
(2024) 12 MP CK 1236

In the Madhya Pradesh High Court, Indore Bench

Case No : Company Appeal No.4 of 2019

Kerala Industrial Infrastructure Development Corporation
(Kinfra) Through K.A. Santhosh Kumar

APPELLANT

Vs

M/s Zoom Developers (Pvt.) Ltd. and Others

RESPONDENT

Date of Decision : 16-12-2024

Acts Referred:

Constitution of India 1950 — Article 226
Indian Penal Code 1860 — Section 304-II, 304A

Citation : (2024) 12 MP CK 1236

Hon'ble Judges : Maninder S. Bhatti, J

Bench : Division Bench

Advocate : Ashok Lalwani, Abhishek Singh, B.K. Upadhyay

Final Decision : Dismissed

Judgement

JUDGMENTTAG-JUDGMENT

Vivek Rusia, J,

The appellant / Kerala Industrial Infrastructure Development Corporation (KINFRA) has filed this company appeal under Section 483 of the Companies Act, 1956 being aggrieved by the interim order dated 19.06.2019 passed on I.A. No.255/2019 filed in Company Petition No.9 of 2011 by which the appellant has been directed to hand over the possession of 40 acres of lease land to Official Liquidator and also to keep the amount of Rs.41.40 crore in a separate interest-bearing account.

FACTS OF THE CASE

2. The appellant is a statutory body incorporated under the provisions of the Kerala Industrial Infrastructure Development Act, 1993 (in short 'the KIID Act'). The function of the appellant is to establish industries in the industrial area after identifying the appropriate industrial sites. The appellant is competent to acquire the land and transfer the same by way of lease, sale, exchange or otherwise to

the industries.

2.1 A lease deed dated 27.10.2006 was executed between the appellant and M/s Zoom Developers Private Limited (which is in liquidation before this Court, hence, hereinafter referred to as 'the company in liquidation') for a period of 90 years for design, development & construction, operation and maintenance of International Exhibition and Trade Centre for international standards and quality. The appellant gave 18 months to the company in liquidation to complete the development activities and commencement of commercial operation. The company in liquidation did not comply with the timelines, despite several correspondence, meetings, warnings, assurance etc.

2.2 A show-cause notice dated 24.09.2010 was issued by the appellant contemplating termination of the lease on account of non- fulfillment of the terms and conditions. A reply to the show-cause notice was filed by the company in liquidation. Thereafter, a second show-cause notice was issued on 06.01.2011. The reply filed by the company in liquidation was not found satisfactory, therefore, vide notice dated 07.06.2012, the lease was terminated.

2.3 Being aggrieved by the aforesaid termination, the company in liquidation approached the High Court of Kerala by way of W.P. (C) No.16725 of 2012. The writ petition was disposed of by directing the petitioner therein to prefer an appeal before the Government of Kerala under Section 23 of the KIID Act.

2.4 During the pendency of the appeal, the Government of Kerala agreed to grant additional time for completion of the work, for which a supplementary agreement dated 03.04.2014 was executed. Despite the grant of extension of time, the company in liquidation did not complete the work. Accordingly, notices dated 14.11.2014 and 16.02.2015 were issued calling upon the company in liquidation to surrender the land. Again W.P. (C) No.7333 of 2015 was filed before the Kerala High Court which was disposed of vide order dated 17.03.2015.

2.5 The appellant received a notice dated 28.05.2015 from the Directorate of Enforcement intimating that the offence under the provision of the Prevention of Money Laundering Act, 2002 (in short 'the PML Act') has been registered against the company in liquidation. The appellant was also served with the copy of provisional attachment order No.02/2015-16 (INSZO) dated 28.07.2015 with the finding that the payments paid to the appellant were diverted from Exchange Earners' Foreign Currency Account and those amounts were used to acquire properties in the name of M/s Zoom Reality Projects Private Limited. Thereafter, the appellant issued a show-cause notice dated 01.08.2015 under Section 22 of the KIID Act which was replied by the company in liquidation and finally vide notice dated 12.10.2015, the appellant cancelled the lease in the exercise of the power conferred under Section 22 of the KIID Act.

