

STRESSED ASSETS STABILIZATION FUND

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v.

WEST BENGAL SMALL IND. DEVELOPMENT
CORPORATION LTD. AND ANR.

(Civil Appeal No. 4139 of 2008)

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OCTOBER 21, 2019

**[ARUN MISHRA, VINEET SARAN AND
S. RAVINDRA BHAT, JJ.]**

Companies Act, 1956 – s. 535 – Sick Industrial Companies (Special Provisions Act) 1985 – s. 20 – Second respondent, a company was allotted Industrial premises by the State on lease – The company secured advances from IDBI through equitable mortgages of the leasehold property – Then the company went into liquidation – Pursuant thereto, the High Court appointed a official liquidator – IDBI, through a deed of assignment, unconditionally transferred all loans and advances granted by it, to Stressed Assets Stabilization Fund (SASF), including the loans and securities in relation to the second respondent, the company in liquidation – On the other hand, the premises and properties in question were assigned to the first respondent-WBSIDC by the State – WBSIDC sought possession of the properties and filed application for the same before the High Court – Single Judge of the High Court held that WBSIDC was entitled to possession in view of the lease conditions, which automatically applied, because the original lessee (second respondent) had ceased to use the properties for the purpose originally contemplated i.e. manufacturing activity – Since the conditions of lease had not been complied with, as far as cessation of industrial or manufacturing activity went, the leasehold rights were terminated and as a result, properties were held to be excluded from the winding up process – Appeal preferred by SASF was rejected by the Division Bench of the High Court – On appeal, held: The observations made in Phatu Rochiram Mulchandani v. Karnataka Industrial Areas Development Board (2015) 5 SCC 244:[2014] 3 SCR 710 apply to the facts of this case – The WBSIDC acted within the bounds of law – The finding that since the exercise by the lessor (WBSIDC) of its right to determine the lease attained finality, the

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- A *mortgagee (represented by the appellant) could not claim rights superior to that of the lessee, is in consonance with settled law – The reasoning and conclusion of the High Court requires no interference.*

Dismissing the appeal, the Court

- B **HELD:** 1. This court is of the opinion that the reasoning and conclusion of the High Court do not call for interference. The finding that since the exercise by the lessor (WBSIDC) of its right to determine the lease attained finality, the mortgagee (represented by the appellant) could not claim rights superior to that of the lessee, is in consonance with settled law. [Para 10][1087-F-G]
2. There can be no dispute, nor was it contended that a donee or a grantee (as the status of the lessee company in liquidation as in this case) can have no rights in excess of that possessed by the donor or the grantor. The mortgagee (whose shoes SASF has stepped into) of the lessee (second respondent) can have no right greater or better than that of the lessee in terms of the deed of lease. The observations in *Phatu Rochiram Mulchandani* apply to the facts of this case. [Para 11][1090-H; 1091-A-B]

- E *Phatu Rochiram Mulchandani v. Karnataka Industrial Areas Development Board (2015) 5 SCC 244 : [2014] 3 SCR 710 – relied on.*

Case Law Reference

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| F | [2014] 3 SCR 710 | relied on | Para 8 |
| CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4139 of 2008. | | | |
| From the Judgment and Order dated 16.10.2007 of the High Court at Calcutta in A.P.O. No. 255 of 2007. | | | |
| G | Ms. Jasmine Damkewala, Sidhartha Barua, Advs. for the Appellant. | | |
| Bhaskar P. Gupta, Sr. Adv., Kunal Chatterji, Ms. Maitrayee Banerjee, Supratik Sarkar, Sanjoy Kumar Ghosh, Ms. Rupali S. Ghosh, Avijit Bhattacharjee, Advs., for the Respondents. | | | |
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The Judgment of the Court was delivered by A

S. RAVINDRA BHAT, J.

1. In this appeal by special leave, an affirming judgment of the Calcutta High Court (dismissing the appeal, against an order allowing the respondent's application under Section 535 of the Companies Act, 1956 (hereafter "the Act") has been questioned.

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2. The appellant (hereafter "SASF") is a trust, constituted as a special purpose vehicle (SPV) by the Central Government for acquiring by transfer, the stressed assets of the Industrial Development Bank of India (IDBI), to administer and manage the stressed assets and to recover amounts due, by framing schemes of restructuring, settlement etc. with borrowers. IDBI, through a deed of assignment, unconditionally transferred all loans and advances granted by it, to SASF, including the loans and securities in relation to the second respondent, the company in liquidation.

