

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

DIVISION BENCH:

HON'BLE SHRI JUSTICE SANJAY YADAV
&
HON'BLE SHRI JUSTICE ASHOK KUMAR JOSHI

MISC. APPEAL No.1052 OF 2004

The State of Madhya Pradesh
Vs.
M/s Jiwaji Rao Cotton Mills
(In Liquidation) Gwalior thr.
the Official Liquidator & Ors

Shri R.K. Verma, learned Additional Advocate General with Shri Rohit Jain, learned Government Advocate, for the appellant/State.

Shri K.N. Gupta and Shri J.D. Suryavanshi, learned Senior Counsel with Shri R.S. Dhakad and Shri Kunal Suryavanshi, learned counsel for respondent No.1.

Shri Arvind Dudawat, learned counsel for respondent No.7.

Shri Sanjay Dwivedi, learned counsel for respondents No.13 and 14.

Shri A.K. Jain, learned counsel for respondent No.15.

Whether approved for reporting : Yes/No

O R D E R
(28/09/2018)

Per Justice Sanjay Yadav:

This appeal under Section 483 of the Companies

Act takes exception to order dated 05.11.2004 passed in Company Case No.4/1997 whereby an application preferred by the appellant, State of Madhya Pradesh through its Commerce and Industries Department claiming title over several parcels of land leased out by erstwhile Gwalior State to the Jiyajeerao Cotton Mills Ltd. Birla Nagar, Gwalior / M/s Birla Brothers has been negatived.

(2) Relevant facts leading to the controversy are that M/s Jiyajeerao Cotton Mills Ltd (for short "J.C. Mills") a company registered under the Companies Act moved an application under Section 439 of the Companies Act, 1956 (in short Companies Act) for winding up of the company in view of the opinion expressed by Board for Industrial and Financial Reconstruction recorded in its proceedings dated 23.01.1995 as the company was unable to pay its dues.

(3) In the winding up proceedings the State of Madhya Pradesh through the Officer-in-charge moved an application on 19.12.1997 pointing out that the land on which the J.C. Mills and its other buildings are situated belongs to the State of Madhya Pradesh being successor of erstwhile Gwalior State which had granted *pattas* of the land only for the purpose of establishing the Mill providing specially that, as soon as the Mill will be closed or will not function the land will revert back to the State. Vide said application leave was sought for impleadment in the liquidation proceedings.

(4) Another application was filed in the said proceedings on 31.01.1998 praying that for the help of official liquidator a committee be constituted. Names of three persons were suggested for the committee to

assist the official liquidator. The direction was also sought for the J.C. Mills not to alienate or transfer or convert the lease hold property in their possession in any manner. It was also prayed that the payment to the labourers of the company be made at an early date.

(5) Pertinent it is to note that besides the State of Madhya Pradesh the creditors viz. State Bank of India, Oriental Bank of Commerce, Punjab National Bank, the Andhra Bank, the State Bank of Indore, Union Bank of India, Bank of Baroda, also filed applications for claiming outstanding dues or the permission [under Section 446 (2) of Companies Act] to continue with the suit for recovery. Besides, the labour union also filed application claiming the wages and dues of the workmen.

(6) The winding up application was decided by learned Company Judge on 04.05.1998, whereby the J.C. Mills was directed to be wound up, on the following terms:

“22. It is, therefore, ordered that the company, M/s. Jiyajeerao Cotton Mills Ltd., having its registered office at Birlanagar, Gwalior, be wound up. It is further directed that the winding up order be drawn up and published according to Rules.

23. The intimation of this order be sent to the Official Liquidator and the Registrar of Companies at Gwalior.

24. The Official Liquidator shall be the liquidator of the company and shall take over the custody of the assets of the company as detailed in the chart annexed with the application and affidavit dated 2nd February 1998 filed by the company. The company shall, however, submit to the Official Liquidator the statement as to the affairs of the company in the prescribed form complying with the requirement contained in

section 454 of the Companies Act.

25. It may be noticed at this stage that in its judgment and order dated 30-4-1998 passed by the Apex Court in the case of P.C. Agrawal v. Payment of Wages Inspector, M.P. and others, in SLP Civil No.1117/98 connected with SLP Civil No.3273/98, SLP Civil No.905/98 and SLP Civil No.879/98, it has been observed that there must be large liquid assets including raw materials and other movable properties and fixed assets of the company. An indication was given to get the assets of the company realised as soon as possible so that from the amount realised from the sale of these assets the dues of the workmen even on pari passu basis can be paid, as provided under section 529-A of the Indian Companies Act to avoid atleast partially the sufferings of the unfortunate workmen their families. The Apex Court also indicated that it should be found out whether there are any liquid assets and raw-materials which can be immediately disposed of. The Apex Court also indicated that it would be appropriate to direct ad hoc payment in the meantime, to the starving workmen and their families.

