

(1965) 09 AP CK 0014
In the Andhra Pradesh High Court
Case No : O.S.A. No"s. 2 to 6 of 1965

Navalkha and Sons

APPELLANT

Vs

Ramanujulu Naidu and Others

RESPONDENT

Date of Decision : 24-09-1965

Acts Referred:

COMPANIES ACT, 1956 — Section 457

Citation : (1967) 37 CompCas 48

Hon'ble Judges : Satyanarayana Raju, C.J.;Kumarayya, J

Bench : Division Bench

Advocate : N. Chandramouli, P. Shiv Shankar and T. Anantha Babu, for the Appellant; G. Ramanujulu Naidu, T.R. Bhaskar Reddy and Vasantha Rao Mukhedkar, Joint Commissioners and V.K. Vaidya and K. Chalapathi Rao, for the Respondent

Judgement

1. These are five appeals, O.S. Nos. 2 to 6 of 1965, all arising out of different orders made in connection with the sale of the property in Company Petition No. 1 of 1960. In the winding up proceeding of the Hyderabad Vegetable Products Company Limited, the official liquidator sought permission u/s 457 of the Companies Act read with Rules 272 and 273 of the Companies (Court) Rules for the sale of immovable and movable properties and actionable claims of the company and requested the court to direct sale through commissioners to be appointed by the court as per the terms and conditions submitted by him. One Sirajuddin Babu Khan, a shareholder of the company, also made an application (C. A. No. 93 of 1964) to the similar effect requesting the court to effect sale of the assets of the company as one unit in the interests of the shareholders and creditors through commissioners appointed by the court after giving wide publicity and subject to the confirmation by the court. Our learned brother, P. Jaganmohan Reddy J., approved of the terms and conditions of sale submitted by the official liquidator and by his order dated April 17, 1964, appointed three commissioners for selling the properties as one unit, in accordance with the said terms and conditions. He directed the official liquidator to pay these

commissioners a sum of Rs. 200 for initial expenses. At the same time, he authorised the commissioners to incur further expenses to the maximum extent of Rs. 1,000. This limit, however, was raised to Rs. 3,000 on the application of the commissioners filed on the 8th July, 1964, wherein they stated that such expenses were inevitable as they proposed to advertise the proclamation of sale, etc., twice in each of the five leading dailies, namely, (1) The Statesman, (2) The Times of India, (3) The Hindu, (4) The Indian Express and (5) The Hindustan Times, to ensure wide publicity and get them printed and distributed besides among the probable purchasers. The terms and conditions of sale which were exhaustive need not be set out here at length. The commissioners thereunder were to invite offers, the last date originally fixed being August 8, 1964, which was extended eventually to November 30, 1964, by the court's orders. Every offer had to be accompanied by a deposit of Rs. 50,000 in cash or Rs. 25,000 in cash and the balance of Rs. 25,000 in Government securities or National Savings Certificates or Ten year Treasury Savings Certificates with the commissioners towards earnest money". The offer shall be deemed to have been made with full knowledge of all encumbrances, rights, flaws and defects. The commissioners were not bound to accept the highest or any offer and were at liberty to reject any offer without assigning any reason. Immediately after the offer was accepted by the commissioners, the offerer had to deposit 15% of the offer amount as initial deposit and the balance of the amount together with the amount required for non-judicial stamp for conveyance had to be paid within 15 days from the date of acceptance. It was expressly provided that, in case of default, the earnest money, the initial deposit and any other amount paid by the offerer shall become a forfeit to the estate of the company and the property shall be sold at the risk of the defaulting offerer without any notice to him and he shall be liable for all losses and expenses occasioned thereby and shall have no claim to the property or any part of the sum for which it may be subsequently sold. Acceptance of the offer by the commissioners was subject to the condition of confirmation by the High Court and the offerer was entitled to take delivery of possession of the properties only after such confirmation.

