(1988) 12 DEL CK 0030

In the Delhi High Court

Case No : First Appeal No''s. 72 and 97 of 1988

O.P. Bhartia APPELLANT

Vs

Canara Bank and Others RESPONDENT

Date of Decision : 07-12-1988

Acts Referred:

Citation : (1989) 37 DLT 257 : (1989) 16 DRJ 237

Hon'ble Judges : S.S. Chadha, J;P.N. Nag, J

Bench : Division Bench

Advocate : Jagdeep Kishore, K.N. Bhatt, A.K. Sharma, K.K. Jain, B.N. Sen and B.R. Sapra, for the Appellant;

Judgement

S.S. Chadha, J.

(1) The two F. A. 0s. (OS) 72/88 & 97/88 arise out of the judgment dated May 27, 1988 of the learned Single Judge of this Court and are disposed of by the common judgment.

(2) The facts in brief are these. Canara Bank (hereinafter referred to as the Bank) filed suit No. 1793/84 on October 31, 1984 against M/s Fibre Processors Pvt. Ltd. (hereinafter referred to as the Company) and others for the recovery of a sum of Rs. 11, 98, 449.72 together with interest etc. The Bank filed yet another suit on October 31, 1984, being suit No. 1810/84 for the recovery of a sum of Rs 49,32,803.61 with interest. It was alleged in this suit that the Company bad for the grant of loaning facilities and to secure repayment of the loans had executed several documents and hypothecated the plant and machinery of the factory of the Company, raw materials and finished goods etc. In favor of the Bank and the Bank is entitled to recover its dues from the hypothecated plant, machinery, raw materials and finished goods etc. The Bank filed on November 7, 1984 another suit No. 1754/84 for the recovery of a sum of Rs. 6,58,907.85 together with interest etc. Along with suit No. 1793/84, an application, being 1.A. 2596/85 under order 40 Rule 1 of the CPC for

appointment of a Receiver was made. The power sought for the Receiver was to take possession of all the plant, machinery, tools, accessories, raw materials, goods in process, stores and spares, finished goods and other items whatsoever and for a direction to the Receiver to sell the plant, machinery, raw materials and finished goods and other items lying in the factory premises of the Company. In suit: No. 1810/84, similar relief was claimed in I.A. 1837/85.

(3) In suit No. 1793/84, the summons of the suit were sent to the defendants including the Company at its Faridabad address and it was reported that the Company refused to accept service and, Therefore, a copy of the summons was affixed at the spot. The service was deemed as sufficient and as none was present on behalf of defendant No. 1, the proceedings were taken ex parte against the Company in the Court''s order dated February 19, 1985. The other defendants in the suit were duly served and were represented. I.A. 2596/85 in suit 1793/84 for appointment of the Receiver was allowed by G.R. Luthra. J. the learned Single Judge in the order dated May 28, 1985. The Court appointed Shri S. K. Prakash Naik, Manager, Legal Section, Circle Officer, Parliament Street, New Delhi of the Bank as the sole Receiver with all the powers under Order 40 of the Code of Civil Procedure. The order of the appointment of the Receiver in suit No. 1793/84 was extended to suit No. 1810/84 and it was directed that the Receiver would also work for the purpose of that suit also. The Company had not been served in suit No. 1810/84 and orders were made for its substituted service by way of publication in the "Statesman", Delhi and Calcutta, The rest of the proceedings were recorded in suit No. 1810/84.

