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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 12.07.2013

Decided on: 22.08.2013

+ **CO.APPL.26/2011, C.M. NO. 7989/2011 (for stay)**
M/S. TANEJA DEVELOPERS AND INFRASTRUCTURE
LTD. AND ANR.
Appellants

versus

THE OFFICIAL LIQUIDATOR AND ORS..... Respondents

+ **CO.APPL.27-29/2011, C.M. APPL.8046/2011 (for stay),
C.M. APPL.8728/2012 (Under Order I Rule 10), C.M.
APPL.8729/2012 (for exemption), C.M. APPL.8730/2012 (Under
Order I Rule 10) & C.M. APPL.8731/2012 (for exemption)**

DELHI AUTOMOBILES LTD. Appellant

versus

THE OFFICIAL LIQUIDATOR AND ANR..... Respondents

Appearance: Sh. Bhanoo Sood, Advocate, for
Appellant No.1 in Item No.1.

Sh. Girdhar Govind with Ms. Priyanka Kalra,
Advocates, for Resp. No.2 in Item No.1 and for
appellant in Item No.2.

Ms. Kajal Chandra, Ms. Renu Kuhar and Ms. Swati
Sinha, Advocates, for Resp. No.2 in Item Nos. 1
and 2.

Sh. Rajiv Behl and Sh. Manish Bishnoi, Advocates,
for Official Liquidator.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P. MITTAL

MR. JUSTICE S. RAVINDRA BHAT

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FACTS:

1. This judgment will dispose off two appeals: one preferred by

Taneja Developers and Infrastructure Ltd. (hereafter “Taneja”) and the other by the Delhi Automobiles Ltd (“DAL”), against the order of the learned Company Judge, dated 04.04.2011 in C.A. No. 2462/2010, 2382/2010 and 127/2011 (in C.P. No.161/1997).

2. Briefly, the facts are that in 1997, a petition for winding up was filed by M/s. Rocksmelt Company (India) [the second respondent] against M/s. Ganga Automobiles Limited (GAL). During the pendency of those proceedings, on 02.02.1998, Mr. G.S. Suri, father of Mr. Ashwin Suri (Managing Director of GAL), appeared before the Company Court and offered to pay the unsettled dues of GAL, in his capacity as DAL, by selling the property situated at 1, Sikandra Road, New Delhi (hereafter “suit property”). The offer was accepted by the Court, which then ordered that the property would be deemed to be attached and sold under Court supervision, if not sold within 3 ½ months. This was expressly recorded by the order of Court, in the company winding up proceeding, as follows:

“02/02/1998

“.....It is submitted by the learned counsel for the respondent that M/s Delhi Automobiles Limited have immovable property, namely, 1, Sikandara Road, New Delhi. According to the learned counsel for the respondent the property is extremely valuable. He further states that efforts are being made to sell the property and in case the property is sold, the money will frst be utilized for meeting the amount due to the creditors who have filed petitions in this Court. He further states that the Chairman of MIs Delhi Automobiles Limited and Mr. Mukhinder Singh, the Director of M/s Ganga

Automobiles Limited are present in Court and their statements may be recorded Let their statements be recorded.

February 2, 1998.

*Sd/
Anil Dev Singh, J*

The statement of Mr. G.Sagar Suri, Chairman, Al/s Delhi Automobiles Limited, and Mr. Mukhinder Singh, Directors of M/s Ganga Automobiles Limited, have been recorded The undertakings given by them are accepted In case the property No. 1, Sikandara Road, New Delhi is not sold within a period of three and-half months and the amounts which are due to the creditors who are before this Court are not paid off or any other favourable arrangement securing the monies of the creditors is not reached within the above said period from today, the property No. 1, Sikandara Road, New Delhi will be deemed to have been attached and will be sold under the supervision of the Court.....”

3. On 03.02.1998, Mr. G.S. Suri sought to withdraw the statement he had made the previous day on the ground that he had made it (the statement) without authority from the Board of Directors of DAL, the company which owned the suit property. The Court directed that that the request to withdraw the undertaking recorded in the order, i.e. the part pertaining to attachment of the property at Sikandra Road, would take effect if a review of the order dated 02.02.1998 was sought. On 20.02.1998, the Court modified its previous order, stating that the order would have no effect till the next hearing on 22.05.1998, by which date the company would make all efforts to repay their creditors, failing which the company would be deemed to be wound up. The order made thereafter however, did not make any reference to

the property situated at Sikandra Road, and stated that “*the order dated 20th February, 1998 needs no variation,*” once an undertaking to deposit ₹610 lakhs was made. On 18.8.1998, GAL was directed to be wound up and an Official Liquidator was appointed.

4. DAL filed an application, C.A. No. 1508/98, for review of the order dated 02.02.1998. An application, C.A. No. 1421/05, was also filed for amendment of the review petition. On 13.08.2009, both these applications were dismissed for non-prosecution. Subsequently an application, C.A.1242/09, for revival of these applications was also dismissed for non-prosecution on 18.3.2010.

5. DAL claims to have entered into an agreement to sell the suit property on 24.12.2002 to Taneja for a consideration of ₹25 crores out of which a sum of ₹5 crores was paid to DAL. By lease deed dated 14.01.2003, the 1st floor of the property was let out to Universal Buildcon India Ltd (hereafter “Universal”), the second appellant in Taneja’s appeal. Universal is an associate company of Taneja, and physical possession of the property was handed over subsequently. Universal apparently paid ₹2 crores towards the lease agreement which was adjusted as part consideration towards the sale.