2. It was made abundantly clear in Clause 16 that in all matters touching the sale of the property, the decision of the commissioners shall be final and shall be binding subject to the control of the High Court. These, in short, are the essential terms and conditions of sale with which we are concerned. As would appear from the affidavit of the commissioners, they prepared and got published the proclamation of sale, the terms and conditions of sale and the schedule of the properties of the company in four leading dailies only, viz., The Hindu, the Southern group of the papers, The Indian Express, The Statesman and The Hindustan Times. They did not publish in The Times of India which they said they would do in application dated 8th July, 1964. Nor did they advertise twice in all the said newspapers. Of course, in two of them there were two insertions. But, in the remaining papers, there was only one insertion. In addition to the said advertisement, the commissioners got printed 300 copies and posted them to

various industrial concerns likely to tender offers for purchase of the properties of the company. The last date fixed for receipt of offers was September 8, 1964. Not even a single offer was received by that time. Of course, some of the leading concerns asked for supply of some information in clarification of the terms and conditions of the sale meanwhile. The time for receipt of offers was then extended at the instance of the commissioners by the court till the end of November, 1964. Navalkha & Sons happened to be the sole offerers. Their offer was for a sum of Rs. 7,91,001, which was made up of Rs. 2,50,000 for the immovable property and Rs. 5,41,001 for the machinery. They made no offer for actionable claims. They made a deposit of Rs. 50,000 in the shape of demand draft drawn on the State Bank of Hyderabad. The accompanying letter sent by them, however, stipulated certain conditions which were inconsistent with some of the notified sanctioned terms and conditions of sale. As against the terms and conditions of sale, they stated that it is an essential condition of their offer that the court should allow them to put their watchman immediately after the acceptance of their offer by the commissioners. The further condition laid down by them was that the High Court should confirm the offer within a fortnight after its acceptance by the Commissioners. The offer was accepted by the Commissioners on December 2, 1964. The offerer was called upon by or under letter dated December 2, 1964, to deposit 15% of the amount of the offer as initial deposit immediately as per clause 7 of the terms and conditions of sale and the balance together with the amount required for non-judicial stamp for conveyance within 15 days from the date of the acceptance. Navalkha & Sons did make their initial deposit. The commissioners then made an application on December 3, 1964, to the court for confirmation of the sale referring to the various clauses contained in the offer which are not consistent with the terms and conditions of sale. On December 11, 1964, when the matter came up before the court, time for payment of balance amount was sought to be extended. As the Government wanted time, the time for payment was extended by two weeks from December 17, 1964, which was the due date for payment of balance amount and also of non-judicial stamp. Mr. A.K. Babu Khan, a major shareholder and creditor, filed a counter saying that the price tendered was too low, the offer therefore should not be accepted and requested the court that fresh offers should be invited after giving adequate publicity. It would appear that in the application dated August 29, 1963, the Government which was one of the major secured creditors had shown the value of the immovable property and machinery as Rs. 13,40,000. But on December 24, 1964, it was represented on behalf of the Government that the Government had no objection to the acceptance of the offer. At that time, another person came on the scene with an offer of Rs. 8,15,000 saying that he could not submit his offer in time because he came to know of the sale only two days prior to that date and that was due to the fact that there was no adequate publicity. To show his bonafides, he gave a demand draft to the commissioners for a sum of Rs. 1,00,015. On December 24, 1964, the court came to the conclusion that the property did not fetch its proper price and there is possibility of higher bids. Instead of directing fresh auction after due

