(2008) 11 DEL CK 0148

In the Delhi High Court

Case No : CA No''s. 165, 385, 706 and 992/07 and 1031/08 in C.P. No. 428 of 2002

In Re: Consolidated Steel and Alloys

Date of Decision : 07-11-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3
Civil Procedure Code, 1908 (CPC) — Section 115
Companies Act, 1956 — Section 441, 441(2), 531, 537
Income Tax Act, 1961 — Section 12(B)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), 16, 20
Transfer of Property Act, 1882 — Section 8

Citation : (2011) 167 CompCas 117

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : R.D. Makhija, for MPFC, Sidhartha Tanwar, in CA No. 992/2007/ auction purchaser, Indrani Mukerjee, for SCB, Mayank Goel, for O.L. and Kumar Sinha, for Gupta Refractorie, for the Appellant;

Judgement

Vipin Sanghi, J.—By this order I propose to deal with the following applications:

(a) CA No. 165/2007 filed by Madhya Pradesh Financial Corporation (MPFC) initially filed on 12.1.2007 and refiled on 6.2.2007 thereby seeking the quashing and setting aside of the order dated 26.7.2001 passed by Collector, District Morena and Tehsildar, District Morena selling the movable assets of the company in liquidation M/s Consolidated Steels and Alloys (in liquidation) for an amount of Rs. 52 lakhs, and for a declaration that the aforesaid sale in favour of Gupta Refractories is null and void on the ground that same was conducted when the proceedings for winding up of the company were pending before this Court. Further relief is sought that respondent No. 5, namely, Gupta Refractories be directed to either return the properties and assets removed by it, or to pay the additional costs as per the valuation.

(b) CA No. 385/2007 filed on 3.4.2007 by M/s Gupta Refractories for an order excluding the structures, machines and other movable goods lying at the premises situated at Banmore Industrial Area, Tehsil Morena, M.P. from the preview of the auction proceedings ordered to be held pursuant to the orders of this Court.

(c) CA No. 706/2007 filed on 17.7.2007 by the auction purchaser Cosmos Wampun (P) Ltd.(Cosmos), the purchaser of the assets of the company in liquidation for Rs. 6.15 crores in the Court auction held on 26.4.2007 whereby it seeks a direction to the official liquidator to execute conveyance documents in respect of the immovable property of the company in liquidation purchased by the applicant in its favour or in favour of its nominee and to complete all the requisite formalities in respect thereof. The applicant also seeks compensation for the delay in the completion of the said process.

(d) CA No. 992/2007, filed on 19.9.2007 and CA No. 1031/2008, filed on 16.9.2008 by the auction purchaser Cosmos seeking the withdrawal of substantial part of the amount deposited by it to the extent of Rs. 6 crores on the ground that the disposal of the aforesaid applications is taking time.

2. The company in liquidation M/s Consolidated Steels Alloys Ltd. filed a reference u/s 15(1) of SICA before BIFR being BIFR Case No. 62/89. The BIFR conducted an enquiry u/s 16 of SICA and concluded that despite exploring all possible avenues the said company had not been able to work out any acceptable revival scheme which could enable it to turn its networth positive within reasonable frame of time while meeting all its financial obligation. BIFR formed the final opinion dated 13.1.1998 that it would be just and equitable in the public interest if the company in liquidation is wound up u/s 20 of SICA. The appeal filed against the said final order dated 13.1.1998 of BIFR was dismissed by AAIFR on 28.5.1999. The aforesaid opinion of BIFR was forwarded to this Court for necessary action according to law. The same was registered as C.P. No. 25/1998. However, it appears that no proceedings took place in the said file. In the meantime, a winding up petition was filed in this Court by M/s Rameshwar Dass Devi Dayal against the company in liquidation being CP No. 428/2002. Vide order dated 13.9.2004 this Court admitted that winding up petition and ordered the provisional winding up of the company in liquidation. By order dated 4.4.2005 the Court passed the final winding up order in respect of the company in liquidation and appointed the Official Liquidator attached to this Court as the liquidator of the company. While the matter was pending consideration in this Court on the basis of the final opinion of BIFR in C.P. No. 25/1998, but before the passing of the order dated 13.9.2004, the Tehsildar and recovery officer Morena issued a proclamation for sale in respect of the property of the company u/s 147-C of the M.P. Land Revenue (Code), 1959. The same was published in the daily newspaper Dainik Bhaskar dated 26.6.2001. By this proclamation the fixed assets of the company, which had been attached, were sought to be sold for recovery of Rs. 1,82,30,677/- on account of electricity dues owed to M.P. State Electricity Board, as arrear of land revenue. When MPFC learnt of the aforesaid proclamation it objected to the proposed auction before the Tehsildar, Recovery

Officer Morena by filing objections dated 25.7.2001.

3. It appears that the Collector and Tehsildar, District Morena fixed the auction on 24.7.2001 in terms of its aforesaid proclamation. However, the same was postponed till 26.7.2001. The objections preferred by MPFC were rejected. The machinery/plant etc. of the company in liquidation was purportedly shown to the bidders. The Tehsildar, Morena in his proceedings of 26.7.2001 records that the "movable property" of the company in liquidation was offered for inspection by 17 persons attending the auction. The auction of the "movable properties" was started from the amount of Rs. 35 lakhs and the highest bid of Rs. 52 lakhs was offered by Shri J.P. Gutpa of M/s Gupta Refractories, Gwalior. It was further recorded that the estimated value of the property sold in auction had been assessed by Shri A.K. Pathak at Rs. 47,8,800/-. M/s Gupta Refractories deposited 25% of its bid amount of Rs. 52 lakhs. Shri J.P. Gupa of M/s Gupta Refractories was declared the "purchaser" of the movable properties. The proceedings of the Tehsildar Morena of 26.7.2001 recorded in Hindi, along with its English translation, have been filed on record. At various places the said proceedings recorded that ?chal sampati? has been sold to M/s Gupta Refractories.

