
(2005) 03 P&H CK 0061

In the Punjab And Haryana At Chandigarh

Case No : Company Application No. 650 of 2004 in Company Application No. 775 of 2003 in Company Petition No. 226 of 1999

Punjab Wireless Systems Limited

APPELLANT

Vs

The Indian Overseas Bank and Others

RESPONDENT

Date of Decision : 30-03-2005

Acts Referred:

Companies (Court) Rules, 1959 — Rule 272, 273, 6, 9
Companies Act, 1956 — Section 391, 433, 434, 447, 455

Citation : (2005) 4 BC 359 : (2005) 126 CompCas 554 : (2005) 140 PLR 462 : (2005) 2 RCR(Civil) 401

Hon'ble Judges : M.M. Kumar, J

Bench : Single Bench

Advocate : Abhishek M. Singhvi, Dhruv Mehta and Deepak Suri, Vivek Bhandari, for the Appellant; B.B. Bagga, for Respondent Nos. 1, 2, 4, 5 and 6, Anand Chhibbar, Rohit Sapra, Jaishree Thakur, Manish Jain, S.C. Nagpal and P.K. Gupta for Punwire Employees Union, for the Respondent

Judgement

M.M. Kumar, J.—This order shall dispose of numerous applications filed in C.P. No. 226 of 1999 which include CA 650 of 2004, 18, 28, 72, 94, 185 and 228 and 2.005. All these applications have been filed in respect of confirmation, higher bid and other related issues connected with the sale of assets of the company in liquidation, namely, the Punjab Wireless Systems Limited (for brevity, "PUNWIRE").

2. The background facts are necessary to provide proper perspective and focus to the controversy raised in these applications. The company in liquidation, namely, PUN-WIRE had been running into rough weather which resulted in filing a winding up petition in this Court being C.P. No. 226 of 1999 under Sections 433 and 434 of the Companies Act, 1956 (for brevity, "the Act"). The aforementioned petition was allowed on 1.2.2001 and the Official Liquidator was appointed the liquidator. It is pertinent to mention that before passing order dated 1.2.2001 for winding up the PUNWIRE finally, this Court had appointed a provisional liquidator

vide its order dated 27.7.2000 passed in CA No. 705 of 1999. After the order of winding up, the Official Liquidator filed CA. No. 775 of 2003 for permission to sell the assets and properties of the PUNWIRE. The aforementioned CA No. 775 of 2003 was allowed by accepting the prayer of the Official Liquidator to sell the assets and properties of the PUNWIRE vide order dated 4.1.2003. Thereafter, a sale committee was constituted to work out the modalities for auctioning of the properties of the PUNWIRE which comprised of the Official Liquidator and representatives of the secured creditors. It was decided that the auction of the assets and properties of PUNWIRE was to be conducted by inviting sealed tenders in the office of Official Liquidator by creating separate lots as prepared by the sale committee. Accordingly, a tender notice was floated on 15.6.2004 which was published on 25.6.2004 in various leading newspapers, namely. The Economic Times (All India Edition), Times of India (All India edition) The Tribune (All edition), Punjab Kesri (Hindi), Ambala, Delhi and Jalandhar Editions and Jagbani (Punjabi), Jalandhar edition. According to the tender notice, the properties and assets of PUNWIRE were bifurcated in 25 lots. The reserve price of each lot along with earnest money in respect thereof have been specified. The tender further pointed out the date of inspection, last date of receipt of tenders upto 11.00 A.M. and date of opening of tenders on the same day at 1.00 P.M.. The tenderer was required to submit separate tender for each lot along with earnest money through Bank Draft in favour of the Official Liquidator's account Punjab Wireless Systems Limited payable at Chandigarh. The Official Liquidator and the committee was given the power to reject any offer without assigning any reason if it thought fit, it could allow inter se bidding amongst participating bidders. The sale was of course subject to the confirmation by this Court. According to Clause 13 of the terms and conditions of the tender notice, the bid for complete factory premises or all assets at B-53, B-55, B-76 and B-77 was to be preferred for which earnest money required to be deposited was Rs. 2 Crore and reserve price kept was Rs. 25 crores. One of the tenderers was M/s Winsome Yarns Ltd. (for brevity, "the auction purchaser" for lot No. 17 (consisting of land and building) Lot No. 19 (consisting of furniture) and lot No. 20 (consisting of air conditioners). The other bidders were M/s Star Point Financial Services Ltd. and M/s S.K. Khaitan and Company for Lot No. 17. The Official Liquidator along with the sale committee opened the tenders on 26.7.2004 and 28.7.2004 in the presence of all the members of the sale committee and various representatives of the tenderers. In respect of Lot No. 17 which was for B-77, Industrial Area, Phase VII, S.A.S. Nagar (Mohali), the auction purchaser had offered Rs. 3.15 crore for the land and building. The sale committee comprised of the Official Liquidator and representatives of the secured creditors decided that since no tender had been received for machinery, it would be difficult to sell the land of this building because the machines would be required to be shifted to another premises which may result into damage to those machines. This tender was opened on 27.7.2004. However, the decision was deferred by retaining the offer of the auction purchaser for some time so as to take a decision after looking into other tenders in respect of furniture and fixtures and other miscellaneous items.