publicity or calling for fresh sealed offers in accordance with the approved terms and conditions of sale, the learned judge thought it proper to arrange for an open bid in the court itself on that very day as between Navalkha & Sons and Gopaldas Darak, the applicant. Before starting the bid, the learned judge gave time to M/s. Navalkha & Sons to think over and say whether they were willing to the course decided upon and to participate in the auction bids. Navalkha & Sons consented to the course and voluntarily took part in the bid and became the highest bidders at Rs. 8,82,009. The learned judge accepted the said bid as the final bid and concluded the sale in favour of Navalkha & Sons directing them to pay the balance of the money together with the amount required for non-judicial stamp on or before 31st January, 1965, making it clear that, in case of default, the deposit already made would be a forfeit to the estate. Navalkha & Sons accordingly paid the total balance amount together with the amount required for non-judicial stamp on January 30, 1965. But, on the same day, perhaps before the deposit was actually made, one Padam Chand Agrawala of Agra came with an application (C.A. No. 44 of 1965) offering Rs. 10,00,000. He complained that publicity of the sale of the property through the commissioners was not adequately made. He said that the newspapers in which the notices were published did not have much circulation in Northern India, that the notices did not mention that the site on which the building stands is also put for sale, that the extent of the site also was not mentioned, that, in short, neither the advertisement was full nor the publicity adequate, and that since he came to know very late and just saw the premises, he was prepared to enhance the offer to Rs. 10,00,000 and was also willing to participate in open bid if the court so decides with Rs. 10,00,000 as initial bid and would pay the entire amount within two weeks from the date of acceptance of the offer. Our learned brother did not accede to this request and by his order dated February 19, 1965, held that, since the bid of Navalkha & Sons was already accepted on December 24, 1964, and the sale stood confirmed as the entire amount due was paid within the extended period, they, as a result, must be, deemed to have acquired an indefeasible interest. The learned judge further remarked that the offer of the petitioner was not accompanied by the necessary deposit or even a draft and that on that basis also there is no justification for reopening the matter which was concluded on December 24, 1964. Aggrieved by this order, Padam Chand Agrawal filed Appeal No. 4 of 1965. One Ramanujadas, a contributory, also chose to prefer an appeal (Appeal No. 3 of 1965) against the order of confirmation. According to him, the publicity given by the commissioners was too inadequate to attract proper price for the property, that the first offer given by Navalkha & Sons was too low, that the court therefore had rightly refused to confirm acceptance of the offer. His grievance, however, was that the learned judge, having come to the conclusion that there can be higher bids, should have held the auction only after due publicity; but it was not done so and the course followed by the court could not and did not achieve the object of getting adequate price for the property, which is further clear from the offer of Padam Chand in Company Application No. 4 of 1965. The learned judge therefore should not have confirmed the final bid of

Navalkha & Sons which was done even before payment of the entire sale price and also without giving favourable consideration to the application of Padam Chand Agrawal and, at any rate, should have either invited fresh tenders or held public auction after adequate publicity.

3. After the confirmation of sale, Navalkha & Sons made an application (C.A. No. 60 of 1965) for execution of the sale deed in respect of the immovable properties and for directing the official liquidator for delivering possession of the movable and immovable properties and to transfer all the actionable claims and assets of the company including the deposits, securities, licences, permits, quotas, etc., of the company and for other directions. The learned judge did not agree that actionable claims also had been sold along with the property for, firstly, the schedule that had been appended to the conditions of sale did not mention about the actionable claims; and, secondly, the actionable claims were not included in their offer also. He rejected the application on 19th February, 1965. Aggrieved by this order, Navalkha & Sons preferred an appeal (Appeal No. 2 of 1965). They then preferred also appeals against the order which, by implication, refused to confirm their first offer of Rs. 7,91,001 and directed open bid between them and Gopaldas Darak. These are Appeals Nos. 5 and 6. Thus we have before us, Appeals Nos. 2, 5 and 6 of 1965 filed by Navalkha & Sons, Appeal No. 3 of 1965 filed by the contributory and Appeal No. 4 of 1965 filed by a third party, Padam Chand Agrawal.

