



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on : 07 May 2024**
Judgment pronounced on : 05 July 2024

+ **CO.PET. 292/2004**

PACIFIC CONVERGENCE CORPN LTD.Petitioner
Through: **Mr. Y.P.Narula, Sr. Advocate**
with Mr. Abhay Narula,
Advocate for Canara Bank.

versus

DATA ACCESS (INDIA) LTD. Respondent
Through: **Mr. Sandeep Sethi, Sr.**
Advocate with Ms. Riya
Kumar, Ms. Pallavi Shali, Ms.
Shambhavi Mishra and Mr.
Sumer Dev Seth, Advocates for
SMS Textiles.
Mr. D. Bhattacharya, Standing
Counsel for OL.

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

CO.APPL. 1864/2011, CO.APPL. 3176/2016

1. The above-noted applications have been moved on behalf of the applicant – SMS Textiles Limited, under Section 446 of the Companies Act of 1956¹, read with Rule 9 of the Companies (Court) Rules, 1959, seeking directions against the Official Liquidator to handover vacant possession of the property situated at Plot No. 43/6, Block No.E, as per the layout plan of Okhla Industrial Area Phase-II, New Delhi, measuring approximately 622.50 sq. yards (hereinafter referred to as the '*property in question*'). In CO.APPL. 3176/2016, the

¹ The Act



applicant has also sought direction to the Official Liquidator to make payment of compensation of Rs. 5 lacs per month since the date of possession of the property in question.

2. Briefly stated, it is the case of the applicant that it had purchased the property in question for a valuable consideration of Rs. 1,35,00,000/- from M/s. Jasai Exports Private Limited through its Managing Director – Mrs. Guljit SP Singh, by way of a registered Sale Deed dated 14.03.2005. Further, it is stated that the company (in liquidation) – Data Access (India) Ltd. (hereinafter referred to as 'DAIL') was a tenant of the erstwhile owner, from whom the applicant purchased the property in question. The lease deed (titled as a "License Deed") entered into between original owner of the property in question and the company (in liquidation) is dated 02.06.1999 (Annexure A-2 in CO.APPL. 3176/2016) and extends for a maximum term of 9 years. A perusal of the same suggests that the company (in liquidation) was granted permission to use the basement and first floor of the factory premises to carry out its business activities.

3. A company petition seeking winding up was instituted against DAIL and *vide* order dated 26.10.2004, a Provisional Liquidator was attached to the company, and thereafter, *vide* a detailed order dated 18.11.2005, the company was ordered to be finally wound up and the Official Liquidator was appointed as its Liquidator, with the direction to take charge of the assets and effects of the company. In doing so, the Official Liquidator also took possession of the property in question and sealed the premises on the basis of the fact that the movables and records of the company were in the premises.



4. Reply dated 21.05.2012 has been filed on behalf of the Official Liquidator wherein it is stated that the averments made in the application cannot be substantiated in the absence of original documents being placed on the record. It has further been contended therein that the Official Liquidator is not liable to pay any compensation/rent/user charges in respect of the property in question.

5. A reply has also been filed on behalf of Canara Bank, a secured creditor of the company (in liquidation), wherein it is contended that the present application is not maintainable as it is not supported by any documents, and that the lease/license deed dated 02.06.1999 relating to the property in question is not a registered document, and therefore, cannot be relied upon. It is further stated therein that the applicant has no *locus standi* in the present matter as the applicant is not the original owner of the property in question, with whom the company (in liquidation) entered into the concerned lease/license deed. In this regard, it is stated that the applicant can move an appropriate Civil Suit seeking possession subsequent to being granted permission of this Court under Section 446 of the Companies Act, 1956.

6. Additionally, it is submitted that in view of the larger conspectus of the winding up petition pending against the company (in liquidation), it is rather claimed that the property in question be attached in these liquidation proceedings and be duly auctioned so as to recover the amounts which are alleged to have been transferred fraudulently by one Mr. K.C. Palanisamy. In this regard, the non-applicant/Bank has placed reliance on certain search records sought



from the Registrar of Companies (Annexure-B to the Reply dated 01.01.2013) and it is stated that the said records reflect that the property in question belongs to Mr. K.C. Palanisamy, and further, that the said property was purchased by him using the funds he diverted from the company (in liquidation). It is urged that this is an attempt to take possession of the property which has been purchased using the funds of the company sought to be wound up.

