(2011) 09 DEL CK 0491

In the Delhi High Court

Case No : CO. APP. 21 of 2009

Gupta Refractories APPELLANT

Vs

Consolidated Steels and Alloys Ltd. And Others RESPONDENT

Date of Decision : 05-09-2011

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 16, 20

Citation : (2011) 7 AD 561 : (2011) 167 CompCas 141 : (2011) 183 DLT 202

Hon'ble Judges : Vikramajit Sen, J;Siddharth Mridul, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Siddharth Mridul, J.—The present Appeal assails the Order of the learned Company Judge dated 7th November, 2008 whereby the application of the Appellant being C.A. No. 385/2007 was dismissed.

2. The facts as are relevant for the disposal of the present Appeal are as follows:

(a) The Company in liquidation, Respondent No. 1 herein, filed a reference u/s 15(1) of SICA before BIFR being Case No. 62/1989. The BIFR after conducting an enquiry u/s 16 of SICA concluded that it would be just, equitable and in the public interest that the Company in liquidation is wound up u/s 20 of SICA vide order dated 13th January, 1998. The Appeal filed against the said final order of BIFR was dismissed by AAIFR on 28th May, 1999.

(b) A Company Petition being C.P. No. 25/1998 was registered in this Court in terms of the order dated 13th January, 1998 passed by the BIFR. Further, a winding up petition was also filed by M/s Rameshwar Dass Devi Dayal against the Company in liquidation being C.P. No. 428/2002. Vide its order dated 13th September, 2004, the said winding up petition was admitted by this Court and a Provisional Liquidator was appointed. This Court vide order dated 4th April, 2005 passed the final winding up order in respect of the Company in liquidation and appointed the Official Liquidator as the Liquidator of the Company.

(c) It transpires that while the matter was pending consideration in this Court in C.P. No. 25/1998, but before passing of the order dated 13th September, 2004 in C.P. No. 428/2002, the Tehsildar and Recovery Officer, District-Morena (Madhya Pradesh) issued a proclamation for sale of the property of the Company u/s 147-C of the Madhya Pradesh Land Revenue (Code), 1959. The said proclamation was published in the daily newspaper Dainik Bhaskar on 26th June, 2001. By this proclamation the assets of the Company, which had been attached, were sought to be sold for recovery of 1,82,30,677/- on account of electricity dues owed to Madhya Pradesh Electricity Board, as arrears of land revenue.

(d) The Collector and Tehsildar, District-Morena fixed the auction for sale of assets of the Company on 24th July, 2001 in terms of the aforesaid proclamation. When the Madhya Pradesh Financial Corporation (hereinafter referred to as ''MPFC''), Respondent No. 2 herein,'' learnt of the aforesaid proclamation, it objected to the proposed auction before the Tehsildar, Recovery Officer, Morena by filing objections dated 25th July, 2001. Although the auction scheduled for 24th July, 2001 was postponed till 26th July, 2001, the objections filed by MPFC were rejected. Thereafter the auction proceedings were held on 26th July, 2001, wherein the Tehsildar in his proceedings recorded that the property of the Company in liquidation was offered for inspection to 17 persons attending the auction. The estimated value of the property sold and auctioned had been previously assessed by M/s A.K. Pathak & Associates at 47,08,800/-. In the circumstances, the minimum bid was fixed at 35 lakhs.

(e) The Appellant herein submitted the highest bid at ''52 lakhs and on being declared as the highest bidder, deposited a sum of ''39 lakhs with the Tehsildar and Collector in accordance with law. Thereafter, the whole amount of ''52 lakhs was deposited by the Appellant with the Collector. The Collector vide its letter dated 12th February, 2002 requested the Appellant to take delivery of the movable property of the Company (except the land, building and the permanent construction on the land) lying at the premises.

