(1998) 11 AP CK 0079

In the Andhra Pradesh High Court

Case No : Original Side Appeal No. 16 of 1993

Guardian Papers Ltd. APPELLANT

Vs

Industrial Development Bank of India and Others RESPONDENT

Date of Decision : 19-11-1998

Acts Referred:
Companies Act, 1956 — Section 456, 457

Citation : (1999) 98 CompCas 93 : (1999) 1 CompLJ 282

Hon'ble Judges : P. Venkataramareddi, J;Bilal Nazki, J

Bench : Division Bench

Advocate : S. Ravi, for the Appellant; K. Srinivasa Murthy and C. Malla Reddy, for the Respondent

Judgement

P. Venkataramareddi, J.—This is an appeal against the order of the learned single judge in C. A. No. 279 of 1992 in C. P. No. 3 of 1986.

2. The official liquidator, who is the first respondent in the application, has filed this appeal, The company by name M/s. Guardian Papers Limited was wound up by an order of this court dated November 7, 1989, on a petition filed by a creditor. It appears that the financing institutions, viz., Industrial Development Bank of India (IDBI) (the first respondent) and other institutions filed suits in the High Court at Mumbai. This court allowed those suits to continue, by an order dated March 22, 1991. While so, the first respondent-bank filed an application, C. A. No. 279 of 1992, seeking the following directions :

(1) To direct the official liquidator to sell the movable and immovable assets of the company in liquidation to the seventh respondent, viz., Chaitanya Papers Limited, on the terms and conditions contained in the letter of the applicant-bank as modified by its letter dated September 8, 1992 ; and

(2) To direct the official liquidator to transfer the entire properties of the company to the seventh respondent.

3. The application was allowed by the learned single judge, thereby granting

permission to the official liquidator to sell the movable and immovable assets of the company to the seventh respondent on the terms and conditions contained in the applicant-bank''s letter dated September 8, 1992, as modified by the letter dated February 16, 1993, addressed by the seventh respondent. The official liquidator was permitted to transfer and hand over all the assets of the respondent company in his custody to the seventh respondent. Aggrieved by this order, the official liquidator has preferred this appeal.

4. In the affidavit filed in support of the application, it is stated by the manager of the IDBI, Hyderabad Branch that the official liquidator brought to the notice of the bank in December, 1991, that on account of heavy rains the sheds and machinery got damaged. Thereafter, one of the officials of the bank inspected the industrial unit and found that the factory sheds were in a dilapidated condition and that most of the machinery was worn out and became useless.

5. The applicant-bank further averred that it has been exploring the possibility of disposing of the plant and machinery and other properties over which it has charge. The offer made by the seventh respondent was found to be beneficial to all the secured creditors including the applicant-bank. As per the offer the seventh respondent should pay the entire term loan of Rs. 605 lakhs granted by the applicant-bank and respondents Nos. 3 to 5 (other financial institutions) can get 25 per cent. of the total interest accrued due on June 30, 1992. That amount should be paid in a phased manner with interest at the rate of 5 per cent, per annum from June 30, 1992, twice till payment. It is stated that the proposal was discussed in joint meeting of the applicant-bank as well as respondents Nos. 3 to 6, who supported the proposal. A summary of the proceedings of the joint meeting held on January 30, 1992 was drawn up and the same was filed in the annexure. In view of the present condition of the plant and machinery and the building, it was felt that the offer made by the seventh respondent was reasonable and beneficial. The applicant also undertook to pay to the official liquidator the dues to the workmen as per Section 529A of the Companies Act.

6. The learned single judge observed as follows :

"After hearing all the counsel, I am of the view that the proposal given by the seventh respondent has to be accepted. It is not the case of the official liquidator, or the second respondent that they have identified any party, who is prepared to offer better terms than the terms offered by the seventh respondent. The entire machinery has been kept idle for several years and as submitted by counsel for the applicant that the same is likely to be disposed of as junk, if the proposal is not accepted. According to him, there are no prospective purchasers, and, therefore, the applicant as well as respondents Nos. 3 to 6 have accepted the proposal in their joint meeting after taking into consideration the overall situation, including the value of the machinery, the liabilities and the demand for such old machinery in the market, etc.

In view of all the above circumstances, I am of the view that the application has to be allowed."

