

**SUPREME COURT OF INDIA**

Divya Manufacturing Co. (P) Ltd.

Vs.

Union of India

C.A.Nos.4706 and 4707 of 1998

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

11.07.2000

**JUDGEMENT**

**SHAH, J.:-**

1. These appeals are filed against the judgment and order dated 11-8-1998 passed by the Division Bench of the High Court of Calcutta in G.A. No. 344 of 1988 in Appeal (ACO) No. 16 of 1998 whereby the sale of the assets and properties of the Tirupati Woollen Mills Limited ("Tirupati Mills" for short) (under liquidation) confirmed on July 2, 1998 in favour of the appellant-Divya Manufacturing Co. ("Divya" for short) had been recalled and set aside on the application of respondent No. 7, Sharma Chemical Works (For short "Sharma") and respondent No. 8, Jay Prestressed Products Ltd. ("Jay" for short) herein.

2. In 1972, 'Tirupati Mills' was incorporated to manufacture Carpet yarn at Sonapat (Haryana). On 30-5-88, a financial institution filed a reference to the BIFR and it was declared as sick industrial company. On 27-1-1994, BIFR proposed winding up of the Company. On 21-4-95, the High Court of Calcutta ordered winding up of the company and directed official liquidator to take charge of the

company. On 5-7-1997, Tirupati Woollen Mills Shramik Sangharsha Samity ("Samity" for short)-respondent No. 3 entered into an agreement with appellant-Divya whereby 'Divya' agreed to run 'Tirupati Mills' and to provide re-employment to the workmen of the said Company upon purchase of the assets and properties of the said Company under liquidation. On 17-12-1997, the 'Samity' made an application No. 741 of 1997 before the High Court of Calcutta inter alia praying that (i) the assets and properties of the company be sold to 'Divya' at the price valued by the Official Liquidator and/or valuer appointed by him or at such price as the Court may deem fit and proper; (ii) 'Divya' be directed to re-employ all the workers as agreed by agreement dated 5-7-1997 and (iii) the Official Liquidator be restrained from taking further steps with regard to the sale of their assets and properties. The learned Company Judge by order dated 22-12-1997 directed the Official Liquidator to indicate the valuation of the properties to all concerned. On 24-12-1997, the learned Company Judge directed the Official Liquidator to publish the Notice for Sale specifying that the factory of the Company (in liquidation) would be sold as a going concern with a reserved price fixed at Rs. 37 lakhs on the basis of valuation report. However, respondent No. 1 (Union Bank of India) pleaded that the approximate value of the company in liquidation was about one crore and if the same is to be sold after advertisement, they will have no grievance. The Official Liquidator was directed to publish sale notice specifying the Company to be sold as a going concern in the Hindustan Times, Statesman and Hindi newspapers in circulation in the State of Haryana. The learned Judge also noticed that appellant-'Divya' was agreeable to purchase the factory of the Company (in liquidation) as a going concern and to provide employment to the existing workers who were out of employment since the last 12 years. Being aggrieved by the order dated 24-12-1997, respondent No. 1-Bank filed an appeal, being CA No. 22 of 1998 before the Division Bench for setting aside that order. The same was dismissed on 12-1-1998 with liberty to the Bank to agitate the same before the learned single Judge at the time of hearing of the matter.

