

SUPREME COURT OF INDIA

Union Bank of India

Vs.

Official Liquidator H.C. of Calcutta

(R.P.Sethi and M.B.Shah JJ.)

26.04.2000

JUDGMENT:

SHAH, J.

This appeal is filed against the judgment and order dated 24.12.1996 passed by the Division Bench of the Calcutta High Court dismissing the Appeal No. GA 708 of 1996 arising out of Company Petition No. 316 of 1981 whereby the learned Single judge had confirmed the auction sale of the property of Mesrs. Kolay Biscuits Company Private Limited - Company under liquidation. In the present case, it is admitted fact that on 9th July 1965 Mesrs. Kolay Biscuits Company Private Limited created a mortgage of its land and building in favour of Union Bank of India for the loan granted in its favour. The factory of the company was closed down in 1980. On 20th March 1991 under the provisions of the Sick Industrial Companies Act (SICA), the company was declared as sick unit by the Board of Industrial and Financial Reconstruction (for short B.I.F.R.) and thereafter application under the said Act was rejected by the Board. Appeal filed before the A.I.F.R. was also dismissed. It is the contention of the Bank that on 30th March, 1981, the borrowings by the Company increased to about Rs. 3 Crores and Company executed four balance confirmations in respect of the dues in various accounts. The bank also filed a title mortgage suit No. 103/1992 before the Assistant District Judge, Sealdah against the Company and five guarantors for recovering Rs. 4,11,21,411/- along with interest after obtaining leave by the Company Judge under Section 446 of the Companies Act. By order dated 19th August, 1991 the Company Judge issued directions for winding up of the Company and appointing official liquidator to take over assets. On 16th February, 1996, the Company Judge appointed Mr. Pranoj Roy Chowdhary of M/s Chowdhary Associates as a valuer with a direction to submit a report within six weeks from the date. Official Liquidator has stated that he informed the appellant Bank about the said order by letter dated 29th February, 1996. Thereafter the matter was placed before the Company Judge on 21st June, 1996 and on the same date Company Judge passed an order fixing date of sale of Company's assets as 2nd August 1996 and directed the official liquidator to make advertisement for notice of sale of assets of the Company in newspapers, namely, the Statesman, Dainik Bishwamitra and Anand Bazaar Patrika inviting applications for purchase of the property on as is where is basis with a direction that purchaser will be bound to deposit 20 per cent of the tender amount along with the tender by Bank draft or bankers cheque or pay order.

On 2nd August, 1996, one Advocate Mr. Dutta moved an application stating that nearly 1200 workmen would be affected if the sale does not take place as a going concern and the workmen are not re-employed. The Company Judge observed:

the fate of so many workmen nearly 1200 in number with their families depending upon them cannot be ignored by the Court.

On that day on behalf of the State of West Bengal it was submitted that its Corporation (R. No.4) was interested to purchase the land and the entire Company and they were also interested in re-employment of workers so the Company be sold out as a going concern. Thereafter, the Court straightaway directed that the sale fixed on that day would not be held and Official Liquidator was directed to issue fresh advertisement in the same newspapers on 22nd August 1996 fixing the date for auction sale on 13th September, 1996 for the assets of the Company as a going concern.

On 20th September 1996, the matter was placed before the Court and it was stated on behalf of the State Government Corporation that it was not agreeable to purchase with the condition of re-employing workmen. Therefore, they withdrew their offer to purchase the Company as a going concern. The Court also considered the Valuation Report which was placed before it wherein the assets of the Company were valued at Rs.66,90,032/-. On the basis of the said valuation M/s Indrani Soft Drinks - respondent No.1 whose offer was Rs. 40 lakhs raised the same to Rs. 67 lakhs and agreed that they would take the Company as a going concern and all eligible employees would be re-employed. Hence, the Court accepted the said offer. The learned advocate appearing on behalf of the secured creditor Union Bank of India prayed for stay of the operation of the order but the same was rejected on the ground that no useful purpose would be served if the stay of the operation of the order was granted. Thereafter, it appears that on behalf of Syndicate and Promising Exports Limited, one advocate appeared and submitted that it was ready and willing to purchase the Company as a going concern by paying Rs. 70 lakhs on the same terms and conditions as stated above. His offer was considered by the Court by giving a direction that offeror would deposit 20 per cent of the amount either by Bank draft or pay order, with the official liquidator on or before 23rd September 1996. The Court further directed that in the event of failure to deposit the said sum, the offer of M/s Indrani Soft Drinks will stand accepted without there being any further bid. The matter was kept for further orders on 27th September, 1996. On that date it was found that Promising Exports had neither sent any offer to the official liquidator nor had deposited any amount. The Court observed that the sale in favour of auction purchaser M/s Indrani Soft Drinks remains accepted and directed them to pay the balance amount within 60 days. It also directed Official Liquidator will supply a copy of the valuation report to the secured creditor at their cost. The Official Liquidator was directed not to part with possession of the Company till the entire purchase price was paid.