4. First, we take up Appeal No. 2 of 1965 as it raises a short point which can be summarily disposed of. As already noticed, this appeal is directed against the order dated February 19, 1965, passed in Company Application No. 60 of 1965. It may be recalled that whereas in paragraph 8 of the offer dated November 30, 1964, the appellants had expressed their intention in clear and unequivocal terms to purchase immovable property-land and structures thereon and machinery and gave the details of their offer as Rs. 2,50,000 relating to immovable property-land, with structures thereon, and Rs. 5,41,001 towards machinery and their offer did not bear remotest reference to actionable claims ; they later claimed before the learned judge at the stage of implementation of sale that their offer did include actionable claims as well. In support of this contention, they placed much reliance on the earliest order of the court dated April 17, 1964, passed in Application No. 93 of 1964 appointing the joint commissioners and also the order dated December 24, 1964, passed in Company Application No. 183 of 1964 which bears reference to the fact that the joint commissioners called for tenders in terms of the order dated April 17, 1964. The argument so based did not find favour with the learned judge who, having regard to the specific terms of the offer and also in view of the fact that the schedule appended to the conditions of sale does not mention about the actionable claims, held that there was no warrant for the point raised. We fail to understand how, notwithstanding the terms of their offer which were express and explicit admitting of no other interpretation than that it was in reference to immovable property and machinery alone, they can set up a right to the actionable claims as

well. No exception can be taken to the order passed by our learned brother. The appeal therefore must fail and it is accordingly dismissed with costs.

5. We then turn to Appeals Nos. 5 and 6 and Appeals Nos. 3 and 4 preferred by the contributory and the third party respectively. Appeal No. 6, as already noticed, is directed against the order dated December 24, 1964, in that it did not confirm their offer dated November 30, 1964, but by implication rejected it. Appeal No. 6 impugns further the court's direction of holding auction at the instance of a fresh offerer which resulted in a substantial rise in the original bid. Appeal No. 3 calls in question the legality and propriety of this auction bid on altogether a different ground, namely, that the fresh auction should have been held after a wide or due publicity giving opportunity to all the contending purchasers. Thus, while Appeals Nos. 5 and 6 are directed against refusal to confirm the first offer, both Appeals Nos. 3 and 4 are directed against the confirmation of the auction sale held in the court on December 24, 1964, which was done by the order dated February 19, 1965, as well.

6. The principles which should govern confirmation of sales are well-settled, whether the sale be by the official liquidator or the commissioners. Where the acceptance of the offer by any of the said authorities is subject to the confirmation of the court, the offerer does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The terms and conditions of sale as notified in this case clearly say that the commissioners are not bound to accept any offer, be it the highest, and, even if they accept any, the acceptance is subject to the confirmation of the court. This condition of confirmation by the court evidently was to operate as a safeguard against the property being sold at an inadequate price whether or not it be the consequence of any irregularity or fraud in the process or conduct of sale itself. 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 in the circumstances is reasonable and perhaps the best that could be expected to be offered. Unless the court is satisfied about the adequacy of price, the act of confirmation of sale would be an arbitrary and not a judicial exercise of discretion. This principle is well-established by a long chain of authorities both of the Madras and other High Courts. In *Gordhan Das Chuni Lal v. T. Sirman Kanthimathi Nathan Pillai*, AIR 1921 Mad. 286 it was observed that where the property is authorised to be sold by private contract or otherwise, it is the duty of the court to satisfy itself that the price fixed is the best that could, in all human probability, be expected to be offered. That is because the court is the custodian of the interests of the company and its creditors; and the sanction of the court required under the Companies Act has to be exercised with judicial discretion, regard being had to the interests of the company and its creditors as well. This principle has been followed in *Ratnasami Pillai Vs. Sabapathy Pillai and Others*, and reiterated in *S. Soundararajan v. Khaka Mahomed Ismail Saheb of Roshan & Co.*, AIR 1940 Mad. 42. In *A. Subbaraya Mudaliar Vs. K. Sundararajan, (Joint Receiver) and Others*, which followed the decisions in *Ratnasami Pillai v. Sabapathy Pillai* and *S.*

