to the appellants. The said agreement specifically stated that the insolvent firm had closed down the business and that it had given the said premises on the tenancy basis on the terms and conditions stated therein.

3. After the said M/s. S.Bhavanidas and its partners were adjudicated Insolvents, the Official Assignee made a report to the Court for a direction against the appellants to pay to the Official Assignee arrears of rent of Rs. 36,500/- for the period of 73 months from June 1972 to June 1978 at the rate of Rs.500/- per month remaining payable by the appellants to the Insolvents and also to deliver possession of the said premises of which the Insolvents were tenants to the Official Assignee as the same being the property of the insolvents vested in the Official Assignee. Although initially the appellants had contended that they had paid the said arrears of rent directly to the landlord, factually they had not paid the same either to the landlord or to the Insolvents. The fact of the appellants being in arrears of the said rent was admitted by them. It may also be pointed out that the said M/s. D.Vasantrai and Co. had filed in the Court of Small Causes at Bombay a suit against the Official Assignee of Bombay as such, without describing him to be the Official Assignee of the estate of the insolvent firm for a declaration that they were sub-tenants or deemed tenants (licensees) of the premises protected under the Rent Act and were therefore liable to pay only the standard rent and permitted increases. To that suit, the Insolvents were not made parties nor was the permission of the Insolvency Court obtained to file the said suit, as according to the appellants no such leave was required u/s 17 of the Presidency-Towns Insolvency Act.

4. The trial Court on the said report of the Official Assignee directed the appellants to the said M/s. D.Vasantrai and Co. to pay to the Official Assignee the said arrears of Rs.36,500/- and a further amount at the rate of Rs.500/- per month from July 1978 onwards till the possession was handed over to the Official Assignee. The Court also directed that the Official Assignee was entitled to take possession of the business premises. Against the said order this appeal has been filed.

5. The contentions in the appeal may be dealt with in two parts. First one was as regards the direction to pay the arrears of rent and recurring rent to the Official Assignee. As regards the admitted said arrears of Rs.36,500/- and liability to pay recurring amount of Rs.500/- per month towards the rent there was no dispute that they would form the estate of the insolvent vesting in the Official Assignee. The Insolvency Court had therefore, under S. 7 of the Presidency-towns Insolvency Act, jurisdiction to determine the question as to the liability to pay the said amount to the insolvent and to give direction in respect of the same.

6. However, the question as to the subtenancy and direction to the appellants to hand over possession of the premises to the Official Assignee appears to stand on a different footing. The learned Counsel for the appellants has contended that the tenancy of the premises in the name of the insolvents being inalienable it cannot be considered to be the property of the insolvents vesting in the Official Assignee as the asset of the insolvents and therefore the Insolvency Court had no jurisdiction under Sec. 7 of the Presidency-Towns Insolvency Act to determine any question as to title to such property.

7. In support of his said contention the learned Counsel has firstly relied upon the decision of this Court in the case of [Zarina Umer Chamdewala Vs. Sati Lalchand Verumal Lalwani](#). There the Court held :

"Sections 17 and 52 of the Presidency-towns Insolvency Act, 1909, read together mean that the property which vests in the Official Assignee must be such property that it is capable of being disposed of so that the amount realised can be divided amongst the creditors.

Tenancy of a monthly tenant who has been adjudicated an insolvent and which is not alienable under S. 15(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, cannot be regarded as property of the insolvent which must vest in the Official Assignee under S. 17 of the Presidency-towns Insolvency Act, 1909."

(Underlining supplied)

8. He has further pointed out that the agreement of sub-tenancy dated 11-10-1971 between the Insolvents and the appellants in terms created sub-tenancy only of the premises in favour of the appellants by specifically pointing out that due to financial difficulties the business of the insolvents being closed the sub-tenancy of the premises was created.

9. On the facts of the case, the said contention of the learned Counsel for the appellants deserved acceptance. The broader proposition considered by the Insolvency Court as to the Insolvency Court's jurisdiction under S. 7 of the Presidency-towns Insolvency Act to determine even the question as to title to Insolvents' property cannot be disputed. However, the said jurisdiction of the court could exist only in respect of the Insolvents' property which could vest in the Official Assignee. As pointed out in the afore cited decision, tenancy of the premises being inalienable under the Rent Act was not capable of being disposed of by the Insolvents and therefore could not vest in the Official Assignee.

10. In this case the agreement of sub-tenancy of the premises between the insolvents and the appellants clearly shows that it created only the sub-tenancy of the premises and nothing more. The report of the Official Assignee also proceeded on that basis. In that event the Insolvency Court could have no jurisdiction to determine the question of title in respect of the said tenancy which could not vest in the Official Assignee.

11. The learned Counsel for the creditors has contended that the afore cited decision of this court was not followed by this Court in its subsequent decision in the case of [Atlas Trading Co. Vs. Official Assignee of Bombay and Others](#). In the said decision of this Court relied upon by the learned Counsel for the creditors the facts were quite different. There the court was concerned with the transfer by the Insolvent of his going concern along with the occupancy rights in the premises. While dealing with the afore cited decision in Chamdewala's case 1969 Bom LR 809 the Court there firstly pointed out to

the observations of this Court in that case viz., "We find it impossible to hold that such a tenancy dissociated from a going business can be regarded as a property which must vest in the Official Assignee". On the facts therefore the Court held that the whole bundle of rights in the running business including the right of occupation must be taken to have vested in the Official Assignee. The said decision therefore shows that apart from not following the decision in Chamdewala"s case as contended by the learned counsel for the creditors, the court had in fact based its decision on the observations of the Court in that case.

12. In this case looking to the agreement between the parties which seeks to transfer only the tenancy of the premises to the appellant and not the business of the insolvents as a going concern along with the occupancy rights in the premises, the ratio of the decision in [Zarina Umer Chamdewala Vs. Sati Lalchand Verumal Lalwani](#), , would alone be applicable in this case. In that view of the matter the direction of the Insolvency Court to the appellant to hand over possession of the said premises to the Official Assignee on the basis that the tenancy of the premises in favour of the insolvent had vested in the Official Assignee and that as against the insolvent the appellants had no title to the said premises, cannot be sustained, and is set aside.

13. In the result the appeal is partly allowed. Direction of the learned Judge to the appellants to pay to the Official Assignee Rs.36,500/- being arrears of rent as well as recurring rent at Rs.500/- per month from July 1978 onwards is sustained. The appellants to pay the said arrears of Rs.36,500/- with further arrears of rent calculated at the rate of Rs.520/- per month from 1-7-1978 to 30-4-1982 and thereafter at the rate of Rs.525/- per month from 1-5-1982 to 31-10-1983 on or before 10-11-1983 and to continue to pay the rent for subsequent months from 1-11-1983 onwards at the said rate of Rs.525/- per month with permitted increases, whenever due payment for the month of November 1983 to be made on or before 15th December 1983 and for subsequent months on or before the 15th of each succeeding month. No orders as to costs.

14. Appeal partly allowed.