

(2005) 08 GUJ CK 0084

In the Gujarat High Court

Case No : Official Liquidator Report No. 68 of 2005 in Company Petition No. 205 of 1996

O.L. of G.S.T.C. Ltd., Unit Monogram Mill

APPELLANT

Vs

M.A. Narmawala, Dy. Secretary (Textile) and Another

RESPONDENT

Date of Decision : 23-08-2005

Acts Referred:

Companies (Court) Rules, 1959 — Rule 272, 273, 274
Contract Act, 1872 — Section 5

Citation : (2005) 08 GUJ CK 0084

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Official Liquidator, for the Appellant; S.N. Soparkar and Swati Soparkar, for Mahakali Scrap Traders, for the Respondent

Judgement

K.A. Puj, J.—The Official Liquidator has filed this report seeking certain directions which inter alia, include confirmation or otherwise of the offer of M/s. Mahakali Scrap Traders of Rs. 4.31 Crores being the highest bidder for building structure except T.K. Office, Account Office, Credit Society Office, Office Records, Compound Wall, Trees and land on the terms and conditions of sale.

2. The Official Liquidator has submitted in his report that he has informed to the members and offerers present before the announcement of the auction that the auction was for building / structure only except T.K. Office, Account Office, Credit Society Office, Office Records, Compound Wall, Trees and not for land as was inadvertently stated in the top portion of the advertisement. The Sale Committee started auction proceedings. The highest offer received as per Tender was Rs. 2.97 Crores from M/s. Mahakali Scrap Traders. Thereafter, the inter-se bidding was taken place amongst the bidders and at the close of the auction, three highest offers were found by the Official Liquidator which are as under :-

M/s. Mahakali Scrap Traders Rs. 4,31,00,000/- M/s. V.L. Intex Rs. 4,26,00,000/-
M/s. Khemaji & Jodhaji Bros. Rs. 4,21,00,000/-

3. The Official Liquidator has further stated that subsequently, one offerer, namely, M/s. Virasat Reality Pvt. Ltd. has also requested to retain its EMD and he sent letter on 31.03.2005 offering Rs.4,31,00,000/-. However, vide his letter dated 09.05.2005, he has requested the Official Liquidator to return the EMD of Rs. 15 Lacs.

4. Based on the aforesaid report, this Court has issued notice on 17.06.2005 directing the Official Liquidator to intimate to all the bidders who have participated in the auction before the Sale Committee and also to the intending purchasers who want to participate in the inter-se bidding before the Court on 06.07.2005. The Official Liquidator was further directed to inform the intending purchasers that if they want to participate in the inter-se bidding, they have to pay EMD to the Official Liquidator along with late entry charges @ 18% p.a. and it should be made clear that late entry charges are not refundable in case they may not turn out to be the highest bidder. The Court has also directed the office to place Company Application No. 133 of 2005 along with this report. The said Company Application was moved by M/s. Mahakali Scrap Traders, the highest bidder for confirmation of sale in its favour.

5. Pursuant to the notice issued by this Court on 17.06.2005 and pursuant to the intimation sent by the Official Liquidator, no bidders have remained present on 06.07.2005 or even thereafter. The Court was, therefore, inclined to confirm the sale in favour of the highest bidder, namely, M/s. Mahakali Scrap Traders. On 06.07.2005, this Court has passed an order permitting the highest bidder, namely, M/s. Mahakali Scrap Traders to withdraw Company Application No. 133 of 2005 as the applicant had no more interest in keeping its offer alive. The Court has, however, clearly observed that the issue with regard to return of EMD would be decided in O.L.R. No. 68 of 2005.

6. Mr. S.N. Soparkar, learned Senior Counsel with Mrs. Swati Soparkar, learned advocate appearing for M/s. Mahakali Scrap Traders has submitted that since considerable time has elapsed and the highest bidder has already invested its fund elsewhere, the highest bidder is not interested in continuing its offer and it has already withdrawn Company Application No. 133 of 2005. In this view of the matter, the EMD which was paid should be refunded to him. He has further submitted that there is no valid contract between the highest bidder and the Official Liquidator to this effect and even if this is considered to be a valid contract, the Official Liquidator has no right to forfeit the amount of EMD as there is settled position in law and also statutory provisions u/s 5 of the Contract Act that it is always open for the offerer to withdraw its offer before it is accepted and once the offer is withdrawn, the EMD paid by the offerer is required to be refunded. He has submitted that Section 5 of the Contract Act deals with revocation of proposals and acceptance. The offerer can withdraw its offer before communication of the acceptance is complete against it. The Official Liquidator by merely providing clause to the contrary in the tender document cannot take away the legal rights of the offerer. In support of his submissions, he has relied