3. In the meantime, notice for sale was issued and the Official Liquidator published an advertisement inviting offers for the sale of the assets and properties of the Company (in liquidation) in newspapers. On 31-12-1997, the Union Bank of India valued the immovable properties of 'Tirupati Mills' at Rs. 1,21,00,000/-. Inspection of the assets of the Company was allowed and 12 intending purchasers took inspection of its assets on 2-1-1998. On 16-1-1998, about 14 parties made their offers to purchase the company. 'Divya' enhanced its offer to Rs. 85 lakhs from 37 lakhs and it was declared as the highest bidder. In addition to its offer of Rs. 85 lakhs, 'Divya' also agreed to re-employ the workmen of 'Tirupati Mills'. In spite of being the highest offeror the sale was not confirmed in favour of the 'Divya' as the Bank pleaded that they should be given further opportunity to bring a higher offer. The High Court agreed to give a further opportunity to the offerors to match the offer of the appellant. On 17-1-1998, the Bank made application before the Company Court being C.A. 41 of 1998 for re-advertisement of the sale. On 6-2-1998 when the matter was heard, as no one turned up to make any higher offer, the offer of the 'Divya' was conditionally accepted by the learned single Judge with liberty to the secured creditors to find higher offer within 30 days. The appellant was directed to deposit the balance sum of Rs. 77 lakhs as per the notice for sale.

4. Being aggrieved by the order dated 6-2-1998, respondent No. 1, Bank and respondent No. 3, the 'Samity' preferred appeals being GA Nos. 141 and 107 of 1998 respectively before the Division Bench. By order dated 9th March, 1998, the part of the order dated 6-2-1998 confirming the sale in

favour of 'Divya' was stayed.

5. On 6th May, 1998, it was ordered that the Official Liquidator should take steps to conduct fresh sale in the manner indicated in the said order and the Company be sold as a going concern with a reserved price of Rs. 85 lakhs. The Court also noted that the auction purchaser has not withdrawn the amount deposited by it and that auction purchaser reserved its rights and contentions with regard to the sale already clinched in its favour by the learned single Judge. The matter was kept for further proceedings on 17th June, 1998. Sale notices as directed mentioning terms and conditions were issued. On 14th May, 1998, on behalf of auction purchaser (Divya) an application was filed contending therein that it wanted to back out from the offer to purchase the Company for an amount of Rs. 85 lakhs. Court noted that the matter required consideration and therefore, directed the parties to file necessary affidavits on or before 17th June, 1998 when appeal was to come up for consideration. Finally, at the request of learned counsel for 'Divya', Court permitted it to withdraw 80 per cent of the amount out of 85 lakhs and to keep 20 per cent of the amount i.e. 17 lakhs as deposit liable to forfeiture if ultimately there is no buyer who makes any bid for an amount of Rs. 85 lakhs. On 26th June 1998, the Court directed the Official Liquidator to open sealed covers containing the offers by six bidders. On that day, the Court directed the matters to be placed for hearing on 2nd July, 1998 for finalisation of sale either in favour of M/s. Eastern Silk Industries Ltd. or M/s. Jay Prestressed Products Ltd. Again on 2nd July, 1998, additional offers of three bidders were received i.e. M/s. Eastern Silk Industries Ltd. offered Rs. 1.01 crores, M/s. Jay Prestressed Products Ltd. offered Rs. 1.25 crores and M/s. Divya offered Rs. 1.30 crores. Hence, the offer of 'Divya' was accepted and sale was confirmed in its favour on the conditions mentioned therein. On the same day, the Court also disposed of the appeals and applications accordingly.

6. On 10th July 1998, Jay, respondent No. 8 filed an application before the Division Bench praying that order dated July 2, 1998 accepting and confirming the sale in favour of 'Divya' be recalled and set aside and it be given an opportunity to submit its offer of Rs. 1.40 crores for the assets of the company in liquidation. On 23rd July, 1998, respondent No. 7, 'Sharma' served upon the appellant an application inter alia praying that order dated 2nd July, 1998 be recalled as it was prepared to pay Rs. 2 crores for the purchase of the assets of the Company. At the time of hearing of these applications on 23rd July, 1998, on behalf of respondent Nos. 7 and 8 it was submitted that they were ready and willing to purchase the Company as a going concern and to establish their bona fides, they were prepared to deposit 20 per cent of Rs. 2 crores. On the basis of the said applications, the Court directed the applicants to deposit Rs. 40 lakhs each with the Official Liquidator. Thereafter, the matter was kept for hearing on 11th August, 1998 on which day the Court considered the facts stated above and also the application filed by respondent Nos. 7 and 8 to re-open the confirmed sale. Those applications were opposed by the auction purchaser (Divya) and also by respondent No. 3 'Samity'. After considering the submissions made by the learned counsel, the Court referred to the following clause 11 of the terms and conditions of Sale and held that in view of the specific term, the Court was vested with authority to set aside the sale for the benefit of the creditors etc. and/or in public interest :