On 28.7.2004, the tender in respect of Lot Nos. 19 and 20 comprised of furniture and air conditioners respectively was opened. The auction purchaser had offered Rs. 4.50 lacs for lot No. 19 against the reserve price of Rs. 4 lacs and the sale committee expressed the opinion for moving appropriate application for consideration of this Court. The other tenders in respect of this lot, namely Rajdhani Cables (India) were not found qualified as no negotiable instrument of any cash showing the payment of earnest money was attached. For lot No. 20 comprised of air conditioners again the auction purchaser had offered Rs. 15.50 lacs on the condition that lot No. 17 is also sold to it at a price offered by it. The sale committee expressed the opinion to send an invitation for offer to the auction purchaser for lot Nos. 17, 18, 19 and 20 asking it to offer at least Rs. 5 crore. It was also agreed to mention in the letter that it could come forward for further negotiations if so desired.

3. The Official Liquidator on 30.9.2004 filed CA No. 650 of 2004 u/s 455 of the Act read with Rule 6 and 9 of the Companies (Court) Rules, 1959 (for brevity, "the Rules") in which prayer was made that the following prospective bidders may be called upon for inter se bidding in the Court in respect of land and building comprised in the premises marked as B-77, Phase VII, Mohali, Lot No. 17:-

a) Winsome Yarns Limited, S.C.O. No. 191-192, Sector 34-A, Chandigarh.

b) Star Point Financial Services Pvt. Ltd., H. No. 680, Sector 6, Panchkula.

(c) S.K. Kaitan & Co, S.C.O. No. 54, 2nd Floor, Sector 26, Chandigarh.

4. In respect of Lot No. 19 recommendation was made to consider the offer received by the Official Liquidator for sale in favour of the auction purchaser. For Lot No. 20 it is averred in paragraph 9 of the application that the auction purchaser had offered Rs. 15.50 lacs in respect of the aforementioned lot on the condition that if lot No. 17 be sold to it at the price offered by it. The aforementioned offer of the auction purchaser was sent back with a counter offer of the sale committee to give bid for lot Nos. 17, 18 19 and 20 respectively for at least Rs. 5 Crore.

5. The secured creditors, namely the Indian Overseas Bank- respondent No. 1, Canara Bank, respondent No. 2, State Bank of Patiala, State Bank of India and IDBI Bank (respondents 4 to 6) in their joint reply have stated that they hold second charge on the fixed assets of the PUNWIRE along with Deutsche Bank, New Delhi, respondent No. 3. It has further been asserted in paragraph 12 of the reply that the machinery attached to the plots and building comprised in Plot No. B-77, Phase VII, S.A.S. Nagar (Mohali) should be sold first so as to avoid any payment of rent, shifting expenses and costs of dismantling the machinery. In the end, the prayer has been made to issue directions to the Official Liquidator to take effective and prompt steps for disposal of current assets because delay is likely to cause substantial dilution of the value of assets.

6. On 10.12.2004, inter se bidding was held between the auction purchaser and M/s Star Point Financial Services Limited in respect of Lot No. 17. Against highest bid of the auction purchaser received by the Official Liquidator, the company M/s Star Point Financial Services Limited made an offer of Rs. 3.15 crores which was further toppled by the auction purchaser by offering higher bid of Rs. 3.16 crores. The Official Liquidator supported the view that the highest bid of the auction purchaser in respect of Lot No. 17 deserved to be accepted. While noticing the objection raised on behalf of the secured creditors that moveable items including plant and machinery should be sold first and the confirmation of sale of the land and properly styled as B-77, Industrial Area, Phase VII, S.A.S. Nagar (Mohali) be deferred, this Court confirmed the sale of Lot Nos. 17, 19 and 20 in favour of the auction purchaser. The operative part of the order dated 10.12.2004 is reproduced hereunder for facility of reference:-

"After hearing the counsel for the parties, I am of the considered view that sale in favour of the auction purchaser deserves to be confirmed because it has been pointed out by the learned counsel for the Official Liquidator that according to the valuation report, the value of moveable property which include machinery plant etc. is about 20 lacs. Therefore, the meagre expenses in the shape of payment may have to be incurred for securing the same elsewhere. At the same time a substantive amount would fall in the hand of the Official Liquidator for its disbursement in accordance with law to the secured creditors and others. Therefore, the objection raised cannot be sustained.

In view of the above, the sale is confirmed in favour of the auction purchaser namely Winson (Winsome sic) Yarns Ltd., subject to the condition that the sale is on where is, whatever is, wherever is basis. Let all steps be taken by the auction purchaser to deposit the balance amount within a period of 30 days from today. However, the amount deposited by the intervener namely M/s Star Point Financial Pvt. Ltd. and M/s S.K. Khaitan Pvt. Ltd. Co. be returned forthwith which is retained in form of Bank Drafts, which are attached to the papers supplied to this Court in sealed covered. On the direction issue, the Bench Secretary has opened the envelopes and handed over the respective drafts to the respective learned counsel.

The auction purchaser has also given a bid in respect of Lot Nos. 19 and 20 which comprised of furniture and air conditioner respectively. In respect of the prayer made regarding other lots, let a list of prospective buyers be furnished to the office with their complete addresses so that notice be issued to them for 28.1.2005. To come up for further consideration.

Copy of the order be given Dasti."