on the decision of Madras High Court in the case of Somasundaram Pillai v. Provincial Government of Madras AIR 1947 MAD 366 wherein the Court has taken the view that to have an enforceable contract there must be an offer and an unconditional acceptance. A person who makes an offer has the right of withdrawing it before acceptance, in the absence of a condition to the contrary supported by consideration. The fact that there has been a provisional acceptance makes no difference. A provisional acceptance cannot in itself make a binding contract. There must be a definite acceptance or the fulfillment of the condition on which a provisional acceptance is based. The Court has further held that at an auction-sale of liquor shop licenses held in accordance with the conditions of sale prescribed by the Board of Revenue the plaintiff's bid was provisionally accepted by the selling officer. The final acceptance rested with the Collector under the conditions of sale. The conditions stipulated that no bid which had been provisionally accepted should be withdrawn before it lapsed on a higher bid being accepted or before orders were passed confirming or refusing to confirm it. The Court has held that the conditions of sale were not settled by the Board of Revenue under any particular provision of the Madras Abkari Act and their publication did not amount to a notification u/s 69 of that Act and had therefore no statutory force. The Court has further held that the plaintiff was entitled to withdraw the bid because the prohibition against withdrawal had not the force of law and there was no consideration to bind him down to the condition.

7. Mr. Soparkar has further relied on the decision of Madras High Court in the case of T. Linga Gowder v. The State of Madras AIR 1971 MAD 28 wherein it is held that when there is no completed contract between the plaintiff and the Government, no further question can arise. Section 66 of the Madras Forest Act enables the Government to recover the money due to the Government as if it were arrear of land revenue. The Court found in that case that the money claimed by the Government did not fall under any of the heads provided for u/s 66. To start with, there was no enforceable contract for a breach to occur. Secondly, the Court's attention has not been drawn to any statutory rule under the Act whereunder the money could be claimed by the Government, the conditions of the auction sale having no statutory force. It was not claimed that any statutory rules having the force of law have been made in this regard. u/s 52 of the Revenue Recovery Act all sums due to the Government, including compensation for any loss or damage sustained by them in consequence of a breach of contract, may be recovered in the same manner as arrears of land revenue under the provisions of the Act, unless recovery thereof has otherwise been specially provided for.

8. Mr. Soparkar has further relied on the decision of Madhya Pradesh High Court in the case of Rajendra Kumar Verma Vs. State of Madhya Pradesh and Others, where, in pursuance of tender notice for the sale of Tendu Patta (Leaves) the petitioner had given his tender but had withdrawn it before it was opened and accepted. It is held that when the tenders were opened there was no offer from

the petitioner and, therefore, there could be no contract either express or implied between the parties. It is further held that the Government by merely providing a clause in the tender notice imposing condition on the exercise of the right to withdraw the offer could not take away that legal right of the petitioner.

9. Lastly, Mr. Soparkar has relied on the decision of the Delhi High Court in the case of Suraj Besan and Rice Mills Vs. Food Corporation of India, wherein it is held that a person can withdraw or modify his offer or tender before communication of the acceptance is complete as against him, that is, before its acceptance is intimated to him. The Government by merely providing a clause to the contrary in the tender notice could not take away the legal rights of a person.

10. Based on the aforesaid decisions and the statutory provisions, Mr. Soparkar has submitted that the EMD which is lying with the Official Liquidator should be returned to the highest bidder forthwith.

11. As against the aforesaid submissions, the Official Liquidator has invited the Court's attention to Condition No. 7 & 32 of the Tender document. Condition No. 7 empowers the sale Committee to accept the highest or any offer, subject to the sanction and confirmation of this Court. This condition further empowers the Sale Committee to reject any or all offers without assigning any reasons thereof, subject to the permission of this Court. It further stipulates that the decision of the High Court shall be binding on the parties. Condition No. 32 makes it abundantly clear that the offerer shall not be entitled to withdraw or cancel his offer once submitted. It also talks about the consequences if the offer is withdrawn or cancelled. In case of withdrawal or cancellation of offer, not only the earnest money deposit shall be liable to be forfeited, but the offerer will also be liable to pay the Official Liquidator the loss or damage suffered consequent upon his backing out of the offer. It further stipulates that the said property / assets will then be re-sold at the risk and consequences of the offerer. The Official Liquidator has, therefore, submitted that on withdrawal of the offer by the highest bidder and that too, after its acceptance by the Sale Committee, the earnest money deposit paid by it is liable to be forfeited and it shall also be held to be liable for any loss or damage that may be caused to him on re-sale of the said property / asset. In support of his submission, the Official Liquidator has relied on the decision of this Court in the case of O.L. Of New Jhangir Textile Mills (Unit of G Ltd.) v. M.A. Narmawala and Ors., being O.L.R. No. 25 of 2003 in Company Application No. 47 of 2003 decided on 31.07.2003, wherein, on withdrawal of the offer by the successful bidder before the Sale Committee, the Court held that the earnest money deposit made by the offerer shall be liable to be forfeited.