2.6 Feeling aggrieved by the aforesaid cancellation, again the company in liquidation filed W.P. No.33671 of 2015 before the High Court of Kerala which was disposed of vide order dated 17.11.2015 with direction to prefer an appeal. The

appeal was preferred before the Secretary to Government, Industries Department and the same was dismissed vide order dated 30.03.2016 with an order to the appellant to evict the company in liquidation from the premises and resume the possession of the land. According to the appellant, on 02.04.2016, the possession was resumed and since then it has been vested with them.

2.7 The company in liquidation again approached the High Court of Kerala by way of W.P. (C) No.14239 of 2016. The State of Bank of India, Overseas Branch, Kochi vide communication dated 14.11.2016 informed the appellant that the order of winding-up dated 20.11.2014 has been passed in Company Petition No.9 of 2011. According to the appellant, the aforesaid winding-up order has never been brought to the knowledge of the High Court of Kerala by the company in liquidation. When the aforesaid order of winding-up was brought to the knowledge of the High Court, the writ petition was dismissed on 13.11.2018 on the grounds of locus. Thereafter, Writ Appeal No.2457 of 2018 was filed before the Division Bench of the High Court of Kerala challenging the termination of lease and resumption of the land. Vide order dated 20.12.2018, the writ appeal was dismissed, meaning thereby, the order passed by the learned Single Judge was affirmed.

2.8 The Senior Manager, of UCO Bank approached the High Court by way of a Company Petition seeking winding-up of M/s Zoom Developers Private Limited under Sections 433(3) & 434 of the Companies Act. The company petition was admitted on 20.11.2014, and thereafter, the Official Liquidator of the High Court was appointed as the Official Liquidator of the company in liquidation.

2.9 One M/s Susner Infrastructure Private Limited through Rahul Sharma, being a major shareholder of the company in liquidation filed an application for quashment of order of cancellation of the lease deed dated 12.10.2015 executed by the appellant. Notice was issued to the appellant by the Company Judge and accordingly, a counter affidavit was filed opposing the aforesaid application. The company in liquidation also filed a reply to the aforesaid application. Vide order dated 17.06.2019, learned Company Judge has allowed the application by holding that the appellant had no right to cancel the lease and resume the possession without leave of this Court, accordingly, directed the appellant to deposit the amount of Rs.41.40 crore which was deposited by the company in liquidation as a premium of lease and hand over the vacant possession of the land to the Official Liquidator.

2.10 Being aggrieved by the aforesaid, the appellant preferred an appeal on the following grounds:-

(i) That, the learned judge has wrongly held that the appellant failed to point out the date of knowledge of winding-up proceeding which is not correct. In fact the appellant came to know about the winding-up order only through a letter dated 14.11.2016 issued by the Branch Manager, State Bank of India, Kochi;

(ii), Section 446 of the Companies Act bars from the filing of the suit or initiation

of legal proceedings after passing the winding-up order and appointment of the Official Liquidator. However the issuance of show-cause notice and termination of lease does not come under the category of filing of suit or other legal proceedings.

(iii) That, no prior permission under Section 537 of the Companies Act is required from the lessor for cancellation of the lease as held by the Apex Court in the case of Phatu Rochiram Mulchandani v/s Karnataka Industrial Areas Development Board & Others reported in (2015) 5 SCC 244;

(iv) That, the learned Company Judge has wrongly held that the appellant could not take possession of the land without approaching the Company Court; &

(v) That, the learned Company Court has wrongly directed to deposit the amount of Rs.41.40 crore and handing over the possession of the land to the Official Liquidator.

(03) After notice, the Official Liquidator and Directorate of Enforcement have filed reply by opposing the aforesaid prayer on the ground that by virtue of Section 537 of the Companies Act, the appellant could not have terminated the lease and taken possession because the order of winding-up had already been passed on 20.11.2014. Hence, the company appeal is liable to be dismissed.

