

Man Mohan Mitra and anr. Vs. Official Liquidator and ors.

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Court : Allahabad

Decided On : Oct-08-2004

Reported in : II(2005)BC330; [2005]123CompCas37(All)

Judge : B.S. Chauhan and ;Dilip Gupta, JJ.

Acts : Indian Contract and Specific Relief Acts, 2001

Appeal No. : Company Appeal No. 3 of 2004

Appellant : Man Mohan Mitra and anr.

Respondent : Official Liquidator and ors.

Advocate for Def. : Ravi Kant, Adv. for Respondent Nos. 2 and 3 and ;R.P. Agarwal, Adv.

Advocate for Pet/Ap. : Yashwant Verma, Adv.

Disposition : Appeal dismissed

Judgement :

B.S. Chauhan, J.

1. This appeal has been filed against the order dated August 17, 2004, by which the learned company judge rejected the application of the appellants to recall the order dated April 15, 2004, by which the bid of respondent No. 2 was accepted

with certain conditions.

2. The facts and circumstances giving rise to this appeal are that winding up proceedings are pending before the company judge. The advertisement was issued in four newspapers, i.e., Times of India, Economic Times, Dainik Jagaran and Amar Ujala fixing the date for sale of the assets of the company, of which the present appellants are the ex-directors. In response to the said advertisement, four tenders had been received by the court. Learned counsel for the parties were heard before the proceedings of auction etc. started and it was agreed that the property should not be sold for a sum less than Rs. 2 crores. Respondent No. 2 had been the highest bidder for a sum of Rs. 2.25 crores. The said offer was accepted tentatively vide order dated April 15, 2004, taking into consideration the report of the valuation, etc. The sale was made conditional that it would be confirmed if there is no offer by any other buyer for one and-a-half times of the amount offered by respondent No. 2, i.e., a sum of Rs. 3,47,50,000. The court further gave opportunity to the secured creditors to bring any buyer for the said amount. As nobody turned up and a period of one month was over the court passed the order to execute the sale deed in favour of the said respondent and hand over the possession of the premises in dispute. After expiry of about four months, the application was filed to recall the said order dated April 15, 2004, on the ground that it had been sold on a much lesser price, which was rejected vide impugned order dated August 18, 2004. Hence this appeal.

3. Shri Yashwant Verma, learned counsel appearing for the appellants has submitted that the bid of respondent No. 2 for a sum of Rs. 2.5 crores is a distress sale and not the price of the property. The property can definitely fetch a much higher price. Therefore, the learned company judge has erred in not allowing the application recalling the order dated April 15, 2004. Therefore, the appeal deserves to be allowed.

4. On the other hand, Shri Ravi Kant, learned senior counsel appearing for the respondents Nos. 2 and 3 and Shri R.P. Agarwal, official liquidator have submitted that the learned company judge had given 30 days' time to bring a better buyer. No body turned up. The application to recall the said order was filed after four

months. Even today there is no buyer for a better price. Therefore, the appeal is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. Order dated April 15, 2004, reads as under :

'In view of the report of approved valuer, the court considers the said amount to be quite reasonable. The offer of Rs. 2.25 crores made by M/s. Udai Rice and Dal Mill is therefore tentatively accepted.

However it is clarified that if within 30 days from today any person offers one and a half times of the said amount, i.e., Rs. 3 crores, 37 lakhs, and 50 thousand or more, the offer of the purchaser Udai Rice and Dal Mill will be rejected.

Secured creditors particularly United Bank of India and IDBI are permitted to search for some buyer who is ready to pay more than Rs. 3 crores 37 lakhs 50 thousand for the said purpose. They are at liberty to issue advertisement in the newspapers for this purpose. In case any inspection of the unit is considered necessary, application for the same may be made to this court.'

7. Thus, it is evident that the sale in favour of respondent No. 2 was conditional and the present appellants and any other secured creditor was at liberty to bring the better buyer. The application for recalling that order was filed after about four months of the order and the learned company judge rejected the same making reference to the earlier order and held that they miserably failed to bring any better buyer.

8. We have asked Shri Yashwant Verma, learned counsel appearing for the appellants as to whether there is any buyer even today for a better price, but Shri Verma has fairly acceded that there is no such buyer, but he has serious objection to the value for which the property is being transferred.

