(2015) 08 RAJ CK 0108

In the Rajasthan High Court

Case No : Company Application Nos. 9144, 9145/08, 21251/11, 5121, 12493 and 12500/12 in Company Petition No. 2/95

In Re: Shikhar Polytex Limited

Date of Decision : 13-08-2015

Acts Referred:
State Financial Corporations Act, 1951 — Section 29

Citation : (2015) 08 RAJ CK 0108

Hon'ble Judges : Sangeet Lodha, J

Bench : Single Bench

Advocate : Vikas Balia, for the Appellant

Judgement

Sangeet Lodha, J—Heard learned counsel for the parties.

2. This petition for winding up of the company-M/s. Shikhar Polytex Limited (''the company'') has been registered pursuant to reference made by the Board for Industrial & Financial Reconstruction (BIFR), New Delhi.

3. In response to the notice issued, the Secured Creditors, Rajasthan State Industrial Development and Investment Corporation (RIICO) and Rajasthan Financial Corporation (RFC) put in appearance through their counsels and elected to remain outside the winding up proceedings.

4. On 12.2.98, the counsel appearing for RIICO while informing the court that the unit of the company has already been taken over by RIICO, sought permission to recover its amount against the company. The court directed that RIICO may take steps to realise its due by enforcing the securities but this will be done in consultation with the Official Liquidator. Keeping in view, the steps which were to be taken by the RIICO for realisation of its security, the Official Liquidator was directed not to issue advertisement and not to take further steps in the winding up proceedings until further orders from this court.

5. Later, the RIICO preferred an application dated 6.2.02, for confirmation of sale of plant and machinery of the company auctioned on 6.6.01. The sale was confirmed by this court vide order dated 22.2.02 subject to the condition that the

amount recovered from the auction purchaser shall be deposited forthwith in fixed deposit in some nationalised bank by the applicant RIICO and the amount shall not be used without permission of this court.

6. The offers were invited by RIICO for sale of land and buildings of the company in liquidation, for 52 times, last being on 16.11.07. The MRV of the land and buildings was worked out as Rs. 30.94 lacs. The Disposal Committee of RIICO in its meeting held on 16.11.07, recommended the highest offer for sale of land and buildings, for consideration of Rs. 27.11 lacs on cash down basis. In view of the recommendations made by the Disposal Committee, the Industrial Committee of RIICO in its meeting held on 27.3.08, accorded approval for sale of land and building of the company in liquidation to the highest bidder Smt. Rekha Bhatia for sale consideration of Rs. 27.11 lacs on cash down payment basis, on the standard terms and conditions of sale, subject to approval of the company court. Accordingly, the RIICO preferred application (IA No. 9144/08) seeking permission for confirmation of sale of land and building of the company in liquidation as approved by Industrial Committee.

7. The RIICO preferred yet another application (IA No. 9145/08) seeking permission to appropriate the amount of Rs. 6.90 lacs received from the auction purchaser on sale of plant and machinery of the company in liquidation, towards its dues.

8. A perusal of the orders sheets reveal that the said applications remained pending and were not considered any time earlier than 6.9.11, when the learned counsel for the RIICO was directed to supply the copies of the applications to the counsel appearing for Official Liquidator.

9. During the pendency of the application preferred by the RIICO seeking confirmation of sale, the applicant-M/s. Athena Advisory Services Private Limited (AASPL) preferred an application (IA No. 21251/11) before this court offering a sum of Rs. 37.11 lacs for the purchase of the assets in question or in the alternative, prayed that the RIICO may be directed to consider the offer of Rs. 37.11 lacs given by the applicant-AASPL or the order may be passed for inter se bidding between the applicant-AASPL and Smt. Rekha Bhatia. It is alleged in the application that RIICO did not make wide publicity earlier else, the applicant would have participated in the auction.

10. The RIICO has filed reply to the application preferred by the applicant-AASPL taking the stand that enough time has elapsed since Smt. Rekha Bhatia had given offer for buying the assets of the company in liquidation, in the changed circumstances, the value of the assets having increased substantially, the RIICO may be permitted to invite fresh offers for sale of land and buildings of the company in liquidation.

