

(2013) 05 DEL CK 0307
In the Delhi High Court
Case No : Co. Petition No. 59 of 2002

Empire Trading Co.

APPELLANT

Vs

Express Hi-Tech Pvt. Limited

RESPONDENT

Date of Decision : 08-05-2013

Acts Referred:

Companies Act, 1956 — Section 125, 130, 433(c)(e)(f), 434(1)(c)(b), 439
Sales of Goods Act, 1930 — Section 20
State Financial Corporations Act, 1951 — Section 29, 29(1), 29(1), 29(5), 31

Citation : (2013) 200 DLT 748

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Raman Kapur, with Mr. R.P. Singh and Mr. Ankur Gosain, for the Appellant; Sandeep Agarwal and Mr. Rajesh Pathak, Advocates for PICUP and Mr. Rajiv Bahl, Advocate for the Official Liquidator, for the Respondent

Judgement

S. Muralidhar, J.—This judgment disposes of C.A. Nos. 477 of 2005 and 2385 of 2013 in Co. Pet. No. 59 of 2002.

Background Facts

The background to these applications is that the Petitioner, Empire Trading Co. ("ETC"), through its Sole Proprietor, Mr. Mohd. Yamin, filed Co. Pet. No. 59 of 2002 in this Court on 4th February 2002 under Sections 433(c) (e) (f) and Section 434(1) (c) (b) read with Section 439 of the Companies Act, 1956 ("Act") seeking the winding up of the Respondent, Express Hi-Tech Pvt. Ltd. ("EHPL"), which had its registered office in New Delhi. EHPL was established with the object of manufacturing automobile parts. It had a factory at A-85, UPSIDC Industrial Area, Sikandarabad, Bulandshahr in Uttar Pradesh.

2. According to ETC, about 3 to 4 years prior to the filing of the winding up petition, the factory of EHPL at Sikandarabad was lying closed. ETC claims that on 14th November 2000 EHPL through Mr. V.P. Rai, its Director, entered into a verbal agreement with ETC for sale of its plant and machinery including scrap,

dye blocks, crane, gantry, cables-ferrous and non-ferrous, generators, electrical parts, etc. (hereafter referred to as "goods") located at the factory premises of EHPL at Sikandarabad for a sum of Rs. 32,00,000. ETC claims to have paid EHPC a sum of Rs. 15,00,000 between 14th November 2000 and 7th February 2001 as part payment of the above consideration. ETC claims that subsequently a written agreement dated 7th February 2001 was executed between the parties. A copy of the said Agreement is enclosed with the petition as Annexure-P1 (later marked as Exhibit PW1/8).

3. In terms of the said Agreement, signed by Mr. V.P. Rai as Director of EHPL (described as Seller) and Mohd. yamin as Proprietor of ETC (described as Purchaser) the latter was to purchase the goods for a total sale consideration of Rs. 32,00,000. The Agreement noted in Clause 2 that the Seller had received Rs. 15,00,000 as an advance and part payment from the Purchaser. The break-up of the sum of Rs. 15,00,000 was set out as under:

Mode of Payment

Date

Amt.

In Favour

A) DD 053423

14.11.00

3.30 lac

PICUP

B) Cash

14.11.00

2.70"

C) DD 324380

26.12.00

4.00"

Trade Tax Officer Sikandrabad

D) Cash

26.12.00

0.50"

E) DD 324420

07.02.01

1.00"

SBI A/c Express Hi-tech Pvt. Ltd.

F) DD 324419

07.02.01

1.00"

Trade Tax A/c Express Hi-tech Pvt. Ltd.

G) Cash

07.02.01

2.50"

Total

15.00 Lac"

4. Clauses 3 and 4 of the Agreement read as under:

3. That the balance amount of Rs. 17.00 lacs shall be paid by the purchaser after getting clearance by PICUP Trade Tax Office, SBI and other creditors who has lien on abovesaid factory seek by the seller within the month of Feb. 2001.

4. That any delay in seeking clearance by the seller within stipulated time purchaser shall charge security expenses and the intt. On the said amount paid to the seller from the 1st date of payment and the same shall be adjusted towards balance payment.

5. It is not in dispute that the payment of Rs. 3.30 lacs by way of demand draft ("DD") was made on 14th November 2000 to The Pradeshia Industrial and Investment Corporation of U.P. Limited ("PICUP"). According to ETC when the said payment along with a cash payment of Rs. 2.70 lacs was made to EHPC, the property in the goods passed on to ETC immediately. Alternatively, it is submitted that the property in goods passed to ETC when the written Agreement was executed on 7th February 2001. Reliance is placed on Section 20 of the Sale of Goods Act, 1930 ("SGA"). It is submitted that the requirement under Clause 3 of the Agreement of obtaining clearance from PICUP had nothing to do with the passing of the property in the goods. It is stated that ETC immediately appointed one of its employees as security personnel to prevent removal of goods from the factory premises of EHPL. It is further pointed out that Clause 4 of the Agreement acknowledged this fact by stating that in the event that there was delay in obtaining clearance from PICUP, the Trade Tax Officer ("TTO"), State Bank of India ("SBI") and other creditors, the expenses of the security personnel and the interest on the amount paid would be charged from the Seller.

6. ETC's case is that Mr. V.P. Rai assured that the amounts set out in the Agreement were the only ones payable by EHPL to its creditors. It is contended

that a representation was made to ETC by EHPL that a bank guarantee ("BG") in the sum of Rs. 10,00,000 had to be furnished to the TTO. No bank was willing to issue such guarantee unless a fixed deposit ("FD") of the like amount was placed with the bank. ETC states that as a result it paid Rs. 10,00,000 by way of cash to EHPL to enable it to get a BG issued in its favour. A receipt dated 29th June 2001, issued by Mr. V.P. Rai, has been marked as Exhibit PW1/9 in these proceedings.

7. It is contended that ETC was obliged to pay Rs. 17,00,000 after 7th February 2001 only after EHPL obtained clearances from PICUP and other creditors. However, a sum of Rs. 14.15 lacs was paid subsequent to that date as a result of "a concession obtained by fraud by the company through its Director, Mr. V.P. Rai." ETC states that when the sole proprietor went to the factory at Sikandarabad to make arrangements for removal of the goods and making the balance payment of Rs. 2.85 lacs, he found the officers of PICUP and Uttar Pradesh Financial Corporation ("UPFC"). The security guards posted by prevented him from removing any goods. The officers informed that they had a charge over the plant and machinery. When Mr. V.P. Rai was contacted, he admitted that PICUP was demanding a sum of Rs. 65.82 lacs as a One Time Settlement ("OTS"). Mr. Rai admitted that UPFC was also claiming a sum of Rs. 45,00,000.

