

(2009) 02 CAL CK 0049

In the Calcutta High Court

Case No : A.P.O.T. No"s. 235 and 248 of 2008, A.C.O. No"s. 48 and 49 of 2008, Company Application No"s. 159 and 160 of 2006 and B.I.F.R. No. 503 of 1994

Official Liquidator, High Court

APPELLANT

Vs

Ujjain Nagar Palika Nigam and Others

RESPONDENT

Date of Decision : 05-02-2009

Acts Referred:

Companies (Court) Rules, 1959 — Rule 154
Companies Act, 1956 — Section 530, 530(1), 530(8)

Citation : (2009) 149 CompCas 446 : (2011) 3 CompLJ 266

Hon'ble Judges : Surinder Singh Nijjar, C.J.;Dipankar Datta, J

Bench : Division Bench

Advocate : Mukti Ghosh and Mithua Sen, for the Appellant;Debal Banerjee, D. Basak and Sandip Kumar Basu for respondent No. 1, C.K. Dutta and Asit Ranjan Nandy for respondent No. 2 and P.C. Sen, P.K. Dutta and Sandip Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Dipankar Datta, J.—Ujjain Pipe and Foundry Co. Ltd. (hereafter "the company in liquidation") having registered office in Kolkata, had its factory located in Ujjain, Madhya Pradesh. It became sick and was ultimately directed to be wound up by an order of the company court dated July 10, 1997.

2. The official liquidator put up the assets of the company in liquidation for sale vide sale notice dated May 9, 2003, pursuant to an order of the company court dated April 4, 2003. The assets of the company in liquidation were to be sold on "as is where is whatsoever there is basis".

3. By an order dated July 4, 2003, the company court was pleased to confirm the sale in favour of one Nagendra Jain at a sum of Rs. 20 crores. Subsequently, the offer was increased to Rs. 20.50 crores. After sale as referred to above, the official liquidator had invited claims from the creditors of the company in

liquidation by publishing advertisements. In response thereto, Ujjain Nagar Palika Nigam (hereafter "the Nigam") being a local authority governed by the provisions of the Madhya Pradesh Municipal Corporation Act, 1956, filed its affidavit of proof of debts for realisation of unpaid property tax amounting to Rs. 4,66,49,092 and unpaid water tax amounting to Rs. 11,14,612.

4. A meeting was convened for adjudication of the Nigam's claim. A sum of Rs. 2,79,955 was admitted by the official liquidator as preferential claim of the Nigam up to the period of winding up while the balance claim for a sum of Rs. 4,63,69,137 was rejected as the claim pertained to post liquidation period. So far as water tax is concerned, the official liquidator allowed a sum of Rs. 2,162 and rejected the balance claim of Rs. 11,14,612 towards water tax. The balance claims were withheld by the official liquidator without passing any reasoned order.

5. By letters dated January 24, 2006, the official liquidator served notices of admission and rejection of proof of debts on account of property tax and water tax upon the Nigam. Feeling aggrieved by the adjudication of the official liquidator, the Nigam preferred applications before the company court which were registered as C. A. Nos. 159-160 of 2006. A learned senior advocate of this Court was appointed by the learned judge to assist the court as *amicus curiae*. By a composite order dated April 25, 2007 (Ujjain Nagar Palika Nigam Vs. Official Liquidator and Others, , the learned judge, was pleased to set aside the adjudication of the official liquidator and granted prayer (b) of the judge's summons of both the applications. The official liquidator is now in appeal before us questioning the legality and/or propriety of the order dated 25th April, 2007.

6. Mr. Mukti Ghosh, learned Counsel in support of the appeals contended that the official liquidator had not carried on any business and consequently did not gain any profit for utilising the assets of the company in liquidation and, therefore, the learned judge erred in not holding that rejection of the claim of the Nigam by the official liquidator was valid and proper. According to him, the provisions of the Companies Act do not contemplate payment of property tax or water tax for the post-liquidation period of the company in liquidation and, therefore, the official liquidator having acted in the capacity of *custodia legis* pursuant to the winding up order passed by the company court till such time the assets are sold had no liability to pay rates and taxes as claimed by the Nigam. He invited the attention of the court to the terms and conditions of the sale and contended that the assets of the company in liquidation having been put up for sale on "as is where is whatsoever there is basis", the same would mean that the assets are not being sold free from encumbrances and, therefore, it is the purchaser who must bear the liability of property and water taxes claimed by the Nigam since such liability shifts to him once the property and assets are sold. He relied on the decisions reported in *Kewalramani Bros. Vs. Commissioner of Income Tax*, *United Bank of India Vs. Naresh Kumar and others*, *Karamchand Appliances Pvt. Ltd. Vs. M/s. Bharat Carpets Ltd. and Others*, and *K. Ramachandra Rao Vs. Ranks Cables Ltd. (In Liquidation)*, in support of his submissions and prayed for orders to allow the

appeals.

