

SUPREME COURT OF INDIA

FCS Software Solutions Ltd.

Vs.

La Medical Devices Ltd.

C.A.No.4271 of 2008

(C.K. Thakker and D.K. Jain JJ.)

09.07.2008

JUDGMENT

C.K. Thakker, J.

1. Leave granted.

2. The present appeal is filed by the appellant against an order passed by the Division Bench of the High Court of Punjab & Haryana on October 15, 2007 in Company Appeal No. 10 of 2006. By the said order, the Division Bench of the High Court dismissed the appeal filed by the appellant-herein and confirmed the order passed by the Company Judge on February 16, 2006 in Company Application No. 178 of 2005 in Company Petition No. 42 of 1999.

3. Few facts of the case are that La Medical Devices Ltd.-respondent NO.1 went into liquidation. Official Liquidator was appointed by the Court who is joined as Respondent No. 1 in the present proceedings. In view of the liquidation of the Company and dues to be paid by it, proceedings were initiated for sale of property of the Company. Sale notice was issued by the Company Court on October 19, 2004 which was published in various newspapers inviting sealed tenders for the sale of property of the Company situated at NOIDA (U.P.). Twelve bids were received which were opened on November 16, 2004. The bid of the appellant for Rs.1.47 crores for immovable as well as movable property was the highest. One of the creditors, namely, Pradeshiya Industrial and Investment Corporation of U.P. Ltd. (PICUP) granted 'no objection' to the sale-price. Since the appellant was the highest bidder, it wrote a letter to the Official Liquidator on December 19, 2004 followed by a reminder dated January 0, 2005 requesting him to expedite the process and issue letter of acceptance of the offer of the appellant so that possession of the Unit can be given to the appellant and the property could be made ready for commencement of production. It is the case of the appellant that there was no reply by the Official Liquidator to the appellant. The appellant, therefore, wrote a letter to the Company Judge on January 27, 2005, complaining that though it was the duty of the Official Liquidator to accept the highest offer submitted by the appellant, no action had been taken by the Official Liquidator and there was delay in the process of finalization of acceptance of bid. The appellant also complained about

the threat administered by the Official Liquidator. According to the appellant, thereafter on February 15, 2005, the Official Liquidator accepted the bid of the appellant for Rs. 1.47 crores for immovable property. The appellant on its own had forgone its claim of leased machinery. The Official Liquidator also instructed the appellant to deposit 25% of the bid amount for immovable property within fifteen days. The appellant, however, deposited the said amount on the same day, i.e. February 15, 2005. According to the appellant, the Company Judge having found the auction in accordance with law and for adequate price and there being no other objection, confirmed the auction sale in favour of the appellant-Company on March 24, 2005. The Company Judge also directed the Official Liquidator to hand over possession of the Unit by executing sale deed in favour of the appellant after receiving full and final payment within one month. The Official Liquidator conveyed the appellant vide his letter dated April 4, 2005 that an order was passed by the Company Judge in favour of the appellant. The appellant was also asked to deposit the rest of the amount immediately. On receiving the letter dated April 4, 2005 from the Official Liquidator, the appellant deposited the remaining amount on April 12, 2005. The appellant thereby became entitled to receive possession and execution of sale deed in respect of immovable property of the Company. By a communication dated April 21, 2005, the Official Liquidator informed the appellant that possession of the property would be handed over to the appellant on May 6, 2005 at 11.30 a.m.

4. According to the appellant, thereafter the Official Liquidator did not act legally and in accordance with law. On May 6, 2005, though the officers of the appellant waited at the site for getting possession of the property, neither the Official Liquidator nor his representative turned up to hand over possession of the property to the appellant. The appellant-Company, hence, sent a telegraphic notice to the Official Liquidator and requested him to immediately comply with the order of the Company Judge confirming sale and handing over possession to the appellant. Instead of complying with the order of the Court and handing over possession of the property, the Official Liquidator sent a letter purported to have been written on May 5, 2005, stating therein that possession would not be given to the appellant on May 06, 2005 as higher bid of Rs.1.55 crores had been received and order for handing over possession to the appellant had been stayed by the Hon'ble Court. The appellant made enquiries and it was found that it was at the instance of the Official Liquidator himself that Company Application No. 178 of 2005 before the Company Judge was moved and he created obstruction in delivery of possession of property to the appellant on the alleged ground that he had received higher offer. The appellant stated that other two persons also offered more amounts. The appellant, in the circumstances, filed Company Application No. 407 of 2005 under Rule 9 of the Company Court Rules, 1959 read with Section 151 of the Code of Civil Procedure, 1908 stating therein that it had paid full amount, sale was confirmed and in spite of the order by the Company Judge, possession had not been handed over to the appellant. A prayer was made to direct Official Liquidator to hand over possession of property to the appellant. Meanwhile other offers were also received by Official Liquidator. One Satish Choudhary offered an amount of Rs.2.10 crores. Keeping in view all the facts, the learned Company Judge, vide his order dated February 16, 2006 directed re-sale of property by issuing fresh advertisement in the newspapers mentioned in the order. It was also observed that the reserve price would be fixed at Rs.2.10 crores.