4. On or about 8.8.2001 a writ petition was filed before the Madhya Pradesh High Court, Gwalior Bench in the name of the company in liquidation being WP(C) No. 1341/2001 to seek the quashing of the demand raised by MP State Electricity Board and the process of auction initiated by the Collector and Tehsildar, District Morena for auctioning the factory of the company. A prohibition was sought against the Collector and Tehsildar, Morena from confirming the auction held by the Tehsildar, Morena. The Madhya Pradesh High Court passed an order on 24.1.2002 in the aforesaid writ petition directing that the sale of the immovable property shall not be confirmed till final disposal of the petition. However, movable property was permitted to be sold in auction.

5. On or about 14.2.2002 the MPFC preferred a writ petition being WP(C) No. 325/2002 in the High Court of Madhya Pradesh at Gwalior seeking the issue of writ of certiorari for quashing the entire proceedings rendered in case No. 273/2000-01-A/76 by Tehsildar, Morena pertaining to the aforesaid auction and the consequent order passed by the Collector Morena in respect of the said proceedings. However, since this Court in the meantime passed an order provisionally winding up the company in liquidation on 13.9.2004 whereby the official liquidator attached to this Court was appointed as the provisional liquidator, the MPFC filed IA No. 18093/2006 in its writ petition seeking to withdraw the same with liberty to raise the question involved therein before this Court. The Madhya Pradesh High Court, Gwalior Bench permitted the withdrawal of its writ petition by MPFC with liberty to raise questions involved in the aforesaid writ petition before this Court by its order dated 2.11.2006. Consequently, MPFC preferred CA No. 165/2007 before this Court initially filed on 12.1.2007 and refilled on 6.2.2007.

6. In the meantime, after getting the assets of the company in liquidation valued

vide order dated 08.09.2005, the Court directed the issuance of the sale proclamation. Since the sale could not take place, a fresh valuation was ordered by this Court on 13.10.2006 in respect of land, building, plant and equipment available in the factory. On 15.03.2007 the Court directed issuance of the fresh composite sale proclamation for the land, building, structures and various machines of the company in liquidation lying at the factory premises in Morena. On 03.04.2007 M/s Gupta Refractories preferred C.A. No. 385/2007 to say that they were concerned with the movable goods and machinery and structures owned by the Company in liquidation which they had purchased in the auction proceedings conducted by the Tehsildar and Collector Morena as aforesaid. Their bid of Rs. 52 Lacs being the highest had been accepted by the Tehsildar and the Collector. It was stated that some movable goods lying at the factory premises of the company in liquidation were delivered to the applicant M/s Gupta Refractories from 12.02.2002 to 25.02.2002. It was further stated that initially the M.P. High Court had stayed the delivery of the auctioned goods to the applicant M/s Gupta Refractories vide order dated 25.02.2002 passed in Writ Petition No. 325/2002, filed by the MPFC. However, the said order was modified on 17.05.2002 and the applicant M/s Gupta Refractories was permitted to remove the remaining goods from the premises of the company in liquidation. The applicant M/s Gupta Refractories further stated that between 28.05.2002 and 05.06.2002 movable goods were removed from the factory premises of the company in liquidation. It was further disclosed that MPFC moved IA No. 6197/2006 in writ petition No. 325/2002 before the MP High Court to restrain M/s Gupta Refractories from removing any further goods on the ground that they had taken delivery of all the remaining goods and there were no movable goods remaining in the factories premises. It was further stated that the said application filed by MPFC was dismissed by the MP High Court on 24.04.2006. It was further claimed that a fake and fabricated inventory list had been prepared by the Tehsilar of the goods allegedly removed by the applicant M/s Gupta Refractories. M/s Gupta Refractories further stated that it had filed a writ petition being W.P.(C) No. 3148/2006 whereby it challenged the inventory/ list of the goods stated to have been removed by M/s Gupta Refractories, as prepared by the Tehsildar. M/s Gupta Refractories stated that it had moved an application for stay of auction by the Official Liquidator in W.P.(C) No. 3148/2006. The M.P. High Court on 13.03.2007 ordered that since the auction proceedings were being held under the directions of this Court by the Official Liquidator, the Applicant M/s Gupta Refractories should approach this Court for staying the proceedings of auction. M/s Gupta Refractories stated that they were the lawful owners of the "structures and various machines" having purchased the same in an auction proceeding conducted by the Tehsildar and Collector held on 26.07.2001. It was stated that they had not been able to take possession of the structures and various machines as MPFC had staked their claim on the goods and structures on the ground of their being the first charge holder. The applicant M/s Gupta Refractories sought an order for excluding the structures, machines and other movable goods lying at the factory premises of the company in liquidation at

Banmore Industrial Area, Tehsil Morena, M.P. from the purview of the auction proceedings being held by the Official Liquidator.

