

(1998) 04 MAD CK 0170

In the Madras High Court

Case No : O.S.A. No. 15 and C.M.P. No. 1653 of 1998

Bancorex S.A.

APPELLANT

Vs

Ocean Marine Services Co. Ltd. and Others

RESPONDENT

Date of Decision : 23-04-1998

Acts Referred:

Citation : AIR 1998 Mad 225 : (1998) 2 LW 468

Hon'ble Judges : Shivaraj Patil, J;M. Karpagavinayagam, J

Bench : Division Bench

Advocate : C.A. Sundaram, S.C. for K. Harish, for the Appellant; S. Vasudevan, for Respondent 1, Alagiriswami, S.C. for A. Thiagarajan, for Respondent 3 and Sampathkumar, for Crew, for the Respondent

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—This appeal has been filed by the appellant/intervenor before this Court against the decretal order and fair order of the learned single Judge dated 24-1-1998, passed in Application No. 1217 of 1997 in C.S. No. 97 of 1997 in exercise of the Admiralty Jurisdiction confirming the sale of the vessel "M.V. Eleni."

2. The plaintiff/first respondent Ocean Marine Services Company Limited, Korea, filed an admiralty suit in C.S. No. 97 of 1997 for recovery of money from the defendant, the owners and parties interested in the vessel M.V. Eleni, in Feb. 1997. He also filed an application in A. No. 750 of 1997 on 26-2-1997 for the arrest of the vessel. Thereafter, he filed another application in A. No. 906 of 1997 on 6-3-1997 for the sale of the same. Pursuant to these applications, the vessel was directed to be arrested by the order dated 27-2-1997 and the same was ordered to be sold by the order dated 17-4-1997.

3. At this stage, several persons claiming Hens over the vessel, filed the intervenor applications in the suit. The appellant also intervened through Application No. 2172 of 1997, as the said vessel had been mortgaged to the

appellant to secure the loans advanced to the owners. In the meantime, the second respondent, the owners of the vessel also filed Application No. 1217 of 1997 for the sale of the vessel. The order of sale through public tender was passed in these applications by the learned single Judge and an Advocate-Commissioner also was appointed for such purpose.

4. The upset price of the vessel was fixed by the Court at US \$ 2.25 million and the Earnest Money Deposit at US \$ 1,00,000/-. Notice of sale was published in leading dailies and in the Lloyds List. As directed by the Court, the plaintiff incurred the expenditure. The last date for receipt of the sealed tenders was fixed as 26-5-1997. The tenders were to be opened by the learned single Judge on 14-6-1997 and the sale was subject to the confirmation by the Court.

5. Pursuant to such notice of sale of the vessel, only one bid was received for US \$ 3,80,000/-, though the minimum acceptable price was fixed as US \$ 2.25 million. The bidder is M/s. Jansee Steel Industries Private Limited, the third respondent herein. On 26-5-1997 the Managing Director of the third respondent met the Advocate Commissioner and paid US \$ 1,00,000/- as security as per the sale condition,

6. Barring this sole tender, no other tender had been received by the Advocate Commissioner, Therefore, on 27-5-1997 the Advocate Commissioner submitted the sealed tender along with the interim report. On 30-6-1997 the sale tender received was opened by the Court and the same was found to be for US \$ 3,80,000/-.

7. The plaintiff, the appellant and other intervenors objected to the acceptance of the said bid of the sole bidder, as the offer was too low and much below the upset price. They further contended that the vessel might be brought to sale once again by publishing the necessary notices as made earlier. When the question arose as to who is to bear the necessary cost of publication, since it comes to nearly Rs. 90,000/- as expenditure incurred by the plaintiff for the earlier publication, the counsel for the appellant represented that he would bring a better offer or in the alternative, the appellant would bear, the expenses for the publication for the fresh auction. Therefore, the matter was adjourned to a future date to enable appellant to make arrangement for the same. On the adjourned date, the counsel for the appellant expressed his inability to bring a better offer. However, he offered to bear the cost of re-tender. But, the learned single Judge by order dated 4-8-1997 accepted the bid of sole bidder, the third respondent herein for US \$ 3,80,000/-.

