(2013) 10 DEL CK 0286

In the Delhi High Court

Case No : CS (OS) 647 of 2006 and IA No''s. 12628 of 2013, 12631 of 2013 and 15316 of 2013

Kusum Kumria and Others APPELLANT

Vs

M/S. Pharma Venture (India) Pvt. Ltd. RESPONDENT

Date of Decision : 03-10-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 12, Order 21 Rule 72, Order 21 Rule 90

Citation : (2013) 139 DRJ 270

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : M.S. Ahluwalia, for the Appellant; Rohit Priya Ranjan, Advocates for Bidder, Mr. Anil Airi, Ravi Krishan Chandna, Hemant Manjani and Mr. Dhruv Tamta, for the Respondent

Final Decision : Disposed Off

Judgement

Jayant Nath, J.

IA No. 15051/2013 (Objections to the Auction Sale)

1. These are the objections filed by plaintiff No. 1 to the auction sale conducted by the Court Auctioneer on 26.07.2013 under Order 21 Rule 90 CPC. As per the report of the Court Auctioneer bid of DKG Buildwell Pvt. Ltd. is the highest at Rs. 10.45 crores. This Court on 08.05.2013 had passed an order to conduct the auction of the suit property comprising of basement, ground floor and second floor of property No. W-152, Greater Kailash, Part 1, New Delhi at a reserve price of Rs. 10 crore. Plaintiffs are co-owners of 50% of the property while defendants are co-owners of 50%. The plaintiff had filed an appeal against the said order dated 8.5.2013 being FAO(OS) No. 338/2013. It appears that on 26.07.2013, the Division Bench had passed an interim order staying the auction proceedings. The auction, however, was completed by the Court Auctioneer. Subsequently, the Division Bench on 29.08.2013 permitted the appellant (plaintiff No. 1 herein) to

withdraw the appeal. The appeal was withdrawn and the interim order was vacated. The counsel for the appellant (plaintiff No. 1 herein) had sought permission to record her objections to the auction conducted pursuant to the impugned order. The Division Bench had noted that if such right is available in law, the same can be exercised by the appellant. The present application has been filed based on the said permission which was granted by the Division Bench. At the outset, learned counsel appearing for the defendants submits that he does not wish to file a reply and would like to argue the same without any reply, based on the record of the case.

2. Learned counsel appearing for the plaintiffs has submitted that a fraud has been played on the Court by the Court Auctioneer and his associates. It is stated that despite being informed that the Division Bench has passed a stay order on 26.07.2013, the Court Auctioneer continued with the auction.

3. It is further submitted that there were three bidders in the auction, namely, M/s. Green Valley Hospitality Pvt. Ltd., M/s. DKG Buildwell Pvt. Ltd. and M/s. Chase Avian Communication Pvt. Ltd. It is submitted that the said bidders are mixed up with each other having common directors and essentially one and the same person. It is further argued that these persons are all inter connected with the defendants and essentially, it is the defendants who have made this bid. It is argued that the earnest money of Rs. 1 Crore has been deposited by Green Valley Hospitality Pvt. Ltd. and DKG Buildwell Pvt. Ltd. Their draft will show that the bank drafts have been made from the same bank branch at the same time bearing consecutive numbers and both are dated 18.07.2013. It is further stated that Green Valley Hospitality Pvt. Ltd. was represented by Sh. Ankush Pughat in the bid, whereas DKG Buildwell Pvt. Ltd. was represented through Sh. D.K. Gupta. It is stated that DKG Buildwell Pvt. Ltd. had deposited a draft of Rs. 1 crore which bears the name of Sh. Surinder Sahlot who is stated to have given the order to make the draft. It is stated that Sh. Surinder Sahlot as well as Ankush Pughat are together directors of Aerofield Flying Academy Pvt. Ltd. It is stated that Surinder Sahlot is the main man behind the bid and happens to be the man of the defendants. Reliance is placed on the provisions of Order 22 Rule 72 CPC to claim that a party to the proceedings cannot make a bid.