(f) After the receipt of the aforesaid letter from the Office of the Collector, the movable goods lying at the factory of the Company were delivered to the Appellant from 12th February, 2002 to 25th February, 2002. After the said movable property was sold in favour of the Appellant, MPFC filed a writ petition being W.P. No. 325/2002 in the Madhya Pradesh High Court, whereby MPFC claimed to have the first charge on the said goods lying at the premises of the Respondent Company. The Madhya Pradesh High Court after hearing MPFC stayed the delivery of the auctioned goods in favour of the Appellant vide order dated 25th February, 2002. Thereafter on 17th May, 2002 the Madhya Pradesh High Court was pleased to modify the said order by allowing the Appellant to remove the remaining goods. Pursuant to the said order dated 17th May, 2002 the Tehsildar, Banmor, requested the Appellant to remove the remaining goods from the premises of the Respondent Company and as such the delivery process was resumed and the movable goods were delivered to the Appellant from 28th

May, 2002 to 5th June, 2002.

(g) According to the Appellant despite the orders of the Madhya Pradesh High Court the Appellant was unable to collect all the movable goods and structure due to the lack of cooperation on behalf of the Tehsildar and further due to the dispute with MPFC and as such the Appellant moved an application before the High Court for maintaining status quo in the matter with respect to the remaining goods in question. The Hon''ble High Court vide order dated 18th October, 2004 was pleased to order status quo with respect to the remaining goods. The Appellant also moved another application in W.P. No. 325/2002 seeking a direction for the delivery of the remaining goods lying at the premises of the Respondent Company.

(h) The MPFC on its part moved an application being I.A. No. 6197/2006 seeking a direction that the Appellant be restrained from taking delivery of the remaining goods on the ground that Appellant had allegedly taken delivery of all the remaining goods and there were no movable goods remaining which belonged to the Appellant. According to the Appellant the alleged inventory list filed by the MPFC whereby the goods were alleged to be delivered from 6th June, 2002 to 10th June, 2002 was fake and fabricated inventory list and that the goods mentioned therein had never been taken delivery of by the Appellant. Thereafter, the Appellant after coming to know of the said inventory list filed a writ petition being W.P. No. 3148/2006 whereby the Appellant challenged the said fake and fabricated inventory list and the Madhya Pradesh High Court was pleased to issue notice of the same.

(i) Since this Court in the meantime had passed an order provisionally winding up the Company in liquidation on 13th September, 2004, MPFC filed I.A. No. 18093/2006 in its writ petition filed in Madhya Pradesh High Court seeking to withdraw the same with liberty to raise the question involved therein before this Court. Vide order dated 2nd November, 2006 the Madhya Pradesh High Court permitted the withdrawal of the writ petition with liberty as prayed. Thereafter, the Appellant came to know that the Official Liquidator attached to this Court had published a sale notice dated 15th February, 2007 for the sale of the land and building and the structures and the various machines pursuant to the winding up order passed by this Court. The Appellant immediately filed an application for stay of the auction in W.P. No. 3148/2006 before the Madhya Pradesh High Court. Vide order dated 13th March, 2007 the Madhya Pradesh High Court held that since the auction had been ordered by this Court therefore it would be appropriate to move this Court for staying the auction sale of the said goods. This Court in C.P. No. 428/2002 had passed an order fixing the date of auction as 15th March, 2007.

(j) Pursuant to the direction of the Madhya Pradesh High Court, the Appellant approached this Court on 15th March, 2007 i.e. the day of auction and although due to paucity of time the Appellant was unable to file an application in this Court, however his Counsel appeared before the Court on 15th March, 2007 and objected to the auction sale and prayed for stay of auction proceedings. This Court was pleased to cancel the auction for 15th March, 2007 and adjourned the matter for 26th April, 2007. However, since the auction with respect to the said goods was not stayed by the learned Company Judge vide order dated 15th March, 2007, the Appellant moved an application being C.A. No. 385/2007 in C.P. No. 428/2002 on the ground that the said movable goods, structures and machines lying at the premises situated at Banmor Industrial Area, District and Tehsil Morena, Madhya Pradesh belonged to the Appellant and as such should be excluded from the purview of the auction proceedings.

(k) On 26th April, 2007 the bids received from the various bidders were opened and open bidding was held in the Court. M/s Cosmos Wampun Pvt. Ltd., Respondent No. 3 herein, emerged as the highest bidder with a bid of 6,15,00,000/-. This Court accepted the highest bid of the Respondent No. 3 and directed that upon payment of entire amount, the highest bidder would be entitled to take possession of the property of the Company in liquidation and deploy its own security guards on payment of 25% of the bid amount. The Court further directed that the auction purchaser i.e. Respondent No. 3 shall not remove the machines from the premises till the entire bid amount is deposited with the Official Liquidator and possession of the premises is handed over to it.