8. In terms of the OTS dated 5th March 2001, EHPL was to pay PICUP a sum of Rs. 9,87,251.99 within one month from the date of the issue of the approval letter. The balance sum of Rs. 55,94,427 was to be paid in two equal installments on 31st May and 30th June 2001. ETC states that it wanted to avoid disputes with PICUP and by a letter dated 14th January 2002 it wrote to PICUP enclosing a DD for a sum of Rs. 1.32 lacs as earnest money offering to purchase the unit, i.e. the land, factory, building and machinery, for Rs. 70.10 lacs. Rs. 40 lacs was to be paid as cash down payment and the balance within six months thereof. ETC contends that the said offer did not affect its claim to the goods in which the property had already passed to it on 14th November 2000. It is stated that although PICUP had fixed 24th January 2002 for acceptance of the offer and required ETC to remain present, the sole proprietor of ETC could not do so due to his illness. On 25th January 2002 PICUP accepted a higher offer for Rs. 71 lacs given by another bidder M/s. Ashok Goyal & Associates, which was only marginally higher than Rs. 70.10 lacs offered by ETC. ETC alleges that Mr. V.P. Rai and his family members have committed a fraud. ETC claims to be "a contingent and prospective creditor" of EHPL. It is in the above circumstances that the petition seeking the winding up of EHPL was filed by ETC.

Proceedings in this Court

9. Notice was issued in the petition on 12th February 2002. On the same date, notice was issued also on CA No. 170 of 2002 for the impleadment of PICUP as a party. On 3rd May 2002, the Court passed the following order:

No reply has been filed in spite of time granted on 17th April 2002. Last opportunity of four weeks is granted to file reply. Rejoinder, if any, be filed within four weeks thereafter. The petitioner is already protected by the order dated 26th February 2002 by which the respondent company was directed to secure its assets worth Rs. 30,00,000. Learned counsel appearing for PICUP/applicant states that he will secure the amount up to the next date of hearing. He further states that the PICUP is prepared to deposit this amount out of and after the sale proceeds of the land and building of the respondent company. In the interest of justice and to safeguard the interest of the petitioner, the applicant PICUP is permitted to complete the sale of the company's land and building as prayed in this application subject to deposit of a sum of Rs. 30,00,000 in this Court within eight weeks from today.

The amount so deposited may be invested in a short term fixed deposit by the Registrar of this Court pending further orders.

With the consent of the parties the date fixed i.e. 16th May 2002 is cancelled. List on 31st July 2002.

Dasti to the counsel for the applicant.

10. On 31st July 2002, the following order was passed:

It is confirmed that the property in question has been sold. Learned counsel for the Petitioner states that the Bank draft No. 039998 dated 25.7.2002, drawn on Bank of Patiala, Branch Code 5-643 SBP-Lucknow (PICUP) in the sum of Rs. 30,00,000 in the name of Registrar of Delhi High Court has been brought to the Court. He is directed to deposit it with the Registrar of this court in the course of the day.

Adjourned to 25.10.2002.

11. On 11th December 2002, the Company Court passed a detailed order in which, after noting the contentions of the parties, the Court concluded as under:

There is no doubt that the Respondent company had received a sum of Rs. 29.15 lacs from the Petitioner and that the sale was not completed owing to reasons not attributable to the Petitioner. The sale was allowed by the Court, keeping in view the claims of the present Petitioner who should not be made to suffer a huge loss for no fault of its own. There appears to be no substance in the contention of the PICUP that the ulterior motive to defer the sale, which has subsequently been permitted by this Court to be finalized.

In these circumstances, the Registrar-General of this Court is directed to release a sum of Rs. 29.15 lacs to the Petitioner and return the balance sum of Rs. 85,000 to the PICUP.

The Petition and the pending applications are disposed off in these terms.

Appeal before the Division Bench

12. Aggrieved by the above order, PICUP filed Co. Appeal No. 71 of 2002 in which notice was issued on 17th December 2002. An interim order was passed by the Division Bench ("DB") directing that the sum of Rs. 29.15 lacs shall not be released unless ETC furnished a BG to the satisfaction of the Registrar-General ("RG") of this Court.

13. Subsequently, on 12th May 2003, the DB partly set aside the order dated 11th December 2002 of the Company Court by the following order:

Impugned order dated 11.12.2002 is affirmed to the extent that release of Rs. 29.15 lacs to respondent No. 1 on furnishing of the bank guarantee for this amount and of Rs. 85,000 to Appellant shall be subject to rights and contentions of Appellant in C.P. No. 59/02. The direction to dispose of C.P. shall stand set aside. This petition shall revive and be re-considered and disposed of by the learned Company Court afresh under law.

Proceedings on remand to the Company Court

14. On 5th November 2003, ETC informed the Court that it had furnished a BG to the satisfaction of the RG and had withdrawn the sum of Rs. 29.15 lacs. The Company Court directed that the BG should be kept alive till the disposal of the company petition.

15. On 8th July 2004, the Company Court decided to wind up EHPL even while setting down the dispute concerning Rs. 29.15 lacs for hearing on 6th October 2004. In other words, a formal admission of Co. Pet. No. 59 of 2002 and the winding up order of EHPL was passed by the Company Court only on 8th July 2004.

16. Another formal order to that effect was passed on 4th February 2005. It was at that stage that CA No. 477 of 2005 was filed by ETC u/s 446 (2) (b) of the Act for a direction to PICUP to pay a sum of Rs. 71,00,000 received by it from selling the goods of EHPL together with 25% addition being the profit payment to have been made by the purchaser from PICUP minus Rs. 29.15 lacs already deposited by it. In the alternative, it was prayed that the Court may grant ETC "such lesser relief as it may be found entitled to. The contention of ETC in its application was that it was a contingent and prospective creditor of EHPL for a sum of Rs. 29.15 lacs being the price of the goods which had been agreed to be sold to it for a sum of Rs. 32,00,000. ETC claimed to be bonafide purchaser ready to pay the balance sum of Rs. 2.85 lacs for removal of the goods. ETC further claimed that it was also a "secured preferential creditor" of EHPL and had a right over the goods in the property which had passed to it. It was contended that in any case ETC had a lien over the goods and that the charge was not inferior to any other charge. It was contended that the sale conducted by PICUP was "wrong, illegal and void". The participation by ETC in the sale and making of an offer by it did not validate the inherent illegality of the sale. It was stated that there was no hypothecation or assignment of the goods. They were not pledged with PICUP or UPFC or even mortgaged. The possession of the goods remained with EHPL. It

was contended that the hypothecation as a concept was not recognised under the Indian Contract Act 1872 ("ICA") and that that Section 29 of the State Financial Corporation Act, 1951 ("SFC Act") was "an incomplete provision." It was submitted that ETC was an innocent purchaser without notice and was duped by Mr. V.P. Rai into believing that only Rs. 3.30 lacs was due to PICUP and the said sum was paid by ETC. It is stated that PICUP knowing fully that ETC was a third party making payment for the purpose of purchasing the goods failed to apprise ETC about PICUP's claim "and thus became party to the fraud by silence when it was under duty to inform" ETC about its claim. It was further contended that no signboard was placed outside the factory of EHPL stating that the possession thereof had been taken over by PICUP. It is further contended that the provision of Section 537 of the Act would be attracted since the winding up petition was filed even before the process of sale was complete and that the proceedings under the SFC Act would be subject to Section 537 of the Act.