Soundararajan v. Khaka Mahomed Ismail, it was clearly laid down 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 which it undoubtedly has of accepting or refusing the highest bid at the auction held in pursuance of its orders, should see that the price fetched at the auction is an adequate price, even though there is no suggestion of irregularity or fraud. The Allahabad High Court in Brindaban Agarwala v. Official Liquidator, Saraswati Soap and Oil Mills Ltd., [1952] 22 Comp. Cas. 75 cited with approval the principle laid down in 5. Soundararajan v. Khaka Mahomed Ismail Sahib and Rowthmall Neopani v. Nagarmall Madan Gopal, A I.R. 1940 Mad. 179 and observed that where the sale is effected subject to the confirmation by the court, it is the duty of the court to exercise that discretion judicially and accept it only when the price is adequate. One would do well also to bear in mind one other principle which is equally well-settled and recognised in the said authorities. It is to the effect that once the court comes to the conclusion that the price offered is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already received. The Mysore High Court shares the same view in Premier Insurance Co. Ltd. v. Davanagere Cotton Mills Ltd., [1961] 31 Comp. Cas. 737 and Premier Insurance Co. v. Bharat Commerce and Industries Ltd.. AIR 1962 Mys. 185. This court voiced its opinion in no uncertain terms in In the matter of In the matter of Taj Clay Works Ltd. Vs. Official Liquidator, High Court of Andhra Pradesh, Hyderabad, . It was clearly laid down therein that the fact that the sale is subject to the confirmation of the court does not mean that the court can refuse to accept the highest bid merely because at a later stage some one, on second thought, says that he is willing to pay more and that the subsequent offer of a higher bid should not be a ground for refusing confirmation of the sale provided the price already offered is adequate. The judicial opinion therefore is uniform in this behalf that when the sale is held by the official liquidator or a commissioner subject to confirmation by court, it is entirely within the discretion of the court either to accept or refuse the same, albeit it is a discretion which should be exercised not arbitrarily but judicially on principles of justice, equity and good conscience. It is the duty of the court to safeguard the interests of the company and its creditors by ensuring that the price fetched at the sale is not inadequate. Once that is ensured, the existence of a higher subsequent offer would not be a consideration for refusing the previous final bid. Be it also noted, that the consideration that there has been material irregularity or fraud in the conduct of sale would necessarily affect the decision as to the adequacy of price, for substantial injury, loss or prejudice is implicit in certain irregularities as also in cases of fraud.

7. In this view of the matter, we have to judge whether the learned judge was in error when he refused confirmation of the first offer accepted by the commissioner. To start with, the offer itself was not unqualified. It was not in full accord with the terms and conditions of sale but contained fresh terms which was