7. In pursuance to the confirmation of sale in favour of the auction purchaser in respect of lot Nos. 17, 19 and 20 for a total sum of Rs. 3.36 crores (Rs. 3.16 crores, Rs. 15.50 lacs and Rs. 4.50 lacs respectively), the total payment was made by the auction purchaser on 13.12.2004 with a request to hand over

possession on that day itself. On 16.12.2004 possession of lot No. 17 (land, building and partitions) was given. However, in respect of lot No. 19 comprising furniture and Lot No. 20 comprising air conditioners possession was also given. The security of the auction purchaser was deputed. The assets which were not sold and were found at the spot were given by the Official Liquidator under the superdari to the auction purchaser. On 21.12.2004, the auction purchaser is claimed to have availed a term loan of Rs. 1.64 crores from the Canara Bank and Rs. 1.38 crores from State Bank of Patiala on 6.1.2005 (total Rs. 3.02 crores) against the land and building situated at B-77, Industrial Area, Phase VII, Mohali. It is further claimed that to avail the term loan it has entered into an agreement to mortgage the land and building situated at B-77, Phase VII, Mohali with Canara Bank on 4.1.2005 and had also given an undertaking to create a mortgage in favour of State Bank of Patiala on 4.1.2005. Accordingly, the sale deed has to be deposited with those banks. Certain other steps were also taken by sending intimation to the Punjab Small Scale Industries Export Corporation (for brevity, "PSIEC") to transfer the land in favour of the auction purchaser.

8. On account of some omission in order dated 10.12.2004, CA No. 27 of 2005 was filed by the auction purchaser seeking clarification and on 13.1.2005, the clarification was issued by stating that sale in favour of the auction purchaser in respect of lot Nos. 19 and 20 has also been confirmed.

9. However, CA No. 72 of 2005 was filed by the Sun Group Enterprises Pvt. Ltd., New Delhi (for brevity, "the intervener") offering Rs. 12 crores to purchase the entire assets of PUNWIRE. The application is supported by an affidavit of Brig. Shamsher Singh (Retd.) son of Shri Ripudaman Singh. When the application came up for consideration of this Court on 28.1.2005, notice was issued to the auction purchaser and the Official Liquidator on the condition that a demand draft of Rs. 2 Crore be deposited with the Official Liquidator on or before 4.2.2005. It was further directed that any other offer may be filed with the Official Liquidator and the Official Liquidator was restrained from executing the sale deed in favour of the auction purchaser. According to the averments made in CA No. 72 of 2005, the intervener is a recognised largest Indian owned investment and marketing organisation in Russia. It is further claimed that net worth of this group as on 31.3.2004 is US Dollars 4,310,103. In paragraph 2 of the application, it is claimed that the Punjab Government had constituted a high powered core group under the Chairmanship of the Finance Minister to formulate a scheme for revival of the company. The intervener appears to have shown interest for the beneficial exploitation of the assets of the company and a visit to the factory premises of the PUNWIRE was undertaken on 28.12.2004, after taking due permission from the Official Liquidator. It was concluded that since PUNWIRE was involved in manufacturing of hitech electronic equipment and research, in case the assets were purchased en bloc as a going concern, if upgraded and production activities are raised, it would generate substantial social and economic benefits to the region in terms of employment opportunities and revenue generation. The intervener was eventually advised by the Secretary,

Industries Punjab to approach the Official Liquidator to purchase the assets of PUNWIRE and thereafter the application was filed on the tendered documents. It is claiming that the bids received in respect of land and build(sic) situated at B-77, Phase VII, Industrial Area, Mohali would not be in the interest of PUNWIRE because it was likely that the machines have to be sold as scrap keeping in view the nature of machinery and non-availability of buyers. The intervener has then made an offer of Rs. 12 crores for entire assets of PUNWIRE which included land and building situated at B-77, Industrial Area, Phase VII, Mohali. The applicant has asserted that it would be in the interest of justice, equity and public interest to sell the property of PUNWIRE in one lot rather than in different lots.

10. A detailed reply has been filed by the auction purchaser claiming that it had acquired vested rights after confirmation of auction by this Court on 10.12.2004 deposit of total amount on 13.12.2004 and taking of possession on 16.12.2004. It is claimed that the reserve price is Rs. 40 crores and the offer of Rs. 12 crores is woefully low. It has been pointed out that the property included in lot No. 25 situated at Bombay alone is kept at the reserve price of Rs. 8 crore and the offer of Rs. 12 crore for the entire assets of PUNWIRE being far below the reserve price amounted to playing a fraud and such an offer would not serve the interest of the company or anyone else. The application is said to be filed beyond the last date of submission of tenders. The application has also been opposed on the ground of mala fide as Mr. B.S. Baidwan is stated to be well aware of the liquidation proceedings. No scheme of revival has been put forward. A reference has also been made to an order dated 9.9.2004 passed by this Court dismissing CA No. 554 of 2004. The aforementioned application was filed by the PSIDC by asserting that the Core Group is likely to formulate a scheme for rehabilitating the PUNWIRE and the workmen of PUNWIRE were pressing the State Government to do so. As nothing was placed on record to explain as to how the aforementioned Core Group of PUNWIRE was likely to meet the gigantic financial liability assessed by the Provisional Liquidator, the application was dismissed. No scheme of arrangement envisaged by Section 391 of the Act has been framed. A prayer has been made for dismissal of the application being malafide.