17. In its reply to the above application PICUP contended that ETC, in collusion with Mr. V.P. Rai, was trying to recover Rs. 29.15 lacs by way of the present application by showing itself to be a secured creditor. The fact that EHPL had not entered appearance despite notice served upon it, made this collusion apparent. It is denied that ETC is a secured creditor and is entitled to any amount from the sale proceeds. It is pointed out that the agreement was only between Mr. V.P. Rai and Mr. Mohd. Yamin and not an agreement between ETC and EHPL. It is also pointed out that PICUP also filed a claim before the Official Liquidator ("OL").

18. CA No. 1181 of 2006 was filed by ETC for framing of issues. Both the said applications, i.e., CA No. 1181 of 2006 and 477 of 2005 were heard at length by the Company Judge. On 4th October 2006, the Company Court disposed of CA No. 1181 of 2006 observing that issues were not required to be framed since the pleadings of the parties were sufficient to dispose of the case. However, if while disposing of the main petition the Company Court felt that the issues were required to be framed or the parties should lead evidence, it would so be directed. Thereafter, the Company Court by a detailed order proceeded to dispose of CA No. 477 of 2005. It was held by the Company Court that ETC was fully aware that the goods it wanted to purchase were already "charged and secured with PICUP" and that unless clearance is obtained from PICUP, EHPL could not sell the goods even under the Agreement dated 7th February 2001. Further, since PICUP never entered into an agreement with ETC, there was no breach of agreement by PICUP. Further, the OTS dated 5th March 2001 was clear and unequivocal. EHPL could not have sold the assets before making the down payment of Rs. 9,87,251.99. The payment of Rs. 3,30,000 by ETC to PICUP did not give rise to any equity in its favour. The balance of Rs. 11.70 lacs was never made to PICUP. Further, PICUP could not be held liable for the fraudulent actions of Mr. V.P. Rai. In the circumstances, the Company Court by the order dated 4th October 2006 directed ETC to deposit Rs. 29.15 lacs in the Court within a period of one month and upon such deposit being made, it would be released to PICUP.

Second round before the Division Bench

19. Aggrieved by the aforementioned order dated 4th October 2006, ETC filed Co. Appeal No. 65 of 2006 in which notice was issued on 4th December 2006. The operation of the order dated 4th December 2006 was stayed subject to ETC depositing Rs. 29.15 lacs within six weeks which amount, when deposited, would be kept in an FD.

20. Co. Appeal No. 65 of 2006 was allowed by the DB by an order dated 30th May 2008. The DB discussed Section 29 of the SFC Act and the decision of the Supreme Court in *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, It was concluded that Section 29 made it explicit that "where a State Financial Corporation takes any action against an industrial concern, pursuant to the provisions of Sub Section (1) of Section 29 of the State Financial Corporation Act, it shall thereupon be deemed to be the owner of the industrial concern instead of the industrial concern, inasmuch as, it can sue or be sued, in the name of the concern, in all pending or future litigation." The DB further summarized a legal position as under:

(a) A money claim for and on behalf of or against a company in liquidation does not necessarily have to be instituted by a suit and that it can be made alternatively by a petition under Clause (b) of Section 446(2) of the Companies Act 1956.

(b) A dispute relating to the nature of the debt and interest and priority or its preferential nature in relation to other creditors of the company is a matter which has to be decided by the Company Court and cannot be adjudicated upon by the Official Liquidator.

(c) In a proceeding relating to a claim against a company in winding up if the facts raise disputes of a serious nature, the failure to frame issues is a material irregularity if it results in prejudice to a party

(d) Distribution of assets of a company under liquidation can only be in terms of Section 529 read with Section 529-A of the Companies Act under the control, supervision and directions of the Company Court.

(e) A State Financial Corporation is liable to be sued in place of an industrial concern, for a claim against that industrial concern, pursuant to any action taken by the SFC" u/s 29(1) of the SFC Act.

21. After noting the contentions of the Appellant, the DB held that the refusal of the Company Court to frame issues amounted to "a material illegality affecting the disposal of the case on merits." It was further held that the Company Court had erred in coming to the conclusion that since PICUP had no privity of contract with ETC, it could not be held responsible for any acts of omission or commission by EHPL. It was held that "under the provision of the SFC Act PICUP could be liable, even if it was only to the extent that the assets and property of the Company under liquidation came into its hands and subject to its disposal."

Consequently, the judgment dated 4th October 2006 of the Company Court was set aside and the matter was remitted to the Company Court for disposal in accordance with law. The following directions were issued:

The claim of the appellant will be posted for framing of issues and recording evidence followed by adjudication on the basis of the evidence adduced at the trial by the parties. The amount of Rs. 29.15 lacs, deposited by the appellant in this Court, shall be kept in a fixed deposit to earn maximum interest for a period of one year to enure to the benefit of the successful party.

22. It may be mentioned that by an order dated 8th May 2009, it was directed that a sum of Rs. 29.15 lacs, which had been placed in an FD, should be kept renewed till further orders.

Issues framed by the Company Court

23. On 13th July 2009, the Court passed the following order:

Co. Appl. Nos. 477/2005, 323/2006 and 1181/2006 in Co. Pet. No. 59/2002

Proposed issues have been filed by the petitioner as well as by M/s. PICUP and the Official Liquidator. Following issues are framed:

1. Whether the PICUP is an unsecured creditor? O.P.P.
2. Whether hypothecation of goods by company (in liqn.) makes PICUP a secured creditor (onus on PICUP)?
3. Whether hypothecation of goods is not recognized by law in India? If so, to what effect? O.P.P.
4. Whether the word "hypothecated" in sub-section (1) of Section 29 of State Financial Corporation Act do not create any enforceable lien or give any right to the creditor until possession of moveable property is taken over by the Financial Corporation? O.P.P.
5. Whether on the date of entering into an agreement to sell dated Nil with the company (in liqn.), the Petitioner was not aware that the company had already hypothecated its assets to PICUP? O.P.P.
6. Whether the said agreement between the Petitioner and the company (in liqn.) is binding on PICUP? O.P.P.
7. Whether the plant and machinery were sold by the company with the permission of PICUP? If so, to what effect? O.P.P.
8. Whether the Petitioner paid Rs. 29.15 lacs to the company (in liqn.) for purchasing its plant and machinery? O.P.P.
9. Whether the Petitioner is entitled to recover Rs. 29.15 lacs from PICUP being an amount received by PICUP after selling the plant and machinery in question? O.P.P.