6. In November 2006, Taneja filed a suit for specific performance of the sale agreement and for a permanent injunction. In 2007, Universal also filed a similar suit with respect to the lease deed. Both suits are pending on the file of this Court. On 31.01.2007, a Single Judge in the suit noted that the counsel for the defendant stated that the understanding that the parties had entered into on 08.12.2006 would continue till the next date. On 27.02.2007, the Single Judge

appointed a local commissioner for the property and directed the parties to maintain *status quo* with respect to the possession of the property as per the report of the local commissioner. On 27.07.2009, the order of injunction passed in respect to C.S. (O.S.) 2182/2006 directing *status quo* was continued till further orders.

7. By application, C.A. 2382 of 2010, the Official Liquidator sought directions to DAL to hand over possession of the suit property. He also submitted that before any orders were made, he would try to regain the possession of that property. The Court then re-notified the case for 27.01.2011, further stating that the consequence of Mr. G.S. Suri's dishonouring the undertaking made by him to the Court would also be considered. Later, a fresh application, C.A. No.127/2011, was moved by the Official Liquidator seeking directions to the police for providing aid in taking possession of the suit property. DAL resisted the application on the ground that there was no Court order directing the sale of the property, and placed the title deed of the property on record.

8. On 04.02.2011, the Appellants filed an application, C.A. 192/2011, under Rule 9 of the Company Court Rules for appropriate orders to recall the order of attachment and seek confirmation of the sale agreement. This application was withdrawn when the Single Judge allowed the Appellants to approach the Court again after the disposal of the applications for sale of the property filed by the Respondents. The Single Judge, however, reserved orders on the applications of the liquidator, without notice to DAL.

9. On 04.04.2011, the Company judge by the impugned order held

that the suit property Sikandra Road stood attached and was liable to be sold, reasoning that Mr. G.S. Suri held a valid power of attorney from the previous owners and was therefore competent to make the statement.

APPELLANTS' ARGUMENTS:

10. It is urged that the learned Single Judge erred inasmuch as in the winding-up proceedings of GAL, the Company Court ordered attachment and sale of property admittedly owned by another company (DAL), for which Taneja had already entered into agreement to sell and paid a substantial consideration, and for enforcement of which it had already filed a suit for specific performance. In the suit, the Court issued a restraint order in respect of the suit property as regards possession and against alienation. It was argued that, likewise, the learned Company Judge overlooked that Universal too had entered into a lease agreement with DAL for renting the entire first floor of the suit property and is in possession of the same. For enforcement of that lease deed, it too filed a suit for specific performance in which the Court has issued an interim order as regards possession.

11. Taneja urges that on a proper and fair reading of the orders dated 02.02.1998, 03.02.1998 and 20.02.1998, the so called deemed attachment of property ordered on 02.02.1998 was stayed by the Court on 20.02.1998 till next date and on the next date i.e. 22.05.1998, the Court directed that “... *the order dated February 20, 1998 needs no variation. Therefore, the suit was taken out of the*

purview of attachment order and the learned Single Judge is in gross error of fact in holding that the said property was under order of deemed attachment.” The order dated 02.02.1998 thus stayed the attachment of the property and on the next hearing, the Court directed that the previous order needed no variation. This translated to the concerned suit property being removed from the purview of the attachment proceedings.

12. Learned Senior Counsel for Taneja, Dr. Singhvi, argued that the impugned order overlooked that that the Appellants entered into a *bona fide* agreement to sell and lease for valuable consideration without notice of the pending proceedings and, therefore, their rights and interests ought to have been protected especially when the learned Single Judge was cognizant of those said facts. Significantly, Counsel stressed that it was brought to notice of the learned Single Judge that there existed a restraint order against alienation or encumbrance or parting with the possession of the suit property till disposal of the suit by a learned Single Judge of this Court. It was submitted in this regard that a contract for conveyance of immovable property (like the two agreements in question here with DAL, in respect of the suit property) entered into before the attachment order, cannot be considered binding upon the *bona fide* purchaser, on whom such order would act in an oppressive manner. Learned senior counsel contended, on the strength of the decisions reported as *Vannarakkal Kallalathil Sreedharan v Chandramaath Balakrishnan & Anr.* 1990 (3) SCC 291; *Rajender Singh v Ramdhar Singh* 2001 (6) SCC 213 and *Kancherla Lakshminarayana v Mattaparthi Syamala & Ors* 2008

(14) SCC 258, that a contract of sale entered into before attachment orders are made, conveys good title in spite of attachment.

13. Taneja contends that the order of the Single Judge is erroneous as far as it ordered attachment of the property owned by another company, in respect of which the High Court had already passed an order for specific performance and granted a permanent injunction for possession and alienation. This, therefore, causes an inconsistency between two judicial orders which results in confusion and miscarriage of justice. It was urged that on 02.02.1998, the property did not vest with DAL, which had entered into an agreement to acquire it from its original owners and Mr. G.S. Suri was only holder of a power of attorney for certain purposes. He, therefore, did not possess any authority to make the statements concerning the suit property. Even if he were to be considered competent to make such statements, the same was *ultra vires* the Memorandum of Association and Articles of Association of DAL, as it was beyond the objects of the company to be a guarantor for the debts of other companies. The appellants are *bona fide* purchasers/lessees for valuable consideration and were not given any notice of the pending proceedings concerning the property. Their rights should have therefore been protected. Learned counsel relied on the judgment reported as *Shubh Shanti Services Ltd v Manjula S. Agarwalla & Ors* 2005 (5) SCC 30 and submitted that in the absence of express authorization or power a Director or Managing Director of a company cannot enter into binding obligation on its behalf, especially those which result in encumbrance of its immovable properties or in any manner create

clogs on its transfer or alienability. It was also argued that no benefit flowed to DAL as a result of the unilateral statement of Shri Suri. Even otherwise, property was offered to prevent winding up of another company, GAL. Winding up was eventually ordered and consequently, the property cannot be now the subject matter of attachment.