7. C.A. No. 385/2007 was listed before the Court on 04.04.2007. The Court directed the issuance of notice of the application to the non-applicants. The same was adjourned to 26.04.2007. On 26.04.2007 the applicant M/s Gupta Refractories sought an adjournment to file certain additional documents in support of C.A. No. 385/2007. Consequently, the application was adjourned to 24.05.2007. On 26.04.2007 itself, the bids received from the various bidders were opened and open bidding was held in the Court. Cosmos emerged as the highest bidder with a bid of Rs. 6,15,00,000/-. The Court accepted the highest bid of Cosmos and directed that upon payment of the entire amount the highest bidder would be entitled to take possession of the property of the Company in liquidation and to deploy its own security guards on payment of 25% of the bid amount. The Court further directed that the auction purchaser i.e. Cosmos 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. The applicant M/s Gupta Refractories preferred two Company Appeals. The first being Company Appeal No. 19/2007 decided on 24.04.2007. 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 off by the Company Court. The second Company Appeal No. 23/2007 was directed against the acceptance of the bid of Cosmos on 26.04.2007, as aforesaid, without first disposing off CA No. 385/2007. This Company Appeal No. 23/2007 was disposed off by the Division Bench on 17.08.2007 with the direction that C.A. No. 385/2007 be examined and dispose off by the Company Court before any further directions regarding removal or appropriation of the fixtures and the machinery lying in the factory premises are issued. The Court directed that till C.A. No. 385/2007 is disposed off by the Company Court, the auction purchaser (Cosmos) shall maintain status quo as regards the assets claimed by M/s Gupta Refractories and that Cosmos 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 CA No. 385/2007.

8. I first proceed to take up the submissions made by the counsels in respect of CA.No. 165/2007 filed by MPFC. MPFC has sought to attack the auction sale conducted by the Tehsildar on 26.07.2001 by contending that the said sale is in contravention of Sections 441, 531 and 537 of the Companies Act. It is contended that the BIFR had forwarded its final opinion to wind up the company in liquidation to this Court u/s 20 of SICA. The aforesaid opinion of BIFR was registered in this Court as C.P. No. 25/1998. u/s 441(2), winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up. Consequently, the winding up of the company in liquidation commenced when C.P. No. 25/1998 was registered in this Court pursuant to the receipt of the opinion of BIFR. It is further argued that u/s 531

any transfer of property movable or immovable, relating to property done by or against a company within 6 months before commencement of its winding up is deemed to be a fraudulent preference of its creditors and would be invalid. It is argued that the sale of the property by the Tehsildar and Collector, Morena, in pursuance of the sale proclamation published in Dainik Bhaskar on 26.06.2001 u/s 147-C of the M.P. Land Revenue Code 1959 is void, as it had been undertaken after the commencement of the winding up proceedings of the company in liquidation, without the permission of this Court.

9. Having considered the aforesaid submission of learned Counsel for the MPFC, Mr. R.D. Makheeja, I am not inclined to set aside the auction sale conducted by Tehsildar and Collector, Morena, in respect of the movable properties of the company in liquidation situated at its factory premises at Morena on the ground that the said auction sale is hit by the aforesaid provisions of the Companies Act. No doubt the final opinion of the BIFR u/s 20 of SICA opining that the company in liquidation should be wound up in public interest was registered in this Court as C.P. No. 25/1998 in the year 1998. However, it appears that no effective orders were passed by this Court in those proceedings and it was only when the company petition i.e. C.P. No. 428/2002 initiated by M/s Rameshwar Dass Devi Dayal Pvt. Ltd. was taken up that the Court passed orders on 13.09.2004 admitting the petition and appointing the Official Liquidator attached to this Court as the provisional liquidator. Thereafter on 04.04.2005, since no opposition was received to the winding up of the company in liquidation, this Court directed final winding up of the company in liquidation and the Official Liquidator was directed to act as the liquidator of the said company. It is not the case of the MPFC that the Collector and Tehsildar, Morena, or M/s Gupta Refractories were aware of the pendency of the aforesaid company petition bearing No. 25/1998. No publication had been directed by the Court in the said company petition till the time when the auction was conducted by the Collector and Tehsildar on 26.07.2001. In fact, even MPFC was apparently not aware of the pendency of the winding up proceedings in respect of the company in liquidation in this Court and learnt of it much later during the pendency of the writ petition before the M.P. High Court.

10. I may also note that the Official Liquidator upon his appointment as the Provisional Liquidator, under the directions of this Court dated 13.9.2004 seized the assets of the company in liquidation by, inter alia, putting his locks and seal on the said companies factories and godown. It appears that M/s. Gupta Refractories at the relevant time was in the process of removing the goods from the factory premises of the company in liquidation in pursuance of its auction purchase. Since it was prevented from removing the goods because of the lock and seal of the Official Liquidator, it preferred CA No. 1453/2004. On 04.04.2005, this Court while dealing with C.A. No. 1453/2004 took note of the fact that auction of movable assets of the company in liquidation lying at its Morena factory took place on 26.07.2001 and the bid of M/s Gupta Refractories of Rs. 52 Lacs was accepted. The Court also took note of the fact that M/s Gupta

Refractories had deposited the entire amount and removed part of the goods as well. The Court also noted the order dated 17.05.2002 passed by the M.P. High Court in writ proceedings aforesaid, whereby M/s Gupta Refractories had been allowed to remove the remaining goods as well. This Court observed that the Company had been ordered to be wound up thereafter and the factory premises at Morena had been sealed by the Official Liquidator because of which M/s Gupta Refractories were not able to remove the goods. The Official Liquidator did not deny the averments made in C.A. No. 1453/2004. The Court observed "Since the applicant had purchased the goods in public auction much before passing of the winding up order, it is made clear that in so far as the present proceedings are concerned, there is no impediment for removing the goods by the applicant. The applicant would, therefore, be entitled to remove these goods subject to the order that may be passed by the Madhya Pradesh High Court in the writ petition pending before it. The O.L shall deseal the premises to enable the applicant to remove the goods and after the goods are removed, the premises shall be sealed again."