10. Whether the petitioner had taken physical possession of the goods and appointed its own watch and ward security for its protection and PICUP forcibly deprived the petitioner of the said goods by misusing its position as an instrumentality of State, if so, its effect? O.P.P.

11. Whether Section 29 of the State Financial Corporation Act by allowing a creditor to take possession of hypothecated goods does not convert hypothecation into a pledge and if so, was the PICUP not required to approach the court designated by the Act for enforcement of its lien by way of hypothecation? O.P.P.

12. Whether the property in goods had passed to the Petitioner and it became the owner thereof before PICUP converted its hypothecation into a pledge? O.P.P.

13. If the property in goods did not pass to the Petitioner whether the consideration of Rs. 29.15 lacs paid by the Petitioner to the company in liquidation was trust money and did not become the property of either the company or PICUP and therefore, the Petitioner is entitled to the same?

14. What is the effect of Petitioner paying Rs. 3.30 lacs by a bank draft to PICUP? O.P.P.

15. Whether the Petitioner is entitled to recover the loss of profit @ 25% from PICUP? O.P.P.

16. Relief.

No further issue arises or is claimed by any of the parties.

The petitioners may file affidavit by way of evidence within six weeks.

List the matter before the Joint Registrar concerned for further proceedings including the Exhibition of admitted documents etc. on 7th September, 2009.

The matter may be placed before this Court for cross-examination on 20th November, 2009.

24. Thereafter, the affidavit dated 6th May 2010 by way of evidence of Mr. Mohd. Shah Alam, son of Mr. Mohd. Yamin, was filed. He was cross-examined on 19th October 2010. In view of the fact that issues were framed, CA No. 1181 of 2006 did not survive and was disposed of as such. Subsequently, the OL filed CA No. 2385 of 2012 u/s 481 of the Act for dissolution of EHPL.

Submissions of Senior counsel for ETC

25. Mr. Raman Kapur, learned Senior counsel for ETC, reiterated the submissions made in CA No. 477 of 2005. He referred to Section 20 SGA and submitted that the property in the goods passed to ETC when the verbal contract was entered into on 14th November 2000, and in any event, when the written Agreement was executed on 7th February 2001. He submitted that without PICUP ever being in possession of the goods, it could not claim to have any charge on them. The

Deed of Hypothecation ("DOH") relied upon by PICUP was to no effect. The charges registered with the Registrar of Companies ("ROC") did not create any enforceable right in the goods in favour of PICUP. He referred to Sections 172 to 179 ICA and submitted that only a pledge of movable assets was recognized and for a pledge to be effective there had to be possession of the goods, which obviously PICUP did not have. He submitted that the sale of the goods by PICUP was completed only after the winding up petition had been filed and was therefore subject to the orders of the Company Court.

26. Mr. Raman Kapur submitted that PICUP could not be said to be a secured creditor only because there was a DOH in its favour. Even Section 29 of the SFC Act did not create any enforceable lien till such time the possession of the goods was not with PICUP. Moreover, ETC was an innocent third party purchaser without any knowledge of hypothecation of goods in favour of PICUP. The Agreement between EHPL and ETC had to necessarily be honored by PICUP as well. Referring to the decision of the DB, he pointed that if PICUP chose to invoke Section 29 of the SFC Act, then it was liable for all the actions of EHPL into whose shoes it had stepped into. The property in the goods had passed to ETC even before PICUP converted its hypothecation into a pledge by seeking to take possession of the goods. He reiterated that Rs. 29.15 lacs paid by ETC to EHPL for the goods should now be treated as lying in trust with it and had necessarily be returned to ETC. It could not become the property of PICUP, much less of EHPL. The fact that PICUP accepted Rs. 3.30 lacs from ETC estopped PICUP from denying that ETC had discharged the liability of EHPL to the extent it was informed by EHPL. It was accordingly prayed that a sum of Rs. 29.15 lacs deposited with the Court together with interest accrued thereon should be released to ETC.

Submissions of counsel for PICUP

27. Appearing on behalf of PICUP, Mr. Sandeep Aggarwal disputed the bonafides of ETC. He stated that the transactions evidenced by the so-called Agreement dated 7th February 2001 demonstrated the collusion between ETC and EHPL. He submitted that the Agreement was not between EHPL and ETC but between Mr. V.P. Rai and Mr. Mohd. Yamin in their personal capacities. He submitted that on 22nd June 2000 a notice invoking Section 29 of the SFC Act was issued to EHPL by PICUP and, therefore, the proceedings under the SFC Act commenced on that date much prior to the Agreement dated 7th February 2001. As on that date, the principal amount owing to PICUP was Rs. 65,81,678.97, the interest was Rs. 56,75,242.00 and the interest tax Rs. 11,23,156.97. Mr. Aggarwal questioned the authenticity of the receipts produced by ETC in support of its plea that Rs. 29.15 lacs has been paid to EHPL. He reiterated that PICUP was nowhere concerned with any private arrangement between ETC and EHPL. Referring to Section 29 of the SFC Act as well as the DOH dated 24th January 1990, he submitted that the constructive possession of the goods was throughout with PICUP. At no time had PICUP parted with possession of the goods. In fact, EHPL

was holding the goods as an agent of PICUP. He also referred to the registration with the ROC of the charge created in favour of PICUP both in respect of the land as well as the goods of EHPL in terms of Sections 125 and 130 of the Act. Referring to Clause 3 of the agreement dated 7th February 2001, he pointed out that throughout ETC was aware that the goods were hypothecated with PICUP and could not be sold to ETC without obtaining clearance from PICUP. He referred to the minutes dated 24th January 2002 when negotiations took place in which ETC also participated and made an offer of Rs. 70.10 lacs for the goods as well as the land and building. Therefore, ETC was estopped from contending that it was not aware of the liability owing to PICUP.