14. It was submitted that the withdrawal of the statement made by Mr. Suri was immediate and suffered from no delay – reliance is placed on the order dated 03.02.1998, in this regard.

15. Counsel for the appellants urged that the Official Liquidator only had authority to take control of the property of the company under liquidation and not of another party unconcerned with the liquidation. In this context, it was submitted that Section 433 of the Companies Act entitles a creditor to realize the valid debts of the company; GAL's winding up proceedings could not confer jurisdiction over DAL's property.

16. It was lastly urged that Taneja or DAL should not be driven to substantial proceedings in the form of a title or declaratory suit. Learned senior counsel submitted that the nullity of an order without jurisdiction can be successfully set up at any stage, even in unconnected or collateral proceedings. Learned counsel relied on the decision reported as *Chiranjilal Shrilal Goenka v Jasjit Singh* 1993 (2) SCC 507.

17. Learned counsel for the DAL, Shri Girdhar Govind, adopted the arguments made on behalf of Taneja and further added that the learned Single Judge did not give opportunity to the parties to address

as to the true effect of the previous orders. The impugned order seriously prejudiced the entitlements of DAL, and consequently Taneja, inasmuch as the title which was acquired by the latter as an innocent third party purchaser was seriously prejudiced without adequate hearing. Counsel submitted that a reading of the orders of 02.02.1998, 03.02.1998 and 20.02.1998 reveal that there was no subsisting direction to attach or sell the suit property, and eventually the position was confirmed by the order of the Company judge dated 22.05.1998. The learned Single Judge, argued Shri Govind, erroneously interpreted these to imply that there was a subsisting attachment.

18. When C.A. 127/2011 was moved by the Official Liquidator and the appellant entered appearance, the Company Judge informed them that the Court had not yet issued notices on the said applications and in case the Court decided to pass orders which were adverse to the interests of the appellants, appropriate notice would be issued to them. The matter was taken up on 10.02.2011, when submissions made by the parties were heard but no notice was given to the appellant DAL. Thereafter on 04.04.2011, the learned company judge pronounced the impugned order allowing the Official Liquidator's applications and directing control and possession to be taken of the property at Sikandra Road.

19. It was submitted that the observation of the Judge that Mr. G.S. Suri had the power of attorney to deal with the property of DAL is incorrect. The power of attorney was given by the erstwhile owners of the said property in respect of their undivided shares, transferring it in

favour of Mr. Suri. The power of attorney did not empower him to offer the property to meet the liabilities of the creditors. The General Power of Attorney executed by the erstwhile owners of the property on Sikandra Road authorized Mr. G.S. Suri to '*do all acts and deeds for effecting the transfer of share in favour of Delhi Automobiles*'. It further detailed that the GPA authorized the holder to execute a sale deed between the owners and DAL.

20. Mr. Govind argued that in terms of provisions of the Companies Act, the official liquidator is only empowered to take control of the property of the company in liquidation and not another party which is unconcerned with the liquidation. This contention has not been addressed by the company judge. The property is owned exclusively by DAL and no objection has been taken to the same by the respondents.

21. Learned counsel further submitted that DAL had, under mistaken advice, filed an appeal, C.A. No. 16/1998, claiming to be aggrieved by the order of 2nd February, 1998, even though there was no need to do so. That appeal was disposed by the Division Bench, which granted liberty to DAL to seek review. The company mistakenly sought review of the order; an amendment application too was filed. They were, however, dismissed for want of diligence. Counsel stressed that these developments are irrelevant and the actual express terms of the orders in question amply clarify that there was no attachment or encumbrance upon the suit property.

Respondents' contentions

22. It is argued on behalf of the Official Liquidator that the order

dated 04.04.2011 merely directed physical possession to be taken of the property. The order which actually directed the attachment of the property was the one dated 02.02.1998, which had attained finality. The application filed by the Appellants for review of the order dated 02.02.1998 were dismissed for non-prosecution, as were the applications filed for revival of the application. The appeal against the order had been disposed off without any relief to the appellants.

23. Mr. Bahl, learned counsel for the Official Liquidator, submitted that the present appeals are not maintainable as the appellants are, in effect, challenging the order dated 02.02.1998 since the order dated 04.04.2011 is ancillary to the previous orders. The previous order is both unambiguous and final. It was submitted that non-pursuance of the orders of review and recall was not inadvertent but deliberate. Counsel emphasized that the orders in question, made in 1998, categorically stated that the property stood attached. The DAL was aware of those orders; its attempts to have the order revisited, and also to set them aside, clearly belied its contention that it was not bound by it, or that the order could not affect its property. All legal avenues to have the Court's orders nullified were themselves set at naught. Consequently, it does not lie in the mouth of Taneja or DAL to say that there was no attachment order. The non-prosecution of applications by DAL was also deliberate.

24. It was argued no notice was required to be given of the proceedings before the Company Judge as the appellants were fully aware of it. In any case, there was no need to issue notice with regard to the Liquidator's applications as they were in pursuance of the order

dated 02.02.1998, which had attained finality.

25. Counsel for the Official Liquidator submitted that on 03.02.1998, when Mr. G.S. Suri sought to withdraw the undertaking made by him the previous day, the counsel for the Appellants sought to delete that part of the order which related to the property at Sikandra Road. However, the Company judge had pointed out that those contentions would only take effect if an application for a review of that order was made. DAL filed an application, C.A. No. 1508/98, for review of the order dated 02.02.1998. Additionally, an application, C.A. No. 1421/05, was filed for amendment of the review petition. On 13.08.2009, both these applications were dismissed for non-prosecution. Subsequently an application, C.A.1242/09, for revival of the said applications was also dismissed for non-prosecution on 18.03.2010. The order directing the attachment of the property at Sikandra Road thus stood and attained finality. Accordingly, the property was thus not taken out of the purview of the attachment order.