(4) In the meantime, by order dated February 28, 1985 in I.A. 1836/85 in suit No. 1810/84, the learned Single Judge appointed Shri Kamal Bhushan Vashisht, Assistant Registrar of this Court as Local Commissioner for going on the spot at 17/H, Faridabad Industrial Area, Faridabad, the factory premises of the Company, for the purpose of making an inventory of the plant, machinery as well as the goods lying therein. The Local Commissioner submitted his report dated May 7, 1985 along with the inventory of the plant and machinery of the Company, the raw materials, the finished goods in godown No. 1, tools for machining etc. The Receiver appointed by the Court took possession of the plant, machinery and other goods of the Company and later scrutinised the inventory prepared by the Local Commissioner with the machinery items and goods at the site and found certain additional items in the electrical Control Room and inventoried them also. The Receiver appointed by the Court wanted to proceed with the publishing of the advertisement regarding the sale or the disposal of the hypothecated items. However, he was informed that the Company Court of the High Court Calcutta had passed an order on. May 25, 1985 for winding up of the Company in Company Petition No. 55/85.

(5) The Bank had moved an application u/s 446 of the Companies Act, 1956 in the Company Court of the Calcutta High Court for grant of leave to continue with the aforesaid three suits filed against the Company and also to grant permission

to the Receiver to take further steps. The Company Judge granted leave to the Bank to proceed with the three suits pending in this Court and to take interlocutory executions and also for sale of the hypothecated goods by the Receiver in its orders dated July 30, 1985 and July 31,1985.

(6) Thereafter, the Receiver after obtaining the copies of the orders of the Calcutta High Court released an advertisement in the ''Statesman'' issue of September 10, 1985 in the editions of Calcutta and New Delhi. The report was submitted by the Receiver on October 31, 1986. Twelve parties contacted the Receiver to ascertain the particulars of the plant, machinery and stocks etc. to be sold as well as the terms and conditions of the sale and some of them who wanted to inspect, were given inspection of the plant, machinery and stocks at site. Only five parties gave their quotations. The Receiver commented upon the quotations of various parties. He also noticed the book value as per records as on June, 1983 as per Company''s declarations of the raw materials (Rs. 50,000.00), finished goods (Rs. 7,00,000.00), stocks and spars (Rs. 9,00,000.00) and plant and machinery Rs. (20,00,000.00), in all Rs. 36,50,000.00 . He also observed about the value of the machinery being depreciated because of non-use. On close scrutiny and on comparison of the offers, the Receiver expressed the opinion that the proposal of M/s. Delhi Agencies and Investment Pvt. Ltd. (hereinafter called M/s. Delhi Agencies) is reasonable as they had offered a sum of Rs. 65 lacs for the machinery, plant, stocks, spares etc. The Receiver sought permission of the Court for the sale of the hypothecated moveable property.

(7) Before the report could be considered by the learned Single Judge, an offer was received by the Receiver from Shri B.S. Bhutoria of M/s. Ashoka International Corporation and according to that offer, the plant, machinery and other goods could be sold for a sum of Rs. 65.5 lacs. The Receiver sent another report dated May 8, 1987 enclosing that offer. The case came up for hearing before the learned Single Judge on May 12, 1987 when the counsel for the parties including the Deputy Official Liquidator of the Company stated that they had no objection to this offer being accepted. The learned Single Judge accepted the offer with the condition that the proposed purchaser would deposit 25% of the amount of Rs. 65.5 lacs within One week from the date of communication by the Receiver by demand draft/pay order payable to the Bank and the remaining amount in five Installments within six months. This decision was communicated by the Receiver to the said Corporation and he filed his report.

(8) It came up for consideration before the Court on May 25, 1987. The Receiver stated that M/s Ashoka International Corporation had not paid the amount and further that M/s Delhi Agencies had revised their offer for purchase of plant and machinery, finished goods, raw materials etc. for Rs. 66 lacs and a demand draft of Rs. 6.6 lacs had also been received from them. The counsel for the parties in the suits agreed that the offer of M/s. Delhi Agencies could be accepted with the condition that they furnish a bank guarantee for the remaining amount within one month to the satisfaction of the Bank and remove the machinery etc.