12. After having heard the learned Senior Counsel Mr. S.N. Soparkar appearing for the applicant and the Official Liquidator and after having perused their respective pleadings, relevant statutory provisions and authorities cited before the Court, it is the considered opinion of the Court that the highest bidder before the Sale Committee is not entitled to claim refund of earnest money deposit. The

Court has examined the Conditions No. 7 & 32 of the Tender document. The highest bidder has participated in the inter-se bidding before the Sale Committee. Its bid was accepted subject to confirmation by the Court. The said acceptance was communicated at the conclusion of the Sale Committee meeting i.e. On 24.03.2005. The highest bidder's offer was of Rs. 4,31,00,000/- whereas the offers of other two bidders, namely, M/s. V.L. Intex and M/s. Khemaji & Jodhaji Bros. were to the tune of Rs. 4,26,00,000/- and Rs. 4,21,00,000/- respectively. As a result of acceptance of the offer of the highest bidder, the earnest money deposit of other bidders were returned. The sale was required to be confirmed by the Court. The highest bidder has filed Company Application No. 133 of 2005 before this Court for confirmation of said sale in its favour. The Official Liquidator has also filed the present report on 15.06.2005. The Court issued notice therein making it returnable on 06.07.2005 and it was directed to be placed along with Company Application No. 133 of 2005. On the returnable date i.e. 06.07.2005, the highest bidder sought the permission to withdraw the application as it did not want to keep its offer alive. The period of 3 to 4 months cannot be said to have any attributes of delay or laches. The Court is, therefore, not convinced with the submission of Mr. Soparkar that there was unreasonable delay in granting sanction or confirmation of sale in favour of the highest bidder.

13. As far as withdrawal of the offer by the highest bidder is concerned, there is no much dispute about the offerer's right to withdraw his offer before its acceptance being communicated to him. However, consequences flowing from such withdrawal or cancellation of offer depend upon the facts of each case. Authorities cited by Mr. Soparkar deal with the cases where conditions imposed in the Tender document were held to be without statutory force or without any consideration. In the present case, Condition No. 30 specifically states that this Court has right to impose such other and further terms and conditions as this Court may deem fit and proper in the circumstances of the case may arise and the terms and conditions already specified in the Tender document will be binding on all the parties concerned. These conditions are having the statutory force. Rules 272 to 274 of the Companies (Court) Rules, 1959 deal with sales by the Official Liquidator. Rule 272 puts an embargo and mandates that unless the Court otherwise orders, no property belonging to Company which is being wound up by the Court shall be sold by the Official Liquidator, without the previous sanction of the Court, and every sale shall be subject to confirmation by the Court. Rule 273 prescribes the procedure at sale. It states that every sale shall be held by Official Liquidator, subject to such terms and conditions as may be approved by the Court. Thus, the condition regarding forfeiture of earnest money deposit, on withdrawal of the offer by the highest bidder in the present case, that too, at the stage when the matter is pending before the Court for confirmation of sale, cannot be considered to be without any statutory force.

14. The condition regarding forfeiture of earnest money deposit in the present case, cannot be treated as without any consideration. The highest bidder has got an exclusive right of consideration of its offer by the Court, in exclusion of other

bidders who were before the Sale Committee. Even if other bidders may intervene and may take part in inter-se bidding before the Court, pursuant to the notice issued by the Court, but in that case, they are liable to pay late entry charges @ 18% p.a. for the period from the date of inviting the offers by the Official Liquidator till they make the offer before the Court and pay earnest money deposit. The highest bidder whose earnest money deposit is retained by the Official Liquidator is not supposed to pay these late entry charges. If any other bidder raises his bid before the Court and ultimately, the Court confirms the sale in favour of such other bidder, the highest bidder before the Sale Committee will certainly get his earnest money deposit back. But, when there is no other bidder or no one makes any highest offer and Court is inclined to confirm the sale in favour of the highest bidder, at this stage, if the offer is withdrawn, the earnest money deposit of such highest bidder will certainly be liable to be forfeited and in a given case, such person shall also be exposed to other consequences as contemplated in the terms of the Tender document. The view which this Court is taking in the present case, finds support from the decision of Rajasthan High Court in the case of Bhanwarlal Vs. The State of Rajasthan and Others, In this case, tenders were invited for sale of country liquor group shops. The offer was withdrawn prior to its acceptance. The Court found that there is a statutory condition in the tender form that tenderer had no right to withdraw. The Court held that earnest money deposit was liable to be forfeited on withdrawal by tenderer.