(I) Being aggrieved, the Appellant preferred two Company Appeals. The first being Company Appeal No. 19/2007 was decided on 24th April, 2007. By that order the Division Bench had expressed the hope that before directing the sale of plant, machinery and structures of the Company in liquidation, C.A. No. 385/2007 would be disposed of by the Company Court. The second Company Appeal No. 23/2007 was directed against the acceptance of the bid of the Respondent No. 3 on 26th April, 2007, as aforesaid, without first disposing of C.A. No. 385/2007. The Company Appeal No. 23/2007 was disposed of by the Division Bench on 17th August, 2007 with the direction that C.A. No. 385/2007 be examined and disposed of by the Company Court before any further directions regarding removal or appropriation of the fixtures of the machinery lying in the factory premises are issued. The Division Bench directed that till C.A. No. 385/2007 was disposed of by the Company Court, the auction purchaser shall maintain status quo as regards the assets claimed by the Appellant and that the Respondent No. 3 shall not remove from the factory premises or otherwise encumber any part of the machinery or other fixtures or any other movables whether or not embedded to earth pending disposal of C.A. No. 385/2007.

(m) The learned Company Judge after hearing the Appellant as well as MPFC and the Respondent No. 3 reserved the judgment on 29th April, 2008. Vide the impugned Judgment dated 7th November, 2008 the Company Judge dismissed the application being C.A. No. 385/2007 filed by the Appellant. Vide the impugned Order the learned Company Judge directed the appointment of a Local Commissioner and called for a report on the aspect whether the Appellant had removed from the factory premises of the Company in liquidation any machinery/

parts thereof, which were attached to the earth'' and were, therefore, immovable property, and also to determine whether there is any movable property presently lying in the factory premises, which the Appellant can lay a claim to. The impugned Order further directed that at the conclusion of the inspection the Respondent No. 3 would be entitled to deal with all the properties found on the factory premises of the Company in liquidation, irrespective of the fact that there may be some items at the factory premises of the Company in liquidation over which the Appellant may lay their claim. It was directed that the claim of the. Appellant for such items, if found admissible, would be met from out of the sale proceeds deposited by the Respondent No. 3 or adjusted from the value of any immovable property which may have been already removed by the Appellant. The impugned order specifically directed that C.A. No. 385/2007, filed by the Appellant, was dismissed, subject to the right of the Appellant to stake their claim, if any, for the value of any movable asset, after receipt of the report of the Local Commissioner and Technical Expert.

(n) Aggrieved by the said impugned Order dated 7th November, 2008, the Appellant has preferred the present Company Appeal.

3. On behalf of the Appellant, it was urged by Mr. Sandeep Sethi, Senior Advocate, that the Appellant had purchased all the plant, machinery and structures of the Company in liquidation and only the land, building and other permanent structures were not purchased by it. In this behalf, the Appellant has relied upon the valuation report prepared by M/s A.K. Pathak & Associates dated 28th July, 2001. The Appellant further relied upon the proceedings recorded by the Tehsildar, District- Morena, at the time of auction on 26th July, 2001, which, inter alia, reads: "the machinery, plant etc. of the debtor consumer Company available for sale was shown to the present auction bidders at the site and auction started. The present auction bidders started the auction for plant and scrap except the land, building and other permanent structure.

For the auction of machinery/scrap of M/s Consolidated Steels Alloys Pvt. Ltd., it was got evaluated from Sh. A.K. Pathak & Associates, Gwalior. The detailed valuation report is enclosed. The estimated value of this property has been offered as Rs. Fifty two lakhs.

4. On the other hand, Mr. Arvind Nigam, Senior Advocate, appearing on behalf of the Respondent No. 3 supported the impugned Order and stated that all that had been purchased by the Appellant at the auction conducted by the Tehsildar, Morena, was the movable goods, which had already been removed by the Appellant as far back as in 2002.