11. At this stage, Smt. Rekha Bhatia, the highest bidder, made an application (IA No. 5121/12) seeking impleadment in the application (IA No. 21251/11) preferred by the applicant-AASPL and an opportunity for filing counter affidavit in

relation to the said application. The applicant-Smt. Rekha Bhatia attempted to submit that earlier the bid amount was not deposited on having been informed that the same was subject to confirmation by this court. It was further submitted that the applicant was forced to approach the court in view of the application (IA No. 21251/11) as moved by AASPL, seeking to offer higher amount.

12. The applications (IA No. 9144/08, 9145/08, 21251/11 and 5121/12) were considered by the court on 10.4.12. The court observed that there arise no question of any of the applicant being impleaded party to these proceedings but, the submissions and offers as made by them, deserve to be considered while dealing with the application as moved by RIICO (IA No. 9144/08). The court opined that it is necessary to examine the record of the proceedings said to have been conducted by the Secured Creditor, RIICO, in relation to the sale of assets of the company in liquidation. The counsel appearing for the RIICO was granted time to produce the entire record for perusal before the court as prayed for. The respective parties/applicants were also permitted to make further submissions in writing.

13. On 10.9.12, the RIICO submitted application (IA No. 12493/12) for placing on record the factual position with regard to the land leased to the company in liquidation and auction of the assets for realization of the dues. It is averred in the application that the company in liquidation was given an industrial plot ad measuring 3800 sq. meters vide lease deed dated 20.2.86. The industrial unit of the company in liquidation was financed by RFC and accordingly, a ''Memorandum of Entries'' was made between the company in liquidation and RIICO acting for itself and agent of RFC to create security by way of joint mortgage by deposit of title deeds on the company''s immovable properties situated at plot No. E-34, Ambaji Industrial Area, Abu Road and other assets as mentioned in ''Memorandum of Entries''. It is submitted that the assets of the company in liquidation were taken over under Section 29 of State Financial Corporation Act, 1951. It is submitted that while preparing the possession report, an error occurred in showing total land taken over as 4019 sq. meter whereas, the said company had mortgaged the land measuring 3800 sq. meters and thus, the possession showing excess land i.e. 219 sq. meter was a bona fide error. It is submitted that the error crept in was rectified and therefore, in the advertisement issued after 2003 for public auction, the area of the land was shown as 3800 sq. meter. It is further averred in the application that after the recommendation of the Disposal Committee on 16.11.07 and pending disposal of the application preferred by the RIICO before this court in the year 2010, out of 3800 sq. meter of land, 254 sq. meter land was acquired by National Highway Authority of India, the compensation payable was quantified at Rs. 3,02,267.45 and after deduction of tax at source i.e. Rs. 30,831.21, a sum of Rs. 2,71,436.17 was received in the account of company in liquidation. According to the RIICO as on the date actual land available land for auction is 3546 sq. meter. The RIICO has also prayed for permitting the fresh auction in the public interest.

