(2021) 03 KL CK 0250

In the High Court Of Kerala

Case No : Company Appeal No. 1 Of 2021

P. Anantharajan APPELLANT

Vs

Official Liquidator And Ors RESPONDENT

Date of Decision : 23-03-2021

Acts Referred:

Citation : (2021) 03 KL CK 0250

Hon'ble Judges : C.T. Ravikumar, J;Murali Purushothaman, J

Bench : Division Bench

Advocate : Bindu George, K. Moni, H. Ramanan

Final Decision : Dismissed

Judgement

Murali Purushothaman, J

1. The challenge in this appeal is against the order dated 18.02.2021 in C.A.No.1/2021 in C.P.No.2/1996 of the Company Court. The appellant participated in the auction held by the Official Liquidator for the sale of 5670 kilograms of copper ingots of M/s. Premier Cables Company Limited (in liquidation). The appellant was the highest bidder.

2. The Official Liquidator filed Report No.195 in C.P. No.2/1996 on 26.08.2019 for confirmation of sale in favour of the appellant. The learned Company Judge by order dated 31.10.2019 confirmed the sale. Accordingly, the Official Liquidator as per Annexure-R2 communication dated 22.11.2019 (Annexures referred to hereinafter in this judgment are the Annexures produced along with and marked as such in, the Statement filed by the Official Liquidator in C.A. No. 01/2021) informed the appellant that the sale has been confirmed in favour of the appellant and the appellant was called upon to remit the balance sale consideration of Rs.20,81,920/- along with 18% GST by way of Demand Draft in favour of the Official Liquidator within 30 days from the date of order of confirmation by the Court as per the terms and conditions of the sale.

3. Meanwhile, by Annexure-R3 letter dated 14.11.2019 sent through his counsel, the appellant informed the Official Liquidator that he was not informed whether he is the successful bidder and demanded return of EMD of Rs.50,000/-. On receipt of Annexure-R2 communication dated 22.11.2019 of the Official Liquidator regarding confirmation of sale, the appellant sent Annexure-R4 letter stating that he received Annexure-R2 letter of the Official Liquidator on 26.11.2019 and that he is not intending to proceed with the sale and requested for return of EMD.

4. In reply to Annexure-R4 letter, the Official Liquidator, by Annexure-R5 letter dated 06.12.2019 informed the appellant that, immediately on receipt of the copy of the order confirming the sale, the appellant was put on notice regarding the sale confirmation in favour of the appellant vide Annexure-R2 and inviting the attention of the appellant to the terms and conditions of the tender, requested the appellant to remit the entire balance sale consideration without further delay.

5. Since the appellant did not remit the balance sale consideration, the Official Liquidator by Annexure-R6 letter dated 07.02.2020 informed the appellant that the EMD of Rs. 50,000/- is forfeited in accordance with clauses 7(g) and (h) of Annexure-R1 terms and conditions of the tender accepted by the appellant.

6. The appellant filed Company Application No.75/2020 to set aside Annexure-R6 letter of the Official Liquidator whereby the EMD was forfeited.

7. The appellant also filed Company Application No.76/2020 for direction to allow the appellant to remit the balance sale consideration in two installments within 3 months from the date of order after deducting the amount of Rs.50,000/- deposited as EMD.

8. The learned Company Judge by common order dated 23.09.2020 dismissed both the above applications observing that the said applications were filed only on 22.09.2020 with inordinate and unexplained delay and by the time the Court had already allowed the Official Liquidator to re-tender the sale of copper ingots.

9. After the dismissal of C.A.Nos.75 and 76 of 2020, the appellant filed Company Application No.78/2020 for direction for refund of EMD. During the pendency of the said Company Application, the appellant filed petition to review the common order dated 23.09.2020 in C.A. Nos. 75 and 76 of 2020 and the same was numbered as R.P. No.860/2020. The contention in the Review Petition was that the Counsel could not advance certain contentions while hearing the said applications.

10. During the pendency of the C.A.No.78/2020 and R.P.No.860/2020 the appellant filed Company Application No. 01/2021 for direction to confirm the sale in favour of the appellant as 'directed' by the Court on 09.12.2020. In the affidavit filed in support of the said Company Application, it is stated by the appellant that when C.A. No. 78/2020 was pending, the Court, after considering

all the relevant materials and monitory aspects directed the appellant to deposit an amount of Rs. 21,81,920/-which include the forfeited EMD of Rs. 50,000/-. In paragraph 9 of the said affidavit, it is stated that there was an oral direction by the Court on 09.12.2020 to deposit the said amount with the Official Liquidator within one week. The appellant has further stated that in accordance with the said direction the appellant remitted an amount of Rs. 21,31,920/- on 16.12.2020 and prayed for confirming the sale in favour of the appellant as 'orally directed' by the Court on 09.12.2020.