11. Another application has been filed by the PUNWIRE Employees Union (for brevity, the Union) opposing the confirmation of sale and for recalling order dated 10.12.2004. It is claimed that u/s 529-A of the Act, the dues of the employees are equivalent to the dues of the secured creditors and they are entitled to pari passu alongwith the secured creditors. It has been mentioned that the Official Liquidator has not associated the Union. No Communication is alleged to have been received by the Union for meetings in connection with the sale of assets of PUNWIRE which could have put forward better buyers. The aforementioned assertions have been made in CA No. 185 of 2005.

12. CA No. 94 of 2005 has been filed by the auction purchaser for vacation of stay order dated 28.1.2005 by giving detailed steps after the confirmation of sale in respect of lot Nos. 17, 19 and 20. Various documents showing making of

payment, taking of possession and disbursement of loan against the purchased property comprised in Lot No. 17 have been given. All these developments have already been noticed in the preceding paras.

13. Dr. Abhishek Mr. Singhvi, learned counsel appearing for the auction purchaser has argued that mere inadequacy of price cannot be considered as a basis for setting aside a confirmed bid because if the Court sales are not finalised promptly and are frequently adjourned in order to obtain best, better and bestest buyer, then the prospective bidder would lose faith in the Court sale. Learned counsel has referred to the observations of the Supreme Court in the case of *Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others*, . learned counsel has invoked the principle of administrative law of Legitimate Expectation and has argued that this Court should not accept any toppling bid, at this stage, because it would amount to forcing the auction purchaser to again come up with a higher bid which would be arbitrary. In support of his submission, learned counsel has placed reliance on a judgment of the Supreme Court in the case of *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, . It has further been argued that once the highest bid has been accepted at the auction, the Court must see that the price fetched is adequate and thereafter no subsequent higher bid would constitute a valid ground for refusing confirmation of sale or declining the offer already received. In that regard, reliance has been placed on a judgment of the Supreme Court in the case of *Navalkha and Sons Vs. Ramanuja Das and Others*, . Describing the Sun Group - intervener as the trouble maker, the learned counsel has argued that it is for it to show that there is real need to set aside the auction or presence of any perversity and unfairness in conducting that auction. The higher bid of the auction purchaser cannot be by passed by accepting a bid made later by moving application by the intervener before this Court. In that regard, learned counsel has placed reliance on a judgment of the Supreme Court which is in respect of the liquor vends in the Punjab, namely, *State of Punjab v. Yoginder Sharma Onkar Rai & Co. and Ors.* (1966)6 S.C.C. 173 and has argued that the finality of auction must be recognized because it would be in the interest of the company in liquidation and its secured creditors. Learned counsel has emphasized that if re-auction is ordered without inadequate material, then the company is likely to suffer far greater damages. Challenging the locus standi of the intervener to participate in auction at such a belated stage, learned counsel has argued that there was ample opportunity for the intervener to come forward and participate in the auction proceedings before this Court.

14. It has been emphasized that application is mala fide as the member of the Core Group Mr. B.S. Baidwan has been keeping a watch over the proceedings and was well aware of auction. It has been maintained that the course adopted by the intervener is a deliberate attempt to interfere in the vested rights of the auction purchaser and to cause further delay in finalisation of the sale to the prejudice of secured creditors and the workmen. It is conceded, however, that this court is not functus officio but it must see whether in the given facts and

circumstances a confirmed sale, as in this case the sale confirmed on 10.12.2004, should be set aside especially when possession has already been delivered and various steps to the detriment of the auction purchaser have been taken. Learned counsel has made a reference to the loan advanced against the land and the building by the Canara Bank as well as by State Bank of Patiala. He has also referred to the undertaking creating mortgage in their favour. Placing reliance on a judgment of the Supreme Court in Divya Manufacturing Company (P) Ltd. Vs. Union Bank of India and Others, learned counsel has argued that no new bidder like the intervener should have been permitted to participate in the auction and the application is liable to be dismissed. Dr. Singhvi has further submitted that the usual clause in the terms and conditions like the one found incorporated in the terms and conditions concerning the case Divya Manufacturing Company (supra) which empowered the Court to set aside the sale, even after it is confirmed is conspicuously absent from the sale notice which further shows that the sale by the Official Liquidator or by this Court was not even subject to confirmation.

