

**(1979) 09 DEL CK 0010**

**In the Delhi High Court**

**Case No :** C.A. No"s. 275 and 284 of 1979 in Company Execution No. 35 of 1976

Bank of Baroda

APPELLANT

Vs

Anand Finance P. Ltd.

RESPONDENT

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**Date of Decision :** 11-09-1979

**Acts Referred:**

**Citation :** (1979) 09 DEL CK 0010

**Hon'ble Judges :** H.L. Anand, J

**Bench :** Single Bench

**Advocate :** K.K. Mehra, for the compan S.N. Chopra and Harihar Lal, for the auction-purchase, for the Appellant;

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## **Judgement**

H.L. Anand, J.—Whether the company is entitled to get rid of the auction sale of its property by discharging its liability to the bank, and, if not, whether the auction sale should be confirmed and, if so, on what terms, are the questions that arise in these two applications, C.A. No, 275/79 by the company and C.A. No, 284/79 by the auction purchaser.

2. Some of the salient facts and circumstances, which bring out the questions in focus, may be briefly stated. Anand Finance (P.) Ltd., the company was indebted to the Bank of Baroda, the bank. The debt was secured by an equitable mortgage of property, bearing No. 88, Sunder Nagar, New Delhi, at one time claimed to be the personal property of R.L. Anand, its managing director, but now admittedly the property of the company. During the pendency of a petition for the winding up of the company, Company Petition No. 34 of 1966, and of a petition for sanctioning a scheme of compromise, between the company and its unsecured creditors, Company Petition No. 42-D of 1966, the company and the bank entered into a compromise by which the parties, inter alia, agreed that the bank may realise the agreed amount by the sale of the aforesaid property, if the company failed to make the payment within a stipulated period. The compromise between the company and the bank was approved by Shankar J., on May 10, 1968, in C.A. No. 86 of 1968 on the ground that the compromise appeared to be

in the larger interest of the company and of the creditors. The scheme of compromise between the company and its unsecured creditors was eventually sanctioned by Andley J. on July 29, 1968. The company having made default in the payment of the amount in terms of the compromise with the bank, the bank moved this court by C.A. No. 151 of 1973 for the enforcement of the compromise, inter alia, by the sale by and under the direction of the court of the said property and payment of the sale proceeds to the bank in terms thereof. Certain other directions were also sought so as to compel Anand to be a confirming party to the sale. By an order of October 8, 1973, Sachar J., directed that the property be sold by public auction under the directions of this court. Anand challenged this order in so far as it determined his claim with regard to the property and the right to receive part of the sale proceeds. A Division Bench of this court allowed the appeal of Anand by an order of May 14, 1974 [Ram Lal Anand v. Bank of Baroda [1976] 46 Com Cas 307, and remanded the case for investigation with regard to the claim of Anand to the sum of Rs. 2,05,000 in lieu of the relinquishment by him of his rights in the property. On remand, Avadh Behari J., by an order of July 28, 1976, upheld Anand's right to the amount and directed that the property be sold by public auction and with the reserved price fixed at Rs. 5,00,000. This is how the property was put to sale in an auction held on December 22, 1978. The highest bid of Rs. 30,000 was by the auction-purchaser.

3. By C.A. No. 41 of 1979 under Sections 391 and 392 of the Act, the company sought the setting aside of the sale on the ground of certain irregularities in the course of the proceedings of sale as well as on the ground that the sale price was inadequate, the company had been offered Rs. 8 lakhs and was ready and able to discharge the liability to the bank. By an order made on February 22, 1979, Ranganathan J. dismissed the application on the ground that there was no irregularity in the course of the proceedings of the sale which could vitiate the sale. In the course of the order, learned judge, inter alia, considered the claim of the company that the sale price was inadequate and would hardly leave any distributable asset in the hands of the company out of the sale proceeds in view of the liability to capital gains tax, the offer of the company to pay off the bank, the offer of Rs. 8 lakhs for the property and the desirability of a fresh sale in the interest of the unsecured creditors of the company. The plea of the company that the power of this court u/s 391/392 of the Act were not subject to the limitation of the CPC was also considered. The learned judge, however, refused to set aside the sale and observed that there was no justification for " exercising any discretionary powers u/s 391 or 392 for setting aside the sale ". The company appealed against this order. During the pendency of this appeal, the company made an application, being C.A. No. 275/79, under Order 34, Rule 5 of the CPC, to get rid of the sale and sought leave to pay to the bank the amount claimed by it in terms of the compromise. This application was also grounded on the application that the sale price was inadequate and that the property could be sold for Rs. 9 lakhs. A plea was also made that on the existing sale the company