4. It is further stated that the Company-DKG Buildwell Pvt. Ltd. declared as the successful bidder by the Court Auctioneer is a dummy company just having authorised capital of Rs. 25 lacs and has no financial capacity to purchase the property in auction. It is stated that this so called successful bidder is only a speculator company who on taking loan will purchase the property and sell it for profit. Hence, it is stated that under Order 21 Rule 90 CPC, a fraud has been played on the court and the present auction bid is liable to be cancelled.

5. It is further stated that a perusal of the bid sheet of Court Auctioneer would show that completely an irregular process was adopted for the bid. It is stated that first bid was given by M/s. Green Valley Hospitality Pvt. Ltd. for Rs. 10.20 crores. Thereafter, DKG Buidlwell Pvt. Ltd. gave a bid of Rs. 10.10 crores.

Thereafter, Chase Avian Communication Pvt. Ltd. gave its first bid of Rs. 10.27 crores. Hence, it is stated that the Company-DKG Buildwell Pvt. Ltd. had no right to continue further in the auction as its bid in the first round was the lowest. But the Court Auctioneer in collusion with the defendants continued with the auction and DKG Buildwell Pvt. Ltd. continued to give further bids as the Court Auctioneer had some private interest with the DKG Buildwell Pvt. Ltd.

6. It is further contended that in any case, DKG Buildwell Pvt. Ltd. was to pay 15% of the bid amount within three days of the auction bid which has not done by it and hence, in any case the bid of DKG Buildwell Pvt. Ltd. is liable to be cancelled.

7. Learned counsel appearing for the defendants has on the other hand contended that the present application is absolutely without any merit and only another attempt by the plaintiff to prolong the litigation. He submits that he has been taking steps for carrying out this auction but the plaintiff has been putting spokes into the process of auction which have been repeatedly struck down by this Court. He has placed reliance on various orders passed by this Court to submit that at every stage, the plaintiff has obstructed the auction process. He has also placed reliance on the judgment of the Hon''ble Supreme Court in the case of Saheb Khan Vs. Mohd. Yusufuddin and Others, contend that for a sale to be set aside, it is not enough to just show material irregularity or a fraud. The applicant has to go further to establish to the satisfaction of the court that the material irregularity or fraud has resulted in substantial injury to the applicant. In the absence of any injury, it would not be sufficient to set aside the sale.

8. I have heard learned counsel for the parties. A perusal of the various orders passed by this Court would throw light on the conduct of the plaintiff. On 17.11.2011 a consent order was passed whereby the parties agreed for auction of the whole property except the first floor be carried out and the auction be restricted to the parties to the suit. On 08.02.2012, the counsel representing the plaintiffs, on instructions of plaintiff No. 3, had stated that the plaintiffs are not in a sound financial position to purchase the share of the defendants and would prefer a public auction. However, time was sought to find out a prospective buyer. On 22.02.2012, this Court noted that the plaintiff has failed to find any prospective buyer and accordingly, a direction was passed for sale of the property through public auction. The matter was fixed before the Registrar General for finalisation of the sale proclamation. The plaintiff thereafter, to further stall the matter, filed an application IA No. 7512/2012 under Order 11 Rule 12 CPC seeking a direction to defendant No. 1 to produce its registration certificate, memorandum of association and article of association of defendant company and also the annual returns for the last five years. The court on 14.05.2012 noted that the plaintiff has not been appearing before the Registrar General and has been delaying the issue of proclamation of sale. It was noted that the plaintiff was deliberately trying to delay the matter. The matter was fixed before the Registrar General again while the application was kept pending. On