8. As against the above order, the appellant being a mortgagee filed an appeal in O.S.A. No. 246 of 1997 before the Division Bench. After hearing the parties, by the order dated 28-8-1997 the Division Bench disposed of the said appeal observing that the issue raised in the appeal was premature, as the sale was subject to confirmation by the learned single Judge and that the appellant could raise all objections that are available to him including those objections which

were already raised before the learned single Judge and rejected.

9. Accordingly, on 22-9-1997 the appellant filed his objections to the confirmation of the sale in favour of the third respondent for the low price, which is below the minimum acceptance price and requested for re-tender of the sale of the vessel, as the appellant was prepared to bear the cost of the same. During the pendency of this proceeding, before confirmation of sale, several third parties filed applications expressing their willingness to participate in the fresh bids for the value of over US \$ 8,10,000/-.

10. After hearing all the parties concerned, the order was reserved on 17-10-1997 by the learned single Judge in Application No. 1217 of 1997. However, by the order dated 24-1-1998, the learned single Judge confirmed the sale in favour of the third respondent herein who had bid US \$ 7,90,000/-. This order is challenged in this appeal.

11. Mr. C.A. Sundaram, learned senior Counsel, while attacking the order under appeal with great vehemence, contended that the learned single Judge has committed a grave illegality in confirming the sale in favour of the third respondent; without following the terms and conditions as provided in the tender and the same would suffer from errors of law and fact apparent on the face of the record.

12. In brief, the submission made by the senior Counsel appearing for the appellant could be fitted as follows:

(i) Though the appellant was permitted by this Division Bench, while disposing of the earlier appeal in O.S.A. No. 246 of 1997 in the order dated 28-8-1997, to raise all objections that are available to him including those objections which were already raised before the learned single Judge and rejected; while accepting the sale price, the learned single Judge did not consider the objection of the appellant with reference to the acceptance of the sale price which is admittedly below the upset price fixed by the Court as mentioned in the sale notice.

(ii) The learned single Judge ought not to have passed an order confirming the sale, which is too low and which is a fraction of the minimum acceptable price, especially when the appellant expressed in clear terms that he was prepared to bear the cost of re-tendering for the sale of vessel.

(iii) Had there been afresh tender by reducing the upset price, there would have been more number of bidders who could offer higher bids than that of the bid confirmed which is much below the upset price.

(iv) The refusal of the learned single Judge in ordering fresh tender has deprived of the several persons for offering high bids, resulting in the sale of the vessel for an inadequate price.

(v) The offer of US \$ 7,90,000/- by the third respondent was, in fact, not the

highest bids since M/s. Trinity Shipping (I) Services, the applicant in Application No. 3380 of 1997 had prepared to offer upto US \$ 8,20,000/-. Another applicant in Application No. 3245 of 1997 had offered US \$ 7,80,000/- and subsequently, had improved the offer to US \$ 8,00,000/-. As such, the confirmation of sale for US \$ 7,80,000/- is low when compared to the other bidders who offered their willingness to bid before the open Court.

(vi) The sale itself was vitiated as the advertisement for sale had specifically set out that the minimum acceptable bid as US \$ 2.25 million, thereby indicating that any bid less than US \$ 2.25 million would not be considered. This in effect prevented the prospective purchasers who were interested in bidding less than US \$ 2.25 million but more than the sale bid of US \$ 3,80,000/- or US \$ 7,90,000/- for bidding.

(vii) The learned single Judge wrongly concluded that there is a collusion as between the mortgagee, the appellant herein, the owners and one M/s. Petromarine Products Limited, who has instituted a suit against the vessel in the Bombay High Court, and consequently, the appellant adopted the tactics of delaying the proceedings. This conclusion has been arrived at with no material whatever on record. More so, such conclusion was arrived at not only in the absence of materials but also in the absence of any hearing of the parties against whom such finding was given by the learned single Judge.