26. The Official Liquidator contends that the submission that Mr. G.S. Suri had no authority to make the undertaking before the Court also has to fail. These arguments should have been raised in the review petition which was dismissed for non-prosecution. Reliance placed on the decision in *Shub Shanti Services v Manjula Agrawal* 2005 (5) SCC 30 by the appellant, that in the absence of any specific authority to the Chairman by the Board of Directors to act for and on behalf of the Company, the assurance given by him to the respondents would not create a binding legal obligation between the parties, as the

exercise was beyond the Articles and Memorandum of the company, will also not apply for the simple reason that the agreement to sell relied on by Taneja itself was unenforceable. In a decision of a 3 judge bench of the Supreme Court in *Suraj Lamp & Industries Pvt Ltd. v State of Haryana*, (2012) 1 SCC 656 it was held, in the context of the validity of SA/GPA/Will transactions, that Section 54 of the Transfer of Property Act makes it clear that a contract of sale by itself does not create an equitable interest in the property. Similarly, it was held in *Narandas Karsondas v S.A. Kamtam and Anr.*, (1977) 3 SCC 247, that ownership of a property only passes on the execution of conveyance. The obligation that arises out of a contract of sale does not amount to an interest or easement therein. Thus transfer of immovable property by way of sale can only be by way of a sale deed, which is stamped and registered. Any agreement to sell which is not a registered deed of sale will not confer any interest in an immovable property, except to the limited right granted under Section 53A of the Transfer of Property Act. An agreement of sale with or without possession is not a conveyance. The restraint order of the Single Judge in the suit for specific performance regarding possession and alienation of the property at Sikandra Road is only an injunction which has been granted, and is not a decision on the merits of the case.

27. DAL, it was argued, had attempted to create third party interest in the matter by entering into an agreement of sale with Taneja Developers and Infrastructure Limited, without informing them of the encumbrance on the property in the form of the attachment order.

However, the application filed by Taneja Developers, C.A. No. 192/2011, for recalling the order of attachment on 02.02.1998 wherein they had stated that they had not been informed of the encumbrance on the property when they had entered into the agreement of sale, was withdrawn on 10.02.2011 when they were given the liberty to approach the Court once the matter in 161/97 for sale of the property had been disposed of. However, no subsequent application had been filed by the said Appellant. Here, Counsel argued that *Kancherla Lakshminarayana* had no applicability. The Court had held there that a person who files a suit on the basis of an agreement of sale could not be held to be an utter outsider having no *locus standi* to take the objections. It was further held that the question of whether the validity of the agreement of sale and the question of whether it entitled the appellant for specific performance on the basis of the agreement is a question to be decided subsequently in the suit. However, significantly, the contract for sale in that case was made in the context of an agreement of sale entered into prior to attachment. The decision was based on the judgment in *Vannarakkal Kallalathil Sreedharan*. None of these cases relied on by the Appellants are applicable to the facts of this case as the attachment occurred before, in 1998, whereas the agreement to sell and the lease deed were entered into in 2002 and 2003 respectively. Thus, no valid third party interests have been created, even if the Appellants are *bona fide* purchasers/ lessees without notice of the encumbrance on the property.

28. Counsel relied on *Western Press Pvt. Ltd. v. The Custodian* 2000 (8) SCALE 159. There, a consent decree was obtained by the

parties by misleading the Court and assuring the existence of certain facts. While recording the consent decree, the parties had undertaken that in the event that sale of the property owned by Western Press was sanctioned by the Court, the parties would hand over possession of the property to the purchaser. In the execution proceedings, Western Press claimed that it was not a party to the proceedings, was not given notice, was not a judgment- debtor or a surety and that the undertaking given on its behalf was unauthorised. However, the Court held that this would not be a ground for allowing the execution proceedings of the consent decree to be questioned on the basis of different facts that have been withheld from the court. A factor that was instrumental in this decision was the fact that Western Press, the appellant company and the judgement debtor company were both controlled by the same family.

Analysis & Findings

29. This Court is called upon to decide the correctness of the view of the learned Company judge, in the impugned order, that the suit property was subject to attachment, and consequently, was under control of the Official Liquidator, who in turn wished to put it to sale.

30. Indisputably, winding up proceedings were pending in respect of GAL. On 02.02.1998, to stave off an imminent winding up order, Shri G.S. Suri, Managing Director of DAL made a statement, i.e. an undertaking to the Company Court. The terms of this undertaking are important – he stated that DAL owned the suit property which was valuable and that efforts were on to sell it, and that in the event of sale, the proceeds were to be utilized to liquidate GAL's liabilities.

On 03.02.1998, he sought to resile from that statement. The Company Court, on that date, recorded as follows:

“3.2.1998 Present: Ms Kajal Chandra, Mr S.K. Sharma, Mr A.K. Sikri, Mr. Amitabh Narayan, Ms Anjajli sharma, Mr. Rajeev Nanda, Advocates, for the petitioners in their respective petitions.

Mr Ravinder Sethi, Senior Advocate, with Mr D.R. Mahajan, Ms. Kamlesh Mahajan and Mr. Girdhar Govind for the respondent.

C.P. No. 161/ 97 & C.A. 384/ 97: (with CPs. 320/96, 99/97, 100/97, 101/97, 110/97 120/97, 140/07, 157/97, 163/97, 164/97, 167/97, 293/97, 366/97, 404/97, CCP 21/ 97 & CCP 17/ 97).