15. Mr. Vivek Bhandari, learned counsel appearing for the intervener has argued that basic principle underlying the proceedings for winding up of the company in liquidation is to achieve optimum welfare of the creditors and to ensure that the maximum price is received by the PUNWIRE. Learned counsel has made a reference to the judgment of the Supreme Court in the case of Union Bank of India Vs. Official Liquidator H.C. of Calcutta and Others, and has argued that judgment of the Supreme Court in Kayjay Industries (P) Ltd.'s case (supra) and Navalkha & Sons's case (supra), on which reliance has been placed by Dr. Abhisek M. Singhvi, have been considered and the argument that mere inadequacy of price cannot constitute the basis for setting aside the confirmed sale has been specifically rejected. Mr. Bhandari has drawn my attention to paragraphs 17 and 18 of the judgment. According to Mr. Bhandari it is the duty of the Official Liquidator to make all efforts to realise best possible price from the sale of assets and properties of PUNWIRE because this is an obligation to the creditors of the company. Learned counsel has placed reliance on paragraph 21 of the judgment of the Supreme Court in the case of Allahabad Bank etc. etc. Vs. Bengal Paper Mills Co. Ltd. and Others, and argued that whatever equitable rights might have arisen in favour of the auction purchaser have been off set by the interest of PUNWIRE, its secured, unsecured creditors and the workmen. The expenditure incurred by the auction purchaser in the form of interest etc. is insignificant in the face of the interest of the secured, unsecured creditors as well as its workmen. Learned counsel has drawn my pointed attention to the observations made by the Supreme Court in paragraphs 21, 23, 24 and 25 of the judgment in Allahabad Bank's case (supra). Mr. Bhandari has stated at the bar after obtaining instructions from Major General Amar Singh Sehgal, Director that the intervener is prepared to compensate to the extent of interest and litigation charges which might have been incurred by the auction purchaser. Mr. Bhandari has then made submission based on the judgment of the Supreme Court in Divya

Manufacturing Company (P) Ltd."s case (supra) and argued that it is the primary duty of the Court to see that the price fetched at the auction is adequate price even though there is no suggestion of irregularity or fraud. Referring to the argument raised in paragraph 9 of the judgment which is to the effect that after the sale is confirmed, subsequent higher offer cannot constitute a valid ground for setting it aside learned counsel has submitted that the aforementioned argument was specifically rejected. Learned counsel has placed reliance on paragraphs 13 and 16 of the judgment. Mr. Bhandari has also placed reliance on another judgment of the Supreme Court in the case of LICA (P) Ltd. v. Official Liquidator (1996)85 CC 792 [788] to buttress his stand that the purpose of open auction is to fetch most remunerated price and its duty to keep openness of the auction so that the intending bidders are free to participate and offer higher value. It has been emphasized that if the path is out down, the possibility of fraud or to secure the best price would be a mirage. Mr. Bhandari has refuted the argument advanced on behalf of the auction purchaser that the omission to incorporate the terms and conditions that the sale would be subject to confirmation of the Court is not intentional but an inadvertent act. According to him, it would not mean that this Court has no power to confirm the sale. Learned counsel has made a reference Rule 9 of the Rules and Section 457 of the Act to argue that omission to incorporate such a clause would not result into replacing Section 457 of the Act which postulates power of the liquidator who acts subject to the control of the court. The Official Liquidator through the Court is the custodian of the property of the Company. Mr. Bhandari has made an offer after obtaining instructions that for all the three lots the intervener is prepared to purchase the same in lump sum of Rs. 3.75 crores as against the confirmed rate of Rs. 3.36 crores in favour of the auction purchaser. The difference in both the bids is about Rs. 39 lacs.

16. Mr. S.C. Nagpal, learned counsel for the PUNWIRE Employees Union has submitted that u/s 529-A of the Act, the status of the Union is at par with a secured creditors. In no case it is less than that of a secured creditor and notices are required to be issued to the Union, if there is any proposal for sale of assets for the company. According to learned counsel, no notice to the Union has been issued warranting confirmation of sale. The aforementioned position is evident from Section 529-A of the Act as interpreted by the Supreme court in the case of Textile Labour Association and Anr. v. The Official Liquidator and Anr. J.T. 2004 S.C. 1. Learned counsel has further argued that there are about 500 workers who have been rendered jobless and 19 of them have already died. The proposal made by the intervener Sun Group has been whole heartedly supported by Mr. Nagpal by submitting that interest of workers would be best protected if the company is revived by giving the same to the intervener Sun Group.

17. The question which requires determination in these proceedings is whether this Court could set aside the confirmed sale dated 10.12.2004, on the ground of inadequacy of price and other related factors. It would be necessary to make a reference to Rules 272 and 273 of the Rules.

"R. 272. Sale to be subjected to sanction and to confirmation by Court - 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 be subject to confirmation by the Court.

R.273 Procedure at sale.- Every sale shall be held by the Official Liquidator, or, if the Judge shall so direct, by an agent or an auctioneer approved by the Court, and subject to such terms and conditions, if any, as may be approved by the Court. All sales shall be made by public auction or by inviting sealed tenders or in such manner as the Judges may direct."

18. A perusal of Rule 272 reveals that Official Liquidator cannot undertake sale of any property of a company in liquidation unless there is a previous sanction of the Court. There is further limitation on the power of the Official Liquidator which is to the effect that every sale is subject to confirmation by the Court. Rule 273 makes it obvious that all sales by the Official Liquidator required to be conducted by a public auction or by inviting sealed tenders or by any other mode as may be directed by the Court. It is also of paramount consideration that the interest of the Secured and Unsecured Creditors and the workmen of the company in liquidation are kept in view. These principles flow from a reading of Section 447 of the Act, which deals with the effect of winding up. Section 447 reads as under:-

"Section 447 Effect of winding up order:- An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if it had been made on the joint petition of a creditor and or a contributory."

19. A perusal of the afore-mentioned provision makes it clear that once an order of winding up has been made as has been done in the instant case, vide order dated 1.2.2001, then such an order of winding up operates in favour of the creditors and the contributories of the Company. All of them can avail the benefit of the order to themselves as if the order was passed on a petition filed by all of them jointly.