thereafter and also that the remaining amount of Rs. 59.40 lacs would be paid within four months from that date and further if the balance amount was not paid within a period of four months, the amount of Rs. 6.6 lacs already deposited would stand forfeited. The Court ordered accordingly. The Receiver deposited the demand draft of Rs. 6.6. lacs on May 26, 1987 with the Bank. The Receiver received the guarantee for Rs 59.40 lacs from Shri M. C. Somani of M/s Delhi Agencies. The Receiver in his report dated Julyl7,1987states that "On June 29, 1987, I have handed over possession of plant, machinery, stocks etc. to Shri M. C. Somani. The proceedings of the said handing over are enclosed herewith. I have also paid the salary of the watchman on that day". The report further states that the custody of the plant, machinery, stocks etc. having already been handed over to Shri M. C. Somani, he was directed to make security arrangements for the same and the services of two watchmen employed by the Reviver were terminated with effect from July 14, 1987. It was, however, reported that when Shri M.C. Somani visited the factory on July 14, 1987 to remove the plant and machinery and the remaining raw materials and finished goods the workers of the Company obstructed the removal and a lock was put by them on the main gate of the factory.

(9) M/S. Ashoka International Corporation filed two applications on June 10, 1987, being 1.As. 3716 and 3717 of 1987 alleging that the order of the Court was not communicated to them, that they were still interested and that the order accepting the offer of M/s. Delhi Agencies be kept in abeyance. Textile Mazdoor Singh, Intuc, Faridabad also filed three applications, being I.As. 3752, 3758 and 3952 of 1987 alleging that the dues and emoluments of the workers had accumulated to the tune of Rs. 1.86 crores, that the market value of the plant, machinery, raw materials etc. is more than Rs. 1 crore and that the Bank bad no right to seek disposal of the plant and machinery, raw materials and stocks etc They also challenged the procedure adopted by the Receiver ? in the sale of the hypothecated assets of the Company. They asked for setting aside the sale and in the meantime stay of the remove of the plant machinery and goods etc. from the factory premises was granted. Shri Om Parkash Bhartia filed I.As. 7182/87 and 267/88 challenging the sale by the Receiver as sanctioned by the Court on the ground that the value of assets of the Company was Rs. 222.25 lacs in 1980 and according to the Receiver, the value of the land and building would be Rs. 35 to Rs. 40 lacs and the offer of M/s. Delhi Agencies was shockingly low. It was also alleged that many items which were not included in the inventory of the Receiver were lying at the spot but M/s. Delhi Agencies-were removing those assets of the Company. It was also prayed that the Receiver be directed to furnish the complete list of necessary details/ specifications of the plant and machinery and stocks sold to M/s. Delhi Agencies, those removed by M/s. Delhi Agencies at those still lying in the possession of the Receiver. All these applications have been dismissed by the order under appeal of the learned Single Judge dated May 27 1988.

(10) M/S. Delhi Agencies had prayed in I.A. 2833/88 for the grant of police

assistance to remove the plant, machinery and other goods as they were obstructed by the workers. M/s. Delhi Agencies have been allowed police assistance in case it is found necessary for removing the plant, machinery and goods which have been sold to them.

(11) The matter was heard at some length by a Division Bench of this: Court on October 11, 1988. The Court wanted to be satisfied about the identity of the plant and machinery and stocks of the Company at all relevant times, namely, as to what are the particulars of the plant and machinery and goods lying at the factory of the Company and hypothecated in favor of the Bank ; the details of the plant and machinery or other hypothecated goods which were inventoried by the Local Commissioner and later checked up by the Receiver appointed by the learned Single Judge ; the identity and particulars of the property which were put up for sale in that advertisement dated September 10, 1985 issued in the Statesman; the list of properties. offered for sale which was put to auction by the Receiver to the tenderer ; the Hat of property for which the offers were made by M/s. Ashoka International and M/s. Delhi Agencies and the identity of the property of the Company for which the permission of the Court was sought for sale. Liberty was granted to the parties to file an additional affidavit before the next date. The matter came up for hearing before us on November 21, 1988 and November 22, 1988 when arguments were heard at length. The affidavit has been filed only by the Receiver.