SUBMISSIONS OF THE APPELLANT / KINFRA

4. Shri Kurup, learned Senior Counsel appearing on behalf of the appellant submitted that the winding-up order was passed on 20.11.2014, but the appellant issued the show-cause notice on 01.08.2015 and after the termination of the lease deed, possession of the land in question was taken on 02.04.2016. The appellant came to know about the pendency of the winding-up proceeding after receiving the letter dated 14.11.2016 sent by the Branch Manager, therefore, the date of knowledge of the order of winding-up passed by the Court is 02.04.2016 which was specifically pleaded in the application. Shri Kurup learned Senior Counsel further submitted that the only issue which requires consideration by this Court is whether prior permission from the Company Judge is required before cancellation of the lease deed or not ? The cancellation of the lease deed cannot be said to be a suit or proceedings, therefore, Section 446 of the Companies Act will not apply in this case. The word 'legal proceeding' has been examined by the Apex Court in the case of The General Officer Commanding Rashtriya Rifles v/s Central Bureau of Investigation & Another reported in (2012) 6 SCC 228 and it has been held that 'legal proceedings' means the proceedings regulated or prescribed by law in which a judicial decision may be given; it means proceedings in a Court of Justice by which a party pursues a remedy which a law provides but does not include administrative and departmental proceedings. Therefore, the issuance of notice for termination of the lease is not a proceeding in which a judicial decision is required from the Court of Law.

4.1 Shri Kurup learned Senior Counsel has heavily placed reliance on the judgment passed by the Apex Court in the Phatu Rochiram Mulchandani (supra), in which it has categorically been held that no prior permission is required by the lessor before cancellation of the lease, especially in a pending company petition. The Apex Court has considered Section 537 of the Companies Act and held that no prior permission was required by the Board for cancelling the lease.

4.2 Shri Kurup, learned Senior Counsel further submitted that the appellant has rightly taken possession of the land without approaching the Court because the KIID Act, 1993 which is a complete code controlling the activities of the appellant including the properties given on lease. Once the lease has been terminated, then the company in liquidation has no right to continue with the possession and the appellant has rightly taken the possession. Finally, it is submitted that the learned Court has wrongly directed for deposit of the amount of Rs.41.40 crore and hand over the possession of the land in question.

4.3 Shri Kurup learned Senior Counsel further submitted that the appellant has filed a case before the Special Court constituted under the provisions of the PML Act claiming the entire amount. If it is found that the entire amount of Rs.41.40 crore is an outcome of the offence committed by the company in liquidation, as per the PML Act, there is every possibility to confiscate the entire amount and if the amount is liable to be confiscated, then the Official Liquidator cannot claim the entire as well as any portion of the said amount because the PML Act is a special law and shall prevail over the Companies Act. Therefore, there is no use in depositing the amount of Rs.41.40/- in the interest-bearing account as directed by the learned Company Judge and the same is liable to be set aside.

SUBMISSIONS OF OFFICIAL LIQUIDATOR

5. Shri H.Y. Mehta learned counsel for the Official Liquidator submits that the facts of the case in Phatu Rochiram Mulchandani (supra) are different from the facts and circumstances of the present case. In the case of Phatu Rochiram Mulchandani (supra), the lease was given for a period of 11 years, whereas in the present case, the lease was given for a period of 90 years. In the present case, no notice of termination was served upon the Official Liquidator, but in the case of Phatu Rochiram Mulchandani (supra), the notice was served upon the Official Liquidator. In the case of Phatu Rochiram Mulchandani (supra), the application was filed before the Company Court for taking possession which was opposed by the Official Liquidator. The application was allowed, but the Official Liquidator did not file any appeal. The appeal filed by the promoter of the company in liquidation was dismissed. In the present case, the land is also attached by the Directorate of Enforcement in PMLA proceedings against the company in liquidation and the Company Judge has jurisdiction and can go into the issue of validity of termination of the lease as has been done by the Company Judge in the case of The State of Madhya Pradesh v/s Hukumchand Mills Limited (Company Petition No.19 of 2001) [MANU/MP/3375/2022]. The Company Judge has also jurisdiction to decide the incidental and ancillary issues

which include the termination of the lease deed. It is also settled law that the unexpired lease period is the asset of the company in liquidation.

5.1 It is further submitted that the land cannot be utilized by the appellant unless it is released in PMLA proceedings, for which the appellant's application is pending. Hence, no interference is called for and the company appeal is liable to be dismissed.