28. Mr. Aggarwal submitted that if ETC was defrauded Mr. V.P. Rai, then it has the remedy of proceeding against him under law for fraud and misrepresentation. In fact, no such proceedings have yet been initiated by ETC. As regards the DD of Rs. 3.30 lacs and Rs. 10,000 deposited by ETC in support of its bid, Mr. Aggarwal pointed that since ETC did not turn up ultimately for finalizing the negotiations the land and building as well as the goods were sold to the highest bidder, M/s. Ashok Goyal & Associates for Rs. 71 lacs and the earnest money paid by ETC be returned to it. Immediately, after 24th January 2002, the winding up proceedings were filed on 4th February 2002. Mr. Aggarwal also relied on decisions reference to which will be made hereafter.

Effect of hypothecation of goods in favour of PICUP

29. Central to Issues 1 to 4 is the question whether on account of the hypothecation of the goods of EHPL in its favour PICUP can be said to be a secured creditor? While proceeding to determine the said four issues, the Court first proposes to examine the documents brought on record.

30. On 24th January 1990 titled "Common Loan Agreement" ("CLA") was entered into between PICUP and EHPL. In terms thereof a term loan of Rs. 90,00,000 was advanced by PICUP, Rs. 60,00,000 by UPFC and Rs. 12,00,000 by SBI. The CLA sets out the terms and conditions. Clause 13 (a) provides for the mortgage of the fixed assets of EHPL, on pari passu basis, in favour of the lenders. The fixed assets, both existing and future, included land, building, plant and machinery etc. Clause 14 creates a pari passu charge on the assets. Clause 19 concerns "particular affirmative covenants". Clause 19(d) requires EHPL to ensure that during the currency of the loan, all fixed assets and other assets offered as security would be insured and that until repayment of the loans the amounts shall be treated as a charge on the properties offered as securities.

31. On the same date, i.e., 24th January 1990, a common DOH was executed by EHPL in favour of PICUP. Inter alia, it was agreed under Clause 7 that EHPL would put up at appropriate and conspicuous places in its premises boards which would indicate that the goods were hypothecated to PICUP and "it shall be deemed whenever so required that the said property stands hypothecated with PICUP and UPFC." Clauses 8, 9 and 10 of the DOH read as under:

8. That the PICUP and UPFC shall at all times be and is hereby authorised, as if in absolute possession and without notice to the Borrower by its servants and with or without workmen to enter any part of the said property may be lying or installed to inspect check and value the same at the expense of the Borrower and on any default of the Borrower in payment of any money hereby secured or in the performance of any obligation of the Borrower to the PICUP and UPFC hereunder or in the event of a distress execution attachment or other similar process being held out, levied or enforced against or upon any property of the Borrower or in the event of any winding up or insolvency petition being made or an effective resolution passed for the winding up of the Borrower or on the occurrence of any circumstances in the opinion of the PICUP and UPFC endangering this or any other security in their favour, the PICUP and UPFC on without notice to the Borrower shall be entitled at any time or times to take charge of and/or to sell and realise by public auction or private treaty at such price and on such terms as the PICUP and UPFC in its absolute discretion shall think fit the said property or any part thereof and for the said purposes the Borrower hereby authorises and empowers the PICUP and UPFC through its agents and officers to do and execute any of the above things and acts aforesaid as effectively as if the Borrower was itself doing the same.

9. That the PICUP and UPFC shall be entitled to proceed against the said property or any part thereof and to allocate and apply the net proceeds of any sale or auction and any other moneys in its hands standing to the credit of or belonging to the Borrower on any account independently the one or the other in such order and in such manner as they may think fit in or towards repayment of any amount for the time being payable to them on the said account or otherwise and also apply to hold the same in or towards the satisfaction of any present or future liability and to recover at any time from the Borrower by suit or otherwise the balance remaining payable to the PICUP and UPFC on the said account or otherwise notwithstanding that all or any of the security of the PICUP and UPFC may not have been realized.

10. That the hypothecated property shall be held as the PICUP's and UPFC's exclusive property specially appropriated to this security.

32. Clause 15 of the DOH enabled PICUP and UPFC "at all times and without assigning any reason and without any previous notice" to enter any place where the hypothecated properties were located and to take charge of them. EHPL was obliged to afford every facility for placing the hypothecated property in their exclusive possession and control. The premise of this clause was that PICUP and UPFC were already in constructive possession and could take actual physical possession of the hypothecated goods at any time. Clause 21 read as under:

21. The Borrower shall not, without the written consent of the PICUP and UPFC create in any manner any charge, lien or other encumbrance on the security given to the PICUP and UPFC in respect of such advance or create any interest in such security in favour of any other party or person.

33. Clause 38 permitted PICUP and UPFC to take recourse to the provisions of U.P. Public Moneys (Recovery of Dues) Act, 1972, besides the SFC Act. The schedule to the DOH set out in detail the complete description of the entire assets in the factory of EHPL at Sikandarabad. On 7th February 1990, EHPL registered with the ROC, in Forms 8 and 13 under Sections 125 and 130 of the Act, the respective charges in favour of PICUP and UPFC of the moveable assets in terms of the DOH and the mortgage of immoveable assets by deposit of title deeds.

34.1 The law in regard to hypothecation has been explained in the earlier decisions of this Court which have drawn a distinction between hypothecation and pledge. The earliest of these decisions is Gopal Singh Hira Singh, Merchants Vs. Punjab National Bank and Another, . One of the questions that arose in the said decision was whether the goods hypothecated with the bank could be considered to be in its possession inasmuch as they were kept in the company's godown. The Court noted that the standard cash credit agreement, which included a provision for pledge provided that the pledged goods would remain in possession of the bank even though they may be stored in the godowns which may even belong to the borrower or may be situated within the precincts of the factory of borrower but were under the lock and key of the bank. The Court then observed:

It is true that there is distinction between hypothecation of goods and pledge of goods, in that, the hypothecated goods need not be in the physical possession of the bank but may remain under the actual physical possession of the borrower with a view to enable the borrower to use the same either as raw material or in the process of fabrication of goods or as finished goods. This is a facility granted to the borrower by the banking institutions so that the actual operations of the borrower are not affected. In such cases, the, borrower, is in actual physical Possession but the constructive possession a still of the bank because according to the deed of hypothecation, the borrower holds the actual physical possession not in his own right as an owner of the goods but as the agent of the bank.

34.2 On the facts of the said case the Court found that "the pledged goods throughout were in the exclusive possession of the bank and under the direct care of the banks godown-keeper. The issue is decided accordingly."