26. Considering the facts and circumstances brought on record including the observations of the Apex Court, referred hereinabove, further directions are hereby issued as indicated here under:-

(A) The petitioner-company shall hand over the custody of the shares and debentures, details whereof have been furnished in Annexure-6 to the list of Assets and liabilities filed by it alongwith the affidavit dated 2-2-1998 together with the assets including Fixed deposit receipts etc., details whereof have been furnished in the Annexure-8 to the aforesaid list to the Liquidator within ten days from today.

(B) The Liquidator shall after taking over the custody of the aforesaid assets proceed to verify the current market value of the shares and debentures and find out the extent of cash which

is realisable from the assets indicated in Annexure -8 referred to hereinabove.

(C) The petitioner-company shall furnish to the Liquidator within two weeks the details of the amount of wages due to be paid to its workmen for the period from 28-4-1992 upto date, which will include the amount of wages which has become due under the orders passed by Payment of Wages Authority. The details of the workmen to whom the amount is payable shall also be indicated.

(D) The Liquidator shall submit a report clearly indicating the amount of cash available and recoverable from the assets, referred to hereinabove, including raw-materials and finished goods. He shall also indicate the extent of liability towards the payment of wages to the workmen. This report shall be submitted by the next date fixed in this case.

(E) It has been stated on behalf of the petitioner-company that the balance of its various accounts maintained in various banks comes to Rs.2,55,70,000.00 and the value of the Fully Paid Up Equity shares and debentures etc. detailed in Annexure 6, referred to herein above, comes to about six crores. This has to be verified by the Liquidator before submitting his report.

(F) The Liquidator shall open an account in any branch of the Nationalised Bank at Gwalior in his official capacity and give its information to the petitioner-company.

(G) The counsel for the petitioner-company has stated that company will provide Rs.2,00,000/- lying in its account in the Bank of Tokyo Mistubishi Ltd which amount shall be deposited by the company in the account of Liquidator opened by him at Gwalior which shall be done within two weeks.

(H) The Liquidator shall make suitable arrangements for the security of the properties of the company and maintain proper account of

the withdrawals and expenditures and submit them for the perusal of the Court by the next date fixed in this case.

(I) The civil suits filed by the secured creditors, referred to herein above, shall continue to proceed in the civil courts where they are pending, but the decree passed therein shall be subject to further orders of this Court and no such decree will be executable without prior permission of this Court.

(7) Evidently, while allowing the continuance of the Civil Suits filed by respective creditors, the Company Court did not pass any order on the application filed by State Government for reverting of the immovable property in question.

(8) As no decision was taken by the Company Court and the official liquidator after receiving inventories proceeded to take recourse to auction of the immovable property in question, the appellant State of Madhya Pradesh filed an application claiming therein that the land on which company was being run belongs to the State Government and the land cannot be auctioned for recovery of dues of the company. Similar rights were asserted by the GRASIM Industries, CIMMCO Birla, J.C. Mills Educational Institutions Managing Society claiming exclusive rights over the property in their possession.

(9) Dwelling upon the contention of respective applicants the Company Court dismissed applications filed by State of Madhya Pradesh, GRASIM, CIMMCO, J.C. Mills Educational Institutions Managing Society by impugned order dated 05.11.2004 holding:

“16. Having heard the arguments I find that initial lease was given to M/s Birla Brothers for

running a factory and purpose of lease was to run the factory. Therefore, intention of the then Government can be gathered from the said lease that the said land were earmarked for running a factory. Intention of the government was that the factory should not be closed, therefore certain conditions were imposed but later action of the government and condition to start other industries in the year 1947 no such condition was imposed. The lease was for the period of 99 years. Lease was granted in favour of Birla Brothers. Birla Brothers had transferred the land in the name of J.C. Mills. This Act was not objected by the Government. Transfer of the property was not objected by the Government. Thereafter possession of J.C. Mill continued over the said land. When J.C. Mill transferred its land to Grasim and CIMMCO, the said transfer was not objected by the State Government Therefore now State Government is estopped from their conduct in claiming the said land. Even otherwise at the time of winding up order the property belonged to the Mill and after its possession is taken over by the Official Liquidator, the property of the company is under liquidation under the law.

17. As discussed above the State Government has no right over the said property and the lands belong to the company and the lands are of the company. As regards the property of company at Ujjain, there is no objection by the State Government regarding its title. However, objection was raised by the Collector District Ujjain. This objection was uncalled for. Application of the State Government is therefore dismissed. The properties, which have been taken over by Official Liquidator after winding up proceedings and are in control of Official Liquidator, shall be deemed to be the properties of the company. Other applications are accordingly disposed of."

