Supreme Court of India
Phatu Rochiram Mulchandani vs Kar.Indusl.Area Devt.Board & Ors on 12 March, 1947
Bench: Surinder Singh Nijjar, A.K. Sikri

[REPORTABLE]

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.3803/ 2014
[Arising out of Special Leave Petition (Civil) No. 14161 OF 2010]

Phatu Rochiram Mulchandani ….. Appellant (s)

Versus

Karnataka Industrial Areas
Development Board & Ors. ….. Respondent (s)

WITH C.A.Nos.3804-3807/2014 @ SLP(Civil) Nos.7602-7605/2014 @ SLP(C)...CC14177-14180/2011

J U D G M E N T

A.K. SIKRI, J.

1. Delay condoned.

2. Leave granted.

3. In this appeal the appellant has assailed the judgment and order dated 11.2.2010 passed by the High Court of Karnataka in Company Appeal which was preferred by the appellant herein against the orders dated 3.9.2009 by the Company Judge of the said court. Respondent No. 2 namely M/s. Relectronics Ltd. (hereinafter referred to as the 'Company') is ordered to be wound up and liquidation proceedings are pending before the Company Court. Respondent No. 1 i.e. Karnataka Industrial Areas Development Board (hereinafter referred to as the 'Board') had allotted an industrial plots to the Company on lease-cum-sale basis for a period of 11 years. The Board terminated the lease. The Company Judge, on application filed by the Board, had directed the liquidator to release the said land to the Board and the appeal by the appellant against this order has been dismissed by the Division Bench of the High Court, not on merits but for want of locus standi of the appellant to question the orders. The appellant herein is questioning the veracity of the orders on the ground that it was the property of the Company which could not have been released in favour of the Board.

4. Before we mention about the credentials and locus standi of the appellant, we deem it appropriate to cull-out the seminal facts from the record leading to the passing of the impugned order. The Board had leased 13,657 sq. mtrs. of land in Plot No. 19 (A+B) of Sadramangala Industrial Area to the Company under the Lease Agreement dated 21.12.1984, on certain terms and conditions, for the purpose of establishing an industry for manufacture of AH/ FM Radio, Audio Tape Recorder in combination with radio. The Board executed lease-cum-Sale agreement ("Agreement") in favour of the Company in respect of Plot No. 19 (A+B), measuring 13,657 sq. m. (3.5. acres) situated in Sadarmangala Industrial Area, Krishnarajapuram, Bangalore South. The consideration paid by the Company towards the same was Rs. 3,07,102/- as initial deposit/premium and the lease rentals @ Rs. 6,921/- per annum were to be paid for a period of 11 years.

5. By its letter dated 10.1.1989, the Board assigned an additional plot bearing No. 18 measuring 20,337.87 sq. m (5 acres) to the Company. The consideration paid by Respondent No. 2 towards the same was Rs. 13,31,182/- after adjusting a sum of Rs. 10,19,441/- which was paid as rentals to Respondent No. 1 for Peenya Lands and further payment of Rs. 3,11,741 vide receipt No. 32754 dated 3.1.1989. However, no lease-cum- sale agreement was executed for this allotment. Possession of additional plot bearing No. 18, measuring 20,337.87 sq. m (5 acres) was given to the Company on 19.1.1989.

6. As mentioned above, the Board had allotted the aforesaid plots of lands to the Company for the purpose of establishing a factory to manufacture radio and TV sets. As per the appellant, though the Company started the construction of the factory sometime in the year 1989-1990 but could not complete the same due to the ill health of the Managing Director Mr. T.R. Mulchandani. The Company was also unable to pay debts of its various creditors as it was running in losses. One of the secured creditors namely M/s. Sanmar Financial Limited filed a petition seeking winding up of the Company which was registered as Company Petition No. 18 of 1994. Industrial Development Bank of India (IDBI), another creditor also joined as supporting creditor. Vide orders dated 15.11.1996, the High Court of Karnataka ordered the winding up of the Company. All the assets and liabilities were got transferred to Official Liquidator (OL) who took charge thereof.