ANALYSIS & DECISION:

7. I have given my thought consideration to the contentions raised by the rival parties and have also meticulously perused the record of the present applications as also these winding up proceedings.

8. First things first, it would be apposite to consider the observations made by this Court during the course of hearings accorded in the present petition for winding up, specifically the observations that pertain to the diversion of funds by the Ex-Management as also the fraud played upon the Canara Bank, being the secured creditor of the company (in liquidation) *vide* order dated 18.11.2005, which read as under:

“63. Admitted facts are that since the bank/consortium had to receive substantial amount, on 9th July, 2004, the company sent a letter to the bank informing that it was arranging a sum of Rs.75 crores to Rs.125 crores from an investor in order to augment the working capital and improve the cash flow. Thereafter, *vide* letter dated 23rd July, 2004 the company requested the bank to open a no lien escrow account in the name of the company for repayment of proposed loan of Rs.75 crores to the investors in 60 monthly installments. Accepting this request, the bank opened an escrow account in the name of the company on 24th July, 2004. Thereafter, two letters dated 12th August, 2004 were received by the bank from Mr.Ray and Mr. R.Karunanidhi and other signed by Mr. K.C. Palaniswamy. These were with regard to investors fund of Rs.75



crores and it is clear from these letters that the companies, namely, KCPAHL and CHPL were the notified investors and the amount receivables from M/s Data Access America on account of services rendered had no connection with the same. It was followed by letter dated 18th August, 2004 from the company seeking permission for opening a current account with ABN AMRO Bank, Chennai to facilitate the smooth transfer of funds in the minimum possible time. It was also mentioned that the funds need to be transferred immediately to the bank. From the said letter it is apparent that the investors viz. CHPL and KCPL were having an account with ABN AMRO, Chennai and that the money was to be transferred from one account to the other in the same branch. The said letter never indicated that the investor money was to be received from a foreign party in foreign exchange by the company. The letter dated 18th August, 2004 only indicated that the transaction was within India and was obviously in Indian rupees and there was no indication or mention of any remittance of foreign exchange by any foreign company. It is clear from the letter that the investor money was to be deposited with Canara Bank and for which escrow account was opened by the bank. The bank accordingly granted permission for opening of the account.

69. No doubt the company has tried to give its own version and hue to the entire transaction and dubbing the receipt of funds in the company's account as an error. However, the admitted facts are:

(a) The amount was received in the account of the company maintained with ABN AMRO Bank.

(b) The amount was received through its subsidiary Data Access America Inc.

Whether it was a loan given by Odyssey Re, that too with conditions, is a matter which needs a thorough probe. It is also possible that as Data Access America has to make substantial payments to the company, it borrowed the money from the said parties for making payment to the company.

(c) Although it is alleged that the money was to be given by way of loan by CHPL/Odyssey with certain conditions, even when this money was received on 18th August, 2004, the correspondence on record which is highlighted by the bank shows that much after this date also there were discussions about the investors infusing Rs.75 crores indicating that such a money has yet to come.

(d) This can be inferred from the shareholder's agreement dated 26th August, 2004, consortium meeting dated 7th September, 2004 and follow up letters dated 16th, 17th and 21st September, 2004 received by the bank. Even in reply dated 19th November, 2004 counsel for company M/s Dua Associates did not refute the



allegation of the bank that money was received from Data Access America Inc.in the account of the company.

(e) Although as per the representations made, investors were to infuse Rs.75 crores, money received is US \$ 17 million i.e. Rs.78.45 crores.

(f) After receiving the amount, the ABN AMRO filed inward remittance certificate with RBI on 19th August, 2004 i.e. the same date declaring that the remittance was received in the account of the company against the outstanding bills of services rendered.

(g) No permission of RBI has been obtained by any party for lending foreign exchange to an Indian company.