Against that order appellant preferred an appeal before the Division Bench. Before the Division Bench a contention was raised with regard to the inadequacy of the price and the Court observed that the Court would be rather loath to interfere and intervene in a Court sale where a question of inadequacy of the price is to be considered by observing that: Court sale has taken place for the benefit of the employees concerned and more than 100 employees were starving to death and the official liquidator was trying to sell the assets as a going concern so that the employment opportunities can be maintained in these hard days.

The Court also considered the fact that in the meantime after confirmation of the sale the entire purchase price has been paid by M/s Indrani Soft Drinks and the Official Liquidator has intimated to

the purchaser that possession will be made over in the course of the day and at that stage Union Bank of India thought it fit to move this Court for staying the operation of the order which cannot be granted. The Court also observed that the offer obtained in Court matches with the valuation report and the grievance of inadequacy of price cannot be accepted and sale when taking place in a Court of law ought to be given a final shape, as quickly as possible, so that rehabilitation of the employees can be effected without any loss of time because Court was informed that more than 100 employees have already died. Against that order this appeal is filed.

Mr. G.L. Sanghi, learned senior counsel for the appellant-Bank submitted that the order passed by the Company Judge which is confirmed by the Division Bench is, on the face of it, erroneous and is based on total non-application of mind. He submitted that in sale of Companys property it is the duty of the Court to see that the properties are sold at a reasonable price and not at a throw away price. He pointed out that without there being anything on record merely relying upon the oral statement by some person stating that he represents some workers the orders are passed by the Company Judge and confirmed in appeal by the Division Bench. It has been pointed out that Company was closed since 1980 and, therefore, there was no question of 1200 employees working in the said Company. He further pointed out that apart from the Company being closed since years the BIFR & AIFR, both statutory expert bodies failed to restart the Company and thereafter the learned Judge without verifying any of these facts and the valuation report and without giving the copy of valuation report to the secured creditors for whose benefit properties were sold, directed the property to be sold and confirmed the sale. It is also submitted that in the notice for sale issued by the liquidator the upset price is not stated and that at initial stage offer of respondent No.2 Messrs Indrani Soft Drinks Limited was only Rs.40 lakhs but in the Court after seeing the so called valuation report it was raised to Rs.67 lakhs which clearly indicates that there was something wrong with the offers. He also relied on the decision of this Court in Allahabad Bank & Ors. v. Bengal Paper Mills Co. Ltd. & Ors. [1999 (4) SCC 383] and submitted that facts of the said case are similar and the law laid down in the said case would be applicable in the present case.

As against this, the learned senior counsel Mr. A.K. Ganguli for the respondents vehemently submitted that the Bank has not raised any objection before the Company Judge with regard to the inadequacy of the price or non-supply of the valuation report and for any other alleged irregularity in the conduct of the auction sale. Therefore, the Court should not interfere in this appeal. In any case in adequacy of price is no ground for interference in appeal. He pointed out that auction sale took place in the presence of the learned advocate for the Bank and at the time of the hearing of the matter he never represented to the Court that the oral statement made, at the time of hearing of the application, that 100 workers have died is incorrect or that said facts be verified, and therefore, said statement was rightly accepted by the Court. In the alternative, it is his contention that if the sale is set aside a bona fide purchaser should not suffer as he has invested large amount after the purchase of the property in the auction sale and, therefore, the liquidator should be directed to refund the amount with 18% interest with additional amount invested by Respondent no.2 and the expenses incurred by it.