(12) The Receiver in his affidavit states that at the time of inviting: offers for sale of hypothecated machinery, plant and other goods, he bad given to the offers who had called on him, the list of plant, machinery and. goods lying at the factory premises which was .prepared by Shri Kamal Bhushan Vashisht, Assistant Registrar of the High Court who had been appointed as a Local Commissioner to prepare such an inventory by the order of the Court passed on February 28, 1985. He further stated that the Local Commissioner had left out the Tool Room Machine lying in Tool Room and those were included in the report of the Receiver. The Receiver has also given a comparative chart of the number of machines, plant and other goods as found at the factory as per the inventory prepared by Shri Kamal Bhushan Vashisht, the details given to tenderers including M/s. Ashoka International and M/s. Delhi Agencies and the details as per inventory prepared by Shri Sanjeev Dubey, Local Commissioner appointed by the Appellate Court on June 8, 1988. The identity of the property advertised for sale and that sold to M/s. Delhi Agencies is clearly established from these documents. We find no extra items being sold to M/s. Delhi Agencies. We make it clear that the Receiver shall give the possession of only those items which are included in the inventory prepared by Shri Kamal Bhushan Vashisht, Local Commissioner including the items of the Tool Room Machine lying in the Tool Room inventoried by the Receiver himself.

(13) The main submission of Shri Jagdeep Kishore, the learned counsel for the appellant Shri O.P. Bhartia is to the value of the property of the Company being

put to sale. According to the counsel, the value of the assets of the Company was Rs. 222.25 lacs in 1980 and by taking the value of the land and building of about Rs. 35 to 40 lacs, the other assets are of the value of Rs. 1.80 crores. No efforts were made by the Receiver, urges the counsel, to evaluate the property being sought to be sold through independent sources. The offers were invalid by publication of notices in the Statesman, both issues of Calcutta and Delhi. We have already referred to the report of the Receiver in which he dealt with the offers received, his comparison of the offers, his assessment of the offers with the book value in the records of the Company and the deteriorating conditions of the plant and machinery. We find no illegality in the conduct of the sale or any infirmity in the procedure adopted by the Receiver. We have also seen the original record as well as the orders passed by the learned Single Judge. I.A. 7812/87 came up for hearing after notice before the learned Single Judge on November 3, 1987 when the counsel was directed to file the affidavit of the appellant in regard to the present market value of the machinery in question and the value that he was prepared to offer for the same and also to produce the applicant in Court on the next date of hearing. When the case came up for hearing before the learned Single Judge on December 4, 1987, the Receiver supplied to the counsel a copy of the report of the Local commissioner in which the inventory of the articles then to be sold any lying with the Receiver were mentioned. The Counsel for M/s. Delhi Agencies argued that the applicant Was only delaying the matter and that they would be put to loss. The counsel then stated that incase the applicant was unable to bring much better offer, he would pay the bank guarantee charges and interest for one month lost by M/s. Delhi Agencies and prayed for adjournment. The applicant was given time for inspection of the plant and machinery and called upon to file the necessary affidavit as per the direction dated November 3,1987. Neither Shri O.P. Bhartia, the applicant was: present on January 8, 1988 before the learned Single Judge nor he filed his affidavit. The case was thereafter adjourned from time to time for some reason or other. When the case came up for hearing on April 14, 1988 again, it was stated that Shri Bhartia was abroad and he would appear in person in case the case was fixed after April 25, 1988. The learned single Judge adjourned the case to April 27, 1988 and recorded that Mr. Bhartia should positively appear in person before the Court and comply with the directions already given. Shri O.P. Bhartia appeared on April 27,1988 in Court but did not file his affidavit. The Court heard the arguments on I.A. 7812/87, I.A. 267/88 and other pending applications.

