

Co.Pet. 16/2006

BEFORE

HON'BLE JUSTICE RANJAN GOGOI

J U D G M E N T

1. All these cases being inter-connected were heard together and are being disposed of by this common order.

2. For a better appreciation of the issues involved in the cases under consideration a brief resume of the long and chequered facts of the cases may be made, at this stage.

One Him Containers Limited(hereinafter referred to as the Company) was engaged in the business of manufacture and sale of marine containers. The Company had its manufacturing unit and other establishments in an area of land measuring approximately 40460.456 sq. meters situated within the Haldia Dock Complex. The said land was leased out to it by the owner thereof i.e. the Board of Trustees for the Port of Kolkata (hereinafter referred to as the Kolkata Port Trust) for a period of 30 years commencing from 22.12.82. By an order dated 1.9.2000 passed by this Court the Company was ordered to be wound up. Thereafter the official liquidator took over possession of the assets of the Company including the land that was leased out to it by Kolkata Port Trust. This was on 16.7.2001. At this stage, it may be noticed that under the lease deed executed by and between the parties i.e. the Kolkata Port Trust and the Company, which is dated 2.5.1983, it was provided that in the event there was any default in payment of the stipulated rent or if the lessee Company is to go into liquidation, the lease would stand determined and the lessor would have a right of re-entry. According to the Kolkata Port Trust, the lessee Company was in continuous default in the matter of payment of rent which at that time was Rs.1,76,003.00 per month as per the rates stipulated by a Notification dated 14.5.1992 issued under Section 49 of the Major Port Trusts Act, 1963. On account of the aforesaid default committed by the Company the lease was terminated by the lesser by serving an ejectment notice dated 25.9.2000. As the Company did not hand over possession of the leased land the lessor initiated a proceeding under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. According to the lessor, Kolkata Port Trust, it is at this stage that the lessor could come to know that the Company has been ordered to be wound up by the Court by its order dated 1.9.2000. Immediately thereafter the lessor raised a demand on account of the outstanding rent along with interest payable thereon and, thereafter, filed Company Application No.5 of 2002 before this Court seeking a direction to the Official Liquidator, under Section 535 of the Companies Act, to disclaim all interest in the lease land and to hand over possession of the same to the lessor.

3. Company Application No.5 of 2002 was disposed of by this Court on 11.12.2002, inter alia, holding that the retention of the leased land by the Official Liquidator is necessary to bring the liquidation proceedings to a successful completion and therefore the disclaimer prayed for should not be allowed. However, by its aforementioned order the Court held that the lessor would be entitled to claim rent for the period of possession of the leased land by the Official Liquidator.

4. Thereafter on 17.2.2004 a sale notice was issued in the newspapers for sale of the assets of the Company. In terms of the aforesaid sale notice, the sale was to be as per the inventory made by Valuer as is, where is and whatever there is basis. The report of the Valuer which was appended to the sale notice mentioned that the assets included lease hold land measuring 40460.456 sq. meters which was obtained by the Company on lease from the Kolkata Port Trust for the period of 30 years commencing from 22.12.1982. In the said report it was also mentioned that the Company had erected its structures on the said land to house the factory premises. The Valuer in his report, also, specifically mentioned that i

t will be the responsibility of the new purchaser to negotiate with the Kolkata Port Trust for renewal/transfer/grant of a fresh lease by making all payments in this regard to the Kolkata Port Trust. In the enclosures to the Valuer's report showing the value of the assets which were the subject matter of sale, the good will value of the land was assessed on the basis of the rent payable for the outstanding period of the lease. It was also mentioned that it will be the responsibility of the new purchaser to negotiate with the Kolkata Port Trust regarding renewal or transfer of lease and all payments to the Kolkata Port Trust to be made by the new purchaser.

5. By order of the Court dated 22.6.2004 the offer made by the applicant in Misc. Case No.1256 of 2006, presently under consideration i.e. M/s Scrapt Traders was accepted being the highest offer of Rs.7.20 crores. Thereafter, the amount offered having been paid in full to the Official Liquidator, the assets of the Company including the lease hold land was handed over to the said M/s Scrapt Traders by the Official Liquidator on 13.9.2004.

6. In these circumstances, the lesser, Kolkata Port Trust, file another company application being Company Application No.6 of 2004 claiming rent of the lease land for the period of possession of the same by the Official Liquidator. It was also claimed that the rent due must be deemed to be liquidation expenses and therefore must have priority over other debts payable by the Company in liquidation. In the said Company Application the lessor also prayed for a direction for handing over the lease land to the lessor. Similarly, M/s. Scrapt Traders also filed a miscellaneous application being Misc. Case No.382 of 2005 for a direction to the Kolkata Port Trust for renewal/transfer of the lease in respect of the land, in its favour.