5. Having heard learned Counsel for the parties and perused the relevant documents, we are of the opinion that the present Appeal filed by the Appellant is without merit and untenable for the following reasons:

Firstly, the contention of the Appellant that it had purchased all the plant and machinery of the Company in liquidation and only land, building and other permanent structures were not purchased by it, is contradicted by their own statements made in earlier-proceedings. In this behalf, it is observed that the case of the Appellant, who was arrayed as Respondent No. 7 before the Madhya Pradesh High Court in W.P. No. 325/2002 preferred by MPFC, was that it had only purchased the movable property and it shall remove only the movable and not the immovable properties from the factory premises of the Company in liquidation. This is evident from the order dated 17th May, 2002 passed by the Madhya Pradesh High Court in the aforesaid writ petition. The relevant extract from the said order reads as follows.

It is the case of Shri Mody, learned Counsel appearing for respondent no. 7 that he has purchased the moveable property in auction. He, therefore, submits that he is only removing the movable property which has been purchased by him.

However, Shri Jain, submits that the immovable properties are also being removed to cutting them and removing them from ground.

The aforesaid fact is disputed by Shri Mody.

However, it is made clear that as the respondent no. 7 had only purchased the movable property, he shall only remove the movable property and she has not remove the immovable property.

(b) Secondly, in the proceedings recorded by the Tehsildar on 26th July, 2001 he clearly records "in respect to the machinery of the defaulter consumer company, the present auctioneers shown the same on spot and initiated the said proceedings. By leaving to land, building and other permanent fixtures, the auctioneers started the auction of plant and scrap. Because the land is related with industrial department, therefore auction proceeding for land and building will be initiated thereafter. The movable assets of this consumer company were inspected to all 17 persons as participants in the auction and thereafter knowledge of auction proceeding was given to them and an amount of `25,000/- was deposited by every participant as a security amount and thereafter the auction proceeding was started. Auction of this movable asset was started with an amount of `35 lakhs and last bid of auction was fixed of auction was fixed at `51 lakhs (highest), which was done by Sh. J.P. Gupta-Gupta Refactories, Gwalior. No other person was called excessive bid against such highest bid, therefore this bid was confirmed as last and final". Thus, it is seen that all that was purportedly sold in the auction conducted by the Collector and Tehsildar, Morena and all that was purchased by the Appellant in the auction, was only the "movable property" i.e. "Chal Sampatti". The proceeding sheet prepared by the Tehsildar, Morena dearly records that the bidders were informed that the immovable property was not being sold and only the "Chal Sampatti" was being sold. The bidders were given inspection of the "Chal Sampatti" i.e. plant and scrap and bids were invited.

(c) Thirdly, the Nazir, Tehsil Morena sent a communication to the Additional Tehsildar, Morena on 28th May, 2002 stating that on the said date a joint inventory of the movable properties had been prepared which included only those which are lying on the ground and were not attached to the earth. This inventory was prepared in the presence of the Appellant. The list of the articles inventorized shows that it includes articles which are petty movables and not the plant and machinery installed at the factory premises in question. It was only these articles which the Appellant was entitled to remove and nothing more.

(d) Fourthly, the Tehsildar, Morena reported on 9th June, 2002 that the Appellant had removed all the movable assets lastly between 28th May, 2002 and 9th June, 2002. It was reported by him that there is no other movable property existing on the site. The relevant extract from the said communication dated 9th June, 2002 reads as follows.

Today the 9.6.2002 in compliance of order dated 27.5.2002 of Hon''ble Collector and Order dated 28.5.2002 of Hon''ble additional Tehsildar, the movable property as per inventory prepared handed over to the buyer and there is no other movable property lying at the site and therefore the action of handing over movable property closed. The main entrance of factory was sealed.

(e) Lastly, the communication dated 1st March, 2005 addressed to the Official Liquidator of this Court by the Additional Tehsildar, Sub-Tehsil, Banmore, District-Morena, Madhya Pradesh, clearly states that the Tehsildar, Morena had for the present only auctioned movable property i.e. properties which are lying on the site and was not embedded in the earth. The factory sheds and the machinery which were embedded in the earth and plant and machinery were still present in the factory and they were not auctioned. Relevant extract of the said communication dated 1st March,'' 2005 reads as follows:

2. At present only moveable property has been auctioned. Only those properties which were lying on the site and were not embedded in earth were included. The Factory sheds and the machinery which were embedded in the earth and Plant and Machinery are still present in the factory and they were not auctioned. A list of the assets is enclosed.