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3. The facts are that Wellman Smith Owen Engineering Corporation, a company incorporated in the United Kingdom leased immovable property, which it took possession of, on a lease rent of Rs. 3600/- with effect from 1st April, 1962. The assets and business of Wellman were taken over, through an agreement dated 10th October, 1962 by Wellman Incandescent India Ltd (the second respondent, hereafter "Wellman"). Wellman entered into a fresh lease agreement with the Government of West Bengal, for a term of 99 years, in respect of one industrial property, i.e. Shed J-2 Howrah Industrial Estate, measuring 30612 square feet with effect from 1st September, 1968. A further lease was granted by the Government of West Bengal on 1st July, 1990 in respect of Shed J(i)/A measuring 260 square feet. On 6th May, 1992, Wellman borrowed Rs. 10 crores from the IDBI which entailed provision of security by way of hypothecation of movables and mortgage of the premises and properties leased to it, by the Government of West Bengal. A further advance of Rs.3 crores was obtained by Wellman towards working capital; this was again on the strength of equitable mortgage of the same immovable properties, including the said leased premises, through deposit of title deeds. The memorandum of entry in regard to this was carried out on 15th July, 1999. In the meanwhile, on 5th December 1994, the premises and properties in question along with several others, were assigned to the first respondent. Wellman's

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- A financial woes became acute; it approached the Board for Industrial Finance and Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions Act) 1985 (“SICA”). The proceedings attempting rehabilitation were to no avail; the BIFR on 24th September, 2002 held that reconstruction was not possible and concluded that the company had to be wound up. A reference was accordingly made to the Calcutta High Court, under Section 20 of SICA. In the liquidation proceedings, the High Court directed the appointment of an Official Liquidator, requiring him to take charge of the company’s (Wellman’s) assets.

- 4. The first respondent (hereafter “WBSIDC”) to whom the West Bengal state had assigned the rights of lease, in the meanwhile, determined the lease in terms of the allotment and the grant (of the lease) invoking the power reserved to the lessor (under the terms of the lease) as Wellman, the original allottee/lessee had ceased to carry on manufacturing activity beyond a stipulated acceptable period. The determination went unchallenged. WBSIDC approached the Calcutta High Court for restoration of possession of its properties which had been taken over by the Official Liquidator, in the meanwhile.

- 5. The single judge by an elaborately reasoned judgment, upheld WBSIDC’s argument that as lessor, it was entitled to possession in view of the lease condition, which automatically applied, because the original lessee had ceased to use the properties for the purpose originally contemplated, i.e. manufacturing activity. The single judge also took notice of provisions of the West Bengal Government Premises (Tenancy Regulation) Act, 1976. It was further held that no manufacturing process had been carried out in the demised premises for over six months. The appeal preferred by SASF was rejected by the Division Bench by the impugned judgment.

- 6. Ms. Jasmine Damkewala for SASF, relied on provisions of the lease to contend that the lessee could have validly mortgaged the property, as it did, to the erstwhile IDBI. She pointed out that the impugned judgment, if permitted to stand, would result in loss of public monies to the extent of substantial amounts, over Rs. 42 crores, which would not be in public interest. She also submitted that since the lease was for a substantial period of 90 years, the so-called violation should not have resulted in the inference of a drastic result, i.e. forfeiture of valuable property.

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7. Mr. Bhaskar Gupta, learned senior counsel for WBSIDC, highlighted that the reasoning of the High Court is unexceptionable. He emphasized that the lease forfeiture was never challenged by the lessee, through the official liquidator. Instead, the appellant SASF, which was only a mortgagee (of the leasehold rights) was seeking to question WBSIDC's right to forfeit the lease; when the lessor had no grievance in that regard. Clearly, a mortgagee could not have rights superior to the mortgagor.

8. Learned counsel relied on the decision in *Phatu Rochiram Mulchandani v. Karnataka Industrial Areas Development Board* (2015) 5 SCC 244 to say that the WBSIDC acted within the bounds of law in approaching the court seized of company liquidation proceedings, for release of property, having regard to the forfeiture of lease, which remained unchallenged, and had attained finality.

9. The above factual discussion would reveal that the company (since under liquidation) was allotted industrial premises on two different occasions. Acting in terms of the lease, it secured advances that it obtained from IDBI through equitable mortgages of the leasehold property. Wellman went into liquidation, since its sickness was irremediable despite attempts made to revive its industrial activities under SICA. The official liquidator appointed by the court took charge of the assets. WBSIDC's application seeking possession of the leasehold properties was allowed concurrently. Both the learned Single Judge and the Division Bench, upheld WBSIDC's plea that since the conditions of lease had not been complied with, as far as cessation of industrial or manufacturing activity went, the leasehold rights were terminated. As a result, the properties were held to be excluded from the winding up process.