7. Company Application No.6 of 2004 and Misc. Case No.382/2005 were disposed of by this Court with the following directions :

(a) In such a situation, the rent that is payable by the Official Liquidator for his possession of the leased land must be necessarily construed by this Court to be a part of the expenses incurred in the winding up proceeding. Had it not been for the retention of such possession of the leased land by the Official Liquidator, the sale of assets of the Company-in-liquidation, would not have materialized. Therefore, the rent payable by the Official Liquidator must be reasonably construed to be a part of the expenses incurred for the purposes of winding up of the Company-in-liquidation. Viewed from the aforesaid perspective there can be no manner of doubt that the rent payable by the Official Liquidator for the possession of the leasehold land is a part of the costs and expenses of the winding up and payment of such costs and expenses to the lessor, Kolkata Port Trust, must be made before application/apportionment of the value of the assets of the Company towards discharge of any of its debts.

(b) Under the provision of Section 456 of the Companies Act, with effect from the date of the order of winding up of a company, the property and effects of the Company-in-liquidation is to be deemed to be in custody of the Court and the Official Liquidator takes over physical possession of such property and effects on behalf of the Court. Taking over possession of the leased land by the Official Liquidator with effect from 16.7.2001 must, therefore, be construed to be on the aforesaid basis.

(c) M/s. Scrapt Traders, the purchaser had entered into the deal with its eyes open and what must be assumed by the Hon'ble Court to be on a clear knowledge that what it is acquiring by virtue of the sale/purchase made is a mere right to negotiate for renewal/transfer of the lease. The contrary case pleaded by M/s. Scrapt Traders in the application filed i.e. that the balance period of the lease was one of the assets sold to the purchaser vesting in such purchaser a right to a transfer/renewal of the lease will be difficult to accept in view of the clear stipulation to the contrary as embodied in the terms and conditions of the lease(sic) subject to which the sale was made.

(d) In view of the above and having regard to the provisions contained in Se

ction 456 of the Act, the handing over of possession of the leased land to M/s. Scrapt Traders by the Official Liquidator cannot be termed to be a legally effective act of handing over of the possession of the leased land. The Official Liquidator was not empowered to do so except under orders of the Court and the Court not having so authorized the Official Liquidator, the present possession of the purchaser of the leased land cannot be termed as legal possession which must be understood to have continued to remain with the Official Liquidator, on behalf of the Court. As the purpose of such possession has been achieved by the sale of the assets of the Company-in-liquidation, the Official Liquidator is now directed to hand over legal possession of the leased land to the lessor Kolkata Port Trust.

(e) On the view that this Court has taken, the next course of action will now be for the lessor Kolkata Port Trust to prove the actual quantum of rent due for the period of possession by the Official Liquidator, before the Official Liquidator and the Official Liquidator will disburse, the said amount of rent due to the Kolkata Port Trust out of the sale proceeds realized by treating the amount due to be a part of the costs and expenses incurred in connection with the winding up of the Company:

(f) This Court, notwithstanding the above direction, must, however, recognize in the lessor, i.e. Kolkata Port Trust a legal duty to fairly consider the pending claim of the purchaser M/s/ Scrapt Traders for renewal/transfer of the lease so as to enable it to re-start the business of the Company-in-liquidation. This Court, therefore, leaves it open to the concerned parties to fairly negotiate on the question of the renewal/transfer of the lease on mutually acceptable terms, failing which, M/s. Scrapt Traders is left with the option of availing of all such legal remedies as may be open to it in law.