Tenders should reach in the office of Official Liquidator latest on March 22, 2006, and would be opened in Court at 1.45 p.m. on March 23, 2006 and inter-se bidding would be permitted at that time.

5. In pursuance of the above direction, advertisement was issued. Official Liquidator received offers. The highest offer was by Nice Society- respondent No. 3 herein for Rs.3.5 crores and in the circumstances, bid of respondent No. 3 was accepted. The appellant in the meanwhile challenged the order of the Company Judge and, as observed earlier, the appeal was dismissed by the Division Bench. It is this order which is challenged in the present appeal.

6. Notice was issued by this Court on February 23, 2007. Affidavits and further affidavits were filed thereafter. Considering the nature of litigation, the Office was directed to place the matter for final hearing on a non-miscellaneous day and that is how the matter has been placed before us.

7. We have heard the learned counsel for the parties.

8. The learned counsel for the appellant contended that the Company Judge as well as the Division Bench of the High Court were wholly wrong in setting aside the auction sale in favour of the appellant. It was submitted that pursuant to sale notice, tenders were invited, twelve persons offered their bids. The bid of the appellant was highest. In consonance with law, therefore, the said bid was accepted and the appellant deposited amount of 25% as required by law. It also paid the remaining amount of 75%. Sale was confirmed in favour of the appellant and direction was issued by the Company Judge to the Official Liquidator to hand over possession of the property to the appellant. The Official Liquidator, however, with mala fide intention and oblique motive, refused to do so.

9. According to the counsel, once the bid was accepted and sale was confirmed, it could not be set aside except on the grounds of fraud, material irregularity, etc. It is not even the case of the Official Liquidator, submitted the counsel, that there was fraud or material irregularity in sale and hence, sale could not have been set aside. It was urged that the only ground put forward by the Official Liquidator was that he had received a higher offer of Rs.1.55 crores from another person. The said offer was received after about seven months. The difference in price was 5.44%.

10. According to the counsel, judicial notice can be taken that price of real estate increases day by day and increase of 5% after seven months could not justify the Court in setting aside auction sale which was conducted in consonance with law. On that ground alone, therefore, both the orders are liable to be set aside by ordering handing over possession of property to the appellant.

11. It was also submitted that mala fide action on the part of the Official Liquidator was apparent and from the records and proceedings, it was clearly established. On May 6, 2005, the officers of the appellant remained present at the site to accept possession, but the Official

Liquidator did not come. A letter, said to have been written on May 5, 2005 was received by the appellant belatedly wherein the only ground given by the Official Liquidator was that he had received a higher bid of Rs. 1.55 crores and the Company Judge had issued stay order. The so-called order passed by the Company Judge was also not sent along with the letter.

12. It was alleged that the Official Liquidator did not hand over possession since the appellant did not oblige him by succumbing to his demands. It was asserted that against the said Official Liquidator, the Central Bureau of Investigation (CBI) had instituted proceedings alleging corruption and he was also arrested in that connection.

13. Regarding bid of respondent No.3- Society for Rs.3.5 crores, it was submitted that it is well settled that auction sales cannot be set aside on the ground that higher offers are received from other bidders after confirmation of sale. If this is allowed and sales are set aside, there is no end to it. In absence of illegalities or material irregularities, credibility of court sales cannot be doubted nor such sales be set aside. If price is the only consideration, today the property is worth Rs.5.5 crores. In that case, sale in favour of respondent No.3 should also be set aside and fresh auction must be ordered.

14. It was stated that the appellant was a bona fide purchaser. It was not even the allegation of the Official Liquidator or any other bidder that highest bid of the appellant for Rs.1.47 crores was in any way improper, insufficient or inadequate. The appellant, hence, cannot be deprived of the fruits to which it was otherwise entitled to. On all these grounds it was submitted that the order passed by the courts below deserve to be set aside.

15. On behalf of the Official Liquidator, an affidavit is filed. It may, however, be stated that the present incumbent is different than the one who was in of the office at the relevant time. The deponent denied the allegations levelled by the appellant but stated that in view of the higher offer received by the then Official Liquidator and stay granted by the Company Judge, possession was not handed over to the appellant and the said action could not be said to be illegal or contrary to law. It was stated that as per the order of the Company Judge, fresh tenders were invited and in the said process, respondent No. 3-Society offered Rs.3.5 cores which was accepted and no interference is called for.