7. The Board sent notice dated 23.12.1997 to the Company for the resumption of the aforesaid industrial plots on a ground that Company had committed the breach of the terms and conditions of the Lease Agreement and had not established any factory for which purpose land was allotted to it. Thereafter, vide notice dated 19.1.2002 the Board terminated the agreement in respect of the two industrial plots. This order was also served upon the OL. Subsequent thereto application was preferred before the Company Judge by the Board seeking resumption of these Industrial Plots. This application was opposed by the OL. After hearing the parties, the Company Judge passed the orders dated 3.9.2009 allowing the said application and directing the OL to handover the possession of the industrial plots to the Board. In support, the Company Judge gave the following reasons:-

> (a) KIADB had taken steps and measures as required under the provisions of the Act in placing the Company in liquidation on notice of its breach and its intention to resume the industrial plots after cancellation of the allotment.

(b) The benefit of industrial plots cannot be granted to a Company in liquidation to enhance its assets. The enrichment of the Company in liquidation at the cost of KIADB is not just and legal. Hence the termination of allotment by KIADB is proper.

8. The Official Liquidator did not contest the order of the Company Judge. However, the appellant herein, who claims to be the promoter/ shareholder of the Company, challenged this order by filing appeal before the Division Bench. His submission was that he is a bonafide person as promoter/ shareholder of the Company and is evincing genuine interest to revive this Company and for this purpose retention of land is very crucial. This contention of the appellant has not been accepted by the Division Bench of the High Court primarily on the ground that the merits of the appeal could not be gone into at the instance of the promoter/ shareholder which lacks bonafides. On that basis, the appeal has been dismissed.

9. Mr. T.R. Andhyarujina, learned Senior Counsel appearing for the appellant questions the aforesaid wisdom of the High Court in dismissing the appeal of the appellant on the ground of want of bona fides. His submission in this behalf was that it is the Official Liquidator who is the custodian and trustees of the properties of the Company in liquidation and, therefore, it was his prime responsibility to file the appeal against the order of the Company Judge. As such the order was not in the interest of liquidation proceedings. He argued that a valuable asset of the Company was taken away by the Board and the Company Judge had given permission to the Board to do so. Therefore, it was the bounden duty of the O.L. to challenge such an order when huge amount of debts were payable by the Company to the Public Financial Institutions. He further submitted that in any case the appellant had also vital interest in the matter. The Company had taken financial accommodations from the financial institutions and against those loans etc. the Directors/ Promoters including the appellant had given personal guarantees. In the event of non-payment of dues to those financial institutions by the Company, liability was likely to fall upon the promoters as contributors. Further, the promoters as contributors had a right to intervene in the liquidation proceedings at any stage, if they have a scheme of revival. In these circumstances the appeal of the appellant could not have been dismissed for purported lack of bonafides. He also submitted that the Division Bench could have imposed suitable terms for the appellant which could be complied with by the appellant to establish his bona fides, instead of summarily dismissing the appeal. In this behalf he sought to demonstrate that in the meanwhile one of the two promoters, viz. Mr. G. Mohan Rao had offered to invest sufficient funds for reviving the business of the Company. So much so he had offered to pay off all the debts which are due from the Company to its creditors. The appellant along with Mr. G. Mohan Rao was ready to revive the business of the Company and even willing to agree to the condition not to alienate the land in question.

10. Since it was agreed by and between the Counsel for the parties that in case the appeal filed by the appellant before the Division Bench of the High Court is held to be competent by this Court, then this Court itself should consider and decide the matter on merits, instead of remitting the case back to the High Court, we have heard the Counsel for the parties on merits as well.

11. As already pointed out above on an application filed by the Board, the Company Judge permitted the Board to resume the aforesaid two industrial plots which were allotted to the Company. Mr.

Andhyarujina, learned Senior Counsel, drew our attention to the reply which was filed by the O.L. before the Company Judge opposing the aforesaid application of the Board. This reply shows that OL had contested the application on two grounds namely;

> (i) There could not have been any termination of Lease Agreement by the Board without seeking prior permission of the Company Court, since the Company was under liquidation.
>
> (ii) The two plots, in fact, had become the property of the Company, as the Company had paid the entire consideration in respect of these plots. Therefore, there was no question of termination of the lease and resumption of the plots.