35. Later, in Ideal Bank Ltd. (In Liquidation) Vs. Pride of India Pictures Ltd. (In Liquidation) and another, , the question was revisited. In that case only constructive possession of the hypothecated goods was with the Bank. It was contended then, just as it is contended in the present case, that there was no valid pledge because no part of the assets was physically delivered by the company to the Bank. Negating the contention, it was observed by the Court as under:

This contention, however, ignores the provision of the agreement that all the items of security would be "considered to be in the exclusive possession and

under the exclusive control of the bank in such a manner that such possession and control shall be apparent and indisputable". This clearly changed the relationship between the assets and the company and on the execution of the agreement, the company continued to hold the assets not in its capacity as its owner but as a trustee for the bank. This was enough to constitute constructive delivery of the pledged goods to the bank, even though actual delivery was never made. The constructive delivery coupled with the agreement conferred on the bank special property in the pledged goods and the requirements of a valid pledge were, therefore, fully satisfied. In any event, the mortgage of movable property is a recognised form of hypothecation and such hypothecation confers a good title upon the persons in whose favor it is made even in the absence of possession and the law recognises the transaction as security and equity gives effect to it *Pramatha Nath Talukdar Vs. Maharaja Probirendra M. Tagore and Others*, It has been recognised that such a transaction is not only valid but is customary throughout the country and even resorted to by banks with a view to enable the pledges to carry on business with the pledged property. *Simla Banking and Industrial Co. Ltd., (in Liquidation) Vs. Pritams*, . It is well known that hypothecation is one of the species of pledge and it is immaterial if possession is, in fact, delivered or not and in all cases of pledge and hypothecation, there is the right to take possession and dispose of the property forming the subject-matter of contract. For all these reasons, it could not be said that there was no valid pledge or that the debt was not fully secured. It is, however, true that there could be no pledge or hypothecation in respect of the share money, booking money and the uncalled capital of the company and the only effect of the agreement in relation to these assets was the creation of a charge in favor of the bank over these rights.

36. In *Syndicate Bank Vs. Official Liquidator, Prashant Engineering Co. P. Ltd.*, the distinction between a pledge and hypothecation was explained as under:

8. Unlike a mortgage, a pledge of hypothecation does not have the effect of transferring any "interest" in the property in favour of the pledgee or the hypothecatee. The pledge and hypothecation, however, create a special property in the goods in favour of the pledgee or the hypothecatee. In the case of pledge, the special property is to keep possession of the pledged goods and to dispose them of for the realisation of the debt for which it is held as security. In the case of hypothecation, possession remains with the hypothecator but the hypothecatee has the right to take and to sell it for the realisation of the debt secured by hypothecation....

37. The law explained in the above decisions could be summarized as under:

(i) The distinction between hypothecation of goods and pledge of goods is that hypothecated goods need not be in the physical possession of the bank. They may remain under the actual physical possession of the borrower to enable the borrower to carry on its actual operations. In that event the borrower holds the actual physical possession not in his own right as an owner of the goods but as

the agent of the bank.

(ii) The execution of a deed of hypothecation in favour of the bank, recognising the above arrangement, constitutes constructive delivery of the pledged goods to the bank even though actual possession is not given to the bank. The constructive delivery coupled with the agreement confers on the bank a "special property in the pledged goods".

(iii) The mortgage of movable property is a recognised form of hypothecation. Such hypothecation confers good title on the person in whose favor it is made even in the absence of possession. It can be validly enforced in law.

38. Although the hypothecation as a legal concept is not explicitly recognized under the ICA, the said legislation is not exhaustive of all possible arrangements that the financial institutions may have in securing the moneys advanced by them. Section 29 of the SFC Act recognizes the hypothecation as a possible means of enforcing liability and reads as under:

29. Rights of Financial Corporation in case of default--(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred as if the transfer had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) Where any action has been taken against an industrial concern under the provisions of sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under the provisions of sub-section (1), the Financial Corporation shall

be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and sued in the name of the concern.

39. Consequently, it is futile for ETC to contend that only because hypothecation does not form part of a species of pledge under Sections 172 to 179 of the ICA, it cannot be legally enforced by PICUP. It is apparent on the facts of the present case that the DOH referred to above, makes it explicit that the constructive possession of the goods remained throughout with the PICUP; that EHPL was holding the goods only as an agent of PICUP; the effective control of the goods always remained with PICUP and the constructive possession could be converted into the actual possession by PICUP. More importantly, it is made explicit both in the CLA as well as DOH that prior permission of PICUP had to be taken if any attempt was made to sell any part of the goods at any time. That there was a charge created in favour of PICUP in respect of the goods is evident from the fact that EHPL itself registered the charge with ROC under Forms 8 and 13. Both the Agreement and the DOH made it clear that PICUP was a secured creditor and could enforce the hypothecation in its favour by bringing the said goods to sale. This answers Issues 1 to 4.

The effect of the proceedings under the SFC Act

40. The consequence of PICUP invoking Section 29 of the SFC Act by its notice dated 22nd June 2000 requires to be discussed at this stage. Two facts are important to note while examining the question whether PICUP was obliged to abide by the winding up proceedings and whether the sale by it would be subject to the orders of the Company Court. One is that the process under the SFC Act was invoked much before the Agreement dated 7th August 2001 was entered into between Mr. Rai and Mr. Yamin. The second fact is that PICUP took the proceedings under the SFC to their logical conclusion and sold the assets hypothecated in its favour even before notice was issued in the winding up petition.

41. In Shivalik Agro Poly Products Limited Vs. Disco Electronics Limited (In Liquidation), in a similar situation, the Court recognized the rights of a State Financial Corporation (SFC) to invoke Sections 29 and 32E of the SFC Act. u/s 29 of the SFC Act, the SFC could either take over the management of the concern or take over possession of the assets. In either event, it would have been the right to proceed unilaterally, notwithstanding any other provision in any other law. It was explained as under:

8. It is necessary to analyze the effect of Section 32E of the Act to determine the controversy in question. To appreciate the ambit of the section reference may be made to Section 29 of the Act. In terms of Section 29 sub-section 5 of the Act where an action has been taken against an industrial concern u/s 29 sub-section 1 of the Act, the Financial Corporation shall be deemed to be the owner of such concern for purposes of suits by or against the concern. In terms of Section 29 sub-section 1 of the Act the Financial Corporation has the right to take over the

management or possession or both of the industrial concern as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation when the industrial concern is in default of the payment of its financial liability to the Financial Corporation.

9. Section 32E(1)(c) of the Act provides that where management of an industrial concern which is a company under the Companies Act is taken over by the Financial Corporation then no proceedings for winding up of such concern or for appointment of Receiver in respect thereof shall lie in any court except with the consent of Financial Corporation.

...