The statement of Mr. G. Sagar Suri was recorded on February 2, 1998. However, the statement has not been signed by him. It has been mentioned by the learned counsel for the respondent that Mr G. Sagar Suri was as actually not authorized to make any statement on behalf of M/s. Delhi Automobiles Ltd. with regard to 1, Sikandra Road, New Delhi, as he had not gone to the Board for an authorization from them in this behalf. It is unfortunate that on February 2, 1998 this was not the position taken by Mr G. Sagar Suri. He had categorically stated that he was authorized to make a statement on behalf of M/s. Delhi Automobiles Ltd. Learned counsel for the respondent also submits that the order pertaining to taking over of 1 Sikandra Road in the event of it being not sold in three and a half months should be deleted from the order dated February 2, 1998 as the property belongs to M/s. Delhi Automobiles Ltd. which is not a party before the Court. The prayer of the respondent can be considered only when a proper application is filed by the

respondent for review of the order dated February 2, 1998.

List the matter on the dates already fixed.

Sd/-

February 3, 1998.

Anil Dev Singh, J.”

On the next date of hearing, i.e. 20.02.1998, the Court made the following order:

“Present: Ms. Kajal Chandra, Mr. A.K. Sikri, Mr. Amitabh Narayan, Ms. Anjali Sharma, Mr. Rajeev Nanda, Mr. P.K. Mittal, Mr. Rana Ranjit Singh, Advocates, for the petitioner in their respective petitions.

Mr. Ravinder Sethi, Sr. Advocate with Mr. D.R. Mahajan and Ms Kamlesh Mahan, for the respondent.

C.P. Nos. 161/ 97 & C.A. 384/ 97 & C.A. 279/ 98:

(with C.Ps 320/ 96, 99/ 97, 100/ 97, 101/ 97, 110/ 97, 120/ 97, 140/ 97, 157/ 97, 163/ 97, 164/ 97, 167/ 97, 293/ 97, 366/ 98, 404/ 97 & CCP 21/ 97), CCP 17/ 97, CCP 4/98, CP 65/ 97, 249/ 97.

Learned Counsel for the respondent states that he is conscious of the fact that the respondent had given an undertaking in certain cases, to make the payment to the petitioners within a particular period of time and the same could not be carried into effects because of financial difficulties which are being faced by the respondent. He further states that he is also conscious of the fact that the Chairman of M/s. Delhi Automobiles on 2nd February, 1998, had made a statement in this court that he had authority to state on behalf of M/s. Delhi Automobiles Limited that efforts were being made to sell the property of M/s. Delhi Automobiles located at 1,

Sikandara Road, New Delhi so that the liability of M/s. Ganga Automobiles Limited towards its creditors could be liquidated but on 3rd February, 1998 the Chairman of M/s. Delhi Automobiles Limited had stated that he did not have the authority of the Board to make any statement with regard to 1, Sikandara Road, New Delhi. Learned counsel further states that despite the circumstances which are against the respondent, he would pray that the respondent be given an opportunity till 21st of May, 1998 to make the payment to all the creditors who are before this Court and in the event of the payments not being made by the said date, the Company be deemed to have been wound up and the Official Liquidator attached to this court be deemed to have been appointed as the Liquidator of the Company. Learned counsel for the petitioners have no objection to the passing of the order of deemed winding up in the light of the submission of learned counsel for the respondent.

Having regard to the statement of learned counsel for the respondent and learned counsel for the petitioners, I am of the view that the submission of Mr. Sethi, learned counsel for the respondent, with regard to the deemed winding-up of the company, should be accepted. Accordingly, it is directed that in case the admitted liability of the creditors who have filed petitions in this Court is not discharged by the respondent before 21st May, 1998, the Company will be deemed to have been wound-up and the Official Liquidator attached to this Court will act as the Liquidator of the Company.

Mr. Mahajan, learned counsel for the respondent has presented in Court the statement of account of the Company as on 31st March, 1996. Let the same be taken on record. Mr Mukhinder Singh, director of M/s. Ganga Automobiles will also file the statement of account of the Company upto-date within three weeks. Mr Mukhinder

Singh shall also disclose the names of the Directors of M/s. Ganga Automobiles. Such of the Directors who have given personal guarantee will file list of all their assets.

Mr. Sethi prays that in view of his statement that M/s. Ganga Automobiles will liquidate its liability to the creditors by 21st May 1998 and in case that is not done the company will be deemed to have been wound up, the order dated 2nd February, 1998 be modified.

Having regard to the statement of Mr. Sethi, learned counsel for the respondent, the following lines of the order dated February 2, 1998, will not have effect till the next date:

"In case the property No.1, Sikandra Road, New Delhi is not sold within a period of three and half months and the amounts which are due to the creditors, who are before this Court are not paid off or any other favourable arrangements securing the monies of the creditors is not reached within the above said period from today, the property No.1, Sikandra Road, New Delhi will be deemed to have been attached and will be sold under the supervision of the Court."

List the matter on 21st May, 1998.

A copy of this order be placed in the files of the connected matters.

February 20, 1998 *Sd/-*
Anil Dev Singh, J."

31. On the next date of hearing in the winding up petition, i.e 22.5.1998, the Court made the following order:

"Mr Kapil Sibal, learned senior counsel appearing

for the respondent, states that at this stage without insisting for the variation of the order dated February 20, 1998, his client will deposit a sum of Rs.610 lakhs for being disbursed to the petitioners in the following manner :-

<i>On or before</i>	<i>Amount (lacs)</i>
<i>15.07.98</i>	<i>40.00</i>
<i>14.08.98</i>	<i>40.00</i>
<i>30.09.98</i>	<i>40.00</i>
<i>31.10.98</i>	<i>100.00</i>
<i>30.11.98</i>	<i>140.00</i>
<i>31.12.98</i>	<i>250.00</i>
	<i>610.00</i>

Mr. Sibal also states that in case of default in the payment of any of the above installments, it will be open to the court to appoint the Official Liquidator as the Provisional Liquidator of the Company.