12. Before us the order of the High Court was assailed on these very grounds. Referring to clause 7 of the Lease Agreement dated 21.12.1984 it was argued that the lease was for a period of 11 years initially and the amount of rent paid by the Company for the period of lease was to be adjusted towards the balance of the value of the property. The value of the property was to be fixed in the manner stated in the agreement and on payment of the consideration as fixed, Clause 7 further provided that on payment of entire price as fixed by the Board the property in question was to be sold to the Company. He submitted that virtually the entire price had been paid by the Company in the form of rents which were to be adjusted and, therefore, the only requirement that was left was to execute sale deed in favour of the Company, which could not be done as in the meantime the Company had gone into liquidation. He submitted that the order of Company Court is totally erroneous, in as much as:

> (a) In the first instance, the Court could not have given its imprimatur to the Order of termination of the Board dt. 19.1.2002 because such an order of termination, after an order of winding up, could not have been passed without the leave of the Company Court. For this proposition he referred to the judgment of the Karnataka High Court in the case of Karnataka State Electronics Development Corporation Ltd. v. The Official Liquidator of M/s Anco Communication Ltd. decided on 20.6.2005.
>
> (b) Secondly, all the assets of a Company in liquidation after an order of liquidation belong to the creditors and shareholders and it is not open to the Company Court to give up the assets of the Company in liquidation except by way of disclaimer of onerous property under Section 535 of Company Act.

13. In support of second contention, the learned Senior Counsel referred to the judgment of this Court in United Bank of India v. Official Liquidator and Ors.; 1994 (1) SCC 575 and paras 10 and 11 which reads as under:

> “10. While the aforesaid direction will dispose of the appeal, we would like to say, having heard counsel on the merits of the appeal, that we are not satisfied that the Division Bench appreciated the purpose of the provisions of Section 535 of the Companies Act. Thereunder the High Court may give leave to the Official Liquidator

to disclaim land of any tenure which is part of the property of the Company in liquidation if it is burdened with onerous covenants. The intention of Section 535 is to protect the creditors of the Company in liquidation and not mulct them by reason of onerous covenants. The power under Section 535 is not to be lightly exercised. Due care and circumspection have to be bestowed. It must be remembered that an order permitting disclaimer, while it frees the Company in liquidation of the obligation to comply with covenants, puts the party in whose favour the covenants are, to serious disadvantage. The Court must therefore, be fully satisfied that there are onerous covenants, covenants which impose a heavy burden upon the Company in liquidation, before giving leave to disclaim them.

11. We are of the view that the High Court ought to have appreciated that it was rather unlikely that the party who had the benefit of onerous covenants would apply for disclaimer and ought to have viewed the Official Liquidator's application to disclaim made pursuant to the Trust's letter to him in that behalf, in that light. We find it difficult to see how such a large area of land leased to the Company in liquidation for 99 years with the option of renewal for a further 99 years for the meager rent of Rs. 1200 per annum can be said to be land burdened with onerous covenants. We do not think that the High Court was justified in debating and holding in proceedings under Section 535 that the lease of the said land had been validly terminated so that the Official Liquidator became liable to pay mesne profits to the Trust, and that this coupled with arrears of rent, in five figures made the lease onerous. We are also of the view that the Bank's offer to pay the arrears of rent to the Trust should have been accepted by the High Court. The Bank to protect and keep alive its security, had put official liquidator in funds in regard to other matters and was eager to meet this liability. Had this been done valuable property of the Company in liquidation could have been retained so that its undertaking, which stood on the said land, could have been sold as a running concern, as has been done upon intervention of this Court, for the benefit of its creditors."

14. Deprecating the inaction on the part of the O.L. in not filing the appeal and thereby protecting the property of the Company in question he relied upon the judgment in the case of Rajratna Naranbhai Mills Co. Ltd. v. New Quality Bobbin Works; 1973 (43) Company Cases 131, holding that the most important task assigned to the liquidator under the Companies Act while acting as liquidator of a Company ordered to be wound up is to collect assets of the Company and sell them and to distribute the realization amongst all those who have claims against the Company and payment must be made according to priorities fixed by law. This appears to be not only the foremost but the most basic duty of a Liquidator of a Company ordered to be would up. Now, if the liquidator in course of winding up is required to file suit for recovery of properties and assets of the Company, one has only to imagine at what length of time winding up proceedings can be brought to a close.

15. Mr. Andhyarujina, further mentioned that on 11.1.2010, Mr. Mohan Rao had offered to revive the Company and pay off the debts of the Company. In this behalf he also drew our attention to the orders dated 19.7.2009, 16.8.2010 and 11.2.2011 passed in the present case. In this context, his

submission was that there was every chance of the Company to be revived and, therefore, a valuable asset of the Company should not be allowed to be frittered away.