(10) Though other applicants, Viz, GRASIM Industries, CIMMCO Birla, J.C. Mills Educational Institution, have allowed the order dated 05.11.2004 to attain finality,

the State of Madhya Pradesh and its functionaries are in appeal under Section 483 of 1956 Act.

(11) The appellant reiterates the contentions as raised before the learned Company Court that several parcels of land were leased out by the Gwalior State to the J.C. Mills Ltd, Birla Nagar, Gwalior or M/s Birla Brothers for setting up of a factory.

(12) The conditions of lease dated 24.02.1921 have been adverted to bring home the submission that the lease was granted for the purpose of setting up of factory and in case the factory is closed the land to revert to the State/Ruler. The conditions of lease relied upon are extracted for ready reference:-

“A (1) आराजी गैर दखिलकार है। आराजी व दोचाह पख्ता वास्ते इस्तेमाल कारखाना दी गयी है बाद इनकजात म्याद पट्टा आराजी बिला अदायगी मुआवजा वापिस करना होगी और जो आराजी नाकाबिल काश्त होगी वह काबिल काश्त बनाना होगी और जो अन्दर वदर आराजी के दरखत होंगे उनके काटने का मजाज मैनेजर साहब को न होगा। लगान शुरू माह मकम्मल अदा करना होगा। म्याद पट्टा 5 साल और निस्व लगान माह अप्रैल में लिया जायेगा। आराजी मजकर में खद काश्त करें या दीगर काश्तकारान से करावें।

2. आराजी गैर दखिलकार है यह आराजी वास्ते इस्तेमाल कारखाना दी जाती है लगान कसद वकसद अदा करना होगा। म्याद पट्टा ताकायमी कारखाना है।

3. आराजी गैर दखिलकार है वास्ते इस्तेमाल कारखाना दी जाती है म्याद ताकायमी कारखाना तय लगान कसत वकसत नम्बर 243 व 242 में हुआ है वह वास्ते इस्तेमाल कारखाना दिया जाता है।

4. आराजी गैर दखिलकार है वास्ते इस्तेमाल कारखाना दी जाती है लगान कसत वकसत अदा करना होगा। म्याद पट्टा ताकायमी कारखाना वास्ते काश्त नहीं दी गयी है।

5. म्याद पट्टा ताकायमी कारखाने पर दिया जाता है दीगर शरायतें पट्टे में मन्जर करनी होगी।

6. पट्टा गैर दखिलकार वास्ते (एक्सटेशन) कारखाने के ताकायमी कारखाने की म्याद पर मिसल दीगर पट्टों के दिया जाता है।”

(13) It was urged that since the company has gone in liquidation the purpose for which the land was allowed being frustrated deserves to be reverted back in absence of any term to the contrary. It was urged that the clause for reversion of land by the State was because after the merger of the Gwalior State in the State of Madhya Bharat and the successor State of Madhya Pradesh, all rights, title and interest which vested with the Gwalior State were succeeded by the State of Madhya Pradesh. It was urged that the land should revert back to the State Government and the possession of the land in question be delivered to the State. It was also contended that it was a grant made by the Gwalior State. Under Section 3 of the Government Grant Act all the provisions, restrictions, conditions, and limitations contained in the grant or transfer shall remain valid and effective and any rule or enactment of the legislature to the contrary will not supersede the conditions made in the grant. That by virtue of Section 3 of the Government Grants Act the conditions of the grant had the effect of law and no other legislative enactment even could supersede the conditions of the grant. It was contended that it was specifically mentioned in the grant that the land will continue to remain in possession of the companies so long as the factory is continued and after the cessation of the industrial activities the land will revert back to the Government. In view of this clear condition mentioned in the grant, it is urged that the question of operation of

law of estoppels is not attracted. The law of estoppel cannot supersede the conditions of the grant as per Section 3 of the Government Grants Act.

(14) It is contended that the issues raised before the Company Court were:

“(i) A lease was granted to company on 24.02.1921 and the conditions were specifically mentioned in the lease deed that the grant was conditional. The land will remain in Gair Dakhilkar rights.

(ii) The lease was granted for running the factory with the condition that the lease of land is only for the purpose of running the factory and as an when the factory is closed the land will revert back to the State Government without claiming any compensation.

(iii) The original lease was for a period of 5 years and another lease was granted on condition for the running of factory and the period of lease was till such time as the factory continued. Admittedly the company has gone in liquidation and the factory has stopped working therefore the land should revert back to the State Government. The claim raised on behalf of Grasim Industry, CIMMCO Birla or J.C. Mills Education Institution or D.P. Mandellia who are transferees from the Birla Brother Limited or the JC Mills Limited have no right to raise any objection against the claim of the State Government as they are only under lessees. The under lessees cannot claim higher rights than what are available to the lessees. On account of the closure of the factory the State of MP has become the absolute owner of the land and therefore the land cannot be considered to be the property of the company under liquidation and it should revert back to the State Government.