14. Learned counsel appearing for the RIICO submitted that though the Industrial Committee of the RIICO had approved the highest bid offered by Smt. Rekha Bhatia but the same was subject to confirmation by this court. It is submitted that pending confirmation of the bid by this court, the applicant-AASPL has offered the bid of Rs. 37.11 lacs. It is submitted that keeping in view the fact that a long time has elapsed since the offer was made by Smt. Rekha Bhatia, which was subject to confirmation by this court and therefore, at this stage, when the value of the assets has increased substantially, in the interest of the creditors and the share holders of the company in liquidation, it is absolutely necessary that the RIICO is permitted to invite fresh offers for sale of land and buildings of the company in liquidation. Drawing the attention of the court to the additional affidavit filed on behalf of RIICO, learned counsel submitted that the prevailing rate of the subject property is Rs. 2,771 per sq. meter at Industrial Area, Ambaji and thus, the value of the total area of the land available for auction i.e. 3546 sq. meter, comes to Rs. 98.25 lacs approximately. In this regard, the attention of this court is also drawn to the documents annexed with the additional affidavit. Learned counsel would submit that the highest bid offered by Smt. Rekha Bhatia being subject to approval of this court, no right is created in her favour on account of the offer provisionally accepted, being approved by the Industrial Committee of RIICO. Learned counsel submitted that in absence of the approval being granted by this court, no concluded contract between the RIICO and Smt. Rekha Bhatia has come into existence. Learned counsel submitted that the purpose of auction sale is to get remunerative price so that the interest of the creditors and shareholders of the company be served in best manner. In support of the contentions, learned counsel has relied upon the decisions of the Hon''ble Supreme Court in the matters of Union Bank of India Vs. Official Liquidator H.C. of Calcutta and Others, AIR 2000 SC 3642 : (2000) 101 CompCas 317 : (2000) 7 JT 86 : (2000) 4 SCALE 551 : (2000) 5 SCC 274 : (2000) AIRSCW 4225 : (2000) 4 Supreme 426 , LICA (P.) Ltd. (No. 1) Vs. Official Liquidator and Another, (1996) 85 CompCas 788 : (2000) 6 SCC 79 , Kerala Financial Corporation Vs. Vincent Paul and Another, AIR 2011 SC 1388 : (2011) 2 BC 242 : (2011) 163 CompCas 50 : (2011) 2 CompLJ 531 : (2011) 6 CTC 554 : (2011) 3 JT 421 : (2012) 1 RCR(Civil) 254 : (2011) 3 SCALE 520 : (2011) 4 SCC 171 : (2012) 114 SCL 91 : (2011) 3 SCR 862 : (2011) AIRSCW 4939 : (2011) AIRSCW 2032 , FCS Software Solutions Ltd. Vs. LA Medical Devices Ltd. and Others, AIR 2008 SC 3137 : (2008) 144 CompCas 391 : (2008) 3 CompLJ 209 : (2008) 7 JT 499 : (2008) 10 SCALE 7 : (2008) 10 SCC 440 : (2008) 85 SCL 401 : (2008) AIRSCW 5284 : (2008) 5 Supreme 109 and Navalkha and Sons Vs. Ramanuja Das and Others, AIR 1970 SC 2037 : (1970) 40 CompCas 936 : (1969) 3 SCC 537 : (1970) 3 SCR 1 . Regarding the amount realized by way of auction sale of plant and machinery of the company in liquidation, which is kept in Fixed Deposit as per the directions of this court, learned counsel submitted that the RIICO may be permitted to appropriate the amount towards its dues.

15. On the other hand, learned counsel appearing for Smt. Rekha Bhatia, the highest bidder, submitted that admittedly, after 52nd offer for sale of land and building of company in liquidation, the Disposal Committee as also the Industrial Committee of the RIICO has approved the consideration of the sale a sum of Rs. 27.11 lacs on cash down basis offered by the applicant, obviously, on account of the price offer being found adequate and therefore, there is no reason as to why the bid offered should not be confirmed by this court. Learned counsel submitted that the bid offered being adequate, the higher bid offered by the applicant-AASPL subsequently, by way of an application before this court, is absolutely irrelevant. Learned counsel would submit that any such offer made cannot be taken into consideration at all. In support of the contentions, learned counsel relied upon a decision of the Hon''ble Supreme Court in the matter of Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others, AIR 1974 SC 1331 : (1974) 2 SCC 213 : (1974) 3 SCR 678 , A decision of Allahabad High Court in the matter of ''Saraya Steel Limited (In Liquidation)'', 1997(4) Company Law Journal, 97 and a decision of Andhra Pradesh High Court in the matter of "D. Sudhakar Reddy v. Malwala Oil Ltd. (In Liquidation), (2000)5 Company Law Journal, 190. Learned counsel submitted that there is no allegation of any irregularity or mala fide in conducting the auction proceedings and therefore, the highest bid offered cannot be rejected on account of alleged inadequacy of consideration. Learned counsel submitted that there was no indication in the advertisement that the auction sale is subject to confirmation by this court and therefore, the RIICO is estopped from taking the stand that the auction sale approved by its Industrial Committee is subject to approval by this court. Learned counsel submitted that the highest bidder, Smt. Rekha Bhatia, was required to deposit the balance amount in stipulated time as soon as the sale is confirmed and therefore, she had made necessary arrangement for the same and did not use the money for all these years. Learned counsel submitted that the present market value of the property as set out by the RIICO in the additional affidavit filed is absolutely incorrect. Drawing the attention of the court to the counter affidavit filed on behalf of Smt. Rekha Bhatia, learned counsel submitted that as a matter of fact, the value of the land as on the date does not exceed Rs. 425 per sq. meter. Learned counsel would submit that the applicant-Smt. Rekha Bhatia is even ready to match the offer of Rs. 37.11 lacs made by the applicant-AASPL.