70. That apart, allegations of the bank need serious consideration that pursuant to the orders of this Court, ABN AMRO Bank had filed its affidavit which clearly shows that after receiving the amount in accounts of the respondent company, the same were transferred on different dates in to the account of Cheran Holding Pvt. Ltd. and on its sister concerns. On the filing of C.A. 36/05 by CHPL, it became apparent that the present management of the Company is fraudulently and illegally keeping the amount with its other companies, which is the security of the Bank and which was received in the account of the Company from Data Access America towards payment of its dues. Further serious allegation made by the bank is that the company has tried to fabricate further documentation to fill in lacunas in the false story set up in CAs No.35 & 36/2005 and in order to place the said documents on record, affidavit was filed in CA No.179/2005.

72. Interim order dated 17th December, 2004 is accordingly Consequence would be that the amount which has been transferred from ABN AMRO Account No.1014374 of the company to CHPL and other companies shall be remitted back by those parties to the account of the company maintained with ABN AMRO Bank. Needful in this respect shall be done within two weeks. After receiving this amount the ABN AMRO Bank shall remit this amount to Canara bank. It is because of the admitted liability of the bank and charge of the bank over this money. Furthermore, in case it is found ultimately that the money is to be refunded to Odyssey Re etc., appropriate orders can be passed directing Canara Bank to refund the amount and the bank has sufficient means to carry out such directions. Appropriate order shall be passed in the company petition as to how this amount is to be dealt with depending on the nature of the final orders passed in the company petition.”

9. A perusal of the above observations as also on an overall reading of the order dated 18.11.2005 brings out that subsequent to



permission having been granted by the Canara Bank, the company (in liquidation)/DAIL wrongfully and illegally received a sum of Rs. 78.45 Crores (17 million US Dollars) from its foreign subsidy Data Access America ('DAA') on 19.08.2004 in an account opened with ABN AMRO Bank, which was done without informing the bank. Thereafter, the Ex-Management of the company (in liquidation) diverted the funds received from its foreign subsidy, to its sister concern namely, M/s. Cheran Holding Pvt. Ltd. (CHPL), which was further diverted by the Ex-Management to four other sister concerns, the relevant details of which are as under:

- a. On 19.08.2004 i.e., on the same day, transferred Rs.35,30,46,482/ to the account of M/s Cheran Enterprises Pvt. Ltd (CEPL).
- b. On 19.08.2004 i.e., again on the same day, transferred 18,05,00,000/- to the account of M/s KCP Associates Holdings (KCPAH).
- c. On 28.10.2004 i.e., again on the same day, transferred Rs. 25,00,000/- to Sporting pastime India Ltd.
- d. Out of the amount transferred to KCPAH the management of the Respondent Company transferred Rs.18.03 Crores to Syndicate Bank on 20.08.2004.

10. It has been submitted on behalf of Canara Bank that the entire amount of Rs. 78.45 crores, which was illegally diverted, along with due interest, has not been repaid. It is pertinent to mention that the order dated 18.11.2005 was challenged by Cheran Holdings Private Limited in CO. APPL 3/2006 as also by Sporting Pastime India Limited in CO. APPL. 5/2006 before the Division Bench of this Court, which came to be dismissed *vide* order dated 20.11.2009. It would not be out of place to mention that several applications were filed by the parties involved in the present proceedings and the same



were decided by the then learned Company Judge (as his Lordship of the Supreme Court was then) *vide* order dated 21.01.2011, whereby the following directions were passed:

“36. Keeping in view the aforesaid facts, the following directions are issued:-

(1) All bank accounts and deposits of CEPL, CHPL, SPIL and KCPAHPL are hereby attached. No payments will be made from the said bank accounts except with the permission of the Company Court. the aforementioned companies are also restrained from selling, disposing of or creating third party interest in respect of movable and immovable assets.

(2) Managing Director/principal officer of CEPL, CHPL, SPIL and KCPAHPL will file affidavits in the Court within fifteen days furnishing the following details:

- (a) Account numbers and details of the banks including details of fixed deposits and other deposits.
- (b) Details of movable and immovable assets including shares.
- (c) Names and addresses of the directors.”

11. It was submitted by the learned Standing Counsel for the Official Liquidator that the aforesaid directions *vide* clause (2) have not been complied with.