declared by them as essential terms of their offer. They said in paragraph 3 of their letter that it was the essential condition of their offer that the court should allow them to put their watchmen immediately after the acceptance of their offer by the commissioners. They further wrote in their letter that confirmation of the sale by the High Court has to be done within a fortnight after the acceptance of their offer by the commissioners. This is primarily because they did not choose to make the deposit as per Clause 7 of the terms and conditions of sale unless the acceptance of their offer was done within a fortnight. Both these conditions militate against the notified terms and conditions of sale. So far as time for payment is concerned, the court extended the time, but it did not countenance their condition that they should be allowed to put their watchmen. Thus the essential condition which qualified their offer was rejected. That apart, there was complaint before the court that receipt of a single offer was the consequence of lack of due publicity; that there were several other willing purchasers who could not send their higher offers on account of lack of such knowledge or information. There is no doubt that the publicity was not as wide as originally proposed by the commissioners in their affidavit. Whereas in their affidavit, they (the commissioners) stated that they would publish the terms and conditions of sale and the schedule of properties of the company in five leading dailies, they published only in four, viz., (1) The Hindu, (2) The Southern group of papers of The Indian Express, (3) The Hindustan Times and (4) The Statesman, They did not publish in The Times of India (as they had said they would do in their affidavit dated 8th July, 1964). Further, of the four papers in which the publication was made, only in two there were two insertions and, in the remaining, there was only one insertion. This was also contrary to what they had promised in their affidavit dated 8th July, 1964, that they would publish in all five dailies twice. No doubt, some other efforts were also made for giving publicity. They were not sufficient enough to attract more than one offer. Then again when the case came up for confirmation on December 24, 1964, the court, besides the defects shown above, had to bear in mind the further circumstances which are even more material. Abdul Kareem Babu Khan by that time had apprised the court that the property was of much higher value and that fresh offers should be invited again with wider publicity. There was also on record the previous affidavit of the Government dated August 29, 1963, wherein the value of the property, immovable and movable, was shown to be Rs. 13,40,000. This was exclusive of actionable claims. This material gave an idea of the true value of the property, which was much higher than the offer that was before the court. Besides, on that very day, one Gopaldas Darak had come before the court with a higher offer showing his bona fides and earnestness by depositing more than one lakh of rupees. He came with the complaint that there was no sufficient publicity as to attract people from the North and that as soon as he came to know he gave his offer. This was sufficient to suggest that there must be many more who were similarly prevented due to lack of adequate publicity from submitting their offers. In fact as we see at later stages, some other persons too came with the same complaint showing their readiness to give bids for much higher price. In these

circumstances, the learned judge was right in expressing his reluctance to confirm the offer of Navalkha & Sons. He was not satisfied of the reasonableness of the price fetched. He was clearly of the view that the property was likely to fetch a much higher price. He therefore decided to have an open bid as between Navalkha & Sons and Darak in the court itself on that very day. How far this step could further the interests of justice, we will consider presently. For the time being, for the purposes of Appeal No. 5 of 1965, it is sufficient to note that, on an objective consideration of the matter, the learned judge came to the conclusion that the property did not fetch its proper price and it is likely to fetch a much higher price if fresh offers are permitted to be made. Having regard to the well-established principles referred to above, the refusal, in these circumstances, to confirm the offer which was not for adequate price cannot but be held to be sound exercise of discretion vested in the court. On that score alone, this appeal must fail.

8. There is yet another circumstance which precludes the appellants from making any grievance or raising a plea that the learned judge ought to have accepted their initial offer. On that very day Navalkha & Sons after giving thought to the matter consented to the course decided upon by the court and actively participated in the auction that took place after some interval on the same day in open court. Navalkha and Sons and Darak were the only bidders and the former became the highest bidder. There is no whisper whatsoever that Navalkha & Sons opted to this course under protest. In fact, that step would not have been feasible but for their consent. It is with their consent that the step proposed was implemented. Perhaps calling of fresh tenders with wider publicity would have been the next step if Navalkha & Sons had not agreed to the course decided upon and given consent to participate in the open bid that took place between them and Darak. Having thus agreed to a particular course, which but for their consent would not have been followed, it is not open to Navalkha and Sons to take a plea that the court should not have entertained the application of Darak and should have accepted their initial offer. It is significant that not only they voluntarily participated in the auction but also after the property was knocked down to them, they took time for payment of the whole amount. The time prayed for was granted subject to the condition that in case of default, the deposit already made would be forfeited. Navalkha and Sons paid the whole amount in time. That again suggests that Navalkha & Sons did not insist upon their right, if any, but after taking time for deliberation consented to the auction and made the court hold the auction, voluntarily took part therein without a semblance of protest, and with great readiness and eagerness complied with the terms thereof. This circumstance is sufficient to enforce the doctrine of estoppel against them. Thus Appeal No. 5 of 1965 must fail on both the grounds; firstly, because confirmation of sale being discretionary with the court which discretion has to be exercised judicially on principles of justice, equity and good conscience Navalkha, & Sons cannot insist upon confirmation when the court has come to the conclusion that the offer was inadequate; and, secondly, because when the

party himself has given a go-by to the stand and taken up an inconsistent position and by actively participating in the auction which would not have been held but for his consent and by readily complying with the terms thereof, he cannot make any grievance that the court had failed to make the confirmation of the first offer. The appeal therefore is dismissed with costs.