7. Mr. Debal Banerjee, learned senior counsel representing the Nigam, supported the order under appeal by contending that the learned judge did not commit any error in holding that the official liquidator would be liable to pay the property and water taxes due and payable to the Nigam out of the sale proceeds. He reiterated the submissions which have been recorded in the order under appeal by the learned judge. By relying on the decision reported in [2002] 111 Comp Cas 82 (HL) : [2002] 1 WLR 671 (Toshoku Finance UK plc, In re), in support of his submission, he urged that the appeals be dismissed.

8. Mr. Sen, learned senior counsel appearing for the purchaser/respondent No. 3, contended that his client was neither the owner nor occupier till July 4, 2003, when the sale was confirmed and, therefore, the charge would shift to the sale proceeds and not to the purchaser. According to him, the purchaser would not be liable to bear property and other taxes from any date preceding the date of confirmation of sale and hence question of latching on to the purchaser for clearing the tax liability of the Nigam does not and cannot arise in the facts and circumstances of the present case.

9. On behalf of respondent No. 2 being the Steel Authority of India Ltd., a creditor of the company in liquidation, no oral submissions were made but a short written note was filed in court. It has been contended therein that the claim of the Nigam for arrears of property and water taxes is directed against respondent No. 3 and not against the official liquidator and, therefore, it is respondent No. 3 who must bear the expenses.

10. We have heard learned Counsel for the respective parties and have perused the order under appeal. The issue formulated by the learned judge for decision was whether claims arising against the official liquidator representing the company in liquidation for any period of time subsequent to the order of winding up can outright be rejected or not. The learned judge proceeded to hold that it is the obligation of the official liquidator to protect the assets of the company in liquidation till such time the assets are sold. It was further held that the contention of the official liquidator that debts and claims and particularly claims on account of municipal tax would be payable only till winding up of the company in liquidation in view of Section 530 of the Companies Act, 1956 read with Rule 154 of the Companies (Court) Rules, 1959, is patently misconceived since there is no provision in either of those statutory provisions which restricts claims and debts only till the date of the winding up order. It was also held that post-liquidation liabilities are to be treated as part of the cost of winding up of the company in liquidation and such liabilities would get priority over all other liabilities of the company. The official liquidator having rejected the claim of the Nigam on the basis of his interpretation of Section 530 of the Companies Act and Rule 154 of the Companies (Court) Rules, the impugned rejection of proof of debts was held not sustainable in law and, therefore, the impugned notices of rejection were set aside. While holding that the official liquidator would be bound

to discharge the tax liability as per the claim of the Nigam even for the post-liquidation period, the official liquidator was granted liberty to file an appeal against the demands raised by the Nigam within the date specified therein and it was further directed that if such an appeal is filed within the date specified, the appeal shall be considered on merits waiving limitation, if any.

11. We are of the considered view that the question as to whether the liability to pay arrears of taxes due and payable to the Nigam has to be answered keeping in mind the terms and conditions of the notice of sale. As has been noticed hereinbefore, the assets of the company in liquidation were put up for sale on "as is where is whatever there is" basis. Relevant clauses of the terms and conditions of sale read thus:

1. The sale will be as per inventory made by the valuer on "as is where is whatever there is" basis subject to the confirmation by the hon"ble court. The official liquidator shall not provide any guarantee and/or warranty as to quality, quantity or specification of the assets sold. The tenderers/bidders are to satisfy themselves in this regard after physical inspection of the assets of the company and the purchasers will be deemed to offer with full knowledge as to defects, if any, in the description, quality or quantity of the assets sold. The official liquidator shall not entertain any complaint in this regard after the sale is over any mistake in the notice inviting tender shall not vitiate the same...

3. Offer in sealed cover enclosing a bank draft/pay order in favour of the Official Liquidator, High Court, Calcutta, equivalent to 20 per cent. of the offer as earnest money should be submitted to the official liquidator latest...

5. The successful purchasers will have to pay the balance purchase price to the official liquidator within 30 days after the order of confirmation...