11. Therefore, the view taken by this Court in the said order dated 04.04.2005 was that the auction sale conducted by the Tehsildar, Morena, on 26.07.2001 was prior to the passing of the winding up order passed by this Court.

12. Pertinently, the High Court of M.P. while dealing with the Writ Petition (Civil) No. 1431/2001 filed by the Company in liquidation vide order dated 24.01.2002 directed that the sale of the immovable property shall not be confirmed till the final decision of the petition. However, the sale of the movable property in auction was permitted by the Court. MPFC by its conduct allowed a situation to arise wherein M/s Gupta Refractories were able to remove a large chunk of the goods before the application for stay was taken up for consideration by the M.P High Court. The objections of MPFC were rejected by the Tehsildar, Morena on 26.7.2001 and he proceeded to hold the auction and declare M/s. Gupta Refractories as the purchaser. However, MPFC took no steps to challenge the said auction sale till about 14.2.2002 i.e. for about 7 months, and woke up from their slumber only when Ms. Gupta Refectories started removing the goods from 12.2.2002 onwards. Vide order dated 17.5.2002 passed in C.M. No. 40902/ in W.P(C)325/2002, the M.P. High Court permitted M/s. Gupta Refractories to remove the movable properties.

13. As aforesaid, even in the face of the grievance of MPFC that its objections had been wrongly rejected by the Tehsildar, Morena; that it had a first charge on the fixed assets of the company in liquidation; that the valuation at which the movables were sold to M/s Gupta Refractories was low, the M.P. High Court permitted the removal of the movables by M/s Gupta Refractories vide order dated 17.05.2002. Since M/s. Gupta Refractories has already removed a large quantity of the goods, after depositing the auction price of Rs. 52 lakhs, no useful purpose can be achieved in reopening the auction sale at this stage. Therefore, I am of the view that the auction sale conducted by the Tehsildar,

Morena of the movable assets lying lying under factory premises of the company in liquidation cannot be reopened at this stage. However, the issue whether M/s. Gupta Refractories have removed any articles which they were not entitled to is another question and would have to be considered separately.

14. So far as the grievance of MPFC with regard to its having a first charge on the fixed assets of the company in liquidation, and the rejection of the objections of MPFC by the Tehsildar on 26.7.2001 is concerned, the said issues are not being gone into by me at this stage. The issue whether the claim of MPFC had priority over that of MP State Electricity Board and, if so, the effect thereof on the right of appropriation of Rs. 52 lacs realized by the Tehsildar in auction conducted by him can be determined only after hearing being granted to MP State Electricity who would be directly affected by the determination of that issue. No arguments have been heard be me on that aspect of the matter, and this aspect is not being decided by me at this stage.

15. Similarly, the claim of MPFC that the valuation at which the movables were sold to M/s Gupta Refractories was low is also not being gone into at this stage. Pertinently, even the complete valuation report of M/s Pathak and Associates with its annexures have not been placed on record. In the absence of the same that issue cannot be considered.

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 the Court, since it has befallen upon the Court to protect the legitimate interests and assets of the company in liquidation.

17. I now turn to consider the relief sought by M/s Gupta Refractories in C.A. No. 385/2007. Having heard Counsel for the parties, I am inclined to substantially reject the same. M/s Gupta Refractories seeks to rely upon the valuation report prepared by A.K. Pathak and Associates dated 20.7.2001. Mr. Singla, learned Counsel for M/s. Gupta Refractories submits that this report had valued the property at Rs. 47,08,800/-. Gupta Refractories had bid for the items covered by the said valuation for Rs. 52 lakhs, and therefore, Gupta Refractories is entitled to remove all the items covered by the said report.

18. He relies on the proceedings recorded by the Tehsildar, Morena at the time of auction on 26.7.2001 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.

19. Mr. Mayank Goel, learned Counsel for the Official Liquidator, submits that on 04.05.2006 while dealing with report No. 328/2005 on the administrative side, this Court had directed M/s Gupta Refractories to file details of the goods which have been removed by them from the factory at Morena. The Official Liquidator was also required to make an inventory of the plant and machinery available in the said factory as on date of inspection. On 07.07.2006 it was reported to the Court that a joint inspection of the factory at Morena had been conducted by MPFC, IDBI and IFCI and the plant and equipment available in the factory were found to be very heavy and could not be easily removed as they were embedded in the land. On this basis the number of guards were reduced from 20 per day to 2 per day to reduce the expense on maintenance of security at the factory premises.