Besides the above statement, learned counsel for the respondent submits that the dispute between M/s. Gujarat Lease Financing Ltd. and the respondent company with regard to the question of liability could be resolved by appointing a Chartered Accountant to go into the question as to whether liability of the respondent towards the petitioner is Rs.4.60 crores or is Rs.17 lakhs. He further submits that the dispute between M/s. Goyal MG Gases Limited and the respondent stands referred to an arbitrator. Learned counsel also submits that the dispute between M/s. Poysha Oxygen Pvt. Ltd. and the respondent has also been referred for arbitration. Learned counsel for the respondent says that the liability of the respondent towards M/s. Rajeev Goel Architects Pvt. Ltd. will be notified to petitioner. He states that the respondent will calculate the interest payable to each of the petitioners on the admitted rate of interest and will file a schedule of payment. Learned counsel for the

respondent submits that Mr. Mukhinder Singh, a director of the respondent company, will give a statement that he will abide by the statements and undertakings given on behalf of the respondent, and in the event of the breach of the payment schedule, he will be personally liable for the consequences arising from such a breach.

Mr. Sibal states that Mr. Mukhinder Singh is present and is willing to make a statement to the above effect. Let the statement of Mr. Mukhinder Singh be recorded.

Sd/-

May 22, 1998

ANIL DEV SINGH, J.

Statement of Mr. Mukhinder Singh has been recorded. Learned counsel for the petitioners submit that Mr. Mukhinder Singh be asked to furnish the details of his immovable properties. They state that they would be praying that an order restraining Mr. Mukhinder Singh from selling his properties be passed. Mr. Sibal, learned counsel for the respondent, states that Mr. Mukhinder Singh owns twenty-seven acres of land at Dabala Kalan, Fazilka, District Ferozepur. He submits that Mr. Mukhinder Singh is a non-functioning Director and his personal properties cannot be subject of a restraint order in these proceedings. This position is disputed by the learned counsel for the petitioners. The parties may address their arguments on this aspect of the matter on the next date. However, till the next date Mr. Mukhinder Singh is restrained from selling the above said property.

Having regard to the submissions of the learned counsel for the parties, I am of the view that the order dated February 20, 1998 needs no variation. It is clarified that the statements and undertakings made by the learned counsel for the respondent apply to the petitions which have been filed before February 20, 1998.

List the matter on July 16, 1998. In the meanwhile, it will be open to the learned counsel for the parties to submit the names of the Chartered Accountants.

A copy of this order be kept in the concerned matters.

*Sd/-
Anil Dev Singh, J.*

May 22, 1998”

32. On 18.08.1998, the Company judge, in an elaborate order, recounted the previous orders whereby DAL's Mr. Suri, on 2nd February, 1998 made a statement that it had immovable property, namely, 1, Sikandra Road, New Delhi, which was valuable and that efforts were being made to sell this property and in case the property was sold, the money would first be utilized for meeting the amounts due to the creditors who filed petitions in this Court. Mr. Mukhinder Singh, Director of GAL, too made a statement. The Court noticed that the order itself recorded that in case the property No.1, Sikandra Road, New Delhi was not sold within 3 ½ months and the amounts due to the creditors were not paid or any other favourable arrangement securing the monies of the creditors not reached within the said period, the No.1, Sikandra Road, property would be deemed to have been attached and would be sold under the supervision of the Court. The Court then noted the subsequent stance of Mr. G. S. Suri, through an application for review, and noted that it was taken up on 3rd February, 1998 and thereafter the case was adjourned to 20th February, 1998. The Court then, in its order of 18th August, 1998, stated that:

“.....The proceeding of 20th February, 1998 show that the counsel, appearing for the respondent company, Mr. Ravinder Sethi, Senior Advocate made a statement that despite the circumstances against the respondent company an opportunity till 21st May, 1998 for making the payment of all the creditors (who are before this Court) be given and in the event of the payment not being made by the said date, the company be deemed to have been wound up and the Official Liquidator attached to this Court be deemed to have been appointed as the Liquidator of the company. To this statement of counsel for the respondent, petitioners expressed no objection for passing of the order of deemed winding up. Accordingly, having regard to the statement of counsel for the respondent company and of the petitioners, this Court passed the order if the liability or the debts of the Creditors who filed petition before this Court was not discharged by the respondent company before 21st May, 1998, the company would be deemed to have been wound up and the Official Liquidator attached to this Court would act as the Liquidator of the Company. It was in this background that the order of attachment and sale of the property bearing No.1, Sikandara Road, New Delhi was kept in abeyance till 21st May, 1998. Mr. Kapil Sibal, Senior Advocate appearing for the respondent company without insisting on the variation of the order dated 20th February, 1998 made a statement that his client would deposit a sum of Rs.610 lakhs for being disbursed to the petitioners.....”

33. The Court, very pertinently, stated that GAL failed to honour the commitment made by it, as recorded in the order dated 18.08.1998:

“.....(In) Pursuance to the statement of counsel for the respondent company and the undertaking given by

Mr. Mukhinder Singh, Director of the respondent company, this Court ordered Liquidator not to take over the assets of the company till the next date. At the same time this court made it clear that the Official Liquidator would not cease to be the Liquidator of the company.