(iv) According to the Grasim Industries, Cimmco Birla Limited, JC Mills Education Society and D.P. Mandeliya it was argued that the land will not revert back to the State

Government. On the land building, plant, machinery etc were established. There is no closure of the industry and after the merger of the State the company will be governed by the laws framed after independence and under that law they have acquired absolute right over the lands and these lands are the property of the company, which cannot be sold by liquidation. It is also argued by them that certain other property has been purchased by the company and Government cannot claim those lands which have been purchased by the company.

(15) It is urged that the Company Court without dwelling on the issue raised and the fact that the grant was not absolute and no fundamental right existed in favour of the lessees, negatived the claim of the State, which deserves to be set aside and the lease hold land be directed to be handed over to the State of Madhya Pradesh and the official liquidator be prohibited from causing auction of the land in question.

(16) A cross-objection at the instance of one Harshit Textiles, a company registered under the Companies Act has been filed vide I.A.No.3943/2010 on the anvil that it has purchased some parcel of property in question from GRASIM Industries vide sale-deed dated 07.05.2002. It is urged that GRASIM Industries owed an independent right over the property sold to it and not through the J.C. Mills, therefore, the findings to the contrary in paragraph 16 of the impugned judgment is perverse. The relief is sought through cross-objection that the intervenor be declared the owner of the land purchased by it. The application is objected by the appellant.

(17) Sub-Rule (1) of Rule 22 of Order XLI of Code of Civil Procedure 1908, stipulates that "Any respondent, though he may not have appealed from any part of the

decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow." Thus, it is respondent alone who can prefer the cross-objection and that too within one month, after admission, from the date of service of notice. In the present case, the record reveals that the appeal was admitted on 18.02.2005 and despite service of notice, respondent No.2, through whom the present applicant claims his right in property, had chosen not to appear in the proceedings before the learned Company Judge nor has challenged the order passed and has thus allowed it to attain finality, which leaves no scope for entertaining cross-objection under Order XLI Rule 22 CPC at the instance of the applicant who is no less than a stranger. Consequently, I.A.No.3943/2010 stands rejected.

(18) Before dwelling on the issue which crops up for consideration, relevant it would be to dwell upon that the Status of State of Gwalior after the independence as to its assets and liabilities, the same is succinctly dwelt with by the Division Bench of this Court in "**Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd. Vs. Union of India and others [1960 MPLJ 789]**", wherein while dwelling upon the term in agreement giving tax rebate and its binding nature on the

successor State, in the following terms:-

“3. When the agreement was concluded, the position of the State of Gwalior was of a State under the British suzerainty. That position was altered by the Indian Independence Act, 1947, which came into force on 15th August 1947. With the coming into force of this Act, the British paramountcy over the Indian States lapsed and the State of Gwalior, like other Indian States, was released from its obligations to the British Crown. Section 1 of the Act of 1947 set up as from August 15, 1947, two independent dominions to be known as India and Pakistan. The Government of India Act, 1935, was modified under the provisions of the Act of 1947 and the orders issued under Section 9 of the Act. The Act of 1935, as so modified, provided by Section 5 that the Dominion of India established under the provisions of 1947 Act shall comprise of the Governors' Provinces, Chief Commissioners' Provinces, the Indian States as might accede to the Dominion under Section 6, and any other areas that may, with the consent of the Dominion, be included in it. In pursuance of this section, the Ruler of Gwalior executed on 15th August 1947 an instrument of Accession. It is well known that after 15th August 1947, the process of consolidation of the Indian States in sizeable administrative units and their democratisation went on with vigorous and rapid strides, and on 22nd April 1948, the Rulers of Gwalior, Indore, and certain other States in Central India entered into a covenant, which was concurred in by the Government of India, for the formation of the United States of Gwalior, Indore and Malwa (Madhya Bharat). Article VI of the Covenant required the Ruler of each covenanting State to make over the administration of his State to the Raj Pramukh as soon as may be practicable and in any event not later than the first day of July 1948. It proceeded to say inter alia that on the making over the administration of a State by its Ruler

"(a)

(b) all duties and obligations of the Ruler pertaining or incidental to the Government of the Covenanting State shall devolve on the United State and shall be discharged by it;

(c) all the assets and liabilities of the Covenanting State shall be the assets and liabilities of the United State: and

(d).....