10. This court is of the opinion that the reasoning and conclusion of the High Court do not call for interference. The finding that since the exercise by the lessor (WBSIDC) of its right to determine the lease attained finality, the mortgagee (represented by the appellant) could not claim rights superior to that of the lessee, is in consonance with settled law. In *Phatu Rochiram Mulchandani(supra)* it was held by this court as follows:

“29. On 19-1-2002, the Board passed the orders terminating the lease in respect of both the plots. In this termination order, after giving the past history of events which have already

- A *been noted above and mentioning that the Company had failed to construct the factory building and implement the industrial projects on the main land within the extended period and to execute lease agreement in respect of additional land, thereafter it was also stated that pursuant to the earlier resumption order, a writ petition was filed and because of the stay orders passed therein the Board could not resume the land. This writ petition was dismissed on 14-9-1999 [Ralelectronics Ltd.v.Karnataka Industrial Area Development Board, WP No. 11957 of 1993, order dated 14-9-1999 (KAR)]. Though the Board could act thereafter, however in the meantime the High Court of Karnataka had passed the order dated 10-4-2001 in Karnataka Industrial Areas Development Board v. Electromobiles (I) Ltd.[OSA No. 11 of 1999, order dated 10-4-2001 (KAR)] holding that when the allotment is on lease-cum-sale basis and possession is delivered to the allottee in pursuance of the allotment, it becomes a lease irrespective of the fact that whether a lease deed is executed or not. For this reason the Board did not attempt to resume the possession merely by cancelling the allotment without terminating the lease or taking action in accordance with law. It was for this reason that the Board was formally terminating the lease by the said notice dated 19-1-2002. The termination notice also mentioned that this was being done under Section 34-B of the Karnataka Industrial Areas Development Act, 1966.*

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- G *30. We have already held that the Company had committed clear breach in not completing the project and setting up the factory within the time given on the lease agreement or the time as extended by the Board. In such circumstances, the lease agreement gave a definite right to the Board to terminate the lease. We are, therefore, of the opinion that the Board was very well within its right to terminate the lease as provided in the lease agreement.*

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38. 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 simpliciter 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 lease 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 Karnataka State Electronics Development Corpn. Ltd. v. Official Liquidator[OSA No. 31 of 2004, decided on 21-6-2005 (KAR)] 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.

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41. In view of our elaborate discussion above, we do not find action of the Board to be illegal or blemished. The land was allotted to the Company for a specified project which the Company failed to establish. Let us examine the scheme of the KIAD Act at this point of time. The KIAD Act is enacted to make special provisions for securing the establishment of industrial areas in the State and generally to promote the establishment and orderly development of industries therein and for that purpose to establish an Industrial Areas Development Board, and for purposes connected with such matters. Chapter II deals with the declaration and alteration of industrial areas. Chapter III deals with establishment and constitution of the Board. Chapter IV deals with functions

- A *and powers of the Board and Chapter V deals with finance, accounts and audit of the Board. Chapter VI deals with application of the Public Premises Act and non-application of the Karnataka Rent Control Act, 1961 to the premises of the Board. Chapter VII deals with acquisition and disposal of land. Chapter VIII contains the supplementary and miscellaneous provisions. Section 13 in Chapter IV defines the functions of the Board as generally to promote and assist in the rapid and orderly establishment, growth and development of industries in industrial areas; and in particular, to develop industrial areas declared by the State Government and make them available for undertakings, to establish themselves; to establish, maintain, develop and manage industrial estates within industrial areas; and to undertake such schemes of programmes of works for the furtherance of the purposes for which the Board is established and for all purposes connected therewith.*

- E *42. Section 33 in Chapter VIII of KIAD Act provides that if the Board is satisfied that if a lessee of any land in an industrial area fails to provide any amenity or carry out any development of the land, the Board may after due notice in that behalf, may itself provide such amenity or carry out such development at the expense of the lessee. Section 34 provides for penalty for construction or use of land and building contrary to the terms of holding. Section 34-A provides for demolition or alteration of unauthorised construction or alteration. Section 35 of the Act enables a person authorised by the Board to enter upon any land for the purpose of inspection, survey, measurement, valuation or enquiry. Section 41 enables the Board by notification to make regulations consistent with the Act and Rules thereunder to carry out the purposes of the Act with the previous approval of the State Government.”*
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- H *11. There can be no dispute, nor was it contended that a donee or a grantee (as the status of the lessee company in liquidation as in this*

case) can have no rights in excess of that possessed by the donor or the grantor. The mortgagee (whose shoes SASF has stepped into) of the lessee (Wellman) can have no right greater or better than that of the lessee in terms of the deed of lease. The observations in *Phatu Rochiram Mulchandani(supra)* apply to the facts of this case. The appeal, therefore fails and is dismissed, without order as to costs.

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Ankit Gyan

Appeal dismissed.