14.....The Act is a special Act providing security to the Financial Corporation for purposes of recovery of its dues and the rights of a Financial Corporation thus must be protected. It is an undisputed position that amounts were owed to the DFC and after notices DFC did take over the possession of the land and assets of the company. Complete procedure was followed and it is only after that the sale was confirmed in favor of the appellant company. The financial Corporation thus become owner of the assets in view of Section 29(5) of the Act prior to its sale.

42. This Court, in *Sneh Contracts (P.) Ltd. Vs. Tara Cements Pvt. Ltd.*, , discussed the above position and held as under:

8. Section 29 of the SFC Act stipulates that if any industrial concern is under liability to the financial corporation under an agreement and makes default in repayment of loan, it empowers the financial corporation to take over the management or possession or both of the industrial concern and realize the property pledged, mortgaged, hypothecated or assigned to financial corporation. Section 31, inter alia, provides that without prejudice to the provisions of Section 29 of the SFC Act any authorised officer of the financial corporation, may apply to the District Judge for an order for the sale of the property pledged/mortgaged/hypothecated/ assigned, etc. Section 46B is a non obstante clause and stipulates that provisions of the SFC Act and of any rule or orders made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, etc.

....

13..... However, for the purpose of ascertaining the rights between the financial corporations u/s 29 of the SFC Act and other secured creditors under Sections 529 and 529A of the Act, it is the actual date of the winding up order which would be determinative of such rights and doctrine of relation back cannot be applied to this situation.

(emphasis supplied)

43. In *Rajasthan State Financial Corporation v. Official Liquidator* (supra), the

Supreme Court explained the legal position on the scope of the powers of an SFC u/s 29 SFC Act where it had invoked the process after the proceedings for winding up had commenced. In (SCC) para 18(iii) of the said decision it was explained as under:

18 (iii) If a financial corporation acting u/s 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that Court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529A and Section 529 of the Companies Act.

44. The position in law as regards Section 29 of the SFC Act is that an SFC, which is invariably a secured creditor, is entitled to invoke its powers thereunder to enforce any charge created in its favour on the assets of the borrower. As a secured creditor an SFC would stand outside the winding up proceedings. In terms of Section 32E (1) (c) of the SFC Act where the management of the borrower company is taken over by the SFC then no proceedings for winding up of the company or for appointment of a receiver can be instituted except with the consent of the SFC. Section 46B of the SFC Act, which is a non obstante clause, makes it clear that the SFC Act and the rules thereunder will have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. As explained in *Rajasthan State Financial Corporation v. Official Liquidator* (supra), an SFC is liable to be sued in place of the borrower for a claim against the borrower pursuant to any action taken by it u/s 29 (1) of the SFC Act. As regards the effect of proceedings under the SFC Act vis-à-vis the winding up proceedings, what is critical is the actual date of the winding up order. That date would be determinative of the rights of the SFC u/s 29 of the SFC Act and other secured creditors under Sections 529 and 529A of the Act. As explained in *Sneh Contracts (P) Ltd. v. Tara Cements Pvt. Ltd.* (supra), the doctrine of relation back cannot be applied to such situations. In any event, where the SFC has brought the assets hypothecated in its favour to sale even before the winding up petition is entertained by the Company Court, and long before the actual order of winding up is passed, the SFC can be sued by other creditors for their claims but only to the extent of the funds of the company under winding up that are available after satisfying the claims of the secured creditors and workmen.

45. As far as the present case is concerned, there can be no manner of doubt that the invocation by PICUP of Section 29 of the SFC Act took place long before the agreement was entered into on 7th February 2001 between Mr. Rai, on behalf of EHPL and Mr. Yamin, on behalf of ETC. Apart from the self-serving affidavit of Mr. Alam on behalf of ETC there is nothing to prove the so-called verbal agreement of 14th November 2000 between ETC and EHP. The written

Agreement was entered into on 7th February 2001 at which time, as is plain from Clauses 3 and 4 thereof, ETC was aware of the charge in favour of PICUP on the goods in question. The contention of ETC that it was not aware that EHPL owed PICUP anything beyond Rs. 3.30 lacs is belied by the fact that Clause 3 of the said Agreement recognizes the lien of PICUP and other creditors and mandates their prior clearance before any further payment was to be made by ETC to EHPL. As already noted, no such prior clearance of PICUP for the sale of EHPL's assets to ETC was obtained.

46. Mr. Kapur submitted that Clause 3 recognised the lien of not only PICUP but of the TTO of Uttar Pradesh, the SBI and other creditors as well. ETC was inveigled into parting with Rs. 10,00,000 only to satisfy the condition put forth by the TTO. This amounted seeking the TTO's clearance. In the circumstances, it was impractical to expect ETC to seek the individual clearance of each secured creditor before making further payment for the assets. The above submission is contrary to the unambiguous wording of Clause 3. If it was going to be impractical for ETC to insist on EHPL obtaining prior clearance of the creditors before being called upon to make further payment for the goods, the parties could have amended the Agreement or executed a supplementary agreement permitting that course of action. However, that might have violated the express terms of the CLA and DOH. ETC has only itself to blame for making further payments to EHPL despite Clause 3 of the Agreement

47. Issue No. 5 is answered in the negative by holding that ETC was aware of the charge on the goods in favour of PICUP even on the date of Agreement. Issue No. 6 is answered by holding that the Agreement between ETC and EHPL having been entered without prior clearance of PICUP is not binding on PICUP. Issue No. 7 is answered by holding that the plant and machinery of EHPL were sold by it without the permission of PICUP. Therefore the sale, which was in violation of the CLA, the DOH and Clause 3 of the Agreement, was not valid.

Effect of payments made by ETC to EHPL: Issues 8 to 15

48. The central question in Issues 8 to 15 concerns the payment of Rs. 29.15 lacs by ETC to EHPL. In support of its contention that it paid Rs. 29.15 lacs to EHPL, the following exhibits have been marked by ETC as mentioned in the affidavit dated 6th May 2010 by Mr. Alam, son of Mr. Mohd. Yamin:

Exhibit No.

Description

PW1/1

Power of Attorney dated 28th January 2002 executed by Md.Yamin in favour of his son, Md. Shah Alam.

PW1/2

Photocopy of DD dated 14th November 2000 issued by Allahabad Bank to PICUP

in the sum of Rs. 3,30,000.

PW1/3

Copy of the handwritten receipt on the letterhead of EHPL signed by Mr. V.P.Rai acknowledging receipt of DD in the sum of Rs.3.30 lacs and cash of Rs. 2.70 lacs on 14th November 2000 and stating that the balance payment is Rs. 25 lacs.

PW1/4

Photocopy of DD drawn on Allahabad Bank in favour of TTO, Sikandarabad in the sum of Rs. 4,00,000. The handwritten note of Mr. V.P. Rai dated 26th December 2000 of receipt of above DD as well as Rs. 15,000 by way of cash is appended below the photocopy of the DD.