In accordance with Article VIII of the Covenant, the Raj Pramukh executed on 19th July, 1948 on behalf of the State of Madhya Bharat a revised Instrument of Accession, which was accepted by the Governor-General of India on 13th September, 1948. By that Instrument, the Raj Pramukh accepted all the matters mentioned in List I and List III of the 7th Schedule of the Government of India Act, 1935, except the entries in List I relating to any tax or duty as matters with respect to which the Dominion Legislature may make laws for the State of Madhya Bharat. Some time in May 1949 a supplementary covenant" was entered into by the Rulers of Gwalior, Indore and certain other States of Central India modifying the original covenant in certain respects. The modification material here was about the acceptance of the Constitution of India adopted by the Constituent Assembly of India as the Constitution for the United State of Madhya Bharat and for its enforcement as such in accordance with the tenor of its provisions, On 24th November, 1949 a proclamation was issued by the Raj Pramukh, which after stating that in the best interest of Madhya Bharat it was desirable that the constitutional relationship established between the State and the Dominion should not only be continued but further strengthened, declared that the Constitution of India, as adopted by the Constituent Assembly of India, shall be the Constitution for Madhya Bharat and shall be enforced as such in accordance with the tenor of its provisions and that the provisions of the said Constitution shall as from the date of its

commencement supersede and abrogate all other constitutional provisions inconsistent therewith which were then in force in the State. The Constitution of India came into force on 26th January, 1950. Article 295(1)(b) of the Constitution of India, which provides for the succession to property, assets, rights, liabilities and obligations of an Indian State corresponding to a State specified in Part B of the First Schedule, runs as follows:

"(1). As from the commencement of this Constitution

(a)

(b) all rights, liabilities and obligations of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List, subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(c)"

It is in this manner the State of Madhya Pradesh successor of State of Madhya Bharat that the land in question is succeeded at.

(19) Coming back to the issue, learned Single Judge has recorded a finding in paragraph 16 of the impugned judgment, that "initial lease was given to M/s Birla Brothers for running a factory and purpose of lease was to run the factory. Therefore, the intention of the then government can be gathered from the said lease that the said land were earmarked for running a factory. Intention of the Government was that the factory should not be closed therefore certain conditions were

imposed..” However, in very next breath learned Judge observes that “later action of the government and condition to start other industries in the year 1947 no such condition was imposed”. This finding, in our considered opinion, will not have any adverse bearing on the condition of lease initially created in absence of any new lease agreement. No material is commended at to establish that the lease executed in the year 1921 was superseded. This finding, as apparent from the impugned order, had percolated through entire judgment leading to an observation by learned Judge that the Government is estopped. We consider this to be an erroneous observation. Merely because in later years if further permission is granted for an expansion of the industrial activities. The grant dated 07/04/1947 only expositied certain concession to company for promoting industrial expansion which were not in derogation of the terms and conditions of original lease. There was no waiver of terms and conditions of lease agreement of 24/02/1921. In view whereof, we find it difficult to endorse the opinion by the learned Single Judge that with the grant of 7/4/1947 the terms and conditions of earlier grant of 1921 stood waived and that the State is estopped by its conduct.

(20) Furthermore, learned Single Judge observes that “the lease was for a period of 99 years. Lease was granted in favour of Birla Brothers. Birla Brothers had transferred the land in the name of J.C. Mills. This act was not objected by the Government. Transfer of property was was not objected by Government. Thereafter possession of J.C. Mill continued over the said land. When J.C. Mill transferred its land to GRASIM

and CIMMCO, the said transfer was not objected by the State Government. Thereafter, now State Government is estopped from their conduct in claiming the said land.” In our considered opinion, learned Single Judge while making the observation glossed over the fact that the right in M/s Birla Brothers was that of the lease and no absolute right devolved in them. Therefore, what was created in favour of J.C. Mills, GRASIM and CIMMCO and other transferees in course, was the lease right and not the title in property. It is held in **“Bejoy Gopal Mukherji Vs. Pratul Chandra Ghose [AIR 1953 SC 153]”** :

“4. Mere possession for generations at a uniform rent nor construction of permanent structure by itself may not be conclusive proof of a permanent right as held in A.I.R. 1929 Cal. 87 [H] (supra)”

(21) Again in “Hamidullah (dead) by his legal representatives and others Vs. Abdullah and others [AIR 1972 SC 410 (413)]”, it is observed :

“17. In every case an inference of permanency of tenancy is a question of fact depending upon the facts of each particular case. In [A.S.N Nainapillai Marakayar and Ors. v. T.A. R.A. Rm. Ramanathan Chettiar](#) A.I.R. 1924 P.C. 65, it was ruled that the onus of proving that a tenancy is permanent is on the tenant and that the mere fact of long occupation at a fixed rent does not raise a presumption of permanent tenancy. The same view was held in [Subrahmanya Chettiar v. V.P. Subrahmanya Mudaliyar](#) A.I.R. 1929 P.C. 156. In [Bejoy Gopal Mukherji v. Pratul Chandra Ghose](#) Supreme Court Report 1953 SCR 930 = [AIR 1953 SC 153], this Court said that neither possession for generations at uniform rent nor construction of permanent structures by itself is conclusive proof of permanent tenancy.”