SUBMISSIONS OF DIRECTORATE OF ENFORCEMENT

6. Shri Himanshu Joshi learned Deputy Solicitor General appearing for the Directorate of Enforcement submitted that the company in liquidation invested illegal money in the purchase of land / property. Out of the said money, a premium amount was paid to the appellant to procure the land on lease for a period of 90 years. The adjudicating authority under the PML Act had already passed an order on 28.07.2015 in Original Complaint No.514/2014, against which the company in liquidation has filed an appeal before the Appellate Tribunal under the PML Act. Therefore, at this stage, the land cannot be released. The appellant has no right to retain the possession of the land. Hence, no interference is liable to be called for and the company appeal be dismissed.

APPRECIATION & CONCLUSION

7. The dates and events, as stated above, are not in dispute. An issue has been raised whether prior permission from the Company Judge is required before the cancellation of the lease or not in view of the provision of Section 446 of the Companies Act. For ready reference, Section 446 of the Companies Act is reproduced below: -

"446. Suits stayed on winding-up order .-

(1) When a winding-up order has been made or the Official Liquidator has been appointed as provisional Liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding-up order, shall be proceeded with, against the company, except by leave of the [Tribunal] and subject to such terms as the [Tribunal] [Substituted by Act 11 of 2003, Section 61, for " Court" .] may impose.

(2) [The Tribunal] [Substituted by Act 65 of 1960, Section 165, for sub-Section (2) (w.e.f. 28.12.1960).] [shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

(a) any suit or proceeding by or against the company.

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under section 391 by or in respect of the company.

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding-up of the company,

whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding-up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960)."

8. As per the aforesaid provision of law, after passing of the winding-up order or appointment of Official Liquidator as Provisional Liquidator, no suit or other proceeding shall be commenced or if any proceeding is pending till the date of passing of the winding-up order shall proceed against the company without the leave of the Tribunal. Learned counsel has argued that only the suit or other legal proceedings against the company are barred. Sub-section (2) says that the tribunal shall have jurisdiction to entertain or dispose of any suit or proceedings filed by the company, or any claim made by or against the Company. In sub-section (2)(a), the only word 'proceeding' is there, whereas as per sub-section (1), the suit or other legal proceedings shall not be commenced. As per sub-section (2)(b) any claim by or against the company may be entertained or disposed of by the Tribunal. Therefore, termination of the lease and resumption of land may not be legal proceedings but can be entertained as a claim against the company in liquidation.

9. In the present case, admittedly the order for winding-up had been passed on 20.11.2014, therefore, in view of Section 446 of the Companies Act, the order of termination of the lease could not have been passed whether the appellant had knowledge or not. In either situation, the order of cancellation of the lease shall be treated as void.

10. The Apex Court in the case of Phatu Rochiram Mulchandani (supra) has held that the law requires that the prior permission of the Company Judge is not required for cancellation of the lease, but after commencement of the winding-up, the possession of the land could not have been taken without leave of the Court. It is only after cancellation of the lease that the lessor would become entitled to file such an application under Section 537 of the Act for the resumption of the land. Finally, the Apex Court has concluded that no prior permission was required by the Board for cancellation of the lease in similar facts and circumstances. Paragraphs – 35, 36, 37 & 38 of the said judgment are reproduced below:-

"35. After taking note of various provisions of the Act and discussing case law cited by both the parties, the Court concluded that nowhere does the Act provide for the Board taking back possession of leased plots from the lessee, without recourse to eviction proceedings, whatever be the circumstances. On the other hand, the Act contains a specific provision (Section 25) providing for application of Public Premises Act to premises leased by the Board. The absence of any provision enabling the Board to take possession from lessees and the express provision for making Public Premises Act applicable to the premises leased by the Board, leads to inescapable conclusion that termination of leases and eviction of lessees are left to be governed by contract and general law.

Therefore, any act of forcible dispossession of a lessee by the Board will be an act otherwise than in accordance with law. The court further held that the power of re-entry and 'resumption' that is reserved by the Board in the lease-cum-sale agreement, does not authorize the Board to directly or forcibly resume possession of the leased land, on termination of the lease. It only authorizes the Board to take possession of the leased land in accordance with law. It could be either by having recourse to the provisions of the Public Premises Act or by filing a Civil Suit for possession and not otherwise.