"Clause 11 : The Hon'ble 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 benefit of creditors, contributories and all

concerned and/or public interests."

7. The Court noted that it cannot shut eyes to the fact that initially the property was proposed to be sold at the price of Rs. 37 lakhs. Thereafter the sale was confirmed at Rs. 85 lakhs which was set aside and at the intervention of the Division Bench, the amount was enhanced to Rs. 1.3 crores. The Court observed that as two applicants have come forward with a proposal to purchase the said property at Rs. 2 crores, the principle laid down in LICA (P) Ltd. (1) v. Official Liquidator, (1996) 85 Comp Cas 788 and LICA (P) Ltd. (2) v. Official Liquidator, (1996) 85 Comp Cas 792, applies squarely to the facts of the present case. The Court also observed that it was conscious of the fact that there should be a finality even in a company sale, but so long as possession is not handed over to the purchaser and the sale deed is not executed, the Court by virtue of clause 11 of the terms and conditions for sale can re-open the sale in the interests of justice. The Court also referred to the decision in Navalkha and Sons. v. Sri Ramanya Das, (1969) 3 SCC 537 : (AIR 1970 SC 2037). Considering all the

submissions made by the learned counsel for the parties, the sale confirmed in favour of appellant for an amount of Rs. 1.3 crores was set aside with a direction that respondent Nos. 7 and 8 should compensate 'Divya' by paying Rs. 70 thousand each for the loss suffered by it and directed for re-sale of the assets of the Company. That order is under challenge before this Court.

8. At the time of hearing of these appeals, on behalf of respondent Nos. 7 and 8, it was reiterated that they were still prepared to purchase the property in question at the price they had offered before the High Court of Calcutta and they were eager to purchase the same for a sum of Rs. 2 crores. On behalf of 'Divya', it was stated that it was not prepared to make any offer or statement at present.

9. The learned counsel for the appellant submitted that the order passed by the High Court setting aside the confirmed sale is on the face of it illegal and erroneous. He submitted that before confirmation of sale in favour of 'Divya' all endeavours were made by the Judges and finally the offer of appellant to purchase at Rs. 1.30 crores was accepted and sale was confirmed. At that time, Jay-respondent No. 8 had not increased its offer of Rs. 1.25 crores. Respondent No. 7 was not permitted to bid as he did not comply with the requirements mentioned in the advertisement for sale and, therefore, on 2nd July, 1998 before commencement of auction sale, he was not permitted to participate in auction. It is, therefore, submitted that after the sale is confirmed, subsequent higher offer cannot constitute a valid ground for setting aside such confirmation. He referred to various decisions in support of his contention and submitted that once the sale was confirmed by the Court after applying its mind to all relevant considerations, it is not permissible to probe in retrospect and to accept subsequent offers by 'Jay' or 'Sharma'. He pointed out that as such initial valuation report fixed the value of the property at Rs. 37 lakhs only. Thereafter the appellant raised its offer to Rs. 85 lakhs and agreed to re-employ the workmen, so the learned single Judge confirmed the sale in its favour. As the said order was challenged before the Division Bench, the Division Bench directed the Official Liquidator to conduct fresh sale and finally the highest offer of appellant of Rs. 1.30 crores was accepted by the Court. In such a situation the Division Bench wrongly relied upon the judgment of this Court in LICA (P) Ltd. v. Official Liquidator, (1996) 85 Comp Cas 788. It is also submitted

that after disposal of the appeal, the Division Bench became functus officio and therefore also it could not review its earlier order.