(22) Non-objection of the transfer of lease-hold right, which it appears have been without prior permission/intimation as no material to that effect is commended to us, in our considered opinion, will not create any lease right in the transferee and he does not become an owner of the property. In “**Badrilal Vs. Municipal Corporation of Indore [AIR 1973 SC 508 (511, 512)]**”, it is observed by their lordships:

“8. It was then urged by Mr. Gupte that the appellant having deposited the rent up to 31-3-1954 and the Municipal Commissioner having accepted it he should be deemed to be a tenant holding over. Leaving aside for the moment the contention put forward on behalf of the Corporation that this payment was made behind its back, it has to be noted that the payment was at the rate prevailing before 30-9-1949 and on that date the Corporation having passed a resolution specifying a new rate rent of Rs. 9 per Chasma the payment at the old rate by the appellant and its acceptance by the Municipal Commissioner was not an acceptance of rent as such and in clear recognition of the tenancy right of the appellant. It cannot amount to the Corporation consenting to the appellant continuing as a tenant by paying the old rates of rent. There is thus no question of the appellant being a tenant holding over. But a person who was lawfully in occupation does not become a trespasser, even if he does not become a tenant holding over but is a tenant by sufferance. The position at law was explained in *Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden*, 1949 FCR 262 at p.270= [AIR 1949 FC 124] as follows :

"On the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or a sub-lessee under him continues in

possession even after the determination of the lease, the landlord undoubtedly has the right to eject him forthwith; but if he does not, and there is neither assent nor dissent on his part to the continuance of occupation of such person, the latter becomes in the language of English law a tenant on sufferance who has no lawful title to the land but holds it merely through the laches of the landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession, a new tenancy comes into existence as is contemplated by [Section 116, Transfer of Property Act](#), and unless there is an agreement to the contrary, such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of [Section 116](#) of the Act."

At page 272 it was pointed out :

"It can scarcely be disputed that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it."

The same position was explained in a recent decision of this Court to which one of us was a party in *Bhanwnji Lakhamshi v. Himatlal Jamnadas Dani* (1972) 1 SCC 388 = (AIR 1972 SC 819) at p. 391 it was observed :

"The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. A distinction should be drawn between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former (sic) (latter?) is a tenant at sufferance in English Law and the latter (sic) (former?) a tenant holding over or

a tenant at will. In view of the concluding words of [Section 116](#) of the Transfer of Property Act, a lessee holding over is in a better position than a tenant at will. The assent of the landlord to the continuance of possession after the determination of the tenancy will create a new tenancy. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise. In (AIR 1949 FC 124) the Federal Court had occasion to consider the question of the nature of the tenancy created under [section 116](#) of the Transfer of Property Act and Mukherjea, J., speaking for the majority said that the tenancy which is created by the "holding over" of a lessee or under-lessee is a new tenancy in law even though many of the terms of the old lease might be continued in it, by implication and that to bring a new tenancy into existence, there must be a bilateral act. It was further held that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it."

9. The appellant being merely a tenant by sufferance there is no need for any notice before he could be evicted. Thus the judgment of the High Court is correct, in so far as it held the appellant was liable to be evicted."

(23) It is further observed by learned Single Judge that even otherwise at the time of winding up order the property belonged to the Mill and after its possession is taken over by the official liquidator, the property of the company is under liquidation under the law". While

making such observation, in our humble opinion, learned single judge glossed over the fact that during liquidation proceedings, the State of Madhya Pradesh through its functionaries had filed an application that they are the owner/lessor of the property in question. However, the company court without dwelling on the same passed the liquidation order. The official liquidator on receiving the inventories since proceeded to put on auction the land in question, in our considered opinion, it was well within the right of the State to have moved an application for determination of their right over the property.

(24) Sub-Section (2) of Section 446 of the Act of 1956 stipulates :

“446. (2) The Tribunal 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).”