20. The MPFC has placed on record the offer it had received on 07.02.2001 from Malik Enterprises Pvt. Ltd. whereby they had offered to purchase all the assets except land and office building i.e. the complete plant along with machinery, electronic goods, motor transformer set and other store goods, power house etc. except office and land for an amount of Rs. 2,21,00,781/-. It is argued that the amount of Rs. 52 Lacs bid by M/s Gupta Refractories is far too less and it was never the intention of any of the bidders at the auction held by the Tehsildar that the plant and machinery which is attached to the earth and is an immovable property was being offered for sale. Another offer was received from Khan & Sirohi Electro Mechanical on 30.05.2001, whereby they had similarly made an offer to purchase all the assets excluding the land and building at the site for Rs. 2.25 Crores.

21. A perusal of the application C.A. No. 385/2007 shows that the applicant M/s Gupta Refractories are seeking the inclusion of, inter alia, the structures and machines lying at the factory premises of the company in liquidation, within the scope of its purchase in the auction held by the Tehsildar, Morena. The contention of M/s. Gupta Refractories that it 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 is contradicted by its own statements made in earlier proceedings. All that was purportedly sold in the auction conducted by the Collector and Tehsildar, Morena, and that was purchased by it in the auction held on 26.07.2001 was only the "movable property" i.e. "Chal Sampatti". The proceeding sheet prepared by the Teshildar, Morena, clearly 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 inspections of the Chal Sampatti i.e. movable property and bids were invited. In the process the bid of M/s Gupta Refractories of Rs. 52 Lacs as being the highest was accepted and M/s Gupta Refractories was declared the purchaser of the movable properties lying at the factory premises of the

company in liquidation.

22. The case of M/s Gupta Refractories who were arrayed as respondent No. 7 before the M.P. High Court in Writ Petition No. 325/2002 preferred by MPFC, was that it had only purchased the movable property and it shall remove only the movable and not immovable properties from the factory premises of the company in liquidation. This is evident from the order dated 17.05.2002 passed by the M.P. 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 dispute 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.

23. In the proceedings recorded by the Tehsildar on 26.07.2001 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 Rs. 25,000/- was deposited by every participant of auction as a security amount and thereafter the auction proceeding was started. Auction of this moveable asset was started with an amount of Rupees Thirty Five Lacs and last bid of auction was fixed on Rupees Fifty Two Lacs (highest), which was done by Sh. J.P. Gupta-Gupta Refectories, Gwalior. No other person was called excessive bid against such highest bid, therefore this bid was confirmed as last and final. A cheque of Rupees Thirteen Lac i.e one fourth of the last bid (Rupees Fifty Two Lacs) was deposited."

24. The Nazir, Tehsil Morena sent a communication to the Additional Tehsildar, Morena on 28.05.2002 stating that on the said date a joint inventory of the movable properties had been prepared, which includes only those which were lying on the ground and were not attached to the earth. This inventory was prepared in the presence of M/s Gupta Refractories. A 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 these articles which M/s Gupta Refractories were entitled to remove and nothing more.

25. The Tehsildar, Morena has reported on 09.06.2002 that M/s Gupta Refractories have removed all the movable assets lastly between 28.05.2002 and 09.06.2002. It has been reported by him that there is no other movable property existing on the site.

26. In Duncans Industries Ltd. Vs. State of U.P. and Others, while dealing with the aspect whether the plant and machinery in a factory is movable or immovable property, the Supreme Court observed:

8. Considering the question whether the plant and machinery in the instant case can be construed as immovable property or not, the High Court came to the conclusion that the machineries which formed the fertilizer plant, were permanently embedded in the earth with an intention of running the fertilizer factory and while embedding these machineries the intention of the party was not to remove the same for the purpose of any sale of the same either as a part of a machinery or scrap and in the very nature of the user of these machineries, it was necessary that these machineries be permanently fixed to the ground. Therefore, it came to the conclusion that these machineries were immovable property which were permanently attached to the land in question. While coming to this conclusion the learned Judge relied upon the observations found in the case of Reynolds v. Ashby & Son 1904 AC 466 and Official Liquidator Vs. Sri Krishna Deo and Others, . We are inclined to agree with the above finding of the High Court that the plant and machinery in the instant case are immovable properties. The question whether a machinery which is embedded in the earth is moveable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration the intention of the parties (sic party) when it decided to embed the machinery, whether such embedment was intended to be temporary or permanent. A careful perusal of the agreement of sale and the conveyance deed along with the attendant circumstances and taking into consideration the nature of machineries involved clearly shows that the machineries which have been embedded in the earth to constitute a fertilizer plant in the instant case, are definitely embedded permanently with a view to utilise the same as a fertilizer plant. The description of the machines as seen in the schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with a view to operate a fertilizer plant and the same was not embedded to dismantle and remove the same for the purpose of sale as machinery at any point of time. The facts as could be found also show that the purpose for which these machines were embedded was to use the plant as a factory for the manufacture of fertilizer at various stages of its production. Hence, the contention that these machines should be treated as moveables cannot be accepted....