8. After the order dated 21.3.2005 was rendered by this Court a meeting was held between the representatives of the Kolkata Port Trust and the Official Liquidator at Haldia on 12.4.2005. According to the Kolkata Port Trust, in the said meeting the Official Liquidator agreed to hand over symbolic possession of the land and not physical possession as according to the Official Liquidator the direction of the Court was to hand over legal possession. Such symbolic possession was refused to be accepted by the Kolkata Port Trust. In so far as the payment of rent is concerned, according to the Kolkata Port Trust, in the meeting held on 12.4.2005 the Official Liquidator was requested to make payment of Rs.1,50,86,734.00 on account of rent for the period 16.7.2001 to 31.3.2005. As the Official Liquidator required the Kolkata Port Trust to prove and substantiate the said claim of rent, the Kolkata Port Trust by a letter dated 25.4.2005 indicated the basis of the said claim in the schedule to the said letter dated 25.4.2005 by stating that the said amount of Rs.1,50,86,734.00 has been worked out by claiming rent and escalation charges at the enhanced rate fixed by the Schedule to the Notification published in the Gazette of India dated 2.12.1999 in exercise of powers under Section 49 of the Major Port Trusts Act, 1963. On 15.6.2005 the Official Liquidator issued a letter to the Kolkata Port Trust requiring submission of details of previous rent paid by the Company. The said letter was replied to on 21.7.2005 by the Kolkata Port Trust by stating that no rent was paid by the Company for over five years prior to the determination of the lease in the year 2000. However, in the said letter the Kolkata Port Trust had mentioned that rent bills upto 31.3.2001 were sent to the Company which was at the rate of Rs.435/- per hundred sq. meters i.e. Rs.1,76,003.00 per month. The said rate, it may be noticed, was as per the schedule in force earlier to the Gazette Notification dated 2.12.99. It may further be noticed at this stage that in the letter dated 21.7.2005 the Kolkata Port Trust had also mentioned that as per the schedule published by Gazette Notification dated 2.12.99 the rate of rent was Rs.773/- per 100 sq. meters per month or Rs.3,12,759.32 per month with escalation of 5% every year.

9. Thereafter on 11.8.2005 and 11.11.2005 separate communications were addressed by the Kolkata Port Trust to the Official Liquidator claiming rent as per rates published on 2.12.99 for the months of April to July 2005 and August to Oc

tober 2005 which in conjunction to the earlier claims stood at Rs.1,77,47,842.45 for the period upto October 2005.

10. The Official Liquidator by his notice of rejection dated 9.1.2006 rejected the claim of the Kolkata Port Trust to the extent of Rs.98,42,469.45. By another notice of admission rent, at the rate of Rs.435/- per 100 sq. meters per month, for the period from 16.7.2001 (date of taking over of possession by the Official Liquidator) upto 12.4.2005 (date of offer of handing over of legal possession) amounting to Rs.79,05,373.00 was admitted/allowed as a preferential claim.

11. In so far as renewal of the lease in respect of the land is concerned, it appears that after the order dated 21.3.2005 was rendered by this Court in Company Application No.6 of 2004 and Misc. Case No.382 of 2005 negotiations were held by and between the parties which was followed by meeting of the Standing Land and Building Allotment Committee of the Kolkata Port Trust held on 12.9.2005. The views of the said Committee were placed before the Board of Trustees in its meeting held on 23.9.2005. On the basis of the resolution of the Board taken on the same date i.e. 23.9.2005, the Board recorded its inability to accede to the prayers of M/s Scrapt Traders for renewal/grant of lease in its favour on account of the land policy that had come into operation in the meantime.

12. In the above circumstances, the Kolkata Port Trust has filed Company Petition No.16 of 2006 seeking leave to proceed against the Official Liquidator for committing contempt of the Court's order dated 21.3.2005 in not handing over physical possession of the land to the Kolkata Port Trust. Alternatively, the prayer made in the said Company Petition is for a direction to the Official Liquidator to comply with the said order of the Court dated 21.3.2005 by handing over vacant physical possession of the land to the Kolkata Port Trust. A further direction for payment of the sum of Rs.79,05,373/- allowed by the Official Liquidator by his notice of admission dated 9.1.2006 has been prayed for subject to such orders as the Court may pass with regard to the claim for rent at the enhanced rate with escalation in terms of the Gazette Notification dated 2.12.99 which is the subject matter of the connected Company Appeal No.1 of 2006.

Misc. Case No.1256 of 2006 has been filed by M/s Scrapt Traders for a direction from the Court to the Kolkata Port Trust to grant/renew/transfer the lease of the land in question in favour of the applicant whereas Misc. Case No.2771/2006 and Misc. Case No.2776/2006 have been filed by the Employees Union of the Company seeking intervention in Company Petition No.16 of 2006 and Company Appeal No.1 of 2006 respectively. As evident from the averments made in the said miscellaneous applications what the employees Union seeks to espouse before the Court is in support of the claim of M/s Scrapt Traders for renewal/grant/transfer of the lease. The aforesaid miscellaneous applications both by M/s Scrapt Traders and the Employees Union have been filed primarily on the basis that M/s Scrapt Traders intend to re-start the operations of the Company that had gone into liquidation which operations will generate employment to accommodate the erstwhile employees of the Company.