(viii) The order of the learned single Judge in confirming the sale for low price would result in irreparable loss and damage to the appellant to whom the vessel is mortgaged for a sum of US \$ 13.8 million. The sale of the vessel ought to bring in an optimum value so as to enable the appellant to more effectively and fully utilize its security, viz., the vessel.

(ix) While Confirming the sale of the vessel, the learned single Judge should have mainly considered the adequacy of sale price rather than merely finding out the alleged highest bidder, that too, for a price which is far below the upset price. The failure to consider the adequacy of sale (sic) law apparent on the face of the record which would make the impugned order invalid.

13. In reply to the above submissions, Mr. Alagiriswami, learned senior Counsel appearing for the third respondent, in whose favour the sale has been confirmed by the impugned order, in justification of the order under appeal, contended that though the third respondent originally bid for US \$ 3,80,000/-, after opening the sole tender, he was ready to offer the highest bid of US \$ 7,90,000/- as sale price and that comparatively as held by the learned single Judge, he was the highest bidder who had complied with all the terms and conditions of the sale notice by making the deposit of US \$ 1,00,000/- within the stipulated date as fixed by the Court. He would further state that pursuant to the impugned order, the third respondent made entire payment of sale price by depositing the same into Court and as such, he made a genuine bid and complied with the orders of the Court without any delay and that therefore, the order under appeal does not

warrant any interference by this Court.

14. Mr. Vasudevan, learned Counsel appearing for the plaintiff/first respondent, though initially would state before the learned single Judge that the price was low, ultimately he supported the third respondent and requested the Court to confirm the sale in his favour. The same contentions urged by the plaintiff in the said applications before the single Judge have been reiterated before this Bench also.

15. We have given our careful consideration to the submissions made by the parties.

16. As indicated earlier, while narrating the facts, the Division Bench granted liberty to the appellant to raise all the objections including the objection raised for accepting the sale price before the learned single Judge, while disposing the matter for the confirmation of the sale. The main grievance expressed by the counsel for the appellant is that though such a liberty was given by this Court, the said objection relating to the acceptance of the sale price, in view of the fact that the bid was much below the minimum acceptable price as mentioned in the sale notice, was not actually allowed and the same was not considered by the learned single Judge.

17. (sic) single Judge in the impugned order would observe that "The counsel for the mortgagee requested for the re-sale of the vessel in order to get the better offer and that question had been already decided by this Court in order dated 4-8-1997. It is not open to the mortgagee now to raise any new plea." This observation, in our view, would make it clear that the request of resale of the vessel was turned down even though the sale of the vessel earlier made was objected to by the appellant on the ground that the acceptance of the sale price was not in accordance with law, since the said bid was lower than the upset price.

18. It is seen from the records that from the beginning the appellant has been objecting in the earlier application filed before the learned single Judge before passing order of accepting the sale price and in the earlier appeal filed before the Division Bench in O.S.A. No. 246 of 1997 and in the other applications subsequent to the disposal of the appeal filed before the learned single Judge to entertaining the bid for the lower price which is less than the upset price and acceptance of the sale of the vessel for inadequate price. Therefore, the learned single Judge could have considered those objections also and given a finding on the said aspect.

19. The reading of the entire order under appeal would go to show that the learned single Judge considered several bids offered in the open Court and confirmed this sale for the highest bidder, who is the third respondent herein. But, as submitted by the learned senior Counsel for the appellant, the learned single Judge could have ordered for the fresh tender, more particularly, when the appellant was ready to bear the cost for the fresh tender.

20. As per the valuation report dated 24-4-1997, the market value of the vessel would be worth approximately US \$ 2,90,000/-. Only on the basis of this valuation report issued by Ericson & Richards, Madras, the learned single Judge has fixed the upset price as US \$ 2.25 million. Therefore, though the highest bid for US \$ 7,90,000/- is higher than the bid earlier made for US \$ 3,80,000/-, the same is definitely low price and it cannot be said to be the adequate price, in the light of the opinion given in the valuation report the vessel is worth approximately US \$ 2,90,000/-. In such a situation, we are of the view that the learned single Judge could have ordered for fresh tender at the cost of the appellant, who was ready for incurring the same.