11. From the records of the case in R.P. No 860/2020, we find that the Learned Company Judge, who heard the Company application on 29.01.2021, having regard to the averments in the affidavit and submission made on behalf of the appellant, passed an order directing the Registry to place the matter before the Hon'ble the Chief Justice for appropriate orders for posting C.A. No. 1/2021 and R.P. No.860/2020 before the learned Judge before whom it was listed on 09.12.2020. Accordingly, C.A. No. 1 of 2021 and R.P. No.860/2020 were posted and thereupon, on 18.02.2021, the learned Company Judge dismissed C.A. No.1/2021 in C.P. No.2/1996 and the present Company Appeal has been filed against the same. R.P.No.860/2020 was also dismissed by separate order. The Learned Company Judge while dismissing the Company Application No. 1/ 2021 observed; "I find from the order sheet that no orders have been passed by this Court permitting petitioner to remit the amount. In the facts and circumstances, there was no reason to issue any oral direction as well. Furthermore, the Official Liquidator had filed an application before this Court seeking to re-tender the sale of ingots and the same has already been allowed. The order passed by the Official Liquidator forfeiting the EMD also stands unchallenged. The mischief is apparent as the petitioner has gone to the extent of contending that the amount ordered to be paid is inclusive of the EMD, which has already been forfeited. This is a fit case wherein exemplary cost is to be imposed. However, considering the submission of Smt.Bindu George, I refrain from doing so. Annexure-A1 demand draft shall be returned to the petitioner forthwith".

12. Heard the learned Counsel for the appellant and the respondents. 13. It can be seen that the appellant is not having a consistent stand before the Court. By Annexure-R3 he requested for return of EMD on the ground that he has not been intimated as to whether he is the successful bidder. After receiving Annexure-R2 communication from the Official Liquidator regarding confirmation of sale also the appellant by Annexure-R4 informed the Official Liquidator that he is not intending to proceed with the sale and requested for return of EMD. The appellant filed Company Application No.75/2020 to set aside Annexure- R6 letter of the Official Liquidator whereby the EMD was forfeited. The appellant then turned around and filed C.A. No.76/2020 for direction to allow the appellant to remit the balance sale consideration in two installments within 3 months from the date of order after deducting the amount deposited as EMD. Later, the appellant filed C.A. No.78/2020 for direction for refund of EMD.Still later, C.A. No. 01/2021 was filed for direction to confirm the sale in favour of the appellant as

'directed' by the Court on 09.12.2020. The appellant cannot take inconsistent positions before the Court .

14. The appellant did not avail of the opportunity to remit the balance sale consideration within the time granted and did not seek extension of time to deposit the balance sale consideration. On the contrary, the only request of the appellant was for return of the EMD. Since the balance sale consideration was not remitted, the EMD was forfeited on 07.02.2020. The Court also allowed the Official Liquidator to re-tender the sale of copper ingots. Long after the forfeiture of the EMD, on 22.09.2020, the appellant comes up with applications to set aside Annexure-R6 letter dated 07.02.2020 whereby the EMD was forfeited and to allow the applicant to remit the balance sale consideration in installments. This exercise, appears to us as without any bonafides. As rightly pointed out by the learned Company Judge, no explanation is offered by the appellant for the long delay in approaching the Court.

15. Things did not stop there. The appellant at this juncture comes up with C.A. No.1/2021 stating that, in accordance with the oral direction of the learned Company Judge on 09.12.2020, the appellant remitted an amount of Rs. 21,31,920/- on 16.12.2020 and prayed for confirming the sale in favour of the appellant. The learned Company Judge referring to the order sheet, which is sacrosanct, observed that no orders have been passed by the Court permitting the appellant to remit the amount. The learned Company Judge also observed that in the facts and circumstances, there was no reason to issue any oral direction as well. The EMD was already forfeited and was not interfered with. The learned Company Judge is right in observing that the mischief is apparent as the appellant had gone to the extent of contending that the amount ordered to be paid is inclusive of the EMD, which had already been forfeited. The learned Company Judge took a very lenient view and refrained from imposing cost.

16. Things did not stop there too. In the memorandum of company appeal, it is reiterated by the appellant that, when the review petition as well C.A No.78/2020 came up for consideration on 08.12.2020, the learned Company Judge orally directed the appellant to remit the sale consideration and it is with the authority of law, the appellant remitted the sale consideration on 16.12.2020.

17. On perusing the order sheet of this Court in C.A.No.78/2020 and R.P. No.860/2020, we find that there was no posting of the above cases on 08.12.2020, whereas, the above cases were posted on 09.12.2020 before the learned Company Judge. In the affidavit filed in support of C.A. No.1/2021, it is stated that the direction to remit the amount was issued on 09.12.2020. It was further averred that the same was an oral direction. The learned Company Judge has categorically stated that no oral direction was issued by the Court. We agree with the finding of the learned Company Judge that the contention of the appellant that the Court had orally directed the appellant to remit the amount is clearly an attempt to resuscitate the C.A.Nos. 75 and 76 of 2020, which were already dismissed. Copper does not rust; but the appellant has come to Court

with rusted hands.

18. Before parting with this appeal, we have to advert to one ground taken by the appellant that the copper ingots if sold in re-auction would not fetch more price than what was quoted by the appellant and remitted with the Official Liquidator, as according to the appellant the market of copper ingots is down day to day. After resiling from the offer after acceptance and after confirmation of sale and forfeiture of EMD, the appellant cannot be heard to raise such a contention. It is true that the auction has to fetch maximum price as it has to take care of the interests of various stakeholders who are entitled for the distribution of the proceeds of the sale of the assets of the company in liquidation. Apart from the statement of the appellant in the appeal memorandum, there are no other materials before this Court to infer that a re-auction would not fetch more price than what was quoted by the appellant. Further, the appellant cannot be permitted to take advantage of his own wrong. The Company Court would not confirm the sale on re-auction, if best prices are not secured. Therefore, the said contention of the appellant is only to be rejected. Though we are also of the view that this is a fit case where exemplary cost is to be imposed, taking a lenient view, we refrain from doing so.

The appeal is accordingly dismissed.