13. I have heard Sri S. Roy Choudhury, learned counsel for the Kolkata Port Trust, Smt. M. Hazarika, learned counsel appearing for M/s. Scrapt Traders and Sri K. Agarwal, learned counsel, appearing for the employees Union. I have also considered the reports submitted by the Official Liquidator in response to the notices issued by the Court in Company Petition No.16 of 2006 as well as Company Appeal No.1 of 2006.

14. The entitlement of the Kolkata Port Trust to receive enhanced rent may be considered as the first issue in the cases under consideration.

As already noticed, by the notice of rejection dated 9.1.2006 the Official Liquidator has rejected the claim of the Kolkata Port Trust on account of rent to the extent of Rs.98,42,469.45 for the period 16.7.2001 to end of October 2005 which amount was claimed on the basis of the schedule of rates published by the Notification dated 2.12.99. By a separate notice of admission of the same date

e the Official Liquidator has accepted the claim of the Kolkata Port Trust for Rs.79,05,373.00 on account of rent as a preferential claim. The said claim has been allowed on the basis of the rate prevailing prior to the notification dated 2.12.99 and for the period 16.7.2001 to 12.4.2005 (date of handing over of legal possession in terms of the order of the Court dated 21.3.2005).

15. The Official Liquidator in his order rejecting the claim for enhanced rate as well as in the reports submitted to the Court has stated that the Schedule of rates fixed by a Notification under Section 49 of the Major Port Trusts Act, 1963 is for use of land belonging to a Port Trust for commercial purposes whereas in the instant case that the possession of the Official Liquidator was for the purpose of winding up. According to the Official Liquidator, in view of the said fact and also as in the Port Trust's letter dated 21.7.2005 it was mentioned that rent bills to the Company for the period upto 31.3.2001 (post liquidation) was submitted at the rate of Rs.435/- per 100 sq. meters per month, the claim for enhanced rent as per the Notification dated 2.12.99 should be rejected and rent amounting to Rs.79,05,373/- as per the old schedule of rates should be allowed.

16. A reading of the provisions contained in Section 49 of the Major Port Trusts Act, 1963 leaves the Court satisfied that the power vested in the Board of Trustees to frame a scale/schedule of rates for use of property belonging to the Port Trust is in respect of situation where such property of the Port Trust is let out for being used for different commercial/business purposes. The provisions contained in Sections 51, 53 and 54 of the said Act also make it abundantly clear that the statute has not attached any sacrosanctity to the rates that may be fixed under Section 49. Under Section 456(2) of the Companies Act after an order for winding up of a Company is passed by the Court all property and effects of the Company is deemed to be in the custody of the Court. The possession of such property by the Official Liquidator is for and on behalf of the Court. The possession of the leased land by the Official Liquidator, in the present case, therefore, must be understood in the above context. Such possession was directed to be maintained by the Court in order to facilitate the process of liquidation. Naturally, in respect of such possession by the Official Liquidator, for the purpose indicated above, the owner of the land i.e. the Kolkata Port Trust cannot be allowed to claim rent as per the schedule of rates framed by it under Section 49 of the Major Port Trusts Act, 1963. As the possession and use of the land by the Official Liquidator was not for a commercial purpose, a discretion, therefore, was vested in the Official Liquidator by the Court to fix the quantum of rent payable to the Kolkata Port Trust upon a claim made by it to the said effect. The manner in which the Official Liquidator had fixed the rent by accepting a part of the claim and in rejecting the claim for enhanced rent as per the new schedule, in the facts and circumstances of the case, leaves the Court fully satisfied that what has been allowed and what has been rejected is fair. No interference, therefore, either with the acceptance or rejection as made by the Official Liquidator and for any further direction in this regard to the Official Liquidator will be called for.

17. This will bring the Court to a consideration of the prayer made by the Kolkata Port Trust for a direction to the Official Liquidator to hand over vacant physical possession of the land in question and the corresponding claim made by M/s Scrypt Traders and the employees Union for a direction to the Kolkata Port Trust to grant/renew the lease in respect of the land in question.