18.05.2012, the plaintiff moved IA. No. 9460/2012 stating that order dated 17.11.2011 requires modification as the plaintiff under a mistaken belief gave consent on the said date to auction of the property except first floor. It is stated that the entire property including the first floor has to be auctioned. The court on 18.05.2012 has noted with regard to the said application that an absolutely false, frivolous and vexatious application has been moved by plaintiff No. 1. This court again noted that the background of the case would clearly show that the plaintiff is adopting one or the other mean to cause delay in the matter. The application was dismissed with costs of Rs. 50,000/-. In the meantime, plaintiff No. 1 filed two appeals being FAO (OS) 279/2012 against order dated 17.11.2011 and FAO (OS) 277/2012 against order dated 14.05.2012. After arguing for some time, the plaintiff withdrew the said appeals. On 19.07.2012, the plaintiffs'' earlier application being IA No. 7512/2012 under Order 11 Rule 12 CPC was taken up for hearing. In this application, an argument was raised that there was serious doubt about the title of defendant No. 1 based on the sale deed which was executed by one Pharma Ventures (International) Pvt. Ltd. It is stated that the original owner Mr. S.P. Kumaria had sold 50% share of the property in favour of Pharma Ventures (India) Pvt. Ltd. and not in favour of Pharma Venture (International) Pvt. Ltd. This Court clarified that based on the document placed on record by the defendants a discovery has been made by the defendants that there is some inadvertent error in the sale deed dated 17.10.2001 and that it was Pharma Ventures (International) Pvt. Ltd. which had purchased the suit property. It was clarified that the said error will not create any problem in the auction of the subject property.

9. On 17.12.2012 another application being IA No. 22586/2012 was filed by the plaintiff seeking direction that the Reserve Price of the property be fixed at Rs. 25 crores and that the Registrar General has erroneously fixed the Reserve Price at Rs. 15 crores which is very less. The Court dismissed the said application.

10. In the auction that took place on 11.01.2013 none of the interested bidders deposited the earnest money. The said auction failed. As noted earlier, on 08.05.2013 this court directed the Registrar General to proceed with inviting fresh bids with a Reserve Price of Rs. 10 crores inasmuch as earlier when the Reserve Price was fixed at Rs. 15 crores no bids were received. Pursuant to the said order dated 8.5.2013, the bidding took place on 26.07.2013. On the same date, the plaintiff filed an appeal being FAO (OS) 338/2013 against order dated 08.05.2013. The Division Bench stayed the said order. However, subsequently as noted above, on 29.08.2013 the appeal was dismissed as withdrawn with liberty as stated above. A perusal of the above order sheets shows that at every stage the plaintiff has repeatedly delayed the process of the auction. Repeated applications have been filed raising untenable pleas. The present application seems to be another such attempt.

11. The fact of the matter is that three bidders have made earnest deposit of Rs. 1 crore each and made the bids. The highest bid has been of Rs. 10.45 crores.

Merely claiming that the three bidders are inter se connected to each other on account of there being some commonality of directors would not vitiate the bid process. The three different companies/''bidders'' are registered under The Companies Act and are separate distinct entities. The contention of the plaintiff that on account of commonality of interest, they are one and the same entity is a contention which cannot be accepted. In fact the only allegation in the present application is that Surinder Sahlot is the man who has given directions to prepare the draft on behalf of DKG Buildwell Pvt. Ltd. Ankush Pughat represented M/s. Green Valley Hospitality Pvt. Ltd. Ankush Pughat and Surinder Sahlot are together Directors of another company, namely, Aerofield Flying Academy Pvt. Ltd. The contention has to be rejected. Merely because representatives of two of the bidders are Directors in some third company which has not participated in the proceedings cannot lead to a conclusion that the three companies, which are separately registered under The Companies Act, are essentially one and the same entity. Reference may be had to the judgment of the Hon''ble Supreme Court in Vodafone International Holdings B.V. Vs. Union of India (UOI) and Another, relevant portions of paragraphs 71 and 72 of which read as follows:-

71. In the thirteenth century, Pope Innocent IV espoused the theory of the legal fiction by saying that corporate bodies could not be excommunicated because they only exist in abstract. This enunciation is the foundation of the separate entity principle.

72. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle i.e. treat a company as a separate person. The Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income tax. Companies and other entities are viewed as economic entitles with legal independence vis-?-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct taxpayers.

12. Clearly, the contention of the plaintiff about the commonality of the identity of the three companies which were bidders in the auction is without merits.

13. There is also nothing to substantiate the contention of the plaintiff that the three bidders are nothing but an extension of the defendants. Hence, even otherwise, provisions of Order 21 Rule 72 CPC would have no application to the facts of the present case.