15. In view of the foregoing discussion, the Court hereby directs the Official Liquidator to forfeit the entire amount of earnest money deposit paid by the highest bidder i.e. M/s. Mahakali Scrap Traders. In absence of any other bidder, the property is not sold and hence, it is premature at this stage to say that any loss or damage is suffered by the Official Liquidator by virtue of withdrawal of an offer by the highest bidder. The Court, therefore, does not express any opinion at this stage. It is, however, open for the Official Liquidator to raise such issue when the property is sold and price fetched is less than Rs. 4,31,00,000/-. It is also open for the present highest bidder to raise all its objections if any claim is made against it by way of damages.

16. Subject to the aforesaid directions and observations, prayers made in Clause (a) and (b) of para 10 of the report are disposed off. As far as prayer (c) is concerned, the action of the Official Liquidator of making payment of Rs. 15,700/- to the advertising agency, namely, M/s. Navnitlal & Co. is hereby ratified.

17. As far as prayer (d) regarding sanction of professional bill of Rs. 21,000/- of Shri N.K. Shah, Govt. Approved Valuer is concerned, the Valuer has raised his bill dated 07.02.2003. The same appears to have been received in the office of the Official Liquidator on 09.05.2005. In the same letter-cum-bill dated 07.02.2003, it is stated that as per the Official Liquidator letter dated 29.01.2003, he has visited the site on 30.01.2003 and 03.02.2003 along with Official Liquidator's

representative and submitted Inventory and its Valuation report in duplicate. However, summary of the Valuation Report produced at Annexure E to the present Report is of 02.08.1999. Even the complete Valuation Report produced by the Official Liquidator, after it is called for by the Court, is of 02.08.1999. However, the same did not appear to have been received by the Official Liquidator. There is one more covering letter-cum-bill dated 07.02.2003 along with the said report. This entire bunch of papers must have been received by the Official Liquidator on 09.05.2003. It, therefore, appears to the Court that on 12.03.2005, when the advertisement appeared in the Newspaper fixing the upset price of buildings and construction, at Rs. 150 Lacs, the Valuation Report might not be available as the value of construction and building is determined at Rs. 90 Lacs. Possibly after disclosure of the Report, the highest bidder has withdrawn its offer. Be that as it may, the Official Liquidator has not correctly placed all the relevant facts before the Court. It is not certain as to whether the Valuer has given any other Valuation Report in February, 2003. In absence of proper details before the Court, the Professional Bill of the Valuer is not sanctioned at present. The Official Liquidator is, therefore, directed to clarify the following issues in a separate Report, after calling for necessary explanation from the Valuer :-

1. Whether the Valuer has raised and forwarded any Bill along with his letter dated 02.08.1999.
2. Why the letter dated 02.08.1999 is not produced before the Court at the time of filing O.L.R. No. 68 of 2005.
3. Whether the Valuer has prepared any Inventory and Valuation Report pursuant to his visit on 31.01.2003 and 03.02.2003. If it is so, the same shall be produced before the Court.
4. Why the letter dated 07.02.2003 is stated to have been received on 09.05.2005.
5. The upset price of Rs. 150 Lacs for buildings is fixed on what basis, especially when the Valuation Report has fixed the valuation of Rs. 90 Lacs.
6. Whether plant and machineries, furniture and fixtures and stock have been sold ? Necessary orders for confirmation of such sale be produced. The Official Liquidator to explain as to why and by whom the mistake has been committed to include the sale of land in the advertisement ? Any offer has ever been invited for sale of land.
7. Whether any letter is received from Virasat Reality Pvt. Ltd. requesting to retain its Earnest Money Deposit and raising its bid to Rs. 4,31,00,000/-.
8. Whether Virasat Reality Pvt. Ltd. has been paid back the Earnest Money Deposit ? If yes, when ?
18. The above compliance be made by the Official Liquidator within one week from today. To be notified in the Ist Board on 30.08.2005 for compliance only.

19. This O.L. Report is accordingly disposed off.