18. This Court by its order dated 21.3.2005 passed in Company Application No.6 of 2004 has already held, for reasons that need not be reiterated or repeated, that the rights of M/s. Scrypt Traders, by virtue of the purchases of the assets of the Company in liquidation, in so far as the land is concerned, is a mere right to negotiate for renewal/transfer of the lease and a right to fair consideration of such a request at the hands of the Port Trust. In the aforesaid order dated 21.3.2005 this Court had already held that the handing over of the possession

on of the leased land to M/s Scrypt Traders by the Official Liquidator was not authorized and that such possession of the leased land by M/s. Scrypt Traders was neither legal nor justified. Accordingly, the Court by its order dated 21.3.2005 had directed the Official Liquidator to hand over legal possession of the leased land to the Kolkata Port Trust. In a situation where this Court had already held that the Official Liquidator was not authorized to hand over possession of the leased land to M/s Scrypt Traders and therefore had directed legal possession of the land to be handed over to the Kolkata Port Trust, it is difficult to understand why the Official Liquidator continued to allow possession of the leased land by M/s Scrypt Traders and had handed over symbolic possession to M/s Scrypt Traders. This is not what was contemplated by this Court's order dated 21.3.2005. What this Court meant by the term 'legal possession', if any clarification is required, is actual physical possession so as to enable the beneficiary to be vested with all legal rights flowing from such possession. As the actions of the Official Liquidator appear to have been based on a wrong notion or understanding of this Court's order, he is now directed to act accordingly and hand over vacant physical possession of the land to the Kolkata Port Trust within a period of three months from today.

19. Admittedly, M/s Scrypt Traders is in possession of the land as on date though its request for grant/renewal of the lease in respect of the said land has been refused by the Board of Trustees of the Kolkata Port Trust as far back as on 23.9.2005. The reasons which had led the Board of Trustees to reject the said request is that acceptance thereof would be contrary to the land policy in force which has been pointed out on behalf of the Kolkata Port Trust to require grant of such lease by open tender.

20. Much argument has flown from both sides with regard to the validity/invalidity of the said decision of the Board of Trustees. A decision of the Apex Court in the case of Board of the Trustees, Port of Kolkata vs. Efclon Tie-up(P) Ltd. and others, reported in (2006) 9 SCC 763, has been strenuously relied upon by the learned counsels for M/s Scrypt Traders as well as the employees union.

21. The Company i.e. Him Containers Limited having been ordered to be wound up as far back as on 1.9.2000 and thereafter all incidental and required steps including the sale of the assets of the Company having been completed and the manner of disbursement of the sale proceeds, also, having been laid down the jurisdiction of this Court under Chapter VII of the Companies Act must be understood to have come to an end save and except to deal with incidental matters that may arise from time to time. The entitlement of M/s Scrypt Traders to the grant of a fresh lease or renewal of the old lease after purchase of the assets of the Company in liquidation as per the sale notice dated 17.2.2004 is a matter that is beyond the scope of the provisions contained in Chapter VII of the Companies Act, 1956. Any adjudication of the entitlement of M/s Scrypt Traders to such grant/renewal, in the considered view of the Court, cannot be dealt with in exercise of the jurisdiction under the Companies Act. Though there are reminiscences of the exercise of such jurisdiction under the Companies Act, 1956 by the Calcutta High Court in the case before the Apex Court i.e. Board of the Trustees, Port of Kolkata (supra) the detailed facts in which such jurisdiction was exercised by the High Court are not before the Court. In any case, the approval of the Apex Court to the direction granted by the Calcutta High Court for grant of a fresh lease in Board of the Trustees, Port of Kolkata (supra) can be understood to be in exercise of powers vested in the Apex Court under Article 142 of the Constitution. That apart, in Board of the Trustees, Port of Kolkata (supra), the Kolkata Port Trust had, on its own, agreed to grant a fresh lease to the purchaser of the assets of the Company in liquidation and what was really disputed by it before the Apex Court is whether such lease is to be granted as per the schedule of rates in force or the rates stipulated in the earlier lease which stood terminated by the liquidation of the Company. The aforesaid decision of the Apex Court in Board of the Trustees, Port of Kolkata (supra), particularly, the approval by the Ape

x Court of the direction of the High Court to grant a fresh lease, will, therefore, not permit this Court to act in a similar manner. M/s Scrapt Traders, therefore, will have to seek its legal remedies, if it is so advised, beyond the provisions of the Companies Act, 1956.

22. In view of the discussions that have preceded and for the reasons alluded, Company Petition No.16 of 2006, Company Appeal No.1 of 2006, Misc. Case No.1256 of 2006, Misc. Case No.2772 of 2006 and Misc. Case No.2771 of 2006 shall stand disposed of in terms of the directions and observations contained herein above .