20. The provisions to which a reference has been made in the proceeding paragraphs have been the subject matter of consideration of the Supreme Court in a number of judgments. In Navalkha and Sons's case (supra), sale was set aside by the High Court on the ground that wide publicity as proposed originally was not given. The learned company judge refused to confirm the sale and confined the auction to two persons only. The Supreme Court while interpreting Rule 273 of the Rules held that since there was want of publicity and consequential lack of opportunity to the public to take part in the auction, the method adopted by the Company Judge was held to be prejudicial by the Division Bench on appeal. The opinion expressed by the Division Bench in directing fresh sale was upheld by the Supreme Court. The rationale adopted by the Supreme

Court in Navalkha and Sons's case (supra), is that after the Official Liquidator has conducted public auction, the auction purchaser does not acquire an automatic right of confirmation of his offer. The confirmation which is required to be made by the company Court is a safeguard against the property being sold at an inadequate price irrespective of any material irregularity or fraud in conducting the sale. However, it was emphasized, it is the duty of the Court to ensure about the adequacy of the price before confirmation. In this regard, the observations of the Supreme court in Navalkha and Sons's case (supra), reads as under: -

"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 is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. In Gordon Das Chuni Lal Dakuwala Vs. T. Sriman Kanthimathinatha Pillai and Another, 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 that the price fixed is the best that could be expected to be offered. That is because the Court is the custodian of the interest of the Company and its creditors and the sanction of the Court required under the Companies Act has to be exercised with judicial discretion regarding being had to the interests of the Company and its creditors as well. This principle was followed in Rathnaswami Pillai v. Sadapathi Pillai AIR 1925 Mad. 318 and S. Soundarajan v. M/s Roshan & Co. In a. Subbaraya Mudaliar v. K. Sundarajan A.J.R. 1951 Mad. 986 it was pointed out 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 to 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. It is well to bear in mind the other principle which is equally well-settled namely 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."

21. It is, however, pertinent to mention that in Navalkha and Sons's case (supra), the confirmation order was yet to be passed and the auction held by the Official Liquidator was not confirmed by the Company Judge on account of inherent defect that wide publicity to the proposed auction was not given.

22. Similarly in Union Bank of India's case (supra), a confirmed sale has to be set aside by the Supreme Court because it was found that there was some misrepresentation with regard to the sale of the assets of the company as a going concern. The attention of the learned company Judge was not focussed to the fact that the company was closed since 1980 and there was no question of selling the assets of the Company as a going concern. A proper notice was required to be issued to the secured creditors with regard to the effect of sale on

1200 workers. The failure of the BFIR and AAIFR was also required to be taken into account. However, the foremost factor which weighed with the Court was inadequacy of price. Emphasising that aspect in para No. 10 of the judgment, the Supreme court observed as under:-

"At the outset, we would state that in proceedings for winding up of the company under liquidation, the Court acts as a custodial for the interest of the company and the creditors. Therefore, before sanctioning the sale of its assets, the Court is required to exercise judicial discretion to see that properties are sold at a reasonable price. For deciding what would be a reasonable price. Valuation report of an expert is must. Not only that, it is the duty of the Court to disclose the said valuation report to the secured creditors and other interested persons including the offerors. Further, it is the duty of the Court to apply its mind to the valuation report for verifying whether the report indicates reasonable market value of the property to be auctioned, even if objections are not raised."

23. Rejecting the argument that mere inadequacy of price cannot demolish every Court sale based on the earlier judgment of the Supreme court in Kayjay Industries (P) Ltd., v. Asnew Drums (P) Ltd., their Lordships observed as under:-

In our view, this submission requires to be rejected on the ground that in the said case, the Court has reproduced the paragraph which we have quoted above from the decision in Navalkha and Sons wherein the Court has specifically held that the condition of confirmation by the Court operates as safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale; the Court is required to satisfy itself that having regard to the market value of the property the price offered is reasonable; unless the Court is satisfied about the adequacy of the price the act of confirmation of sale would not be proper exercise of judicial discretion. This aspects reiterated by the Court by holding that the aforesaid principles must govern every Court sale. The Court has also observed that failure to apply its mind to the material factors bearing on the reasonableness of the price offered may amount to material irregularity in conduct of sale.

24. It is thus obvious that the power of the Court to set aside even confirmed sale if unassailable. The judgment of the Supreme Court in Navalkha and Sons's case (supra) has not dealt with such a power. However, in Union Bank of India's case (supra), the view taken in Navalkha and sons's case (supra) has been considered. Emphasising that the object of sale is to apply the sale proceeds to meet the claims of the creditors of the Company, the Supreme Court in the case of Allahabad Bank etc. etc. Vs. Bengal Paper Mills Co. Ltd. and Others, , has held that it is duty of the Courts to ensure that the best possible price is realised by sale of the assets and the properties of the Company in liquidation as it is obliged to the creditors for undertaking such a course. It was noticed that the learned Company Judge had ordered possession to be delivered to the Official Liquidator hastily and concluded that the auction purchasers should have realised that the order of sale could be set aside when any expenditure incurred by the auction

purchaser was at his own risk. It was also observed that the interest of the creditors of the Company, particularly those of the unsecured creditors overweighed such equities. The observations of their Lordships in this regard read as under:-

"The second respondent knew that the appeals were pending and that they could end in the order of sale being set aside. Such expenditure as it incurred with this knowledge was at its risk. In the third place, and most important, the interests of the creditors of the Company, particularly the unsecured creditors, overweighed such equities, if any, as might have been considered to be in favour of the second respondent. It was, in our view, the obligation of the Division Bench to have struck down the order of sale having regard to what it found wrong with it.