The respondent company failed to adhere to the schedule of payment given to this Court on 22nd May, 1998. Thus the breach has been committed by the respondent as well as by its Director in adhering to the schedule of payment. The order of restraining the Official Liquidator from taking possession was kept in abeyance till the next date. Now even after three months of the said order the respondent company has not been able to pay even the first installment as committed to this Court vide order dated 22nd May, 1998. On the last date of hearing, the respondent company paid a sum of Rs.15 lakhs in this Court vide two cheques. Today again another cheque of Rs.5 lakhs has been deposited in this Court. Thus, as against two installments which have become due amounting to Rupees eighty lakhs, the respondent company has been able to pay only twenty lakhs. There is thus a breach in the undertaking given by the respondent company through its counsel as well as of its Director, Mr. Mukhinder Singh. This court vide order dated 22nd May, 1998 made it absolutely clear that in case there would be a breach of the payment schedule the deemed winding up order would come into operation and the Official Liquidator appointed as Liquidator of the company would take over the assets of the company as well as of the Director, Mr Mukhinder Singh who had by his undertaking made himself personally liable for the consequences arising from such a breach.

Since there is a deemed winding up order operating against the respondent company and the Official Liquidator attached to this Court was appointed as the Liquidator of this Company, the said order was

kept in abeyance from time to time to enable the respondent company to pay up its debts. Number of opportunities were given to the respondent company to adhere to the schedule of payment as given by it before this Court on 22nd May, 1998. But the respondent company has faulted and thus committed a breach of the same. Therefore, in these circumstances there is no alternative but to hold that respondent company stood wound up and the Official Liquidator attached to this court who was appointed as Liquidator of the company to take into custody and possession the assets, effects and records of the respondent company as well as the assets moveable and immovable of Mr. Mukhinder Singh, Director of the respondent company, who made himself personally liable for the consequences arising from such a breach. Necessary communication may also be sent to the Registrar of Companies. Notice in the prescribed form for making the order be published in the newspaper "Statesman" (English edition) as well as "Jan Satta" (Hindi edition). Copy of the order be sent to the Official Liquidator. Registrar is directed to draw up notification and formal order as prescribed under the rules.

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Counsel for the petitioners contend that in view of the order passed on 20th February, 1998, the property bearing No.1, Sikandara Road, New Delhi which was attached to be sold under the supervision of this Court, be ordered to be sold. To this, Mr. Girdhar Govind states that he would like to address arguments. According to him his review application has yet not been disposed of. On his request, adjourned to 10th September, 1998."

34. What is immediately apparent from the series of orders, quoted above, (dated 02.02.1998, 03.02.1998, 20.02.1998, 22.05.1998 and 18.08.1998) is that:

- (a) Shri G.S. Suri unequivocally stated that DAL would commit the suit property, i.e. No. 1 Sikandra Road and sell it; the proceeds were to be used to liquidate GAL's outstanding liabilities;
- (b) On 03.02.1998, Shri G.S. Suri sought to resile from the undertaking, stating that he did not have the authorization to commit the suit property in the manner that he did previously. However, the Court did not relieve the undertaking.
- (c) Subsequently, a review petition for recall of the order dated 02.02.1998 was filed. However, the said order was never varied.
- (d) The orders of 20.02.1998 and 22.05.1998 would reveal that GAL sought to buy time to discharge its liabilities, and consequently, the previous orders were kept in abeyance with the condition that in the event the payment schedule indicated to the Court were not adhered to, it would face a deemed winding up order.
- (e) On 18.08.1998, the Court did in fact record the failure of GAL to pay off its creditors, and directed that the winding up order made in a preemptory manner should operate. The counsel for DAL in the present appeals, Shri Girdhar Govind, sought time to submit that the order of 02.02.1998 ought to be reviewed.
- (f) The consequence of the previous orders, especially the order of winding up in a preemptory manner, (which was part of the composite order made on 22.05.1998) has not been disputed. Equally, the order sheet in the company winding up proceedings reveal that the attachment of the suit property was never vacated or modified.
- (g) The review petition and a subsequent application for

amendment, made by DAL were rejected. Its effort to revive those applications were also unsuccessful. It had earlier appealed unsuccessfully against the order of 02.02.1998 to the Division Bench.

35. In the opinion of the Court, the above sequence of events, especially the orders of the Court negate Taneja and DAL's submission that the attachment order cannot bind them. These facts show that the attachment order was not subsequent to the agreement to sell and the lease agreements (which were in 2002 and 2003) but rather, before them, having been made in 1998. The reliance on the observations made in *Vannarakkal Kallalathil Sreedharan; Rajender Singh* and *Kancherla Lakshminarayana* (supra) are consequently of no avail. In all those decisions, the attachment of the property was subsequent to the contracts by which the owners had agreed to sell the property. Here, the fact situation is to the contrary – the attachment order had been made in 1998 and continued in force. The attachment order, therefore, clearly prevailed.

36. So far as the argument that DAL, not being a party to the winding up proceeding, and not having consented to the arrangement whereby its property could be made the subject matter of such proceeding, is concerned, apart from the sequence narrated earlier, which establishes beyond any controversy that its efforts to have the attachment vacated were fruitless, (resulting in consequent finality to that aspect) – even otherwise, it can no longer contend that its director, Shri Suri had no authority to make the statement. A near identical situation had arisen before the Supreme Court, in *Western Press* (supra); the Court repelled a similar argument on behalf of the

third party in the following terms:

“...learned senior counsel appearing for the appellant, strenuously contended, while reiterating the stand taken before the Special Court, that the appellant is an utter third party to the proceedings before the Special Court it being neither a notified party nor claiming through any of the parties and, as a fact, also not having been arrayed as one such, its properties cannot be made liable for the recovery of the dues in question. It is also further contended that neither the appellant gave any undertaking nor it stood as surety for the realisation of the amount secured in the minutes of the order dated 5.7.95 and, therefore, cannot be said to have encumbered its property by any specific thing in writing and the undertaking, if any, given on its behalf is not only an unauthorised one not binding upon the appellant but that it has been given also under a mistaken view of facts and, therefore, the same could not adversely affect the rights of the appellant.....learned counsel for the Custodian, while drawing inspiration from the reasoning of the Special Court, endeavoured to sustain the conclusions arrived at by the Special Court. It is the contention of the learned counsel that the very object of the consent order passed on 5.7.95 was to effectively ensure the recovery of the dues and it is too late in the day to retrace steps to disown responsibility and liability in this regard..