14. The other contention of the plaintiff, namely, that there was some irregularity in the bidding process is a contention which is not based on the record. The bidding sheet which is placed on record by the Court Auctioneer alongwith the report does not indicate which company has made the first bid. To argue that in the first round of bidding M/s. Green Valley Hospitality Pvt. Ltd. gave a bid of Rs. 10.20 crores, M/s. DKG Buildwell Pvt. Ltd. gave a bid of Rs. 10.10 crores and M/s. Chase Avian Communication Pvt. Ltd. gave a bid of Rs. 10.27 crores is a

contention which is not based on the records inasmuch as this is not the order in which the bids are stated to have been made. The plaintiff is deliberately misreading the bid sheets. Even assuming if what is said by plaintiff was correct nothing has been shown as to why M/s. DKG Buildwell Pvt. Ltd. could not continue bidding even if its bid of Rs. 10.10 crores in the first round of bidding was the lowest. The conditions of sale do not show that such a bidder cannot make another bid. Even otherwise, such a process has not caused any prejudice to the plaintiff.

15. Further, the reliance of learned counsel for the defendants on the judgment of the Supreme Court in the case of Saheb Khan vs. Mohd. Yousufuddin and Ors. (supra) is in order. The Supreme Court in the said case made the following observations:-

13. Therefore before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the Court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale. (See: Dhirendra Nath Gorai and Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, ; Jaswantlal Natvarlal Thakkar Vs. Sushilaben Manilal Dangarwala and others, ; Kadiyala Rama Rao Vs. Gutala Kahna Rao (Dead) By Lrs. and Others,

14. A charge of fraud or material irregularity under Order XXI Rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the respondent of the alleged collusion between the other respondents and the auction purchaser. There is also no material irregularity in publishing or conducting the sale....

16. None of the arguments raised by the plaintiffs in any way would materially prejudice the plaintiffs. It cannot be said that the auction process suffers from any fraud or material irregularity so as to vitiate the auction process. Accordingly, the present objections are dismissed.

17. However, learned counsel for the defendants submits that he has no objection in case within a stipulated period the plaintiff can get a bidder who is willing to offer a higher price.

18. Both the plaintiff and the defendant are free to get any offer higher than the highest bid of Rs. 10.45 crores payable on the same terms and conditions as stipulated in the Auction that was held on 26.07.2013. On the next date of hearing i.e. 10.10.2013 any such bid will only be entertained if 10% of the bid amount in the form of a banker cheque in favour of Registrar General is brought on that date and the bidder agrees to abide by all other terms and conditions of

the auction dated 26.7.2013.

19. With the above observations, the present application is dismissed.

IA No. 12630/2013 (for depositing balance 15% of the bid amount),

20. This is an application under Order 151 CPC on behalf of DKG Buildwell Pvt. Ltd. for seeking extension of time for depositing balance 15% of the bid amount. It is the contention of the applicant that the bid took place on 26.07.2013. As per the terms and conditions of the bid, the successful bidder was to deposit 15% of the purchase money within three working days. The balance bid amount of the purchase money was to be paid within 15 days after the sale of the property. It is pointed out that on 26.07.2013, the Division Bench passed the stay order because of which the applicant has not been able to deposit the monies and inasmuch as the Court Auctioneer refused to accept the same. He submits that a cheque in favour of Registrar General of the High Court in the sum of Rs. 1,61,25,000/- is lying with him since then. A similar application was also stated to have been filed before the Division Bench, but the Division Bench is stated not to have dealt with the said application as the Appeal was withdrawn by the plaintiff. Learned counsel submits that he is carrying the cheque and is ready and willing to deposit the same today itself. There is merit in the contention of the applicant. In view of the injunction orders passed by the Division Bench of this Court on 26.07.2013, the Court Auctioneer rightly did not accept the balance 15% of the bid amount from the applicant. The stay now stands vacated. Accordingly, the time for depositing the balance 15% of the bid amount is extended till today. The applicant may deposit the said amount by cheque in favour of Registrar General of this Court today itself. In view of the said condition, the balance sale price may also be deposited within 15 days from today as provided in the conditions of sale and subject to other terms and conditions of the proclamation of sale.

The application is disposed of.

IA No. 12629/2013 (exemption)

Exemption is allowed subject to just exceptions.

The application is disposed of.

IA No. 15316/2013

This application has now become infructuous. It stands disposed of accordingly.

CS(OS) No. 647/2006

List on 10.10.2013.