(25) Dwelling on the scope of sub-section (2) of Section

446 of the Act of 1956, it is observed by their lordships in **“Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others [(1984) 4 SCC 657]”**:

“8. Before we advert to the question of construction of Section 446 (2) (b), it would be advantageous to notice the historical evolution of the provision as well as its present setting. Section 171 of the Indian Companies Act, 1913, the predecessor of Section 446 (1) did not contain any provision similar or identical to that of Section 446 (2). Section 171 only provided for stay of suits and proceedings pending at the commencement of winding up proceeding, and embargo against the commencement of any suit or other legal proceedings against the company except by the leave of the court. This provision with little modification is re-enacted in Section 446 (1). There was no specific provision conferring jurisdiction on the court winding up the company analogous to the one conferred by Section 446 (2). Sub-sec. (2) was introduced to enlarge the jurisdiction of the court winding up the company so as to facilitate the disposal of winding up proceedings. The provision so enacted probably did not meet with the requirement with the result that the Committee appointed for examining comprehensive amendment to the Companies Act in its report recommended that “a suit” by or against a company in winding up should notwithstanding any provision in law for the time being be instituted in the court in which the winding up proceedings are pending. (See para 207 of the Company Law Committee Report). To give effect to these recommendations, sub-sec. (2) was suitably amended to bring it to its present form by Companies (Amendment) Act, 1960. The Committee noticed that on a winding up order being made and the Official Liquidator being appointed a Liquidator of the company, he has to take into his custody company property as required by Section 456. Section 457 confers power on him to institute or

defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company. Power is conferred upon him to sell the properties both movable and removable of the company and to realise the assets of the company and this was to be done for the purpose of distributing the assets of the company amongst the claimants. Now at a stage when a winding up order is made the company may as well have subsisting claims and to realise these claims the Liquidator will have to file suits. To avoid this eventuality and to keep all incidental proceedings in winding up before the court which is winding up the company, its jurisdiction was enlarged to entertain petition amongst others for recovering the claims of the company. In the absence of a provision like Sec. 446 (2) under the repealed Indian Companies Act, 1913, the official Liquidator in order to realise and recover the claims and subsisting debts owed to the company had the unenviable fate of filing suits. These suits as is not unknown, dragged on through the trial court and Courts of appeal resulting not only in multiplicity of proceedings but would hold up the progress of the winding up proceedings. To save the company which is ordered to be wound up from this prolix and expensive litigation and to accelerate the disposal of winding up proceedings, the Parliament devised a cheap and summary remedy by conferring jurisdiction on the court winding up the company to entertain petitions in respect of claims for and against the company. This was the object behind enacting Section 446 (2) and therefore, it must receive such construction at the hands of the court as would advance the object and at any rate not thwart it.

9. The fasciculus of sections included in Part VII of the Companies Act bears the heading 'Winding up'. Section 443 sets out the circumstances in which a company may be wound up by the court. Section 444

provides that where the court makes an order for the winding up of a company, the Court shall forthwith cause intimation thereof to be sent to the Official Liquidator and the Registrar. Section 446(1) provides that 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 Court and subject to such terms as the court may impose. Then comes sub-section (2) of Section 446. It specifies the contours of the jurisdiction of the court which is winding up the company. It confers special jurisdiction on the Court which is winding up the company to do things that are set out in the various sub-clauses notwithstanding anything contained in any other law for the time being in force. Section 446 (2) thus conferred special jurisdiction on the court winding up the company which otherwise it may not have enjoyed. The court in the Companies Act is defined in Section 2 (11) to mean with respect to any matter relating to a company (other than any offence against this Act), the Court having jurisdiction under the Act with respect to that matter relating to that company, as provided in Section 10. Section 10 provides that the court having jurisdiction under the Act shall be the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2). The winding up petition has thus to be presented in the High Court before the Judge who is assigned the work under the Companies Act. Therefore, the Court which is winding up the Company will be the court to whom the petition for winding up was presented and which passed the order for winding up the Company. In

this case, the order was made by the learned Company Judge in the Kerala High Court directing winding up the company. An appeal lies against the order for winding up the Company under section 483 to the same court to which and in the same manner in which and subject to the same conditions under which, appeals lie from any order or decision of the court in cases within its ordinary jurisdiction. In exercise of this Appellate jurisdiction, the Appellate Bench entertained the appeals and directed that the winding up order shall be held in abeyance till the scheme is implemented and if any default is committed the winding up order made by the learned Company Judge would be revived.

10. The Appellate Bench declined to direct the provisional Liquidator to file claim petition at the instance of the company under Section 446 (2) (b) on the sole ground that such a petition at the instance of the Liquidator would be maintainable in the course of winding up of proceedings which means that the winding up proceedings are pending. Undoubtedly, Sec. 446 (1) manifests the legislative intention that the procedure thereunder prescribed could be availed off when the winding up order has been made or where the official Liquidator is appointed as the provisional Liquidator. Section 446 (1) envisages two situations in which the court will have jurisdiction to make the order thereunder contemplated. These two situations are: where a winding up order has been made or where the official Liquidator has been appointed as provisional Liquidator. The first of the two situations envisages an order for winding up of the Company having been made and which is subsisting. The second situation is where without making a winding up order, the court has appointed official Liquidator to be the provisional Liquidator. Section 450 (1) of the Companies Act confers power on the Company Court to appoint official Liquidator to be provisional

Liquidator at any time after the presentation of the winding up petition and before making of the winding up order. The Court before which a winding up petition is presented has power to appoint official Liquidator as provisional Liquidator of the Company even before making the winding up order. If ultimately winding up order is made, the official Liquidator acts as such. And let it be remembered that where a winding up order is made, it relates back to the date when petition for winding up is presented. Referring to Section 446 (1) it becomes clear that the court will have jurisdiction to make the order therein contemplated, where a winding up order has been made or prior to the making up of the winding up order, official Liquidator has been appointed as provisional Liquidator as contemplated by Section 450 (1).”