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....We have carefully considered the submissions of the learned counsel appearing on either side. In our view, apart from the lack of merits in the challenge made to the well considered order of the Special Court, the appellants case does not merit countenance in our hands for another reason also. The parties before the Special Court having consented and invited the Court to pass the order dated 5.7.95 and obtained benefits by giving undertaking of their own and on behalf of the

appellant-company, ought not to be allowed to take shelter under technicalities to overreach the Court, which believed the parties and counsel appearing on their behalf and acted in good faith by accepting the terms suggested by the parties themselves.

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On a careful consideration of the events which occurred before the Special Court which made the said Court to believe the existence of certain facts on the representations made before it, the orders passed and the affidavits found and noticed to have been filed from time to time before the Special Court, the Special Court could not be either faulted for its conclusions or that the specific findings arrived at that the consent order dated 5.7.95 taken together with the affidavit of undertaking dated 28.7.95 covered within its fold the property of the appellant-company in question for being proceeded against in execution of the decree passed for recovering the amount due as declared in the consent order dated 5.7.95, could not be said to be vitiated in any manner warranting our interference. Consequently, it would be permissible for the Custodian to proceed against the property comprised in Units 3 and 4 belonging to the appellant- company also by means of an appropriate execution application as and when he choose to do so. The plea of lack of authority in Milan B. Dalal to bind the appellant needs mention only to be rejected even for the simple reason that the Directors of the appellant-company, who allowed Milan B. Dalal a free hand as Chairman of the appellant- company to deal with the matter, cannot be permitted to blow hot and cold as it suits them. Equally untenable is the pretended mistake of fact which, in our view, is nothing but a self-serving attempt found to be made as a pure afterthought to wriggle out of the lawful commitments made and retrace the position in which the Directors of the company have allowed themselves to be landed

in.....On the other hand, the terms as well as the tenure of the above proceedings make clear the dominant intention and purpose of them to be merely an undertaking given by a third party to the proceedings to the Court to abide by a particular course of action if the judgment-debtor fails to satisfy the decree. Even in cases of such default by the judgment-debtor in this case, the undertaking as well as the consent decree only enables the Custodian to initiate execution proceedings against the properties in question of the appellant- company and it is only in the event of such sale, the question of coming into existence any document which would require compulsory registration under Section 17 of the Act would arise and not at this stage. In substance and effect what has been undertaken to the Court is to preserve the properties intact for being proceeded against in a given eventuality and deliver peaceful possession of the property in the event of such action becoming necessary. Declaration or undertaking conceding such liberty of action cannot be construed to fall under clause (b) of Section 17 (1) of the Registration Act....”

37. For the above reasons, the contentions of both appellants (i.e Taneja and DAL) that the attachment order was not binding, in the circumstances of the present case, are held to be meritless and are consequently rejected.

38. Before disposing off the appeals, it would be necessary to deal with some applications filed during the pendency of the proceedings. On 27.02.2012, in respect of the Company Winding-up Petition (Co. Pet. 161/1997) Rocksmelt Co., the original petitioner, claimed that it had arrived at a settlement with GAL and was withdrawing the petition in view of the development. However, counsel for the Official Liquidator argued that no settlement could be made after the Court

had already ordered the company to be wound up. The Company Court agreed with the objections of the Official Liquidator and held the settlement to be impermissible. The proprietors of Rocksmelt were directed to deposit the amount admitted to having been received by them with the court. The Court is not seized of the appeal against that order and it only observes that the said petitioner is permitted to approach the learned Single Judge for a review or modification of the order.

39. C.M. No. 311/2012 is an application filed by the Official Liquidator seeking directions against the respondents who were the legal heirs of Mr. Mukhinder Singh, who had given an undertaking to be personally liable for the non-compliance with the payment schedule to be adhered to by GAL. The Judge, while ordering issuance of notice to the respondents impleaded in the application, ordered attachment of the land belonging to the late Mr. Singh. Again, this Court does not propose to deal with the said order, as no appeal has been preferred against it.

40. M/s Poysha Oxygen Pvt. Ltd. and Goyal MG Gases Pvt Ltd have sought impleadment under Order 1, Rule 10 CPC read with Rule 101 of the Companies (Court) Rules, 1959 in Company Appeal 27/2011. The Applicants are creditors of GAL, and had initiated arbitral proceedings which had resulted in an award being passed against GAL on 31.07.2000. This arbitral award was not challenged by GAL and had attained the status of a decree. In a judgment dated 30.07.2009, the award was modified by the High Court in O.M.P. 126-127/2001, which made the award-cum-decree executable not only

against GAL but also against the guarantors of the loans taken by it. The guarantors have challenged the judgment, but not the award. During the pendency of the arbitral proceedings, the order for winding up had been made by the Court in C.P. 161/1997. The applicants are seeking to be substituted in place of Rocksmelt or impleaded as a petitioner in C.P. 161/1997, since the latter claimed withdrawal of their petition. It is contended that winding up proceedings once admitted are for the benefit of all the creditors.

41. This Court is of the opinion that since the application of Rocksmelt has not been accepted, the question of impleadment of the present applicants in these appeal proceedings does not arise. Their remedy of pressing the claims before the Official Liquidator, as decree holders, survives, and can be availed in accordance with law. It is open to them to seek impleadment or such other remedies as are available to enforce their claims, in accordance with law. The application is disposed off in these terms.

42. In view of the above discussion, the appeals have to fail and are dismissed. All pending applications are disposed off. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

G.P. MITTAL
(JUDGE)

AUGUST 22, 2013