27. The same issue was also considered by the Supreme Court in T.T.G. Industries Ltd., Madras Vs. Collector of Central Excise, Raipur, in the following words:

21. The appellant has placed considerable reliance on the principles enunciated and the test laid down by this Court in case of The Municipal Corporation of Greater Bombay and others Vs. The Indian Oil Corporation Ltd., to determine what is immovable property. In that case the facts were that the respondent had taken on lease land over which it had put up, apart from other structures and buildings, six oil tanks for storage of petrol and petroleum products. Each tank rested on a foundation of sand having a height of 2 feet 6 inches with four inches thick asphalt layers to retain the sand. The steel plates were spread on the asphalt layer and the tank was put on the steel plates which acted as bottom of the tanks which rested freely on the asphalt layer. There were no bolts and nuts for holding the tanks on to the foundation. The tanks remained in position by their own weight, each tank being about 30 feet in height, 50 feet in diameter, weighing about 40 tons. The tanks were connected with pump house with pipes for pumping petroleum products into the tank and sending them back to the pump house. The question arose in the context of ascertaining the rateable value of the structures under the Bombay Municipal Corporation Act. The High Court held that the tanks are neither structure nor a building nor land under the Act. While allowing the appeal this Court observed: (SCC p. 33, para 32)

32. The tanks, though, are resting on earth on their own weight without being fixed with nuts and bolts, they have permanently been erected without being shifted from place to place. Permanency is the test. The chattel whether is movable to another place of use in the same position or liable to be dismantled and re-erected at the latter place? If the answer is yes to the former it must be a movable property and thereby it must be held that it is not attached to the earth. If the answer is yes to the latter it is attached to the earth.

22. Applying the permanency test laid down in the aforesaid decision, Counsel for the appellant contended that having regard to the facts of this case which are not in dispute, it must be held that what emerged as a result of the processes undertaken by the appellant was an immovable property. It cannot be moved from the place where it is erected as it is, and if it becomes necessary to move it, it has first to be dismantled and then re-erected at another place. This factual position was also accepted by the adjudicating authority.

23. The technical member, however, held that the aforesaid decision was of no help to the appellant inasmuch as a leading international manufacturing firm had offered such machines for export to different parts of the world. He further observed that though on account of their size and weight, it may be necessary to shift or transport them in parts for assembly and erection at the site in the steel plant, they must nevertheless be deemed as individual machines having specialised functions. We are not impressed by this reasoning, because it ignores the evidence brought on record as to the nature of processes employed in the erection of the machine, the manner in which it is installed and rendered functional, and other relevant facts which may lead one to conclude that what emerged as a result was not merely a machine but something which is in the

nature of being immovable, and if required to be moved, cannot be moved without first dismantling it, and then re-erecting it at some other place. Some of the other decisions which we shall hereafter notice clarify the position further.

24. In Quality Steel Tubes (P) Ltd. Vs. Collector of Central Excise, U.P., , the facts were that a tube mill and welding head were erected and installed by the appellant, a manufacturer of steel pipes and tubes, by purchasing certain items of plant and machinery in market and embedding them to earth and installing them to form a part of the tube mill and purchasing certain components from the market and assembling and installing them on the site to form part of the tube mill which was also covered in the process of welding facility. After noticing several decisions of this Court, the Court observed that the twin tests of exigibility of an article to duty under the Excise Act are that it must be a goods mentioned either in the Schedule or under Item 68 and must be marketable. The word "goods" applied to those which can be brought to market for being bought and sold and therefore, it implied that it applied to such goods as are movable. It noticed the decisions of this Court laying down the marketability tests. Thereafter this Court observed: (SCC p. 376, para 5)

The basic test, therefore, of levying duty under the Act is twofold. One, that any article must be goods and second, that it should be marketable or capable of being brought to market. Goods which are attached to the earth and thus become immovable and do not satisfy the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being bought and sold. Therefore, both the tests, as explained by this Court, were not satisfied in the case of appellant as the tube mill or welding head having been erected and installed in the premises and embedded to earth ceased to be goods within meaning of Section 3 of the Act.

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27. Keeping in view the principles laid down in the judgments noticed above, and having regard to the facts of this case, we have no doubt in our mind that the mudguns and the drilling machines erected at site by the appellant on a specially made concrete platform at a level of 25 feet above the ground on a base plate secured to the concrete platform, brought into existence not excisable goods but immovable property which could not be shifted without first dismantling it and then re-erecting it at another site. We have earlier noticed the processes involved and the manner in which the equipments were assembled and erected. We have also noticed the volume of the machines concerned and their weight. Taking all these facts into consideration and having regard to the nature of structure erected for basing these machines, we are satisfied that the judicial member of CEGAT was right in reaching the conclusion that what ultimately emerged as a result of processes undertaken and erections done cannot be described as "goods" within the meaning of the Excise Act and exigible to excise duty. We find considerable similarity of facts of the case in hand and the facts in Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut, and Quality

Steel Tubes (1993) 2 SCC 372 and the principles underlying those decisions must apply to the facts of the case in hand. It cannot be disputed that such drilling machines and mudguns are not equipments which are usually shifted from one place to another, nor is it practicable to shift them frequently. Counsel for the appellant submitted before us that once they are erected and assembled they continue to operate from where they are positioned till such time as they are worn out or discarded. According to him they really become a component of the plant and machinery because without their aid a blast furnace cannot operate. It is not necessary for us to express any opinion as to whether the mudguns and the drilling machines are really a component of the plant and machinery of the steel plant, but we are satisfied that having regard to the manner in which these machines are erected and installed upon concrete structures, they do not answer the description of "goods" within the meaning of the term in the Excise Act.

28. Applying the aforesaid tests it is clear that the heavy machinery, plant and equipments, as also the sheds installed and erected by the company in liquidation, at the time of their installation/erection, were installed/erected with a view to permanently install and erect the plant at the site for the purpose of running the same. The nature of the machinery involved, and the manner in which the same is installed clearly shows that the machinery had been embedded into the earth with the intention of permanently establishing the plant. It also shows that the purpose for which the machines were embedded was to use the plant in the factory for the purpose of manufacture and production. It, therefore, follows 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 immovable property which was not purchased by Gupta Refractories.