10. As against this, learned counsel for the respondents submitted that as the price offered by the appellant is grossly inadequate in comparison to the subsequent offers by respondent Nos. 7 and 8, the Court was justified in setting aside the sale.

11. In our view, on facts it is apparent that the Division Bench of the High Court has considered all the relevant facts including the fact that at the initial stage, the appellant 'Divya' offered only Rs. 37 lakhs to purchase the properties. That means, the appellant wanted to purchase at a throw away price. Thereafter, at the intervention of the Court, the price was increased to Rs. 1.3 crores by the appellant. This indicates that appellant was keen to purchase the property, however by paying only the bare minimal amount and to take advantage of sale by the liquidator in the hope that if there are no other purchasers, it would purchase the Company at a price which is abnormally below the market price. It is also true that on 2nd July 1998, the offer made by the appellant was accepted and it was ordered that sale in its favour be confirmed, but at the same time, before possession of the property could be handed over, or before the sale deed could be executed in its favour, respondent Nos. 7 and 8 pointed out that the assets and properties could be sold at Rs. 2 crores. For showing their bona fides, they were directed to deposit Rs. 40 lakhs each and also to pay Rs. 70 thousand each as damages to the appellant. Further, the application for setting aside the sale was filed within a few days of the order accepting the bid of the appellant. In these set of circumstances, when correct market value of the assets was not properly known to the Court and the sale was confirmed at grossly inadequate price, it was open to the Court to set it at naught in the interest of the company, its secured and unsecured creditors and the employees. Appellant is also duly compensated by payment of Rs. 70 thousand each by respondent Nos. 7 and 8.

12. The law on this subject is well-settled. In the case of Navalkha and Sons (AIR 1970 SC 2037) (supra), after appellant's offer was accepted, a fresh offer from one Gopaldas Darak for higher amount was received by stating that he could not offer in time because he came to know of the sale only 2 days prior to the date of the application and there was possibility of higher bids. Instead of directing a fresh auction or calling for fresh offers, the learned Judge thought it proper to arrange an open bid in the Court itself on that very day as between M/s. Navalkha and higher offeror Gopaldas Darak. M/s. Navalkha thereafter offered higher bid at Rs. 8,82,000 and its bid was accepted and the learned Judge concluded the sale in its favour with a direction to pay the balance amount. Thereafter an application was filed offering Rs. 10 lakhs. A contention was raised that due publicity of the sale of the property was not made, but that application was rejected by the Court. Hence, an appeal was filed by the applicant who made an offer of Rs. 10 lakhs and another by one contributory against the order of confirmation. Both appeals were allowed by the Division Bench and the order passed by the learned Judge was set aside with a direction to take fresh steps for sale of the property either by calling sealed tenders or by auction in accordance with law. That order was challenged before this Court by M/s. Navalkha. It was contended that there was no justification for the Division Bench to interfere with the order of the learned single Judge. In that context, after quoting Rule 273 of the Companies (Court) Rules, 1959, the Court observed (at Pp. 2039 and 2040 of AIR) :

"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 v. 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 v. Sadapathy Pillai*, AIR 1925 Mad 318 and *S. Soundarajan v. Mahomed Ismail, M/s. Roshan and Co.*, AIR 1940 Mad 42. In *A. Subbaraya Mudaliar v. 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."