16. Mr. Patil, Senior Advocate, appearing for the Board stoutly refuted the aforesaid submissions. His argument was that the plots in question were allotted by the Board to the Company on lease-cum-sale basis with clear stipulation that the Company was to construct factory thereupon and complete the project within 24 months .The Company had miserably failed to implement the project in time for which show cause notices were given and all these happened much before the passing of the winding up order of the Company by the High Court. He further submitted that on failure of the Company to complete the project, lease-cum-sale agreement dated 21.12.1984 gave categorical right to the Board to resume the land. He, thus, submitted that the Company never became the owner of the land that too when no sale deed was executed in favour of the Company. Moreover, due procedure was followed before terminating the lease by giving appropriate and due opportunity to the Company which had even replied to the show cause notices. He further argued that before terminating the lease no prior permission under Section 537 of the Companies Act was required. It was only for resumption of the land, after termination of the lease, that such a permission was necessitated and keeping in view this legal requirement the Board had filed the application before the Company Judge which has been allowed by the impugned order. The learned Counsel relied upon the judgment of Karnataka High Court in the case of M/s. Hanuman Silks & Anr. v. Karnataka Industrial Areas Development Board and Ors.; AIR 1997 Kar 134. He also referred to the provisions of Karnataka Industrial Areas Development Act, 1966 (hereinafter referred to as 'KIAD Act') under which the Board has been constituted. Predicted on the provisions of this Act his submission was that the action, taken in terms of the said provisions, was absolutely justified and legal.

17. We may mention at this juncture that after the permission given by the learned Single Judge to the Board to resume the land, the possession of the plots was taken by the Board. The Board has made fresh allotment in favour of M/s. Relectronics Ltd., Respondent No. 3 herein. This action of the Board making allotment in favour of respondent No.3 was challenged by the appellant in the form of Writ Petitions filed in the High Court of Karnataka. Those Writ Petitions have also been dismissed by the High Court vide judgment dated 22nd June 2011 and the correctness thereof is challenged by the appellant in appeals arising out of S.L.P.(Civil)No...CC 14177-14180/2011. Counsel for the parties conceded that the outcome of appeal arising out of S.L.P.(Civil) No.14161/2010 shall govern these appeals as well. Mr. Sundram, learned Senior Counsel appeared for Respondent No. 3 also endeavoured to justify the action of the Board in terminating the lease. He heavily relied upon the judgment of the Karnataka High Court in the case of M/s. Hanuman Silks (supra) and submitted that as per the said judgment it was permissible for the Board to issue termination notice but for further action of taking possession, permission of the Court was to be taken which was done in the present case. He further referred to the provisions of the Lease Agreement dated 21.12.1984 and submitted that the allotment was on certain terms and conditions with specific purpose, viz. to set up industry. Since this could not be accomplished by the Company, action of the Board in resuming the land was justified. In such a scenario, the payment of money in the form of rental by the Company to the Board was totally immaterial. He further pointed out that resumption order was of the year 1992 i.e. before the winding up order was passed which was even challenged up by the Company by filing Writ Petition in the High Court and the said writ petition was dismissed.

Thereafter, keeping in view the spirit of M/s Hanuman Silk's case, termination notice was given which is duly reflected in the show cause notice/ termination letter itself. This termination was never challenged by the Company or the O.L. He thus argued that in this manner once the termination is found to be valid, the Company Judge did not commit any error in allowing the Board to resume the land.

18. We have given our considered thoughts to the various issues involved on which arguments were addressed by the Counsel for the parties. We would like to point out, at the outset, that we are not venturing into detailed discussion on the question of maintainability of the appeal filed by the appellant before the Division Bench of the High Court against the order of the Company Judge. Prima facie, we are of the opinion that this appeal was maintainable and should not have been dismissed on the ground that the appellant did not have locus standi to prefer the said appeal. The appellant is very much concerned with the outcome of the proceedings in as much as, if the ownership of the land in question vests with the Company and proceeds from the sale of this land comes into the kitty of the Company, the effect of that would be to reduce the liability of the creditors, particularly the financial institutions. In turn, it may result in reducing the personal liability of the appellant who has given guarantees to the financial institutions for the loan advances to the Company. However, we leave the matter at that, as Counsel for the respondents did not press the issue of maintainability very seriously.