7. The official liquidator has come up in appeal contending, inter alia, that the court ought not to have granted permission to sell on the basis of the petition filed by one of the secured creditors. It is submitted that grant of such permission is beyond the scope of Section 458(3) of the Companies Act, It is pointed out that the property of the company under liquidation having vested with the official liquidator and the official liquidator having been empowered under the provisions of the Act to sell the movable and immovable property subject to the supervision of this court, a secured creditor or some other third party cannot seek permission from the court for private sale without reference to the official liquidator. It is further submitted that the official liquidator was never associated with the process of consideration of the seventh respondent''s offer and was never apprised of the proposal received from the seventh respondent. It is also submitted by learned counsel appearing for the official liquidator that the normal principle of sale of the company''s property by advertisement and/ or open auction has been given a go-bye and the official liquidator has been directed to transfer the properties to the seventh respondent on the basis of private negotiations held with him by the consortium of financial institutions. Such procedure, it is pointed out, is opposed to the provisions of the Companies Act and does not subserve the interests of the general body of creditors.

8. We find considerable force in the arguments advanced by learned counsel appearing for the official liquidator. Section 456 makes it clear that the custody and control of the property, effects and actionable claims of the company will be vested in the liquidator soon after winding up order is passed. Section 457 confers various powers on the liquidator which he can exercise with the sanction of the court. One such power is to sell immovable and movable properties and actionable claims of the company by public auction or private contract with power to transfer the whole thereof to any person or body corporate or to sell in parcels. The exercise or proposed exercise of the powers conferred by Section 457 is subject to the control of the court (vide Sub-section (3) of Section 457). In the face of these provisions, it could not be open to the creditors to take an independent decision without reference to the liquidator to sell the properties of the company under liquidation to a purchaser of their choice and then apply to the court to issue appropriate directions to the liquidator to give effect to such deal. This would be virtually relegating the liquidator to a secondary position and amounts to acting in derogation of the powers advisedly conferred on the liquidator, subject to the overall superintendence of the company court. It may be that the financial institutions which are secured creditors thought it prudent and expedient to accept the offer of outright purchase made by the seventh respondent. But, the official liquidator ought to have been taken into confidence and the proposal should have been placed before the liquidator for his consideration and his concurrence, so that the liquidator could take appropriate steps to move the court to accord permission. It is a different matter if in spite of the official liquidator having been apprised of the factual aspects of the

arrangement entered into with the prospective purchaser, the liquidator does not act in the matter or takes steps likely to frustrate that arrangement. But, such a situation has not arisen here. The entire transaction has been finalised without reference to the official liquidator and a "fait-accompli" is placed before the court to put its seal of approval on the proposal. Such an action on the part of the creditors is not contemplated by the Act, though the creditors may be vitally interested in the proper realisation of the value of the assets of the company.

9. While we decide on principle that the direction given by the learned single judge on the basis of the application filed by one of the secured creditors is not in conformity with law, we are of the view that in the special facts and circumstances of the case, the impugned order need not be substantially interfered with. At the time of admission of this appeal, a direction was issued to have the assets valued. Accordingly, the official liquidator got the assets valued by an approved valuer. As per the report of the valuer which was prepared in the year 1996, the cost of assets would be Rs. 650.61 lakhs. The offer given by the seventh respondent is Rs. 605 lakhs. The condition of the plant, machinery and the structures is, indisputably, not in good condition. The machinery is non-functional since considerable time. Since the date of valuation, more than two years have elapsed. In these circumstances, we are not in a position to say definitely that the offer given by the seventh respondent is unfair and unreasonable. The important factor that ought to be taken into account is that the applicant-bank which is the lead financing institution had a meeting with the other financing institutions and they have come to almost a unanimous conclusion that the offer of the seventh respondent was the best in the circumstances. It is common ground that the amount realised on the disposal of assets will not be sufficient even to meet the claims of the second creditors, not to speak of other creditors. Therefore, no third party other than the secured creditors can possibly suffer any prejudice on account of acceptance of the seventh respondent''s offer. It is also difficult for the court to judge at this point of time whether the invitation for fresh offers if published which amounts to scrapping the offer made by the seventh respondent, would result in overall advantage from the point of view of secured creditors.

10. Having regard to all these factors, we are of the view that we should refrain from setting the clock back and set at naught the deal proposed between the secured creditors (respondents Nos. 1, 3 to 6) and the seventh respondent. We are inclined to give liberty to the applicant-bank and other financing institutions--respondents Nos. 1, 3 to 6 to negotiate with the seventh respondent and to arrive at a final settlement and then apprise the official liquidator of the decision. If for any reason, the applicant-bank and other respondents find it difficult to arrive at a consensus broadly in terms of the earlier understanding or the negotiations with the seventh respondent fail, the official liquidator in consultation with respondents Nos. 1, 3 to 6 will take proper steps for sale by public auction or by any other beneficial mode of sale subject to the permission of the court. With these directions and observations, the O. S. A. is disposed of.

No costs.