36. It, thus, becomes clear that even though order of re-entry or resumption can be passed by the Board, but for taking possession the Board is supposed to have recourse to legal proceedings act in accordance with the law. However, this was a case where the Company had not gone into liquidation and, therefore, the question of applicability of Section 537 of the Companies Act could not arise.

37. In the present case, we are confronted with a situation where Company is in liquidation. Thereafter, we have to understand the implication of the provisions of Section 537, which reads as under:

"537. Avoidance of certain attachments, executions, etc., in winding-up by Tribunal.

(i) Where any Company is being wound up by Tribunal-

(a) any attachment, distress or execution put in force, without leave of the Tribunal against the estate or effects of the Company, after the commencement of the winding-up; or

(b) any sale held, without leave of the Tribunal of any of the properties or effects of the Company after such commencement shall be void.

(ii) Nothing in this Section applies to any proceedings for the recovery of any tax or impost or any dues payable to the Government.

39. It is clear from the above that prior permission of the Court is required in respect of any attachment, distress or execution put in force or for sale of the properties or effects of the Company. We are of the opinion that the serving of cancellation notice simplicitor would not come within the mischief of this section as that by itself does not amount to attachment, distress or execution etc. No doubt, after the commencement of the winding-up, possession of the land could not be taken without the leave of the Court. Precisely for this reason the Board had filed the application seeking permission. But according to us no such prior permission was required before cancelling the lease. In fact, it is only after the cancellation of the leases that the Board would become entitled to file such an application under Section 537 of the Act. Had the Board gone ahead further and taken the possession, after the cancellation and then approached the Company Judge, the situation which occurred in M/s. Anco Communication Ltd. (supra) would have prevailed. On the other hand, it would have been premature on the part of the Board to approach the Company Judge for permission to resume the

land without cancelling the lease in the first instance."

11. Therefore, the Company Judge has rightly held that the after passing of the winding-up order and appointment of a Provisional Liquidator, the property of the company in liquidation came into the custody of the Court and under the control of the Official Liquidator and after passing the order of winding-up, KINFRA had no authority to take possession of the assets of the company without the leave of the Court. The order of cancellation of the lease deed had been passed by KINFRA without issuing notice to the Official Liquidator and without seeking leave of the Court. Therefore, the Company Judge has only set aside the action of the KINFRA in respect of taking possession of the leased land without leave of the Court and directed to hand over the possession. The appellant has no right to retain the possession of the leased land, and the impugned order is liable to be upheld.

12. After passing of the impugned order dated 17.06.2019, now the Directorate of Enforcement has attached the amount of Rs.41.40 crore treated to be "Proceeds of Crime". For the release of the said land, the appellant has already moved an application before the Special Court established under the provision of the PML Act. Until and unless an order is passed in the PMLA proceedings, the appellant cannot be treated into the possession of the leased land. Therefore, the lease shall be treated as cancelled but the possession of the appellant cannot be upheld. However, the appellant shall be at liberty to file an application before the Company Judge for taking possession of the leased land, for which the appellant is entitled for liberty from this Court.

13. So far as the direction to deposit the amount of Rs.41.40 crore, (which was deposited by the company in liquidation with the appellant as a premium for the lease) and keeping in a separate interest-bearing account is concerned, since the possession of the land has been set aside, therefore, the land is vested with the Official Liquidator coupled with the fact that the same is under attachment in PMLA proceedings. An amount of Rs.41.40 crore is also treated to be attached with the Directorate of Enforcement. Hence, there is no need to secure the said amount by directing the appellant to deposit the same in the interest-bearing account.

14. Thus, the appellant has lost possession of the huge area of the land by virtue of the proceedings under the Companies Act as well as the PML Act due to the default on the part of the company in liquidation. Hence, the premium amount which was deposited with the company and the same is under attachment is not liable to be deposited by the appellant. Even otherwise, the appellant is a statutory body owned by the Government and the Corporation is not running away and the amount can be recovered at any point in time. Accordingly, the direction given in paragraph – 26(ii) of the order dated 17.06.2019 passed on I.A. No.255/2019 in Company Petition No.9 of 2011 is hereby set aside.

15. With the aforesaid, Company Appeal stands partly allowed.