16. Learned counsel appearing for the applicant-AASPL submitted that had the RIICO made wide publicity, the applicant could have participated in the auction. Learned counsel submitted that the price offered by Smt. Rekha Bhatia is too meagre and the offer made by the applicant being approximately 40% higher deserves to be accepted. Learned counsel submitted that in the larger interest of the creditors and shareholders, it will be appropriate that inter se bidding is conducted between the applicant-AASPL and Smt. Rekha Bhatia.

17. Mr. Vikas Balia, learned counsel appearing for the Official Liquidator submitted that at this stage, when the price of the land in question has increased more than three times, if the bid offered by the highest bidder Smt. Rekha

Bhatia is accepted, it will be against the interest of the creditors and shareholders which is of paramount consideration in the winding up proceedings.

18. I have heard the learned counsels appearing for the parties and also perused the record produced by the RIICO for perusal of this court.

19. It is settled law that the highest auction bidder has no indefeasible right to claim the confirmation of sale as a matter of right. The authority vested with the power to confirm the sale is well within its rights to refuse the confirmation for valid reasons. If the sale is subject to confirmation then, no concluded contract comes into existence till the sale is confirmed by the authority competent. In this regard, the reliance may be placed on the decision of the Hon''ble Supreme Court in the matter of Bombay Salt and Chemical Industries Vs. L.J. Johnson and Others, AIR 1958 SC 289 wherein a Constitution Bench of the Hon''ble Supreme Court held that the declaration of the highest bid at auction does not amount to completed sale and transfer of property.

20. If the sale is subject to confirmation then, the right is created in the highest auction bidder only if the sale is confirmed by the competent authority. In this regard, the reliance may be placed on a decision in the matter of Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, (1994) 1 BC 45 : (1993) 5 JT 313 : (1993) 3 SCALE 791 : (1994) 1 SCC 131 : (1993) 2 SCR 346 Supp , wherein the Hon''ble Supreme Court has observed as under:--

"The further contention of Shri Madhava Reddy that the objection petition and the appeal are not maintainable as the wife of Rajinder Singh, joint purchaser was not impleaded eo nominee as respondent, too is devoid of force. The application to set aside the execution sale is primarily against the decree-holder since he is a person at whose instance and benefit the execution proceedings were initiated and the sale was held to discharge his decree debt. Therefore, primarily he is the person entitled to be heard and since he is in-charge of publishing the notices and to conduct the sale, it is he that lays before the court the steps taken or the procedure followed in service of notice or conducting the sale and to establish that they have been done properly, regularly and in accordance with law. The auction-purchaser gets a right only on confirmation of sale and till then his right is nebulous and has only right to consideration for confirmation of sale. If the sale is set aside, apart from the auction-purchaser, the decree-holder is affected since the realization of his decree debt is put off and he would be obligated to initiate execution proceedings afresh to recover the decree debt. Therefore, in the proceedings under Section 47 or order 21 Rule 90, the decree-holder is the affected necessary party. Though the auction-purchasers need to be impleaded eo nominee as respondent as the property was purchased jointly at the court sale, it is enough that one among them had been impleaded as a party. It is not necessary to implead all the joint purchasers."

21. In the matter of ''Riya Garments Pvt. Ltd., Jaipur & Ors. v. M/s. Pratap Rajasthan Copper Foils and Laminates Ltd., Jaipur & Ors.'' (D.B. Special Appeal

(W) No. 309/2006), decided on 12.09.06, the Division Bench of this Court after due consideration of various decisions of the Hon''ble Supreme Court has also taken the view that the purchaser comes to acquire rights after confirmation of sale as the property gets vested in him only thereafter.