would have to pay Rs. 3 lakhs by way of capital gains tax and that the relief prayed would be in the interests of the large body of the unsecured creditors of the company. The appeal was eventually withdrawn on May 17, 1979, " without prejudice to the appellants or auction-purchasers or bank or parties" right to contend whatever is available to them in law in the applications stated to have been made by the appellant under Order 34, Rule 5, Civil Procedure Code". The bank has since been paid the amount claimed by it in terms of the compromise by the company but " without prejudice to the rights and interests of the various parties including the auction-purchasers ". The auction-purchaser seeks confirmation of the sale, the certificate in respect of it and consequential steps by C.A. No. 284 of 1979.

4. Whether the provisions of Order 34, Rule 5 of the CPC could be invoked by the company to get rid of the auction sale, is the first question that requires consideration. The provisions of this rule are clearly inapplicable to the present case. Order 34 regulates suits relating to mortgage of immovable property. Rule 5 envisages payment into court of amounts due from the defendant during the proceedings of the suit. While dealing with the application of the bank for enforcement of the compromise, this court was neither seized of a suit nor was it executing any decree or executable order of this court. Parties had entered into a compromise which required the sanction of the court u/s 391/392 of the Act and when this court accorded sanction, it assumed jurisdiction to supervise the carrying out of the terms of the compromise by the parties. This court, Therefore, did not make any decree or an order which could be said to have the effect of a decree. It was only exercising its supervisory jurisdiction by virtue of its approval of the compromise. Such proceedings could not attract either Order 21 or 0: 34. True, by virtue of Section 634 of the Act, any order made by a court under this Act may be enforced in the same manner as a decree made by the court in a suit. The only order that this court made was with regard to sale and while that order could be enforced as if it was a decree, the sale itself could not be said to be pursuant to any order or decree of this court since the sale was pursuant to a compromise entered into between the parties which had only been blessed by this court. This court did not by its approval invest that order with the character of an order or decree of this court. None of the provisions of the Code would, Therefore, be attracted, even though the sale ordered by this court may be carried out in accordance with the procedure laid down in the CPC. The provisions of Order 34, as indeed Order 21, Rule 89 or 90 were, Therefore, not available to the company to get rid of the auction sale.

5. Would not the company be nevertheless entitled to invoke the principles embodied in Order 34, Rule 5, or in Order 21, Rule 89, to get rid of the auction sale by payment to the bank? To my mind, yes. The provisions of Order 21, Rule 89 and Order 34, Rule 5, embody the principle that the sale of immovable property on the default of the debtor to pay is not intended to punish the debtor for his failure or inability to pay but is intended to realise the amount for payment to the creditor and, if that be so, why must the matter proceed further

if the debtor is in a position to pay and makes the deposit or the tender, as the case may be. The auction sale is subject to the directions of the court and if the creditor has been paid the amount, the non-payment of which led to the sale, the auction-purchaser has no vested right except an obvious right to be compensated, a right which is recognised in Rule 5 of Order 34 and Rule 89 of Order 21. Sub-rule (2) of Rule 5 provides that an order under Rule 5 would not be made "unless the defendant, in addition to the amount mentioned in Sub-rule (1), deposits in court for payment to the purchaser a sum equal to 5% of the amount of the purchase money paid into court by the purchaser ". There is a similar provision in Rule 89(1)(a). In exercising its discretion u/s 391/392 of the Act by virtue of its sanction to the compromise, this court was, Therefore, certainly entitled to invoke this wholesome principle embodied in these two provisions, particularly if such a course would be in the interest of the company and its large unsecured creditors, who have yet to be paid a substantial amount of their claims by the company in terms of the scheme of compromise sanctioned by the court.