16. A counter affidavit is also filed by respondent No.3 stating that the appellant had not approached the Court with true and full facts. Sale notice which was issued on October 19, 2004 was incomplete and invalid. It did not state valuation of movable and immovable properties. Reserve price was also not fixed. No inventory of plant and machinery was made. There was no full description of movable properties. Necessary material was not made available at the site nor in the office of the Official Liquidator. In view of those irregularities, the property could not fetch brought to the notice of the Company Judge, the Company Judge was satisfied that the process undertaken was not proper and hence fresh bids were invited.

17. It was also submitted that no formal order of confirmation in favour of the appellant was at any time made by the Court. But even if it is assumed for the sake of argument that the order of the Company Judge issuing direction to the Official Liquidator to hand over

possession to the appellant can be said to be an order of confirmation, it would not take away the power of the Company Judge to invite fresh tenders if sale was not held in accordance with law. Moreover, if auction sale was confirmed by the Court on March 24, 2005, the appellant was bound to pay the remaining amount of 75% before 15th day of confirmation. Admittedly, the appellant failed to pay the remaining amount within the stipulated period. It, therefore, cannot claim any benefit on the basis of such auction sale.

18. The counsel urged that even otherwise this Court has held in several cases that the Court has power to set aside even confirmed sale if it is satisfied that the property would have fetched higher price. The approach of the Court in such matters is to ensure that the property must fetch maximum price which would benefit the Company in clearing its dues and liabilities towards its creditors, contributors and workers. In the final analysis, the auction sale in favour of respondent No. 3 for an amount of Rs.3.5 crores which was substantially higher than the bid of the appellant for Rs.1.47 crores may not be interfered with.

19. It was further stated that when respondent No. 3 made an offer of Rs.3.5 crores, the Court, in fairness, extended opportunity to the appellant if it wanted to participate in the proceedings and willing to offer higher price. The appellant, however, refused to take part as also refused to pay anything more than what was offered earlier. It is, therefore, not open to the appellant to complain and insist to get ownership rights and possession of property for Rs.1.47 crores.

20. It was stated that respondent No. 3 has paid full amount, got sale deed executed in its favour and had spent substantial amount thereafter and on that ground also, the Court may not exercise discretionary and equitable jurisdiction under Article 136 of the Constitution.

21. Having heard the learned counsel for the parties, in our opinion, no case has been made out by the appellant against the order passed by the High Court. From the facts stated above, it is clear that in November, 2004, the bid of the appellant was highest and was accepted by the Official Liquidator. But it is also clear that certain facts which were necessary to be brought to the notice of intending purchasers were not set out in the proclamation of sale nor were disclosed at the time of sale notice. They related to valuation of movable and immovable properties, fixation of reserve price, non-inventory of plant and machinery, etc. The attention of the Company Judge was invited by other bidders by filing Company Applications. The Company Judge considered the objections and having prima facie satisfied, ordered fresh auction. We find no illegality in the said approach. When fresh bids were received, it was found that the highest offer was of respondent No. 3-Society which was of Rs.3.5 crores. The Company Judge extended an opportunity to the appellant to raise its bid. It, however, appears that the appellant was adamant to get the property for Rs.1.47 crores on the ground that the said offer was highest and all the proceedings taken by the Official Liquidator and Company Judge thereafter were totally illegal and unlawful. In our opinion, the respondents are right that in such cases, the approach of the Company Judge should be to get highest price so as to satisfy maximum claims against the Company in liquidation. The procedure followed by the Company Judge, therefore, cannot be said to be illegal.

22. It may be observed at this stage that even before the Division Bench, such opportunity was afforded to the appellant to raise its bid but it was not availed of by the appellant.

23. The Division Bench, in the impugned order, noted;

"Even during the course of proceedings in this appeal, we had specifically asked the learned counsel for the appellant as to whether the appellant was willing to go for inter-se bidding to which he flatly declined".

24. In this connection, we may refer to some of the decisions of this Court to which our attention has been invited.

25. In *M/s Navalkha & Sons v. Sri Ramanya Das & Ors.*¹, it was held by this Court that the principles which should govern confirmation of sale are well-settled. Where the acceptance of the offer by the Commission is subject to confirmation of the Court, mere acceptance of offer by the Commission would not confer vested right to the property in favour of the bidder. Condition of confirmation by Court operates as a safeguard against the property being sold at an inadequate price, whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. It is the duty of the Court to satisfy itself about the proper valuation. But once the Court comes to the conclusion that the price offered is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already received.

26. In *Kayjay Industries (P) Ltd. v. M/s Asnew Drums (P) Ltd. & Ors.*² this Court held that it is the duty of the Court to accept the highest bid and the Court is not bound to go on adjourning the sale on the basis of valuation report. Referring to and relying on *Navalkha*, the Court stated that in public sales, the authority must protect interest of the parties keeping in view the fact that a Court sale is a forced sale and, notwithstanding the competitive element of public auction, the best price is not often forthcoming.