At the outset, we would state that in proceedings for winding up of the Company under liquidation, the Court acts as a custodian for the interest of the company and the creditors. Therefore, before sanctioning the sale of its assets, the Court is required to exercise judicial discretion to see that properties are sold at a reasonable price. For deciding what would be reasonable price, valuation report of an expert is must. Not only that, it is the duty of the Court to disclose the said valuation report to the secured creditors and other interested persons including the offerors. Further, it is the

duty of the Court to apply its mind to the valuation report for verifying whether the report indicates reasonable market value of the property to be auctioned, even if objections are not raised.

From the facts narrated above, it is apparent that the attention of learned Company Judge was not focussed to the fact that since 1980 Company was closed and that there was no question of selling the Company's assets as a going concern. Not only that it was the duty of the Court to verify the statement made by some applicant that sale of the Company on as is where is basis will affect 1200 workers and for that proper notice was required to be issued to the secured creditors for whose benefit the property was to be auctioned. To straightway rely upon such statement was, to say the least, not judicious. The Company Judge ought to have also considered the fact that an attempt made by the BIFR an AIFR which are expert bodies under the SICA to revive the sick unit had failed. In any set of circumstances, there was no material on record before the Id. Judge for holding that Company could be revived and the employees would be reinstated in service by giving them re-employment. Without indulging in any such exercise straightaway to state that property would be sold as a going concern was totally without any basis and, therefore, unjustified. At the time of hearing of this matter it is admitted that after purchase of the Company, it was restarted only for one day i.e. on the day of inauguration.

It also appears that the Division Bench was persuaded by the so-called sympathy for the workers, without verification of the fact that Company was closed before 17 years of sale. Court has noted in the beginning while narrating the submission of the Id. Counsel who appeared for the benefit of the employees that more than 100 employees were starving to death and in the later para stated that Court was informed by the learned advocate appearing for the employees union that more than 100 employees have already died. Without there being any application on record and without there being proper verification of the facts from the concerned parties, it is not just and proper to make such observations. It is not impossible that because of the lapse of 17 years, out of 1200 workers who might have worked in the said factory 100 employees might have died of natural death. But in any circumstances it was unjustified to make a case over it and to accept oral submissions and to dispose of the valuable properties of a Company by stating that the sale of the Company as a going concern was for the benefit of the so called employees who were not in employment.

Further, in the present case, it is admitted that valuation report was called for by order dated 16th February, 1996; once the report was called for, it was the duty of the Court to see that copy of the said report is given to the secured creditors and other affected persons. It was known to the Court that the appellant secured creditor was claiming more than Rs.4 crores from the Company. It appears that valuation report was kept as a secret, confidential document. After winding up order, the properties of the Company are in the custody of the Court for the benefit of the secured creditors and if anything remains, thereafter for other creditors and its shareholders. In the present case, without disclosing the valuation report to the creditors and without fixing its reserve price, the properties were auctioned and the sale was confirmed. This approach is unjustifiable by any judicial standard and is against the normal procedure for auctioning the immovable property of the Company which is to be wound up.

Further, it appears that learned Judge has not applied his mind to the valuation report itself. He has only considered the last figures given in the valuation report which says that total valuation of the property was Rs.66,19,032/-. Had the Court considered the report, it would have immediately noticed that valuation report was not at all reliable. This would be clear from the following facts narrated in the valuation report: -

Valuation: On enquiry from the local people, it is understood the land price in this particular varies between Rs.2 lakhs to 2.5 lakhs per Katta depending on size, position, Road Frontage, low and or high land etc. However, after considering all aspects, it is felt fair and reasonable value at Rs.2 lakhs per katta is found reasonable but as a matter of fact the land is lease hold. So the value of land will be lease because of lease hold land.

As per lease beginning of the year of 1963 for the term of 99 years @ Rs.300/- per month.