PW1/5

Photocopy of DD dated 7th February 2001 drawn on Allahabad Bank for a sum of Rs. 1,00,000 in favour of Trade Tax A/c EHPL.

PW1/6

Photocopy of DD dated 7th February 2001 drawn on Allahabad Bank for a sum of Rs. 1,00,000 in favour of SBI, A/c EHPL.

PW1/7

Handwritten receipt dated 7th February 2001 on the letterhead of EHPL signed by Mr. V.P. Rai acknowledging receipt of DD for a sum of Rs. 1,00,000 in favour of SBI DD in the sum of Rs. 1,00,000 in favour of TTO and a receipt of Rs. 2.50 lacs by way of cash.

PW1/8

Agreement dated 7th February 2001 entered into between Mr. V.P. Rai as Director of EHPL and Mohd. Yamin as the sole proprietor of ETC

PW1/9

(Colly) Handwritten receipt of Mr. V.P. Rai dated 9th May 2001 for a sum of Rs. 50,000 from Mr. Yameen Qureshi of ETC. Handwritten receipt on the letterhead of EHPL dated 27th June 2001 signed by Mr. V.P. Rai acknowledging receipt of Rs. 2,50,000 from ETC.

Handwritten receipt on the letterhead of EHPL dated 29th June 2001 signed by Mr. V.P. Rai acknowledging receipt of Rs.10,00,000 for ?sale of machinery/plant of Sikandarabad unit?.

Handwritten receipt on the letterhead of EHPL dated 29th

June 2001 signed by Mr. V.P. Rai acknowledging receipt of Rs. 1,50,000 for ?sale of machinery/plant of A-85, Sikandarabad unit?.

49. The cross-examination of the above witness did not throw doubts on the version of ETC that Rs. 29.15 lacs was indeed paid to Mr. V.P. Rai. However, the documents placed on record do not show that the payments prior to the Agreement dated 7th August 2001 were made pursuant to a verbal agreement of sale entered into between ETC and EHPL on 14th November 2000. The Agreement also does not create any lien in favour of ETC vis-a-vis the goods. By the time the Agreement was executed the constructive possession of the goods had already passed to PICUP in terms of the CLA read with the DOH. ETC could at best be said to be in the position of an unsecured creditor of EHPL.

50. ETC's attempt to project itself as a purchaser to whom the property in the goods passed immediately upon the Agreement being entered into cannot succeed. This is because the DOH makes it clear that the constructive possession of the goods in question was with PICUP. EHPL was holding the goods as an agent of PICUP. Possession of the goods or even any title therein could not have been given by EHPL to ETC without the prior clearance of PICUP. Admittedly, even according to ETC, it was never in actual physical possession of the goods at any time. The mere fact that it paid for the security guards at the factory of EHPL makes no difference to this position. ETC's case in fact is that when it went to the factory of EHPL to take possession, it was prevented from doing so by the officials of PICUP and UPFC.

51. As regards Section 20 SGA, the documents produced by ETC show that the full consideration for the goods in question was not paid even as on 7th August 2001. Importantly by that date, in terms of the CLA and DOH, constructive possession of the goods had passed to PICUP. A charge on the goods had been created in its favour. The charge had been statutorily registered with the ROC. Therefore as on 7th August 2001, the date of the Agreement, EHPL could not have either delivered possession of or conveyed the property in the goods to ETC. Even in terms of Clause 3 of the Agreement the parties acknowledged that the sale was not complete till prior clearance was obtained from PICUP. These factors negate the plea of ETC that the property in goods passed to it u/s 20 SGA as on 7th August 2001.

52. At this stage it must be noted that even after sale of the assets of EHPL, PICUP was unable to recover the entire amount owing to it as on 22nd June 2002. The sale consideration of Rs. 71 lacs covered the interest amount and only a part of the principal amount as on that date. For the remaining amount, PICUP itself filed a claim before the OL. Therefore, even if a claim is filed by ETC with the OL as unsecured creditor, that claim can be met only from the funds available with the OL independent of the realization of the security by PICUP as secured creditor. It is not in dispute that as on date there is a negative balance in the fund position of EHPL.

Answers to Issues 8 to 15

53. Issue Nos. 8 and 9 are answered by holding that even if ETC paid Rs. 29.15

lacs to EHPL for purchasing its plant and machinery it cannot seek to recover the said sum from PICUP. ETC is at best in the position of an unsecured creditor of EHPL in the winding up proceedings.

54. Issue No. 10 is answered by holding that ETC by appointing its watch and ward security did not actually take physical possession of the goods. Constructive possession thereof was already with PICUP. EHPL never parted with physical possession of the goods. EHPL was holding the goods as an agent of PICUP. Therefore, the question of ETC being forcibly deprived of possession of the goods by PICUP by misusing its position did not arise.

55. Issue No. 11 is answered by holding that given the clear wording of the clauses of the CLA and DOH, there was no need for PICUP to approach a Court designated under the SFC Act for enforcement of the hypothecation in its favour. Issue No. 12 is answered by holding that the property in the goods did not pass to ETC and it did not become the owner thereof prior to PICUP enforcing the hypothecation.

56. Issue No. 13 is answered by holding that the sum paid by ETC to EHPL or to PICUP on behalf of EHPL should be treated as sums advanced to EHPL by ETC as an unsecured creditor. Issue No. 14 is answered by holding that the payment of Rs. 3.30 lacs by ETC to PICUP was on behalf of EHPL consistent with ETC being an unsecured creditor of EHPL. Given the negative fund position of EHPL, and there being no assets of EHPL available for recovery, the question of ETC being entitled to recover the sum of Rs. 29.15 lacs much less any loss of profit does not arise. Consequently, Issue No. 15 is answered in the negative.

Conclusion

57. C.A. No. 477 of 2005 is dismissed, but with no order as costs.

C.A. No. 2385 of 2012

58. This is an application filed u/s 481 of the Act by the OL. With EHPL having no realizable assets whatsoever and in fact having a negative balance and there being no prospect of recovering any further sums, no useful purpose will be served by keeping the company alive on the register of companies. Accordingly, the application is allowed and EHPL is directed to be dissolved. The OL is discharged. A certified copy of this order be sent to the ROC within thirty days and the ROC is directed to strike off the name of EHPL from the register of companies forthwith. The application is disposed of.

Co. Pet. No. 59 of 2002

59. The amount in the FDR lying deposited in the Registry pursuant to the orders of the Division Bench dated 30th May 2008 will be paid to PICUP by the Registry together with interest, if any, accrued thereon, within ten days. The file be consigned