9. Appeal No. 6 of 1965 also must meet with the same fate as it, in the main, covers the same point. It makes also a grievance of the fact that the learned judge had entertained the application of Darak. Appeal No. 3 of 1965, as already noticed, while supporting the action of the court in refusing confirmation of the first order of Navalkha & Sons, for, according to the said contributory-appellant, there was lack of due publicity and the price offered was inadequate, calls in question the legality and propriety of the next step taken by the court by holding the auction as between the two persons without giving wide publicity. It makes grievance of the fact that the confirmation of that sale was effected, even though it was not justified in law. The first question therefore is whether the very action of the court in deciding upon a fresh course of holding auction in open court without giving wide publicity is justified in law after the court had rejected the offer made in response to the calling of sealed tenders. Rule 273 of the Companies (Court) Rules, 1959, provides that all sales shall be made by public auction or by inviting sealed tenders or in such manner as the judge may direct. It may be recalled that the court, at the instance of the official liquidator and also at the request of a contributory, on April 17, 1964, had approved of the terms and conditions of sale which provide for calling of sealed tenders and directed sale accordingly. The learned judge, however, on December 24, 1964, owing to the inefficacy of this course in realising proper price, decided to abandon the original procedure and to put the properties to auction. Indeed, the court has the power to direct the property to be sold in such manner as it may think fit. But the course to be followed must be such as would best serve the interests of the company and of the creditors and would result in realising adequate or as best a price as possible. Having made up his mind to resort to auction, the learned judge confined the auction to only two persons, the previous tenderer and the fresh tenderer. It was not as though the fresh tenderer was the only intending purchaser, who on account of lack of publicity, could not offer his bid earlier. There must be many more similarly circumstanced. If the sale by auction was decided upon as a sure device calculated to fetch adequate price, that auction must have been a public auction. The auction in question no doubt took place in a public place, but it was not a public auction. Firstly, it was not open to the general public but was confined to only two named persons. Secondly, it was not held after due publicity. It was held immediately after it was decided upon. A public sale necessarily implies sale after giving notice to the public, wherein every member of the public is at liberty to participate. It is obvious therefore that the sale in question was not of the kind and therefore could not have possibly fetched adequate price. No doubt, the device resorted to considerably raised the previous bid. Yet, it was not an adequate price having regard to the market value

of the property to which reference has already been made. The deficiency was the necessary sequel of the inherent shortcoming in the method adopted. The denial of opportunity to purchase the property by persons who would have taken part in the auction bid but for want of notice is a serious matter and is bound to result in substantial loss. Order XXI, Civil Procedure Code, which relates to the execution of decrees, recognises this basic principle. There is a consensus of judicial opinion that substantial injury is implicit in a recourse to public auction without proper proclamation or previous notice: see *Navin Chandra v. Ram Devi*, AIR 1933 All. 161. and *Smt. Laxmi Devi Vs. Sethani Mukand Kanwar and Others*, . In our opinion, the learned judge having decided that the property should be put to auction in the circumstances detailed above should have directed auction by public sale instead of confining it to the two persons. The participation of the public was possible only if due publicity was made. There was no harm if the auction was held in the court room itself but it should have been held after publicity. Since want of publicity and lack of opportunity to the public to take part in the auction was bound to result in substantial injury, the acceptance of bid and confirmation thereof was not a sound exercise of discretion. The confirmation is said to have taken place on December 24, 1964, itself after the auction bid was over, even though the bid amount was not deposited. Confirmation can validly take effect only after the price has been deposited and the court has overruled the objections, if any. The learned judge had given a fortnight's time with a default clause in the order to that effect.