So, the rent for 99 years @ Rs.300/- = Rs.3,56,400. 15% Municipal Tax & Repairing of structure etc.=Rs.53,460/-. Total rent, tax etc. for 99 years=Rs.4,09,860/- So, the value of land for 99 years = Rs.4,09,860/-

(Rupees four lakhs nine thousand eight hundred and sixty only)

In our view valuer stating that for the purpose of valuation of the land he has enquired from local people and that he understood that the land price in this particular area varies between Rs.2 lakhs to 2.5 lakhs per katta cannot be said to be an opinion of an expert valuer. He has not relied upon any sale instance for arriving at the conclusion that the valuation varies from Rs.2 to 2.5 lakhs per katta. He has also not stated from whom he has verified the value of the land. Further, he has stated that after considering all aspects, he felt that fair and reasonable value would be Rs.2 lakhs per katta. Presuming that valuation of land is Rs.2 lakhs per katta then also the value of the land, admeasuring 67 katta and 8 chattak, would be more than Rs.1.35 crore. Thereafter, he stated the land is a lease hold land, so the value of the land would be on the basis of its rental income and he arrived at the conclusion that its value would be only Rs.4,09,860/-. It appears that the valuer has also not considered the material fact that lease period was for 99 years with the condition for its renewal. It is apparent that learned Company Judge has simply noted the final figures mentioned in valuation report and accepted the same without applying his mind to the aforesaid facts. . In Allahabad Bank v. Bengal paper Mills case (supra), dealing with a similar auction sale of the company in liquidation, the Court observed that instead of sale by the liquidator in Company matters sale is required to be confirmed by the High Court so as to ensure that best possible price is realised upon the sale of the assets and properties of the Company so that creditors of the Company can hope to recoup their dues. The Court relied upon the decision in *M/s Navlakha & Sons vs. Sri Ramayana Das & Ors.* [1969 (3) SCC 537] wherein (para 6) the Court has observed thus: The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the court the offeror does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. In *Gordhan Das Chuni Lal vs. T. Sriman Kanthimathinatha Pillai* (AIR 1921 Mad.286), it was observed that where the property is authorised to be sold by private contract or otherwise it is the duty of the court to satisfy itself that the price fixed is the best that could be expected to be offered. That is because the court is the custodian of the interests of the company and its creditors and the sanction of the Court required under the Companies Act has to be exercised with judicial discretion regard being had to the interests of the company and its creditors as well. This principle was

followed in Rathnaswami Pillai vs. Sadapathy Pillai (AIR 1925 Mad. 318) and S. Soundararajan vs. Roshan & Co. (AIR 1940 Mad. 42.) In A. Subbaraya Mudaliar vs. K. Sundararajan (AIR 1951 Mad. 986) it was pointed out that the condition of confirmation by the court being a safeguard against the property being sold at an inadequate price, it will be not only proper but necessary that the Court in exercising the discretion which it undoubtedly has of accepting or refusing the highest bid at the auction held in pursuance of its orders, should see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud.

The learned senior counsel Mr. Ganguli relied upon the decision of this Court in M/s Kayjay Industries (P) Ltd. vs. M/s Asnew Drums (P) Ltd. and Others [1974 (2) SCC 213] and contended that Court should not go on adjourning the sale till a good price is received, as it being a notorious fact that court sales and market prices are distant neighbours; If auction sales are adjourned repeatedly, decree holders can never get the property of the debtor sold. He emphasised the observation mere inadequacy of price cannot demolish every court sale. In our view, this submission requires to be rejected on the ground that in the said case, the Court has reproduced paragraph which we have quoted above from the decision in Navlkha and Sons (Supra), wherein the court has specifically held that the condition of confirmation by the court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale; the court is required to satisfy itself that having regard to the market value of the property the price offered is reasonable; unless the court is satisfied about the adequacy of the price the act of confirmation of sale would not be a proper exercise of judicial discretion. This aspect is reiterated by the court by holding that the aforesaid principles must govern every court sale. The Court has also observed that failure to apply its mind to the material factors bearing on the reasonableness of the price offered may amount to material irregularity in conduct of sale. Thereafter the Court pertinently observed: And where a court mechanically conducts the sale or routinely signs assent to the sale papers, not bothering to see if the offer is too low and a better price could have been obtained, and in fact the price is substantially inadequate, there is the presence of both the elements of irregularity and injury.

It is further observed what is expected of the Judge is not to be prophet but a pragmatist and merely to make a realistic appraisal of the factors, and if satisfied that in the given circumstances the bid is acceptable, conclude the sale.