21. However, in this context, we cannot but express our anguish towards the conduct of the appellant, who has played the game of a hide- and-seek by constantly changing his stand on different occasions before the trial Court as well as this Bench. It must be pointed out that in the affidavit filed on 18-9-1997 in C.S. No. 97 of 1997 by the appellant as the intervenor raising objection to the confirmation of the sale and in the reply affidavit by the appellant dated 15-10-1997 to the counter filed by the third respondent, the appellant while requesting for the re-tender, would specifically state that he is prepared to bear the cost of retendering. Even in the earlier order passed by the learned Judge on 4-8-1997, which is the subject matter of the earlier appeal in O.S.A. No. 246 of 1997, it is specifically mentioned that while the sole tender was opened by the Court and the bid amount was found to be only US \$ 3,80,000/- on 30-6-1997, the counsel for the appellant sought time for attempting to bring a better offer or in the alternative, his client would bear the expenses for the publication for the fresh auction. It is further mentioned in the said order that on the adjourned date, the counsel for the appellant represented that the appellant was not in a position to place any better offer nor was he inclined to bear the expenses of publication for the fresh auction. Only thereafter, the matter was reserved for orders on 15-7-1997. In such circumstances, it is seen that the earlier order was passed on 4-8-1997 accepting the sale price.

22. Even during the proceeding which culminated to the impugned order, as indicated earlier, he filed several affidavits expressing his willingness to bear the expenses. But, during the course of arguments, before passing the order of confirmation of sale, as seen in the impugned order, the appellant represented that he would not be able to bear the expenses for the fresh publication. That was the reason why the learned single Judge mentioned in the order that "since no one was willing to bear the expenses for calling of fresh tenders, this Court has no other option except to accept the only tender available before this Court."

23. Mr. C.A. Sundaram, learned senior Counsel, would, point out during the course of submission before this Bench that this observation is factually incorrect. However, the learned single Judge would mention in the last paragraph of the order that on the date of the pronouncement of the order, the learned Counsel for the mortgagee represented that his client is willing to bear the

expenses. Since there was a change of stand shown by appellant as indicated in the impugned order, the learned single Judge would specifically observe: "A litigant should not think that he can change his attitude as and when he chooses or likes and make representation through his counsel to the Court and expect the Court to change its view to suit his convenience. Hence calling for re-tender at this stage is not possible."

24. Though the above observation was brought to the notice of this Bench by Mr. Alagiriswami, learned senior Counsel for the third respondent and the counsel for the first respondent, in order to show the changing attitude of the appellant, we initially felt, in the earlier affidavits filed before the trial Court and the affidavit filed before the Division Bench expressing his willingness to bear the expenses, it may not be proper to reject the re-tender on the ground that the willingness to bear the expenses was expressed belatedly, that is, only on the date of pronouncement of the order. But to our shock and surprise, here also the same practice has been adopted by the appellant by taking different stand at different times before this Division Bench.

25. In the grounds of appeal memorandum presented before the Division Bench, it is mentioned thus:

(c) The learned Judge after being informed in the course of the hearing was prepared to bear the costs of retendering for sale of the vessel M.V. Eleni erred in confirming the sale in favour of a bidder who had bid US \$ 7,90,000/-, as against the minimum acceptable bid of US \$ 2.25 million, which bid being far lower than the minimum acceptable bid of US \$ 2.25 million fixed by the learned Judge, was not a bid as contemplated by the tender and hence incapable of being accepted, much less confirmed by Hon"ble Court, ought to have directed retendering of the vessel.

According to this ground, the case of the appellant is that the learned single Judge was informed (sic) appellant is prepared to bear the expenses for retendering. But, in the impugned order it is specifically mentioned that though the appellant initially accepted for the same, it was represented that he was not ready either for bringing a better offer or for bearing the expenses for publication. This would show that the facts mentioned in ground (c) were factually incorrect.