12. In the said backdrop, it is also manifest that there has been diversion of funds from the company (in liquidation) to the tune Rs. 78.45 crores, at the behest of the mastermind Mr. K.C. Palanisamy. Evidently, the lease/license deed dated 02.06.1999, entered into between DAIL and M/s. Jasai Exports Pvt. Ltd. was registered. A perusal of the record also shows that the applicant has not placed on the record the certified or attested copy of the registered sale deed dated 14.03.2005, by way of which it is stated to have purchased the property in question from the original owner. The copy of the License



Deed whereby the property in question is alleged to have been leased out to the respondent company (in liquidation) dated 02.06.1999 reserving payment of license fee of Rs. 80,000/- for use and occupation of the premises with provision for increase etc. has not been placed by the applicant on the record and the same has been placed on the record by the respondent/Canara Bank. Evidently, it is not a registered document either.

13. Further, learned counsel for the respondent/Canara Bank has pointed out that the name of the applicant company has since been struck off from the Register of Companies by the Ministry of Corporate Affairs as per the copy of the Master Data placed on the record as on 14.12.2023 at 12:05:05 p.m. Although, learned counsel for the applicant vehemently urged that an application has already been moved for revival of the company on 01.04.2024, the said fact was not disclosed while moving the present application. The authority of Mr. Piyush Kumar, who has filed the application as Authorized Representative of the Board has not been explained. No resolution of the Board of Directors has been placed on the record. Apparently, the sale deed dated 14.03.2005 has been executed after appointment of Provisional Liquidator by this Court *vide* order dated 26.10.2024.

14. As pointed out by the learned counsel for Canara Bank, a perusal of the Master Data from the Ministry of Corporate Affairs as on 14.12.2023 would show that the registered address of the applicant company is at Cheran Towers, 6/25, Arts College Road, Coimbatore-641018, Tamil Nadu, which happens to be the registered address of the sister concern of the company (in liquidation) viz., Cheran



Holdings Private Limited. It is also pointed out that no documents have been placed on the record which would indicate as to how the amount of sale consideration paid for the property in question was generated, considering that the paid-up capital of the applicant company is meagerly Rs. 5,35,000/-. It is also pertinent to mention that the father of Mr. K.C. Palanisamy has been one of the Directors of the applicant company and as per the documents placed on the record, 95.33% of the shareholding of the company is owned by the wife of the kingpin Mr. K.C. Palanisamy.

15. Before parting with the instant applications, the decision in the case of **Ravindra Ishwardas Sethna v. Official Liquidator**² cited by the learned Senior Counsel for the applicant to the effect that the Official Liquidator does not require the premises in question for beneficial winding up of the company (in liquidation) does not cut any ice. Likewise, the decision of the Karnataka High Court in the case of **Shri N.R. Ravi v. The Official Liquidator**³ as well as the decision of the Bombay High Court in the case of **Eleganza Furnishings Private Limited v. The OL of Zenith Infotech Limited**⁴, are clearly distinguishable, wherein it was held that where the premises is belonging to a third party, which was leased to the company (in liquidation), then the Official Liquidator would be required to make payment of rent to such third party land owners as costs of winding up. Reliance on the decisions in **Md. Noorul Hoda v. Bibi**

² (1983) 4 SCC 269

³ Company Application No. 8 of 2015 dated 30.06.2022

⁴ 2015 SCC OnLine Bom 6277



Raifunnisa⁵ and Abdul Rahim v. Sk. Abdul Zabbar⁶ to the effect that the title deed in favour of the applicant company has not been annulled or declared to be *non est* by any Court of law in terms of Article 59 Schedule 1 of the Limitation Act, 1963, do not apply to the issues that have been raised in the present matter. On the other hand, though the applicant company is a separate legal entity, having regard to the manner in which the funds have been siphoned off, as detailed in the foregoing part of this order, provide compelling reasons to lift or pierce the corporate veil of the applicant company and look into the persons who are the real beneficiaries.

16. In view of the aforesaid facts, unhesitatingly, this Court finds that there are sufficient grounds to raise an inference that the applicant company is a shell company of the company (in liquidation) and its mastermind Mr. K.C. Palanisamy. It is manifest that the applicant company has not come to the Court with clean hands, and therefore, the reliefs claimed cannot be granted.

17. In view of the foregoing reasons, the present applications moved by the applicant company, namely SMS Textiles Limited, are hereby dismissed.

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18. Re-notify on 18.07.2024.

DHARMESH SHARMA, J.

JULY 05, 2024

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⁵ (1996) 7 SCC 767

⁶ (2009) 6 SCC 160