29. The photographs of the factory premises have been placed on record by M/s Gupta Refractories. Even in relation to the structures, in my view the claim of M/s Gupta Refractories is totally baseless and the same can only be described as an attempt in greed made by M/s Gupta Refractories to usurp even those properties which can, under no circumstance, be described as movable. The structures and the heavy machinery, it is seen from the photographs placed on record, are attached and affixed to earth, and possibly cannot be removed without being uprooted from the earth. By no stretch of imagination can they be considered to be movables or "Chal Sampatti".

30. Reliance placed by Ram Narain Mahato Vs. State of Madhya Pradesh, " appears to be misplaced. This case pertained to the sale of future goods. It was not a case of sale of specific property in a deliverable state. However, in the present case, there was no agreement that M/s Gupta Refractories would remove from the factory premises of the company in liquidation, any property other than that which was already in a movable state. The auction sale was not in respect of the equipment, machinery and structures which were not a movable state. Similarly, the decision of the Supreme Court in P. Udayani Devi Vs. V.V.

Rajeshwara Prasad Rao and Another, and Anr." has no relevance to the facts of the present case. This case pertained to the scope of the power of the High Court u/s 115 of the CPC. It was held that what was sold in execution of a decree is a question of fact and the High Court?s interference in exercise of revisional jurisdiction u/s 115 with findings of fact of the lower Court is not called for.

31. Reliance placed upon Commissioner of Income Tax Vs. Bhurangya Coal Co., " also appears to be misplaced. In that case there were two agreements. First pertained to immovable property, described in Part-I of schedule and the second pertained to movable properties described in Part-II of the Schedule. It was argued that some of the properties described in Part II of the Schedule were really fixtures and would be "immovable property" as defined in General Clauses Act and the Transfer of Property Act. They passed on to the transferee under the sale deed for the immovable property and therefore, their value should also be taken into account in assessing the chargeable income u/s 12(B) of the Income Tax Act. The Supreme Court held that the question whether the registered sale deed included any of the fixtures mentioned in Part II of the Schedule or not, must be decided purely on the construction of sale deed. Fixtures attached to the land will pass on the sale of the land u/s 8 of the Transfer of Property Act. However, this is subject to any different intention which may be expressed or be necessarily implied in the document. On the construction of the document before it, the Court came to the conclusion that what was intended to be sold under the sale deed were only properties mentioned in Part-I of the Schedule and not any of the items in Part-II of the Schedule and the intention was to sell the fixtures as movable. This decision also does not advance the case of M/s Gupta Refractories. From the proceeding held by the Tehsildar and the subsequent stand of Gupta Refractories itself, as detailed hereinabove, it cannot be said that the intention was to sell the immovable plant and machinery and the structures to M/s Gupta Refractories at the time of the conduct of the auction sale as movables.

32. The reliance placed on the valuation report of M/s Pathak and Associates by M/s Gupta Refractories does not appear to be of much assistance in my view. The said report, as filed in this Court, is bereft of the annexures to which it refers. In fact, what has been placed is an incomplete report. Moreover, even if it were to be assumed that the said valuation report was in respect of the entire plant and machinery and the structures at the site, it does not follow that the entire assets evaluated in that report had been sold. 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.

33. So far as the challenge to the report of the Tehsildar that M/s Gupta

Refractories have removed all the movables and that nothing further remains to be removed by them is concerned, the applicant M/s Gupta Refractories have not made any submission in support of this contention. This issue has been raised by them before the M.P. High Court in a separate writ petition. In any event, the directions that I propose to issue would address this concern of the applicant M/s Gupta Refractories.

34. Under the orders of this Court dated 13.10.2006 M/s Chadha & Associates prepared a valuation report of the factory premises including the plant and machinery, land and building dated 04.12.2006. In this report, the valuer reports:

1.02 We had physically verified and inspected the machines together with the rep. of the court (Mr. Khurana), Sh. B.L. Chadha of M/s Chadha & Associates again on 01/12/2006. No plant & machinery is in complete form. The removable parts of the entire plant & machinery have already been removed (See earlier report given).

1.03 All visual electric cables/wires have been cut & removed. The fitments in all electric control panels namely contractors, relays, connectors, wiring, copper bus bars etc. found missing. Only skelton remain is there.

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.

36. To resolve the controversy whether M/s Gupta Refractories have removed from the factory premises of the company in liquidation any machinery/parts thereof, which was attached to the earth and was, therefore, immovable property, and also to determine whether there is any movable property presently lying in the factory premises, which M/s Gupta Refractories can lay a claim to, I think it appropriate to appoint a Local Commissioner to call for a report on the aforesaid aspect. Accordingly, I appoint Mr. Amrit Pal Singh Gambhir, Advocate, Mobile No. 9810082347, as the Local Commissioner to visit the factory premises of the company in liquidation at Morena and to report whether M/s Gupta Refractories has removed any machinery or parts thereof, which formed part of the plant and machinery installed in the factory premises and which could be said to be attached to the earth or forming part of any plant or machinery, which is attached to the earth. While executing the Commission, the Local Commissioner shall keep in mind the principles enunciated by the Supreme Court in Duncans Industries Ltd. (supra) and T.T.G. Industries Ltd. (supra). The Local Commissioner should also report whether there are any movable articles lying in the factory premises. It should also be indicated whether the articles that are found to be movable, if any, are found in that state on account of their