19. In so far as the dispute on merits is concerned, it has various facets which give rise to the following questions:

> Q.1 Whether the Company had acquired the ownership of the two plots in question and, therefore, the Board was precluded from terminating the lease and resuming the plots?
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> OR Whether the property in question continued to be leasehold property as per the Lease Agreement dated 21.12.1984? Q.2 In the event it is decided that the property was on lease with the Company, whether the notice terminating the Lease Agreement was legal and justified?
>
> Q.3 Whether prior permission of the Company court was required to terminate the Lease Agreement by the Board since the Company was under liquidation?
>
> Q.4 Whether the circumstances warranted the Company court to allow the application of the Board to resume the said land and take possession thereof?

20. We proceed to answer the aforesaid questions in seriatim:-

Q.1 Re: Status of the property in question:-

21. Admittedly, the Lease Agreement dated 21.12.1984 was entered into between the Board and the Company vide which the Board had agreed to lease to the Company the land in question upon

certain terms and conditions. In consideration, the Company had paid a sum of Rs. 3,07,102/- as the initial deposit/ premium and it was also to pay the yearly rent of Rs. 6,921/- for the period of lease which was 11 years, computed from 4.8.1984. Clause 2 of the Lease Agreement stipulated various others covenants. Having regard to the nature of functions which the Board performs, which has been constituted for industrial development in that area, the plots in question were given to the Company exclusively for the purpose of establishing an industry/ factory for manufacture of AH/ FM Radio Audio Tape Recorder in combination with radio. The lease provided that the premises shall be used only for the aforesaid purpose and not for any other purpose. The lease also provided that the civil construction work and erection of factory shall be completed within stipulated period which was 24 months from the date of letter of allotment i.e. 21.02.1983. This time, however, could be extended in writing for good and sufficient reasons furnished by the Company. On extension being given, the Company was to complete the number of works within the extended period. For this purpose time bound schedule was provided in clause 2(P)(1) of the Lease Agreement which is reproduced below:

> "2(P) (1) (i) To submit the property of the plan of the civil construction to him lessor or prior approval within six months from the date of receipt of letter of allotment within two months from the due date of.
>
> (ii) The civil constructions works within three months from the approval of the blue prints, after obtaining licence from the Chief Inspector of Factory and Boilers of Karnataka State.
>
> (iii) To complete civil construction works and erection of factory within twenty months from the date of letter of allotment that is the TWENTY FIRST day of February One Thousand nine hundred and Eighty Three.
>
> (iv) To commence production within twenty four months from the ate of letter of allotment that is the Twenty First day of February one thousand nine hundred and Eighty Three.
>
> For good and sufficient reasons, the Lessor may extend the time in writing in any of the cases mentioned in sub clauses (i) to
>
> (iv) above, by such period as the Lessor. In his discretion deem fit and the Lessee shall complete the item of works for which extension of the time given within such extended time.
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> Failure to fulfill any of the conditions (I) to (IV) mentioned above shall result in allotment begin cancelled and agreement being terminated under clause 4 and a sum not exceeding 5% of the cost of land as indicted in Clause 1 of the lease agreement subject to a maximum of Rs.10,000/- and minimum of Rs.1000/- and interest due and payable as per clause 1 from the date of taking possession to the date of resumption of the land by the Board shall be forfeited to the Lessor."

22. It was further specifically mentioned that in case there is a failure on the part of the Company to fulfill the said condition, it would result in allotment being cancelled and agreement being terminated under Clause 4. Clause 4 of the Lease Agreement provided for determination of the Lease Agreement under certain circumstances including the one mentioned above. Clause 7 of the Lease Agreement enabled the Company to purchase the property in question at the end of 11 years lease period or the extended period, if any. For this purpose, the Board was supposed to fix the price of the demised premises for such sale. The rent already paid by the Company was to be adjusted towards the sale consideration so fixed and on payment of the balance amount of the value of the property within 1 month, the sale was to be effected, as provided in Clause 9. Amount of Rs. 3,07,102/- was to be kept by the Board as security for any loss of expenses that the Board may put to in connection with any legal proceedings including proceedings that may be taken against the Company.