(26) Furthermore, a Full Bench of High Court of Karnataka in “**Karnataka Steel & Wire Products Ltd. (In Liquidation) v. Kohinoor Rolling Shutter and Engineering Works (P) Ltd. [ILR 1993 KAR 293]**” *in seisin* with an issue as to “what is the correct period of limitation for claims to be made under Section 446 (2) (b) of the Companies Act having regard to the provision in Section 458 A of the Companies Act 1956, observed in the context of the scope of sub-section (2) of Section 446 of the Act of 1956 that :

“10.3 The jurisdiction of the Court under sub-section (2) of Section 446 of the Act commences from the date the winding up order is passed. However, it is noticed that the learned single judge of this Court in KARNATAKA LIGHT METAL INDUSTRIES P. LTD., vs PROVISIONAL LIQUIDATOR, KARNATAK STEEL AND WIRE PRODUCTS LTD., AND OTHERS has taken a view that “the expression 'is winding-up' being in the present continuous tense grammatically,

provides a clue to the true intention of the Legislature which is that even before a winding up order is actually made, the Court which is seized of the proceedings can and may in its discretion entertain or dispose of any claim made by or against the company. I, therefore, see no reason to read any ambiguity in the language of sub-section (2) of Section 446 of the Act to construe it as acquiring jurisdiction only after the winding up order is passed." It is not possible to agree with the aforesaid view. Section 446 occurs under the heading "Consequences of winding-up order". Under this heading Sections 444 to 447 are found. Section 441 deals with the commencement of winding-up proceedings, and Sections 442 & 443 deal with the powers of the Court after the presentation of a winding-up petition. Section 441 provides that where, before the presentation of a Petition for winding up of a company by the Court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of passing of the resolution. In any other case, the winding up of a company by the Court shall be deemed to commence at the date of the presentation of the petition for winding up. Section 442 provides that once a petition for winding up is presented and before a winding up order is passed, where any suit or proceeding against the company is pending in the Supreme Court or in any High Court, the company or any Director or Contributory, may apply to the Court in which the suit or proceeding is pending for stay of proceedings; and in a case where any suit or proceeding is pending against the company in any other Court, they may apply to the Court having jurisdiction to wind up the company, to restrain further proceedings in the suit or proceedings. Therefore, it is clear that if the jurisdiction of the Court which is winding up the company were to commence on the date of the presentation of the petition for winding up, or on the date a resolution is

passed by the company for voluntary winding up, to entertain or dispose of a suit or proceedings set out in clauses (a) to (d) of sub-section (2) of Section 446 of the Act, the provisions like those contained in Section 442 of the Act would have been unnecessary. Therefore, the grammatical construction placed by the learned single judge in Karnataka Light Metal Industries Case of Section 446 of the Act cannot be approved and accepted. In JAIPAL SINGH vs TANWAR FINANCE PVT. LTD., it has been held that the jurisdiction of the Court under Section 446 of the Act can be exercised only after the winding up order is passed. We, accordingly, over-rule the Decision in Karnataka Light Metal Industries case.”

(27) The above analysis takes care of the submissions on behalf of the official liquidator that it will be beyond the jurisdiction of the Company Judge to dwell upon the dispute as to the title over the land in question. And dispels the doubt as to whether it was within the competence of the Company Judge to have entertained the application on merit.

(28) To conclude, when the impugned order is tested on the anvil of above analysis, it cannot be given the stamp of approval. Consequently, it is set-aside. Application filed by the State of Madhya Pradesh claiming to be the owner of the immovable property in question, being the successor of erstwhile owner, is allowed. It is held that the lessee and subsequent transferee from the original lessee did not incur absolute right and title in the immovable property in question. In other words, they continue to remain as lessee. And the object for which the land was leased out being frustrated, on winding up of the company in question; the land leased out to it

stands reverted to its owner, the State of Madhya Pradesh. As a consequence whereof, it is held that the official liquidator has no right to auction the leased property in question.

(29) The appeal is allowed in above terms. However, there shall be no costs.

(Sanjay Yadav)
Judge
(28/09/2018)

(Ashok Kumar Joshi)
Judge
(28/09/2018)

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