10. So then, all that could be said was that on December 24, 1964, the bid was accepted forthwith but it was liable to be confirmed in case the party did not commit default in paying the balance within the extended time. Before the expiry of the extended period, Padam Chand Agrawal, the appellant in Appeal No. 4 of 1965, made his application making a grievance of the fact that there was no adequate publicity and saying that he was prepared to pay Rs. 10 lakhs or take part in the auction with the minimum bid of Rs. 10 lakhs. His petition was rejected and the sale was confirmed in favour of Navalkha & Sons who had deposited the amount on the same day the petition of Agrawal was filed. The question is whether the learned Judge while exercising his discretion should have favourably considered the petition of Agrawal to satisfy himself whether want of publicity had resulted in inadequate price.

11. It is contended on behalf of Navalkha & Sons that confirmation being discretionary with the court, this court ought not to interfere with the discretion exercised by the learned judge. We agree with the principle that the discretion exercised by the court cannot be interfered with unless the court has gone wrong on principle; in other words, it was not a sound judicial exercise of discretion. We have already held that the learned judge, having decided upon putting the property to auction, went wrong in not holding the auction as a public auction after due publicity and that this step has resulted in prejudice to the company and the creditors in that the auction did not fetch adequate price. The prejudice was inherent in the method adopted. The petition of Agrawal must have

suggested that the want of publicity in fact had resulted in prejudice. Of course, if the price realised compared favourably with the value of the property as on record, perhaps, the offer of Agrawal, being belated, may not have been deemed to be worthy of notice. But it was obvious that the bid amount was far too low. It was further obvious that there was possibility of higher bids in case of due publicity. In fact there was already a much higher offer before the court with all possibilities of further enhancement. The learned judge, in view of the inherent defect in the method adopted, which came to light also on the application of Agrawal, ought not to have confirmed the offer. Since the auction took place at the initiative of the court itself and the bid was accepted as, the final bid, perhaps, the learned judge thought it not possible to refuse confirmation. Be that what it may, we are clearly of the view that the very method which resulted in the highest bid being fraught with sure prejudice ought not to have been resorted to. On that basis itself. Appeal No. 3 ought to be allowed. The order of confirmation, therefore, cannot stand.

12. It is then argued that Appeals Nos. 3 and 4 as preferred are against the order dated February 19, 1965, and there is no appeal against the order dated December 24, 1964, which confirmed the sale and hence the order dated December 24, 1964, must prevail. There is little force in this contention. It is difficult to disassociate the order dated December 24, 1964, from the order dated February 19, 1965. The appeal against the order dated February 19, 1965, covers the order dated December 25, 1964.

13. Then again it is contended that the order refusing to confirm the sale is not an appealable order and further, when once confirmation was made, the party gets a vested indefeasible right and it cannot be defeated by resort to the remedy of appeal. Both these contentions are untenable in view of the clear authorities on the points. The Supreme Court in *Shankerlal Aggarwala v. Shankerlal Poddar*, [1965] 35 Comp. Cas. 1 (S.C.). has held that such orders are appealable. Such being the case, the order of confirmation in favour of any party is subject to the risk of its being reversed in appeal by the appellate court.

14. It is also argued that the appellant in Appeal No. 4 of 1965 had no right to appeal as he was neither a contributory nor a creditor. This argument is not tenable as he is a party aggrieved by the order in his application as a result of which the sale was confirmed. At any rate, when the appellant in Appeal No. 3 is to succeed on merits, the result would enure to the benefit of the appellant in Appeal No. 4 also. For all these reasons, we allow Appeals Nos. 3 and 4 of 1965 without costs and set aside the order- dated February 19, 1965, read with the order dated December 24, 1964. The result is that the learned judge shall take afresh necessary steps for the sale of the property either by calling sealed tenders or by auction in accordance with law. The tenders will be called or the auction will take place with requisition of minimum offer or starting bid of Rs. 10 lakhs. Appeals Nos. 5 and 6 are dismissed with costs.