26. Even in the affidavit filed in support of the petitioner for stay in C.M.P. No. 1653 of 1998 dated 31-1-1998 filed in this appeal it is specifically mentioned by the appellant in para 12 as follows:

I submit that the appellant is still ready and willing to bear the costs of retendering and therefore the order of the learned single Judge confirming the sale of the vessel for the bid of US \$ 7,90,000/- ought to be stayed pending disposal of this appeal as otherwise grave irreparable loss would be caused to the appellant herein.

27. Even during the course of the arguments, Mr. C.A. Sundaram, the learned senior Counsel for the appellant, in support of the arguments contained in the said affidavit, would submit that the appellant was ready to bear the expenses for retendering. Even on the day when the hearings were concluded by this Court on 31-3-1998, when specifically the question was put by this Court, he said that the appellant was ready to bear the expenses and only thereafter, the order was reserved in the above matter.

28. At this stage, on 3-4-1998 the counsel for the appellant made a mention before this Court seeking permission to file a memo. Accordingly, he filed the memo which is as follows:

It is submitted that as per instructions of the Mortgagee/Appellant from time to time, resting with their instructions on 2-2-1998, it was represented before this Hon''ble Court that the said Mortgagee/Appellant would bear the cost of retendering. After arguments were advanced before this Hon''ble Court when the Mortgagee/Appellant was informed that in the event of this Hon''ble Court directing retendering, they would be called upon to pay the costs of retendering as per their earlier statement, the Mortgagee/Appellant have now instructed their counsel that they would no longer be able to bear the retendering costs and on further query has stated that with the passage of time they are not in a position to bear such costs any more. This Memo is therefore being filed to bring this to the notice of the Hon''ble Court.

The perusal of the memo would make it obvious that the appellant has invariably changed his stand with reference to his willingness to bear the costs of retendering. In the light of the situation, the observation made by the learned single Judge, as referred above, with reference to the change of attitude of the appellant cannot be said to be incorrect.

29. It is seen from the records that on 30-6-1997, the counsel for the appellant represented that the appellant would be ready to bear the expenses, if he is not able to bring a better offer. On the date of subsequent hearing, the counsel for the appellant is stated to have represented that the appellant was not ready for both. After the disposal of the earlier appeal by this Court, in the affidavits filed by the appellant before the learned single Judge in September and October 1997, the appellant mentioned that he was ready to bear the expenses. However, during the course of arguments in the said applications, the counsel for the appellant submitted that the appellant was not ready. On the date of the pronouncement of the impugned order on 9-1-1998 and 24-1-1998, he expressed his willingness to bear the cost before the learned single Judge. Similarly, as indicated earlier, in the affidavit filed along with the appeal before this Division Bench on 31-1-1998, the appellant mentioned that he is still ready and willing to bear the costs of retendering. Even in the reply affidavit dated 24-2-1998 filed by the appellant, signed by him and attested by the counsel at Chennai, it is stated that the appellant is prepared to bear the costs of retendering. Even subsequent to it, both on the date of hearing the submissions

from the counsel for the appellant and on the date of Concluding arguments on 31-3-1998, the counsel for the appellant stated that the appellant is ready to incur the expenditure for retendering. But, suddenly for the reasons best known to the appellant, within three days, that is, on 3-4-1998 the above memo has been filed stating that the appellant would no longer be able to bear the retendering costs. This would reflect the attitude of the appellant blowing hot and cold, which is quite unfortunate. Better not to refer anything more about the conduct of the appellant except this.

30. Regardless of the change of attitude shown by the appellant, this Court is to consider as to whether the impugned order accepting the highest bidder, the third respondent for US \$ 7,90,000/- is valid or not on the facts and circumstances of the case.