25.....The second respondent knew that the appeals were pending. It should have appreciated that the order of sale was very vulnerable, given what the Division Bench of the High Court had to say about it. It consciously took the risk of incurring the expenditure and obligations and it cannot take shelter behind him."

25. The judgment in the case of Divya Manufacturing Company (P) Ltd., (supra) has clarified any doubt about setting aside a sale even after confirmation holding that a subsequent higher offer can constitute a valid ground for doing so. In that case, the sale was confirmed for price of Rs. 1.30 crores but subsequently before possession of the property could be handed over or sale deed could be executed in favour of the auction purchaser, some interveners came and pointed out that the assets of the Company could fetch Rs. 2 crores. Both the interveners deposited Rs. 40 lacs each and also undertook to pay damages to the auction purchaser. The Division Bench of the High Court after taking into consideration all the relevant facts, ordered resale of the assets of the Company. The order of the Division Bench was upheld by the Supreme Court after referring to the judgments in Navalkha and Sons case (supra) and LICA (P) Ltd. (1) and LICA (P) Ltd. (2) (supra). Relying and explaining various earlier judgments of the Supreme Court, it was held as under:-

"16.....The offer of Rs. 1.30 crores is totally inadequate in comparison to the offer of Rs. 2 crores and in case where such higher price is offered, it would be in the interest of the Company and its creditors to set-aside the sale. This may cause some inconvenience or loss to the highest bidder but that cannot be helped in view of the fact that such sales are conducted in Court precincts and not by a business house well versed in the market forces and prices. Confirmation of the sale by a court at a grossly inadequate price, whether or not it is a consequence of any irregularity or fraud in the conduct of sale, could be set aside on the ground that it was not just and proper exercise of judicial discretion. In such cases, a meaningful intervention by the Court may prevent, to some extent, underbidding at the time of auction through Court. In the present case, the Court has reviewed its exercise of judicial discretion within the shortest time."

26. The aforementioned survey of case law clearly lays down that this Court is clothed with the powers to set aside even a confirmed sale provided it comes to the conclusion that the price offered by the auction purchaser in fact was inadequate. Such power is not dependent on any finding that there was material irregularity or commission of fraud in the process of sale, adopted by the Official Liquidator. It is also significant to notice that Dr. Singhvi appearing for the auction purchaser has also conceded such a power of the Court. The question which arises is whether in the facts and circumstances of the case, the sale confirmed in favour of the auction purchaser should be set aside or the plea raised by the interveners should be rejected.

27. The following circumstances may persuade the Court to lean in favour of the auction purchaser:-

(a) participation in the tender proceedings in accordance with the time table notified by the Official Liquidator.

(b) on time payment of earnest money and on confirmation vide order dated 10.12.2004, payment of whole amount on 13.12.2004;

(c) approval to disburse loan by Canara Bank to the extent of Rs. 1.61 crores dated 21.12.2004;

(d) approval for disbursement of term loan of Rs. 1.30 crores being share of the State Bank of Patiala (Annexure A-14) with CA No. 94 of 2005) dated 4.1.2005;

(e) agreement to mortgage the purchased land and building of Lot No. 17 with Canara Bank and the State Bank of Patiala;

(f) delivery of possession of land and building comprised in Lot No. 17, the furniture comprised in Lot No. 19 and the air conditioners comprised in Lot No. 20.

(g) the price offered is more than the reserve price. As far Lot No. 17, the reserve price is Rs. 3 crore, for Lot No. 19 Rs. .4 lacs and for Lot No. 20 Rs. 15 lacs. The price offered and accepted is Rs. 316 crores, Rs. 4.5 lacs and Rs. 15.5 lacs and the total comes to Rs. 3.36 crores.

28. The following factors may persuade the Court to lean in favour of the intervener:-

(a) participation at the stage when the proceedings are pending, although confirmation has been made on December 10, 2004 in respect of Lot Nos. 17, 19 and 20 in favour of the auction purchaser;

(b) Rs. 3.75 crores for Lot Nos. 17, 19 and 20 as a lump sum price as against the offer of the auction purchaser of Rs. 3.36 crores. All liquidation expenses and interest incurred on the loan approved upon released by the Banks is undertaken to be paid back. The possibility of reviving the company back to its life by making higher offer to purchase the whole company;

(c) more effective care of the secured and unsecured creditors as well as of the workmen;

(d) views of the employees union with regard to sale have not been ascertained.