27. In *Union Bank of India v. Official Liquidator, High Court of Calcutta & Ors.*³ this Court observed that in auction sale of the property of the Company which is ordered to be wound up, the Company Court acts as a custodian for the interest of the Company and its creditors. It is the duty of the Company Court to satisfy itself as to reasonableness of price by disclosing valuation report to secured creditors of the Company and other interested persons. It was further held that the Court should exercise judicial discretion to ensure that sale of property should fetch adequate price. For deciding what would be reasonable price, valuation report of an expert is essential. The Company Judge himself must apply his mind to the valuation report. The Court observed that the High Court did not interfere with the auction sale on the ground of sympathy for the worker which was not proper. The auction sale was, therefore, set aside by this Court and Official Liquidator was directed to re-sell the property after obtaining fresh valuation report and after furnishing copy of such report to secured creditors.

28. In *Divya Manufacturing Company (P) Ltd. v. Union Bank of India & Ors.*⁴ this Court held that even confirmed sale can be set aside. In that case, highest bid by a party was accepted by the Court and the sale was confirmed, but before possession was delivered to the auction purchaser and execution of sale deed, other parties offered much higher price. The High Court required the subsequent bidders to deposit an amount of 25% which was done. Considering the facts in their entirety, the High Court set aside the confirmation of past highest bid. The said action was challenged in this Court.

29. This Court held that in an appropriate case, even confirmed sale can be set aside. The Court in this connection, relied upon earlier two decisions in *LICA (P) Ltd. (1) v. Official Liquidator*⁵, and *LICA (P) Ltd. (2) v. Official Liquidator*⁶.

30. The learned counsel for the appellant is no doubt right in submitting that in *Divya*, there was a specific condition (Clause 11) which empowered the Court to set aside confirmed sale "in the interest of creditors, contributors and all concerned and/or public interests".

31. But the Court put the matter on principle and stated; "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". (emphasis supplied)

32. It proceeded to observe; "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". (emphasis supplied)

33. In *Gajraj Jain v. State of Bihar & Ors.*⁷, this Court reiterated that in absence of valuation report and reserve price, the auction sale becomes only pretence. If there is no proper mechanism and if the intending purchasers are not able to know details of the assets or itemized valuation, auction sale cannot be said to be in accordance with law. If publicity and maximum participation is to be attained, all bidders must know the details of the assets and the valuation thereof.

34. In the present case, it was alleged that there were several irregularities in the first auction. The tender notice did not state valuation of movable and immovable property; reserve price was not fixed, inventory of plant and machinery was not made available, etc. If on consideration of these facts, the Company Judge ordered fresh auction, in our considered opinion, no complaint can be made against such action.

35. In our opinion, the submission of the learned counsel for respondent NO. 3 is also well-founded that when its highest bid of Rs.3.5 crores was accepted, opportunity was afforded to the appellant. It, however, did not avail such opportunity. The counsel is also right in referring to subsequent events that after the, fresh auction, sale deed was executed, possession was handed over to respondent No.3, it had incurred expenses. If at this stage, the sale is set aside, serious prejudice will be caused to respondent No. 3- Society.

36. At the same time, however, from the facts it is clear that the appellant's bid was accepted in November, 2004. Immediately, it had deposited 25% amount. The appellant also deposited remaining amount of 75% on April 12/13, 2005. It would, therefore, be appropriate if we direct respondent No. 3 to pay an amount of Rs.30 lacs to the appellant which in our opinion would serve the ends of justice. Payment of Rs.30 lacs will serve as a "solatium to the purchaser for his trouble and disappointment for the loss of that which is perhaps a good bargain". [Vide *Chundi Charan v. Bankey Behary*⁸].

37. Before parting, we may clarify that serious allegations have been levelled by the appellant against the then Official Liquidator. It was also stated that Central Bureau of Investigation (CBI) has instituted criminal proceedings alleging corruption against the Official Liquidator and he was arrested. We are disposing of the present appeal as in our opinion, the order passed by the Company Judge and confirmed by the Division Bench of the High Court are in consonance with law. But we may not be understood to have expressed any opinion on the allegations levelled by the appellant against the Official Liquidator. As and when the matter comes up for consideration before an appropriate Court/Authority, it will be decided on its own merits irrespective of the disposal of this appeal by us.

38. For the foregoing reason, the appeal is partly allowed to the extent indicated above.

¹1969 (3) SCC 337

²(1974) 2 SCC 213

³(2000) 5 SCC 274

⁴(2000) 6 SCC 69

⁵(1996) 85 Comp Cas 788 (SC)

⁶(1996) 85 Comp Cas 792 (SC)

⁷(2004) 7 SCC 151

⁸(1899) ILR 26 Cal 449 (FB)