23. It is not in doubt that while construing an agreement, it is not the nomenclature but the substance thereof needs to be looked into. Therefore, mainly because the agreement in question is termed as “Lease Agreement” that by itself will not be the sole determinative factor. However, various clauses of the agreement also clearly manifest that it was an agreement vide which lease for 11 years period was created in favour of the Company. However at the same time, it was also not a Lease Agreement simplicitor. It did not provide that on expiry of the lease period, the demised property is to be reverted back to the Board. Under this very lease agreement, certain rights were to accrue in favour of the Company, albeit on fulfilling various obligations imposed upon the Company under the Lease Agreement. In nut shell, the specified purpose of this Lease Agreement was to give the plots in question to the Company for setting up of radio factory/ industry. The Company was even allowed to construct the building for this purpose at its own cost within 24 months from the date of letter of allotment. On fulfilling these and other conditions, at the end of 11 years the Company could become entitled to even purchase the land at the sale price which was to be determined by the Board. So much so at that time the rental paid for the period of lease was to be adjusted against the sale consideration. However, this right to purchase the plot in question after the expiry of the lease period could accrue in favour of the Company only on fulfilling the covenants stipulated in clause 2(P). On the Company's failure to do so the Lease Agreement gave right to the Board to determine this lease and resume the land. In that event, the question of right to purchase the land could not arise. It is, thus, in the nature of Lease-cum-Sale Agreement, which started with lease and could culminate into sale. The question is, whether this culmination has occurred in the given case?

24. Having considered the nature of agreement in question, in the instant case it is found as a matter of record that the Company failed to complete the construction and start factory on the demised land. In fact, no factory could be set up at all. One plot was allotted to the Company on 21.12.1984. Second plot was allotted to the Company on 10.1.1989. When the project did not take off by the prescribed time, the Board passed two separate resumption orders, both dated 6.5.1992 in respect of these two plots. Even thereafter, the company could not start factory operations. In fact, against these resumption orders Writ Petition No. 11957 of 1993 was filed by the Company and interim protection was given to the company because of which the Board could not take possession of the plots. However, this writ petition was dismissed by the High Court on 14.9.1999.

25. It is clear from the above that right to purchase the land did not fructify in favour of the Company. On the contrary, while the relationship between the Company and the Board was still that of lessee and lessor, the lease came to be determined by the Board because of the breach of the covenants of lease agreement. We, therefore, cannot accept the contention of the learned Senior Counsel for the appellant that the Company had become the owner of the plots in question.

Q.2 Re: Validity of termination notice

26. As mentioned above, on the failure of the Company to complete the project within the specified period, the Board served resumption letter dated 6.5.1992 upon the Company stating that the land would be resumed on 8.6.1992 for failure to implement the project in time. On the same date in respect of second plot, a show cause notice was also issued by the Board to the Company to show cause within 15 days as to why action be not taken to cancel the allotment for failure to execute the agreement and to implement the project. The Company submitted its reply dated 28.5.1992, inter alia, stating that development of the two plots could not be viewed independently more so when the Board itself had allotted the second plot as part of a consolidated project. It was further stated that the project involved an investment of Rs. 9 crores and the Company had already invested nearly Rs. 5 crores on the project by availing financial assistance from the financial institutions after pledging both the plots. The resumption proceedings were drawn thereafter. After considering this reply, vide letter dated 15.6.1992, the Board directed the Company to submit the following documents:-

(i) Copy of the loan sanctioned letter from IDBI and the details of balance loan to be released by them.

(ii) Certificate of investment on the project so far made issued by the financial institutions.

(iii) Proof for having invested Rs. 5 crores on the project so far along with supporting documents.

(iv) PERT Chart for implementing the project indicating monthly progress.

27. The Company submitted its reply/ detailed representation dated 4.7.1992 in response to the above. Thereafter, the Board also asked the Company to furnish the proof of investment and in response thereto the Company submitted certificate issued by the Chartered Accountant. After considering the replies the Board was not satisfied and, therefore, issued another resumption order in respect of first plot dated 22.3.1993 stating that the possession will be taken on 21.8.1993 for failure to implement the project in time. At this moment, Writ Petition was filed by the Company against this order in which the interim order was passed staying the resumption proceedings because of which the Board could not take possession of the said plot. While these proceedings were pending, winding up petition was filed against the Company by one of its creditors in the year 1994 and winding up orders were passed in the said Company petition on 15.11.1996.