31. The principles which govern the confirmation of sale are well established. It is settled law that at the time of confirmation of the sale of the vessel, adequacy of price is a vital and essential aspect to be considered by the Court. Admittedly, there is no finding in the impugned order with reference to the adequacy of price, having regard to the claims made against the vessel, more particularly as stated earlier, when the value of the vessel as per the Valuation Report is very much higher than the sale price. While considering the adequacy of price, the Court has to necessarily consider various circumstances, as referred to above, including the market value of the vessel.

32. In this context, the observation of the Apex Court made in the decision in *Navalkha and Sons Vs. Ramanuja Das and Others*, is quite relevant which is as follows (at page. 2039):

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.

33. When the similar question has been raised before this Court earlier on various occasions, this Court would hold as reported in *Gordon Das Chuni Lal Dakuwala Vs. T. Sriman Kanthimathinatha Pillai and Another*, *Ratnasami Pillai Vs. Sabapathy Pillai and Others*, *S. Soundararajan and Others Vs. Khaka Mahomed Ismail Saheb of Messrs. Roshan and Co.*, and *A. Subbaraya Mudaliar Vs. K. Sundararajan, (Joint Receiver) and Others*, that it is the duty of the Court to satisfy itself that the price fixed is the best that could be expected to be offered and 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 should see that the price fetched at the auction is an adequate price.

34. So, if the principles enunciated in the decisions referred to above are applied to this case, there is no difficulty for us to come to the conclusion that the aspect of adequacy of sale price has not been given due consideration by the learned

single Judge, more so when the price offered by the third respondent was less than the minimum price fixed by the Court. As already discussed above, if others also had known that they could offer price for purchase of the vessel less than the minimum price fixed by the Court, perhaps there would have been more offers. We have reason to think so, as during the pendency of hearing before the learned single Judge, and as well as before us, some persons, have come forward offering more price, and assuring that in case sale is confirmed they will pay or deposit money as ordered by the Court. Under the circumstances, and having regard to the position of law stated in the decisions referred in paragraphs 32 and 33 of this judgment, we are unable to sustain the order of the learned single Judge confirming the sale in favour of the third respondent.

35. However, it must be stated that we are handicapped in ordering for re-tendering or calling for fresh tenders, as none of the parties are willing to bear the expenditure for publication regarding sale of the vessel. Therefore, we deem it fit and proper to remit the matter to the learned single Judge to ensure that the best possible price is secured through the open bid in the Court amongst the various parties who have come forward to purchase the same before the learned single Judge as well as before us, and others, who, may be present in the Court, on the given date, including the third respondent.

36. Admittedly, various parties approached the learned single Judge with application expressing willingness to offer for the bid for the amount which is higher than the bid amount offered by the third respondent. The Global Marketing System, the applicant in Application No. 3139 of 1997, Sumarina Limited, the applicant in Application No. 3197 of 1997 and other applicants in Applications Nos. 3245, 3265 and 3380 of 1997 are some of the parties who offer to bid. There are some of the applicants before us also. All these persons and others including the third respondent may be allowed to participate in the fresh auction to be held in the Court before the learned single Judge, in the view we are taking.

37. We have to deal with one more submission of the learned senior Counsel for the appellant that there was no need for the learned single Judge to make certain observations as to the alleged collusion between the mortgagee, owners and M/s. Petro Marine Products Limited, who have filed the suit in Bombay High Court. We are of the view that the observations made by the learned single Judge should not affect the appellant or other parties in any way, particularly in the absence of necessary parties and material. We make it clear that those observations shall have no bearing on their rights or conduct.

38. In the result, the appeal is allowed, the order under appeal confirming the sale in favour of the third respondent is set aside, the matter is remitted to the learned single Judge with a request to ensure that the best possible price is secured in the open bid in the Court among various parties mentioned above, and other parties also, who may be present in the Court on the given date, may also be allowed to participate. It is also open to the parties to bring others for

participating in the open bid, and thereafter the learned single Judge may proceed to confirm the sale in favour of the highest bidder. No costs. Consequently, no order is necessary in C.M.P. No. 1653 of 1998.