(14) It is thus clear from the record that the finding of the learned Single Judge that it is not understandable as to what prevented Mr. Bhartia from filing the affidavit in regard to the value of the goods mentioned in the inventory and the advertisement is perfectly justified on the record. No effort was made to bring a better offer even after the appeal was filed in this Court. After the conclusion of the arguments. an affidavit has been filed on November 24, 1988 alleging that "in the estimation of the deponent, the plant and machinery itself is about Rs. 70

lacs. Adding to it the value of the generating set, consumables etc. the total plant and machinery should be of the value of Rs.83 lacs app." The appellant is not willing to purchase or take its delivery on his estimation of the price, as be says that the moveable assets belong to him. No offer of any third party was placed before the learned Single Judge or before the Division Bench. No evidence has been brought forward either in the form of an offer from any party to show that the plant and machinery and assets etc. were being sold at much less price or that the Receiver was there for the benefit of some of the ex-Directors, of the Company as is being alleged at the Bar.

(15) The High Court of Calcutta passed the order on my 11, 1988 on an application of the workers that "The possession shall not be handed over to the purchaser, if not already handed over". The submission is that the possession is being handed over to the purchaser by the orders of the learned Single Judge in violation of the orders of the Calcutta High Court. As already noticed, the Receiver in his report dated July 17, 1987 stated that he had handed over on June 29, 1987 the possession of plant, machinery, stocks etc. to Shri M.C. Somani of M/s. Delhi Agencies. u/s 20 of the Sales of Goods Act, 1930, where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the delivery of the goods, or both, is postponed. The property in the specific goods in a deliverable state passed on to the purchaser when the contract was made and ifs possession was handed over on June 29, 1987. The only question then remained was about the removal of the goods by the purchaser and it in no way violates the orders of the. Calcutta High Court.

(16) The next submission of Shri R .P. Bansal, the learned counsel for the appellant in Fao (OS) 97/88 is that a scheme of arrangement was pending before the Company Judge at Calcutta for revival of the Company for the benefit of all its secured creditors and other creditors and workmen and that in such circumstances it was just and proper that the order for sale and delivery of the properties of the Company should have been deferred. We have seen the deed of hypothecation in favor of the Bank. The machinery, plant and accessories and tools apartment to the said machinery or plant belonging to the Company described in general terms in the schedule to the deed of hypothecation and all other machinery and. accessories etc. that might have been acquired by the Company from time to time and in terms of the deed of hypothecation, stand hypothecated with the Bank. The Bank exercised its right of sale of hypothecated plant, machinery and other assets to satisfy its claim. The Receiver was appointed to take possession of the hypothecated property and to put it to sale. The Company Judge on an application of the Bank u/s 446 of the Companies Act granted. leave to the Bank to proved with the three suits pending in the High Court of Delhi and to take interlocutory executions. A specific permission was. given for sale of the hypothecated goods by the Receiver. It will be presumed that the Company Court examined the facts and circumstances and exercised its

discretion in favor of a secured creditor who chose to remain outside the scope of the winding up. The bank being a secured creditor was given leave to sue the Company on his own security and put the property to sale through the Receiver appointed in the suit. The alleged scheme of arrangement pending before the Company Judge of the Calcutta High Court can have no effect on the hypothecated assets as the Bank has chosen to remain outside the winding up proceedings. Admittedly, there is no order of the Company Judge u/s 391(6) of the Companies Act 1956 staying the proceedings in the three suits against the Company and other defendants.

(17) The last submission is that the officers of the Bank and defendants other than the Company were in collusion with each other and they were acting to seek order for disposal of the plant, machinery and other goods of the Company by playing fraud. Apart from a bare allegation at the Bar, there is no material on the record of the perpetuation of any fraud. The defendants other than the Company are guarantors of the Company for payment of the loans and other dues and naturally they would be keen that the liability is discharged out of the securities held by the bank. Viewed from this angle, they are consenting parties to the sale of the hypothecated plant, machinery and other assets of the Company.

(18) For the above reasons the appeals are dismissed with no order as to costs.