13. From the aforesaid observation, it is abundantly clear that the Court is the custodian of the interests of the Company and its creditors. Hence, it is the duty of the Court to see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud. As stated above, in the present case, the sale proceedings have a chequered history. The appellant started its offer after having an agreement with the Employees Samity for Rs. 37 lakhs. This was on the face of it under bidding for taking undue advantage of Court sale. At the intervention of the learned single Judge, the bid was increased to Rs. 85 lakhs. Subsequently, before the Division Bench, the appellant increased it to Rs. 1.30 crores. At that stage, respondent No. 7, 'Sharma' was not permitted to bid because it had not complied with the requirements of the advertisement. It is to be stated that on 26th June, 1998, the Division Bench has ordered that offers of Eastern Silk Industries Ltd. and Jay Prestressed Products Ltd. would only be considered on 2nd July, 1998 and confirmation of sale would be made on the basis of the offers made by the two parties. Further, despite the fact that the appellant 'Divya' had withdrawn its earlier offer, the Court permitted it to take part in making further offer as noted in the order dated 2nd July, 1998. In these set of circumstances, there was no need to confine the bid between three offerors only.

14. In *LICA (P) Ltd. (1) v. Official Liquidator*, (1996) 85 Comp Cas 788, this Court dealing with a similar question observed thus :

"The purpose of an open auction is to get the most remunerative price and it is the duty of the Court to keep openness of the auction so that the intending bidders would be free to participate and offer higher value. If that path is cut down or closed the possibility of fraud or to secure inadequate price or underbidding would loom large. The Court would, therefore, have to exercise its discretion wisely and with circumspection and keeping in view the facts and circumstances in each case."

15. The matter was again brought before this Court and in LICA (P) Ltd. (2) v. Official Liquidator, (1996) 85 Comp Cas 792 and the Court held :

"Proper control of the proceeding and meaningful intervention by the Court would prevent the formation of a syndicate, underbidding and the resultant sale of property for an inadequate price. The order passed by this Court yielded the result that the property which would have been finalised at Rs. 45 lakhs, fetched Rs. 1.10 crores and in this Court a further offer of Rs. 1.25 crores is made. In other words, the property under sale is capable of fetching a higher market price. Under these circumstances, though there is some force in the contention of Sri Ramaswamy that the Court auction may not normally be repeatedly disturbed, since this Court, on the earlier occasion, had limited the auction between the two bidders, the impediment will not stand in the way to direct sale afresh. Even today the parties are prepared to participate in the bid."

16. Further, there is a specific condition No. 11 in terms and conditions of sale as quoted above which empowers the Court to set aside the sale even though it is confirmed for the interests of creditors, contributories and all concerned and/or public interest. In this view of the matter it cannot be said that the Court became functus officio after the sale was confirmed. As stated above, neither the possession of the property nor the sale deed was executed in favour of the appellant. The offer of Rs. 1.30 crore is totally inadequate in comparison to the offer of Rs. 2 crores and in case where such higher price is offered, it would be in the interest of the Company and its creditors to set aside the sale. This may cause some inconvenience or loss to the highest bidder but that cannot be helped in view of the fact that such sales are conducted in Court precincts and not by a business house well versed with the market forces and price. Confirmation of the sale by a Court at grossly inadequate price, whether or not it is a consequence of any irregularity or fraud in the conduct of sale, could be set aside on the ground that it was not just and proper exercise of judicial discretion. In such cases, a meaningful intervention by the Court may prevent, to some extent, underbidding at the time of auction through Court. In the present case, the Court has reviewed its exercise of judicial discretion within a shortest time.

In the result, Civil Appeal No. 4706 of 1998 filed by 'Divya' and Civil Appeal No. 4707 of 1998 filed by the 'Samity' stand dismissed. Interim order stands vacated. Pending hearing and disposal of this appeal as the order passed by the Division Bench of the High Court was stayed, fresh directions are required to be obtained from the Court for fixing the time-table for conduct of the auction sale. Hence, the Liquidator is directed to take appropriate steps at the earliest, by obtaining an order from the Court for sale of the property by calling sealed tenders or by auction in accordance with law

after giving due publicity in the newspapers, particularly, the newspapers having circulation in Delhi and in the State of Haryana with a reserved price fixed at Rs. 2 crores (as offered). The parties are directed to bear their respective costs.

Order accordingly.