detachment/uprooting/cutting by M/s Gupta Refractories from the immovable plant and machinery, or whether they were movable before M/s Gupta Refractories started removing the articles for the first time. The Local Commissioner shall record the claims made by one or the other party present at the time of inspection with regard to any item found at the site. The Local Commissioner shall also associate with him an independent mechanical engineer of at least five years experience, who shall visit the factory site alongwith the Local Commissioner. The Local Commissioner shall record the opinion of the mechanical engineer, with regard to each of the items of plant and machinery and other movable/immovable properties found at the site in his report, and also his opinion with regard to the missing machinery, parts of machinery, if any, which according to the accompanying expert would have been an essential part/ item of the plant and machinery. He shall co-relate the same with the inventories of the items removed by M/s. Gupta Refractories. The Local Commissioner shall also take the assistance of professional photographer and shall take photographs of all the properties found at the site. The Local Commissioner shall also estimate with the help of the expert mechanical engineer, the scrap value of the parts/ machinery, if any, found missing, which if present, would have formed part of the plant and machinery attached to the earth. The said value shall be worked out on the basis of the rates for scrap metal prevalent in July 2001, when the auction was held by the Tehsildar, Morena and by indicating the approximate weight of such part/machinery. The Tehsildar, representatives of the subsequent auction purchaser M/s Cosmos, M/s Gupta Refractories, MPFC, the secured creditors and the Official Liquidator, shall be given prior notice by the Local Commissioner of the time of execution of commission and they shall be entitled to be present at the site during the time of inspection if they so choose. Looking to the nature and magnitude of work involved, the tentative fees of the Local Commissioner is fixed at Rs. 50,000/-, which would be paid, in the first instance, by the official liquidator from the consideration received from M/s Cosmos and lying in deposit with him. The charges of the mechanical engineer, who may be appointed by the Local Commissioner shall also be borne, for the time being, by the Official Liquidator from the aforesaid fund. All out of pocket expenses towards travel, lodging, boarding and conveyance etc of the Local Commissioner and the Expert shall be borne from out of the consideration received from M/s. Cosmos. Once the report is received, the Court may make further orders regarding the ultimate liability for payment of the fees of the Local Commissioner and the mechanical engineer. The commission shall be executed within a period of one month from today. The report shall be filed in the Court within two months.

37. The Local Commissioner shall be provided by the MPFC and the Official Liquidator, the inventories of the articles removed by M/s Gupta Refractories from time to time, which are found on record, before the execution of the commission. The SHO of the local police station concerned shall provide necessary police assistance to maintain proper law and order at the site during the course of inspection. The Local Commissioner shall be entitled to inspect the

records of the case and if he so desires, to go through the inventories of articles removed by/stated to have been removed by M/s. Gupta Refractories as found on record.

38. M/s. Cosmos, while tendering their bid of Rs. 6.15 crore have obviously taken into account all that is presently lying in the factory premises, which includes movables, if any. M/s Cosmos has not been able to use and exploit the asset purchased by it in Court auction for Rs. 6.15 crores since 26.04.2007. Therefore, I direct that soon after the conclusion of the inspection, M/s Cosmos 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 M/s Gupta Refractories may lay their claim. The claim of M/s Gupta Refractories for such items, if found admissible, would be met from out of the sale proceeds deposited by M/s Cosmos, or adjusted from the value of any immovable property i.e machinery/parts of machinery (which is classified as immovable property), and which may have been already removed by it. This arrangement would enable M/s. Cosmos to deal with the asset for which it has paid a substantial amount of Rs. 6.15 crores some time after April 2007, and they would not have to further await the adjudication of the claims/liabilities, if any, of M/s. Gupta Refractories.

39. I further direct the official liquidator to execute the conveyance deed in favour of M/s Cosmos or its nominee in respect of the immovable property of the company purchased by M/s Cosmos. However, in my view, no compensation can be claimed by M/s Cosmos on account of delay in the completion of process of execution of the conveyance deed, since it cannot be said that the official liquidator has acted negligently in the matter. M/s Cosmos participated in the Court auction with open eyes, knowing fully well about the pendency of the claim of M/s Gupta Refractories, as contained in C.A. No. 385/2007, as also the claim of M/s MPFC in C.A. No. 165/2007.

40. I am not inclined to allow M/s. Cosmos to withdraw any part of the sale consideration deposited by them. Instead they are permitted to exercise their rights unhindered, in any manner, in respect of the assets purchased by it in the aforesaid terms. Accordingly, CA Nos. 706/2007, 922/2007 and 1031/2008 filed by M/s. Cosmos are disposed off in the aforesaid terms. CA No. 165/2007 of MPFC is partially rejected in so far as it challenges the auction sale in favour of M/s. Gupta Refractories on the ground of it being hit by provisions of the Companies Act. Other reliefs prayed for by MPFC would be considered by the Court after the receipt of the report of the Local Commissioner and Technical Expert and after hearing the parties with regard to the claim of MPFC that it has the first charge over the fixed assets of the company in liquidation. CA No. 385/2007 filed by M/s. Gupta Refractories is dismissed, subject to the right of M/s. Gupta Refractories to stake their claim, if any, for the value of any movable asset, after the receipt of the report of the Local Commissioner & Technical Expert.