28. On 13.8.1997, another show cause notice in respect of second plot was issued to the Company asking it to show cause as to why the allotment be not cancelled. This notice was returned undelivered as factory was closed. Accordingly, notice was published in Deccan Herald Newspaper on 8.1.1998. In response to that public notice, IDBI informed the Board that the Company had been ordered to be wound up by the High Court on 15.11.1996. The Board did not take further action immediately thereafter. In the meantime, W.P. No. 11957 of 1993 filed against the resumption order dated 22.3.1993 in respect of Plot No. 19(A+B) came up for hearing before the High Court on 14.9.1999 and was dismissed with the following order:

> "When the matter came up today, learned counsel for the petitioner and the respondents submitted that the petitioner Company has been wound up in pursuance of the order of this court in Company Petition No. 18 of 1994 and, therefore, this petition may be dismissed, as having become infructuous. Petition is dismissed accordingly."

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 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. Though the Board could act thereafter, however in the meantime High Court of Karnataka had passed orders dated 10.4.2001 in the matter of The Karnataka Industrial Areas Development Board v. M/s. Electro Mobiles (India) Ltd.; 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 34B of the Karnataka Industrial Areas Development Act, 1966.

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.

Q.3 Re: Necessity of prior permission of the Company court before terminating the lease:

31. As the Company had gone into liquidation and there was an order of winding up when the notice of cancelling the lease was given, the next question is as to whether prior permission of the Company Court was necessary before terminating the lease. Case of the appellant is that such prior permission is required under Section 537 of the Companies Act and the appellant has relied upon

the judgment of Karnataka High Court in the case of Karnataka State Electronics Development Corporation Ltd. v. The Official Liquidator of M/s Anco Communication Ltd. On the other hand, respondent stated that before terminating the lease no prior permission under the aforesaid provision of the Companies Act was needed and it was only for resuming the land that such a permission was required which led the Board to file an application for this very purpose. The respondents have relied upon the judgment of the Karnataka High Court in the case of M/s. Hanuman Silks (supra). It, therefore, becomes necessary to discuss these two judgments in the first instance.

32. In M/s. Anco Communication Ltd. (Supra) there was an allotment of industrial plot in favour of Anco by the Karnataka State Electronics Development Corporation (Corporation) on lease-cum-sale basis for which an agreement was executed. As per the said agreement, the Company was to establish its manufacturing unit within two years from the date of allotment of the Industrial Plot. In the meantime, the said Anco went into liquidation and winding up orders dated 8.6.2000 were passed. Much after the winding up orders, the corporation cancelled the lease-cum- sale deed on 28.6.2003 and took "paper possession" of the industrial plot. Thereafter, the Corporation filed the application in the Company Petition requesting the Company Judge to declare the Cancellation Order passed by the Corporation to be valid and direct the O.L. not to interfere with its paper possession. The Company Judge rejected the said application keeping in view the language employed in Section 537 of the Companies Act. The Corporation filed appeal which came to be dismissed by the Division Bench. The Division Bench was not impressed with the arguments that the Corporation was not aware of the winding up proceedings and for this reason it had resumed the possession of the industrial plot, after cancellation thereof, without obtaining the leave of the Court. Once the plea of ignorance was denounced, the court addressed the question as to whether the Corporation could have cancelled the allotment of industrial plot made in favour of the Company in liquidation and answered the same in the negative with the following observations:-

> "11. Now the only question before us is, whether after an order was made by this Court in winding up the respondent Company (Company in liquidation), the applicant Corporation could have ventured to cancel the allotment of industrial plot made in favour of the Company in liquidation? This could be answered only after noticing the provisions of Sec. 537 of the Act.
>
> 12. Section 537 of the Act, provides for avoidance of certain attachments, executions, etc. in winding up by or subject to supervision of Court. The winding up proceedings would commence from the date of presentation of the petition before this Court for winding up of the Company as envisaged under Section 433 of the Act and other similar provisions under the Act. Once such proceedings are initiated, any assets of the Company cannot be meddled without the leave of the Court. This settled legal proceedings, time and again is stated by various High Courts and also the highest Court. An elaboration of this settled legal principle, in our view, is wholly unnecessary.

> In the present case, an order of cancellation of the lease- cum-sale agreement is passed by the applicant Corporation, after presentation of the Company Petition and after passing the winding up order, but without the leave of the Court, and in our opinion, any such action is void. A void order cannot be regularised and, therefore, rightly the learned Company Judge has not acceded to the request made by the applicant Corporation. We do not see any error in the order passed by the learned Company Judge and, therefore, no interference with the said order is called for. Accordingly, appeal requires to be rejected and is rejected. No order as to costs. Ordered accordingly."