As discussed above, in the present case, there is total non-application of mind to the material which is required to be considered for auction sale of the assets of the Company. Learned counsel for respondent No.2 referred to the decision of this Court in Ram Maurya vs. Kailash Nath & Ors. [1999 (9) SCC 276] and submitted that as secured creditors have not brought appropriate pleading before the learned Company Judge, this Court should not interfere in such sale. In our view, the said decision has no bearing on the facts of the present case as the case was decided on the basis of auction sale under Order 21 Rule 90 of the CPC and the Court has observed that judgment debtor did not furnish adequate materials to substantiate the allegation of fraud and material irregularity.

Further, learned counsel relied on the decision in Motors and Invests Ltd. vs. Union Bank of India & Ors. [1997 (11) SCC 271] and contended that the Court in the alternative may direct refund of the amount deposited and invested by the bona fide auction purchaser with 18% interest. In that case, the Court has set aside the sale of 44 acres of land by holding that it was sold at too inadequate price. In the said case also the Court has observed: - Equally, though court sale is compulsive sale, equal endeavour should be made to fetch adequate price for the property sold so that the decree debt

would get satisfied and surplus, if any, could be paid over to the judgment-debtor.

The Court further ordered that in case the official assignee has kept the sale amount in any interest-earning security, the principal amount together with interest is directed to be refunded to the appellant. And, in case the amount was not kept in any deposit and was used to discharge outstanding debt due by respondents 2 and 3, the auction purchaser was entitled to get interest at 18% per annum on the amount deposited by him.

In the present case, the said judgment has no bearing mainly because as soon as the amount was deposited by respondent No. 2, possession of the property was handed over to him. Not only that, in our view, similar contention was dealt with in Allahabad Bank v. Bengal Paper Mills case (supra) and is rejected by assigning following reasons: -

It could not have turned a blind eye to the many defects that it itself noted in the order of sale merely because the Banks had moved the appeals after five months; nor was there any justification for taking into consideration the expenditure that had been incurred by the second respondent subsequent to its possession of the assets and properties. In the first place, the Division Bench should have noted that the learned Single Judge had with unseemly haste ordered possession thereof to be handed over to the second respondent on the very next day. In the second place, the appeals had been filed within the period of limitation. Expenditure incurred during this period could not render the appeals, in effect, infructuous. The same should apply to expenditure incurred subsequent to the filing of the appeals and until the time that they were heard. The second respondent knew that the appeals were pending and that they could end in the order of sale being set aside. Such expenditure as it incurred with this knowledge was at its risk. In the third place, and most important, the interests of the creditors of the Company, particularly the unsecured creditors, outweighed such equities, if any, as might have been considered to be in favour of the second respondent. It was, in our view, the obligation of the Division Bench to have struck down the order of sale, having regard to what it found wrong with it.

Thereafter the Court has directed refund of the amount without any interest and has permitted the auction purchaser to apply to the High Court and specify it firstly that expenditure was incurred and secondly that in law it was entitled to recover it. For the reasons stated, same would be the position in the present case. Further, in this case, there is a specific condition of the auction sale which reads thus: The High Court may set aside the sale in favour of Purchaser/Purchasers even after the sale is confirmed and/or purchase consideration is paid on such terms and conditions as the Court may deem fit and proper for the interest and benefits of creditors, contributories and all concerned and/or for public interest.

Hence, if the sale is set aside in appeal, it can not be stated that purchaser is entitled to have refund of the amount with interest.

We also make it clear that we have not dealt with the contention of the learned counsel for the Bank that what was sold in auction was equity of redemption and not the rights of the mortgagee.

In the result, the appeal is allowed. The impugned order passed by the Company Judge in Company Petition No.316/1981 confirmed in appeal GA No.708/96 is quashed and set aside. Official Liquidator is directed to recover the possession of the property sold as per the inventory and thereafter to refund the amount deposited by the respondent No.2 auction purchaser. It would be

open to respondent No.2 to file proper application for recovering any other expenditure incurred by it after purchase of the said property if it is entitled to recover the same. The Official Liquidator is directed to resell the property after obtaining fresh valuation report from other reliable expert and after giving a copy of the said valuation report to secured creditors. In the notice for sale reserved price be fixed and due advertisement be published in newspapers having circulation in commercial cities including Delhi, Mumbai and Chennai on the basis of the directions which may be issued by the High Court. The appeal stands disposed of accordingly. No costs.