12. There is no express provision in the sale notice that the liability to bear charges on account of water and property taxes must be borne by the purchaser. We are unable to comprehend that the expression "as is where is whatever there is basis" comprises within its ambit the liability to clear the statutory charges as might have accrued and are in arrears. The terms and conditions of the sale do specify that the official liquidator shall not provide any guarantee and/or warranty as to quality, quantity or specification of the assets sold and the intending purchaser is required to satisfy himself in this regard after physical inspection of the assets of the company in liquidation and no complaint as to defects, if any, in the description, quality or quantity of the assets sold would be entertained after the sale is over and that any mistake in the notice inviting tender shall not vitiate the sale. These, per se, in our opinion, would not tantamount to a representation being made to an intending purchaser that while bidding for the assets put up for sale he is also to bear the expenses towards arrears of dues of the Nigam. Guarantee and/or warranty as to quality, quantity or specification of the assets sold cannot be equated with the liability attached to the same. The terms and conditions of the tender only protect the official

liquidator to the extent of quality, quantity and specification and would not extend to claiming of immunity to clear taxes claimed by the Nigam.

13. The official liquidator has laid much stress on Section 530 of the Companies Act and Rule 154 of the Companies (Court) Rules. We have failed to find the materiality of the said provisions for a decision on the present dispute. Section 530 provides for preferential payments. According to Clause (a) of Sub-section (1) of Section 530 read with Clause (c) of Sub-section (8) thereof, all revenues, taxes, etc., due from the company in liquidation to a local authority on the date of the winding up order and having become due and payable during the preceding 12 months thereof would be entitled to priority over all other dues. Section 530 has nothing to do with payment of taxes which might have mounted between the date of winding up and sale of its assets by the purchaser. Rule 154 also cannot have any manner of application since it provides the manner of estimation of value of debts and claims on the date of the order of winding up of the company.

14. It would be, in our opinion, thoroughly unreasonable to foist the liability on a purchaser without first letting him know prior to the sale about such liability. Enquiries at site must have been made by the ultimate purchaser before he offered his bid. The purchaser could have been informed thereof the encumbrances. He could have also been told about it prior to his depositing the balance sale consideration. The proceedings before the company court were decided without giving any opportunity to the official liquidator to file counter affidavits to the applications filed by the Nigam, as it appears from the stay petitions. We, however, find no averment in the stay petitions to the effect that after respondent No. 3 had expressed interest to purchase the assets of the company in liquidation, the official liquidator had made him aware that purchase of such assets would carry with it the liability to pay the arrears of taxes recoverable by the Nigam. In the absence of such an averment, we find it difficult to hold that respondent No. 3 ought to bear the liability instead of the official liquidator.

15. At this stage, it would be worthwhile to consider the decision of the apex court in *United Bank of India* (supra) cited by Mr. Ghosh. The official liquidator, in that case, had sold the assets of the company in liquidation on the basis of terms and conditions of sale to Triputi Jute Industries. Clause (2) of such terms and conditions was as follows (page 271 of 79 Comp Cas):

2. The sale will be as per inventory list on "as is where it is basis" and subject to the confirmation of the hon"ble Supreme Court of India. The official liquidator shall not provide any guarantee and/or warranty in respect of the immovable properties and as to the quality, quantity or specification of the movable assets. The intending purchaser must satisfy themselves in all respects as regards the movable and immovable assets, as to their title, encumbrances, area, boundary, description, quality, quantity, and volume, etc., and the purchaser will be deemed to offer with full knowledge as to the description, area, etc., of the properties and

defects thereof, if any. The purchaser shall not be entitled to claim any compensation or deduction in price on any account whatsoever and shall be deemed to have purchased the property subject to all encumbrances, liens and claims including those under the existing legislation affecting labour, staff, etc. The official liquidator shall not entertain any complaint in this regard after the sale is over. Any mistake in the notice inviting tender shall not vitiate the sale.

16. It was on consideration of the express provisions of Clause (2) of the terms and conditions of sale that the apex court proceeded to hold as under (page 272 of 79 Comp Cas):

When the official liquidator sells the property and assets of a company in liquidation under the orders of the court he cannot and does not hold out any guarantee or warranty in respect thereof. This is because he must proceed upon the basis of what the records of the company in liquidation show. It is for the intending purchaser to satisfy himself in all respects as to the title, encumbrances and so forth of the immovable property that he proposes to purchase. He cannot after having purchased the property on such terms then claim diminution in the price on the ground of defect in title or description of the property. The case of the official liquidator selling the property of a company in liquidation under the orders of the court is altogether different from the case of an individual selling immovable property belonging to himself. There is, therefore, no merit in the application made on behalf of Triputi that there should be a diminution in price or that it should not be made liable to pay interest on the sum of Rs. 1 crore and 98 lakhs.