9. The issue involved herein has been considered by the apex court in *Kayjay Industries (P.) Ltd. v. Asnew Drums (P.) Ltd.*, AIR 1974 SC 1331. The court while

dealing with the similar case held that the presiding judge should consider as to what could be the better price and in the interest of the debtor as well as creditor and what should be the reasonable price of the property to be sold. For that, it is always better to have some valuer's report to serve as a test and to guide the court in concluding where a grossly unjust offer was being made. The judgment-debtor may be given an opportunity to bring the best buyer but in case he fails or does not bother at all, the court must proceed making an intelligent guess in the given circumstances and the sale must be approved, for the reason that the court cannot keep the proceedings pending forever in the hope of prospectus of higher prices in the auction. The court observed as under (page 1333) :

'Court sale is a forced sale and notwithstanding the competitive element of a public auction, the best price is not often forthcoming. The judge must make a certain margin for this factor. A valuer's report, good as a basis, is not as good as an actual offer and variations within limits between such an estimate, however careful, and real bids by seasoned businessmen before the auctioneer are quite on the cards . . . The brooding fear of something out of the imported machinery going out of gear, the vague apprehensions of possible claims by the Dena Bank which had a huge claim and was not a party, and the litigious sequel at the judgment-debtor's instance, have 'scare' value in inhibiting intending buyers from coming forward with the best offers. Businessmen make uncanny calculations before striking a bargain and that circumstance must enter the judicial verdict before deciding whether a better price could be had by a postponement of the sale ... If court sales are too frequently adjourned with a view to obtaining a still higher price it may prove a self-defeating exercise, for industrialists will lose faith in the actual sale taking place and may not care to travel up to the place of auction being uncertain that the sale would at all go through. The judgment-debtor's plea for postponement in the expectation of a higher price in the future may strain the credibility of the court sale itself and may yield diminishing returns ...'

10. While deciding the case in *Union Bank of India v. Official Liquidator*, High Court of Calcutta; [2000] 5 SCC 274, the apex court placed reliance upon a large number of its earlier judgments, particularly, in *Navalkha and Sons v. Ramanuja Das* [1969] 3 SCC 537; *Allahabad Bank v. Bengal Paper Mills Co. Ltd.* [1999] 4

SCC 383 and Ram Maurya v. Kailash Nath [1999] 9 SCC 276 and held as under:

'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 a reasonable price, valuation report of an expert is a 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 offerers. 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.'

11. In Anil Kumar Srivastava v. State of U. P.; AIR 2004 SC 4299, the hon'ble Supreme Court while dealing with the tender price has examined the concept of valuation and upset/reserved price and held as under (page 4304):

'In the case of McManus v. Fortescue [1907] 2 KB 1, it has been held by Court of Appeal that in a sale by auction, subject to reserve, every offer/bid and its acceptance is conditional. That the public is informed by the fact, that the sale is subject to a reserve that the auctioneer has agreed to sell for the amount which the bidder is prepared to give only in case that amount is equal to or higher than the reserve. That the reserve puts a limit on the authority of the auctioneer. He cannot accept a price below the upset/reserve price .. . The concept of reserve price is not synonyms with 'valuation of the property'. These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. (see : Pollock and Mulla on Indian Contract and Specific Relief Acts (2001) 12th edition, page 50).

Valuation is a question of fact. That court is reluctant to interfere where valuation is based on relevant material. (see : Duncans Industries Ltd. v. State of U.P. JT 1999 (9) SC 421. The difference between valuation and upset price has been explained in the case of B. Susila v. Saraswathi Ammal, AIR 1970 Mad 357, in which it has been held that fixation of an upset price may be an indication of the probable price which the land may fetch from the point of view of intending bidders. However,

notwithstanding the fixation of upset price and notwithstanding the fact that a bidder has offered an amount higher than the reserve/upset price, the sale is still open to challenge on the ground that the property has not fetched the proper price and that the sale be set aside. That the fixation of the reserve price does not affect the rights of the parties. Similarly, in the case of Dr. A. U. Natarajan v. Indian Bank, AIR 1981 Mad 151, it has been held that the expressions 'value of a property' and 'upset price' are not synonymous but have different meanings. That the term 'upset price' means lowest selling price or reserve price. That unfortunately in many cases the word 'value' has been used with reference to upset price. That the sale has to commence at the higher price and in the absence of bidders, the price will have to be progressively brought down till it reaches the upset price ...'

12 In view of the above, the law can be summarised that as the custodian of the property, the court is under an obligation to protect the interest of the debtor as well as the creditor. In order to assess the actual market value of the property, the court can ask for valuation report from a valuer. The court has to consider as to whether the offer made by a bidder is reasonable, i.e., worth acceptance and before passing the order of confirmation of sale, the court may give an opportunity to the creditors to bring a buyer for a better price.

13 Thus, in view of the above, we come to the conclusion that firstly the learned company judge has applied his mind and considered the reasonableness of the price, and secondly, given liberty to the secured creditors as well as to the present appellants to bring a best buyer within 30 days, but they miserably failed.

14 Thus, in this fact-situation, no fault can be found with the impugned judgment and order. We find no force in the appeal. It is accordingly, dismissed.