6. There is also no force in the reliance placed on the valuation report of M/s A.K. Pathak & Associates by the Appellant. As found by the learned Company Judge the said report, as filed in this Court, is bereft of the annexures to which it refers. As also found by the learned Company Court, the report which has in fact been placed is an incomplete report. As further observed by the learned Company Court, even if it were to be assumed that the said valuation report was in respect of the entire plants and machinery and structures at the site, it does not follow that the entire assets evaluated in that report had been sold. We agree with the reasoning of the learned Company Judge to the effect that "This is so because it is not only possible, but even probable that at the time of open auction, even a fraction of the total evaluated asset may fetch a higher price than the valuation arrived at for the entire asset. This is quite common. From the offers that MPFC claims to have received from other parties, it appears, that

either the report of M/s Pathak & Associates is way off the mark, or it does not include the plant and machinery and pertains only to the bare movables."

7. In the grounds of appeal the Appellant had also raised a ground with regard to the prima facie finding in the impugned Order that the Appellant had removed parts of the plant and machinery installed at the site and attached to the earth in the garb of removing movables. The impugned Order in Paragraph 16 records that the issue whether the Appellant has removed only the movables or even the immovable properties by cutting and dismantling the same is an issue which could not be determined at that stage. In Paragraph 16 of the impugned Order the learned Single Judge observed as follows:

16. As to whether M/s Gupta Refractories have removed only the movables, or even the immovable properties by cutting and dismantling the same, is also an issue which cannot be determined by me at this stage. To determine this aspect further enquiry is necessary to be conducted for which'' directions are presently being issued. I may also observe that the determination of this aspect is a serious concern of this Court, since it has befallen upon the Court to protect the legitimate interests and assets of the company in liquidation.

8. Further, in the impugned Order although the learned Single Judge prima facie held that the Appellant appeared to have removed immovable properties including parts of plant and machinery attached to the earth, the Court came to the conclusion that based on the record as it existed then it was not possible for the Court to come to any definite conclusion on this aspect. In this behalf, in Paragraph 35 of the impugned Order the learned Single Judge observed as follows:

35. From this it prima facie appears that M/s Gupta Refractories have not only removed the movables, but in the garb of removing movables they have even removed the parts of the plant and machinery which was assembled and installed at the site, and were attached to the earth. From the materials placed on record as at present, it is not possible for the Court to come to any definite conclusion on this aspect, or as to the quantity, nature, weight and value of the items dismantled from the plant and machinery at the factory site in question, if any.

9. In order to resolve the controversy whether the Appellant had removed from the factory premises of the Company in liquidation any machinery/parts thereof attached to the earth and therefore immovable property and also to determine whether there Was any movable property presently lying in the factory premises which the claimant could lay a claim to, the learned Single Judge appointed a Local Commissioner and called for a report on the aforesaid aspect. In this behalf, it is seen that although the report of the Local Commissioner was placed on the record by Respondent No. 2, the Appellant herein did not assail the same nor raised any objections questioning the findings contained therein before us at any time including at the time of final arguments. We are therefore not entering into this issue in the present discussion.

10. The learned Single Judge while dealing with the aspect, whether the plant and machinery in the factory premises of the Company in liquidation was movable or immovable property, also relied on the Judgments in Duncans Industries Ltd. Vs. State of U.P. and Others, and T.T.G. Industries Ltd., Madras Vs. Collector of Central Excise, Raipur, , and came to the conclusion that heavy machinery, plant and equipments as also the sheds installed by the Company in liquidation, at the time of their installation or erection, were installed or erected with a view to permanently install and erect the plant at the site, which established that the machinery had been imbedded into the earth with the intention of permanently establishing the plant. The learned Single Judge therefore concluded that the machinery, plant and sheds at the factory site of the Company in liquidation, except those which were not attached to the earth, constituted movable property purchased by the Appellant. We do not find any infirmity or perversity in this finding arrived at by the learned Single Judge having considered the principles enunciated by the Supreme Court in Duncans Industries Ltd. (supra) and M/s T.T.G. Industries Ltd. Madras (supra).

11. In view of the foregoing discussion, we find no merit in the present Appeal and dismiss the same, however without any order as to costs.