33. Though the aforesaid observations give the impression that there cannot even be a cancellation of the allotment of industrial plot in respect of a Company in liquidation without the prior permission of the Company court, we are of the view that these observations are to be read in the factual context of the aforesaid case. As noted above, the Corporation had not only cancelled the lease but had even resumed the land by taking "paper possession". Further, in the application filed before the Company Court, it did not pray for permission to take possession. On the contrary, the Corporation took up the stand that it already had the possession which should be declared as validly taken and the prayer made was to direct the Official Liquidator not to interfere with the possession. It is in this context that the High Court held that same could not be done without the leave of the court. We are of the opinion that the observations are to be read giving restricted meaning that possession could not be taken without the prior leave of the court. It may not be correct to hold that the law requires that prior permission of the Company Judge is mandated even for cancellation of the lease. In fact, question of resumption of land or taking possession thereof could have arisen only after the cancellation of the lease. We will dilate on this aspect further after discussing the judgment in M/s. Hanuman Silks (Supra).

34. In M/s. Hanuman Silks (supra) the said Company was allotted plots by the Board for which lease-cum-sale agreements were entered into on 18.8.1993 and 19.8.1993. The Company was to erect the factory within 12 months and to commence the production within 24 months (same conditions as in the instant case). The Company failed to commence the civil construction work and did not complete the construction nor commenced production by these stipulated dates. Show cause notices were given by the Board and after that the plots allotted to the Company were resumed on 25.7.1995. The Company filed the petitions for quashing of the letters of resumption. The High Court formulated two questions which arose for consideration. We are concerned only with the first question which was couched in the following terms:-

> "Whether the Board can take possession of the plots in the possession of its lessees, without having recourse to a civil suit for possession or to an eviction proceedings under the provisions of the Karnataka Public Premises (Eviction of unauthorized occupants Act), 1974".

35. After taking note of various provisions of the Act and discussing case law cited by both the parties, the Court concluded that no where 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 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.

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 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.

39. We thus, hold that no prior permission was required by the Board for cancelling the lease.

Q.4. Re: Validity of the order of the Company Court granting the permission.

40. Once the application for permission to resume the land is filed, undoubtedly it is permissible for the Company Judge to go into the validity of the action of the applicant. Thus, in the instant case the Company Judge could find out as to whether cancellation of lease is proper or not. The Company Judge could also go into the question as to whether the Company had become the owner of the property, or it was only a lessee. Company Judge could also go into the question as to whether the property in question is required by the Company and parameters of the provisions of Section 535 of the Companies Act are satisfied or not.

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 specified project which the Company failed to establish. Let us examine the Scheme of the KIAD Act at this point of time, 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 and powers of the Board and Chapter V deals with Finance, Accounts and Audit of the Board. Chapter VI deals with application of Public Premises Act and non-application of 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.

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 terms of holding. Section 34 A provides for demolition or alteration of unauthorized construction or alteration. Section 35 of the Act enables a person authorized 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.

43. Thus, when it was found that the Company has not been able to establish the factory for which the land was allotted, under the statute itself powers are given to the Board to cancel the allotment and resume such land.

44. We, further find that the Company is now in liquidation. Till date there is no validly propounded scheme of rehabilitation under Section 391 to 394 of the Companies Act. Some obscure proposals, without concrete Scheme as required under the Act, cannot be made a sheet anchor to come in the way of the rights of the Board which still remains the owners of these plots. It, therefore, cannot even be said that the land in question is required by the Company. The O.L. could claim rights over this land only if it had become the property of the Company and the ownership was vested in it. Even that is not so (whether cost of construction should be reimbursed to Company).

45. The up-shot of the aforesaid discussion would be to hold that termination notice dated 19.1.2002 of the Board is valid. Likewise the order of the Company Judge permitting the board to take possession of the land in question is legal and justified.

46. As a result this appeal is dismissed with costs. Consequently, the appeals arising out of S.L.P.(Civil) .....CC 14177-14180/2011 are also dismissed.

.....J.

[S.S. Nijjar] .....J.

[A.K. Sikri] New Delhi March 12, 2014