17. It is understandable that once an intending purchaser is wanted to satisfy himself in all respects as regards the immovable assets as in the said case, it is for his own benefit that he satisfies himself in all respects including encumbrances of the immovable property that he proposes to purchase. It is also quite understandable that after having purchased the property on such terms any objection that he was not aware of the encumbrances may not be entertained.

18. However, it passes the comprehension of this Court as to why the sale notice in the present case was not couched in similar and comprehensive language as the one which fell for consideration before the apex court. There being no occasion for respondent No. 3 to make himself aware regarding the encumbrances, if any, in respect of assets of the company in liquidation which he proposed to purchase, it is too late in the day for the official liquidator to contend that he ought to have participated in the bid upon being fully satisfied and not having raised any objection at the relevant time it is he who is only liable to bear the property and other taxes.

19. We are of the view that the liability on account of property and water taxes claimed by the Nigam, to the extent rejected by the official liquidator is a post-liquidation liability which the official liquidator is obliged to discharge in the

absence of a clear provision in the sale notice that the intending purchaser must satisfy himself as regards the assets of the company in liquidation in all respects including encumbrances.

20. In the fitness of things, we deem it necessary to direct the official liquidator to issue future notices of sale of assets of companies in liquidation in similar and comprehensive language as the one quoted supra from the apex court decision to avoid complications.

21. We have considered the other decisions cited by Mr. Ghosh.

22. The decision in *Rajratna Naranbhai Mills Co. Ltd.* (supra) is concerned with priority which the Sales Tax Officer claimed and which was founded within the period of 12 months next before June 26, 1967, being the date when the court directed the company to be wound up and as such was held due and payable. The question regarding ambit of the State's claim to priority in relation to revenues, taxes, cesses and rates due from a company in liquidation arose within the frame of Section 530 of the Companies Act. Since we have already concluded that Section 530 of the Companies Act is not material for a decision on this case, the principle of law laid down in the said decision does not assist the appellant in any manner whatsoever.

23. Although the decision in *K. Ramachandra Rao* (supra) supports the contention of the appellant, a closer look at the decision reveals that the same was rendered in the peculiar facts and circumstances. There, the preferential claims like the claims of the secured creditors could not be met in full and there was no amount available with the official liquidator to meet any other demand including the debts of the unsecured creditors and regard being had to such factual scenario, the court considered it unreasonable to direct the official liquidator to meet the demand of payment of property tax, electricity consumption charges and building maintenance charges. It further appears from the said decision that the intending purchaser had notice of dues towards property tax, electricity consumption charges and building maintenance charges before making payment of the entire sale consideration. The court held that having paid the balance sale consideration knowing fully well about the pending dues it is not open to him to raise such an objection and seek a direction on the official liquidator to clear it. Clause 9 of the tender notice was pressed into service by the court to negate the objection of the intending purchaser in such facts and circumstances.

24. As has been noticed above the tender conditions in the present case as well as the factual scenario are completely different from the one considered by the court in the decision on which reliance has been placed.

25. The decision in *Karamchand* (supra) also does not come to the rescue of the appellant since it is not on the point in issue. There, an allegation was raised that the assets put up for sale were not properly described in the advertisement inviting bids. The court proceeded to hold that before making the bid the

purchaser had ample time to satisfy itself on all aspects concerned of the properties, including the nature of the company in liquidation's right in the property or description of the property and having given the bid and participated in the open bidding it was too late in the day to raise the issues. In these circumstances, relief was refused. No law has been laid down therein decisive for adjudication of the present dispute.

26. We thus find no reason to differ with the decision of the learned judge in allowing the applications filed by the Nigam. The appeals are without merit. The same stand dismissed. However, parties shall bear their own costs.

Photostat copy of this judgment, duly countersigned by the Assistant Registrar (Court), shall be retained with the records of A. P. O. T. No. 248 of 2008.

Urgent photostat certified copy of this judgment, if applied for, be furnished to the applicant within four days from the date of putting in requisites therefore.

Surinder Singh Nijjar, C.J.

27. I agree.