6. The only impediment in the way of this court exercising its discretion u/s 391/392 to allow the company to get rid of the auction sale, to my mind, is the order made by Ranganathan J., and it appeals to me that when the company decided to withdraw its appeal presumably under an impression that it could invoke Order 34, Rule 5, it was under a serious misapprehension of the true legal position. If O. 34, Rule 5, was not available to the company, the only way in which the company could invoke the principle embodied in that provision was to ask this court to exercise its discretion u/s 391/392 of the Act and decline confirmation of the sale on the ground of inadequacy of the consideration or otherwise on the ground that the auction sale was not in the interest of the company or its unsecured creditors. The principle had clearly been invoked by the company when it sought an order from this court to get rid of the sale. The prayer was, however, turned down by Ranganathan J. Ranganathan J. clearly considered the question if the court's discretionary power u/s 391/392 should or should not be exercised to enable the company to get rid of the auction sale and in exercising the discretion against the company the learned judge considered all the contentions of the company which were urged before me in support of the present application. Thus, Ranganathan J., considered the question as to the inadequacy of the sale price, the possible incident of capital gains tax, the offer of a higher price, the offer to pay the bank and the impact of all these on the valuable rights of the unsecured creditors, but nevertheless turned it down for reasons indicated by him. In the course of the judgment, Ranganathan J. considered the question, inter alia, "on the assumption that the court has a much wider power and that by virtue of Sections 391 and 392 the court has a wider discretion in confirming or setting aside the sale" and observed that on a consideration of this aspect of the matter, the learned judge had "come to the conclusion that the balance of convenience and equities is for the setting aside of the present sale". It would be useful to bear in mind that, although Rule 89 of

Order 21 was in the mind of the parties, as indeed of the learned judge, Rule 5 of Order 34 was not. But that would not make any difference because both the provisions are in pari materia so far as the principle is concerned, the differences only being in the limitation for a motion under these two sets of rules and the nature of proceedings in which these proceedings could be invoked. The learned judge then proceeded to consider the reasons for which the exercise of discretion u/s 391/392 of the Act was sought to be justified and repelled the contentions now urged before me, with regard to the inadequacy of the consideration as also of its economic implications for the company by way of capital gains tax as also for the unsecured creditors in the availability of a distributable surplus and observed : " in these circumstances having turned over in my mind all the aspects of the matter, I am of the opinion that there is no justification for exercising any discretionary powers u/s 391 or 392 for setting aside the sale which has now been effected ".

7. The questions that, however, still survive for consideration are: Whether this court has the necessary power to confirm the sale subject to any conditions, and if so, the conditions that may be imposed. Ordinarily, having regard to the provisions of O. 21, Rule 92 of the CPC if no application is made for setting aside a sale under Rule 89, 90 or 91 or where such application is turned down " the court shall make an order confirming the sale " thereby leaving no discretion in the court to impose a condition such as the payment of an additional amount by the purchaser. The supervisory jurisdiction of this court under Sections 391 and 392 of the Companies Act is, however, not subject to this limitation as the company court is under an obligation to protect the interest of the creditors of a sick joint stock company, who may be victims of circumstances entirely beyond their control and would, Therefore, need judicial protection. In such a case, the court would have an undoubted power to impose a condition requiring the purchaser to pay such higher sale price as may appear to the court to be reasonable having regard to all the circumstances, but with an option to opt out of the transaction if the purchaser is unwilling or unable to comply with the condition. That the sale price does not truly reflect the market price of the property was not seriously disputed. Court sales invariably have that characteristic for a variety of reasons. A sale in court proceedings has its own hazards and the possibility of further litigation and controversies can rarely be obviated. There is always an element of uncertainty in such transactions with the result that the sale price invariably falls short of the true market value of a property. The exclusion in such transactions of the possibility of absorption of the oft-condemned unaccounted funds also operates as a damper. Even if the proclamation of sale is duly published and the sale is otherwise adequately advertised, the response is rarely effective. The auction purchaser has, however, not been unaware that the property could fetch a slightly higher amount even if he may not go as far as the claim of the company and that is why learned counsel for the auction-purchaser indicated that his client would not be averse to a marginal increase in the sale price. It is also difficult to ignore that, in the

event of the sale being set aside, the company would have to pay the auction-purchaser the solarium at the rate of 5% of the sale price besides the expense of a fresh auction. The company claims to be able to sell the property for 9 lakhs. It may fetch even more. There is, however, no Explanation why the company did not make the payment to the bank earlier and prevent an auction. Having regard to all the circumstances, it would be reasonable and proper that the sale is confirmed subject, however, to the payment by the auction-purchaser of 10% of the sale price and I would direct accordingly. The additional amount would be deposited by the auction-purchaser within two weeks. On the aforesaid amount being deposited, the auction-purchaser would be entitled to the sale certificate, as indeed vacant possession of the property. The auction-purchaser would, however, be entitled to opt out of the transaction in which case the sale would be treated as null and void and the auction-purchaser would be entitled to the refund of the amount deposited by him along with 5% of the amount by way of solarium. In the event of a fresh auction the auction-purchaser would be entitled to make a bid subject to the condition that in case he was declared to be the highest bidder, the amount of solarium would be refunded on the sale being confirmed. C.As. No. Section 275 and 284 of 1979 are disposed of in these terms leaving the parties to bear their respective costs.