Thus, no concluded contract having come into existence, the highest bidder-Smt. Rekha Bhatia cannot claim any right for sale of the land and building of the company in liquidation on the strength of the recommendation made by the Disposal Committee of RIICO being approved by the Industrial Committee of RIICO, subject to confirmation by this court.

22. In Saraya Steel Limited''s case (supra), relied upon by learned counsel for the petitioner, the Allahabad High Court held that when the property is sold by Official Liquidator subject to confirmation by the court, the subsequent offer of a higher bid should not be a ground for refusing confirmation of the sale provided the price is adequate.

23. In M/s. Kayjay Industries Pvt. Limited''s case (supra), the Hon''ble Supreme Court observed that mere inadequacy of the price cannot demolish every Court sales.

24. It is true that every auction sale may not be set at naught only on account of inadequacy of the price but then, the fact remains that the purpose of auction sale is to get remunerative price and therefore, the adequacy of the price of the property sought to be auctioned is of paramount consideration.

25. In Union Bank''s case (supra), the Hon''ble Supreme Court, while dealing with the acts of the company court as custodian for the interest of the company and creditors, observed:

"At the outset, we would state that in proceedings for winding up of the Company under the liquidator, 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 reasonable price, valuation report of an expert is must. Not only that, it is the duty of of the Court to disclose the said valuation report to the secured creditors and other interested persons including the offerors. 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."

26. In LICA''s case (supra), the Hon''ble Supreme Court observed that mere acceptance of the bid auction sale cannot be treated as sale closed inasmuch as, purpose of auction sale is to get remunerative price so that interest of creditors and shareholders of company be served in best manner. Accordingly, subsequent acceptance of the bid at higher price was held to be valid.

27. Adverting to the facts of the present case, it is pertinent to note that the auction sale in question was conducted in the month of November, 2007 and

thereafter, the matter remained pending for confirmation of sale for all these years. It is true that the applicant-AASPL who has not participated in the auction sale, cannot claim any right to offer higher bid for the first time before this court. But then, the fact remains that the auction sale of the plot in question has not fetched the adequate price and after lapse of so many years when the price of the land in question has increased substantially, it will be against the interest of the creditors and shareholders of the company in liquidation to accept the meagre price offered by the applicant-Smt. Rekha Bhatia.

28. Thus, taking into consideration the totality of the facts and circumstances of the case and the position of law discussed as above, this court is not inclined to confirm the highest bid offered by the auction bidder Smt. Rekha Bhatia. This court does not consider it appropriate to conduct the inter se bidding process between the highest bidder Smt. Rekha Bhatia and the applicant-AASPL, which had never participated in the auction proceedings.

29. In view of discussion above, in the larger interest of the creditors and shareholders of the company in liquidation, this court considered it appropriate to permit the RIICO to conduct a fresh auction sale so as to get remunerative price of the land and buildings of the company in liquidation.

30. In the result, the application (IA No. 9144/08) preferred by applicant-RIICO, application (IA No. 21251/11) preferred by the applicant-Athena Advisory Services Private Limited, the applications (IA No. 5121/12 and 12500/12) preferred by Smt. Rekha Bhatia, are rejected. The application (IA No. 12493/12) preferred by the RIICO, seeking permission to conduct fresh auction of the land and building of the company in liquidation is allowed. The RIICO after assessing the market value of the property, shall fix the reserve price and finalise the terms and conditions of the auction sale, which shall be placed for approval before this court. The auction sale shall be conducted with the participation of the Official Liquidator attached to this court after giving wide publicity. The highest bid found to be acceptable by the competent authority of RIICO, shall be subject to confirmation of this Court.

31. The application (IA No. 9145/08) preferred by the RIICO seeking permission to appropriate the amount realized by way of auction sale of the plant and machinery of the company in liquidation, which is kept in Fixed Deposit, is rejected. The appropriate order in this regard shall be passed by the court after the auction sale of remaining assets of the company in liquidation.

32. It is further ordered that the amount received by the RIICO a sum of Rs. 2,70,436.71 as compensation for the land acquired by National Highway Authority, if not already kept in Fixed Deposit, shall be kept in Fixed Deposit in nationalised bank till further orders.