29. The auction purchaser has offered the highest bid of Rs. 3.14 crores for land and building in respect of Lot No. 17. The Official Liquidator had listed only three bidders, namely, (a) auction purchaser, (b) M/s Star Point Financial Services Limited and (c) S.K. Khaitan and Company and a prayer was made to the Court to consider the offers received by the Official Liquidator for sale of land and building from the aforementioned three firms/companies. On 10.12.2004 inter-se bidding was held in the Court between the two participants who were the auction purchasers and M/s Star Point Financial Services Limited. Against the offer of Rs. 3.14 crores, M/s Star Point Financial Services Limited made an offer of Rs. 3.15 crores which was further toppled by the auction purchaser by offering higher bid of Rs. 3.16 crores. According to the advertisement, reserve price for Lot No. 17, was Rs. 3.00 crores. Similarly, in respect of Lot Nos. 19 and 20, a reserved price of Rs. 4.00 lacs and Rs. 15.00 lacs respectively was kept. The auction purchaser in their tender for Lot No. 20, which comprises of air conditioners, had offered Rs. 15.50 lacs on the condition that Lot No. 17 be sold to it at the price offered by it. It has also made an offer in respect of Lot No, 19 for which it had offered Rs. 4.50 lacs. It is evident that Lot No. 17, which comprises of land and building is the prime Lot. The Official Liquidator received only three offers and in the inter-se bidding, only two bidders, namely, auction purchaser and M/s Star Point Financial Services Limited participated. This fact further shows that the auction purchaser succeeded in confirmation of sale at an inadequate price. It is true that wide publicity had been given and there might be delay on the part of intervener, namely, Sun Group Enterprises (P) Limited in making the offer, hiking the bid much higher. During the course of arguments, Mr. Bhandari has offered Rs. 3.75 crores for all the three lots as against Rs. 3.36 crores, for which the sale has been confirmed in favour of the auction purchaser. There is thus a difference of Rs. 39 lacs. The learned counsel further made a statement to compensate the auction purchaser for all the expenses towards interest on financial damages suffered by them after taking into possession of the property. It appears to me that such a huge difference in the price of Lot Nos. 17, 19 and 20 can not be incidental. It has been repeatedly laid down by the Supreme Court that the Court is the custodian of the assets of the property of the Company on behalf of the secured and unsecured creditors as well as the workmen and it is the obligation of the Court to ensure that maximum price is fetched for the property and the assets of the Company. Therefore, I am inclined to recall the order of confirmation dated 10.12.2004 made in favour of the auction purchaser.

30. I am further of the view that the workmen have over-riding claim to that of the secured creditors as provided by Section 529-A of the Act. The dues claimed by the workmen and that due to the secured creditors are to be treated paripassu. The dues of the workmen have to be treated as prior to all other dues.

The Official Liquidator has failed to associate the workmen in the process of sale of the company. The interest of the workmen is in no way insignificant than the interest of the secured creditors in the company under liquidation. For that reason also, the order dated 10.12.2004 requires to be recalled.

31. The argument of Dr. Singhvi, learned counsel for the auction purchase that inadequacy of price can not be considered as a basis for setting aside the confirmed bid or that there should be some element of perversity or unfairness in conducting the auction, in view of the law laid down in various paragraphs quoted from the judgment of the Hon'ble Supreme court in the case of Union Bank of India's case (supra), Divya Manufacturing Company (P) Ltd.'s case (supra) and Allahabad Bank's case (supra), can not be accepted. It is true that the reserve price and the price according to the valuation re-port are less than the price offered by the auction purchaser but it appears to be equally true that the land and the building price of Lot No. 17 is worth much more as the difference is huge.

32. The other argument based on the judgment of the Supreme Court in the case of State of Punjab v. Yoginder Sharma Onkar Rai & Co. and Ors., (1996)6 Supreme Court Cases 173, can not also be accepted because in that case the controversy related to the auction of liquor vend in the State of Punjab. There is no provision equivalent to Rule 272 of the Rules requiring that the sale by the Official Liquidator or the agent appointed by the Court is subject to confirmation by the Court. There can not be parallel situation between the sale of liquor vend and the present case. Therefore, I regret my inability to read the aforesaid judgment for the purpose of applying the same to the facts of the present case.

33. I am unable to persuade myself to the argument that there is any malafide on the part of the interveners to come up with the higher price in respect of Lot Nos. 17, 19 and 20. There is no nexus between the interveners and those who are placed in Core Group, as is sought to be projected during the course of arguments.

34. After the arguments were heard and orders reserved another application being CA No. 228 of 20054 has been filed for enhancing the bid in respect of Lot No. 23. However, in the present case, the dispute is in respect of Lot Nos. 17, 19 and 20. Therefore, the application is not maintainable and the same is accordingly dismissed.

35. For the reasons stated above, the order of confirmation dated 10.12.2004, as clarified on 13.1.2005, is set-aside. The auction purchaser, namely M/s Winsome Yarns Limited are directed to hand over the possession of Lot Nos. 17, 19 and 20 to the Official Liquidator immediately. As per the undertaking of the intervener namely Sun Group Enterprises (P:) Limited the auction purchaser would be entitled to recover the amount of interest paid by it to the bank on the loan taken by it on actual basis. Such bill in respect of the interest shall be presented to the official liquidator within one week from today and the Official Liquidator

shall ensure the payment of the aforesaid bill from the interveners to the auction purchaser. It would be appropriate for the Official Liquidator to undertake the exercise of re-auction of Lot Nos. 17, 19 and 20. The expenses for re-auction shall be borne by the interveners, namely, M/s Sun Group Enterprises (P) Ltd.

The applications stands disposed of.