

(2012) 12 CAL CK 0044
In the Calcutta High Court
Case No : A.P.O. No. 366 of 2012

Siddheswari Cotton Mills Pvt. Ltd.

APPELLANT

Vs

Official Liquidator being Liquidator of M/s. Anantapur Textile
Ltd. (in liquidation)

RESPONDENT

Date of Decision : 04-12-2012

Acts Referred:

Companies Act, 1956 — Section 457, 457(1)(c)

Citation : (2012) 12 CAL CK 0044

Hon'ble Judges : Shukla Kabir (Sinha), J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Ratnanko Banerjee, Mr. Aniruddha Mitra and Mr. Imran Tarafdar, in APO No. 366 of 2012 and Mr. Subhankar Nag and Mr. Satadip Bhattacharya, s in APO No. 391 of 2012, for the Appellant; Dhruba Ghosh, Ms. Ahana Sikdar, Asit Kumar Hazra and M.K. Mukherjee, Advocates for the Respondent no. 2-25 in APO No. 366 of 2012 and APO No. 391 of 2012, Mr. Debangshu Basak and Mr. K.N. Mukherjee, Advocates for Official Liquidator and Mr. Biswapati Das, Advocate for ARCIL, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Anantapur Textile Limited was a company carrying on business of inter alia, hosiery goods. Siddheswari Cotton Mills Private Limited was also carrying on similar type of business. Anantapur and Siddheswari, at one point of time, belonged to the same group having factory on a plot of land contiguous to each other. Subsequently, Siddheswari changed hands. Siddheswari came to the present management. Anantapur was wound up by this Court vide order dated October 9, 2002. The Official Liquidator took possession of the assets. At that time the original promoter group was having the control of Anantapur and Siddheswari as well. When the Official Liquidator went to take possession, they felt difficulty in absence of appropriate boundary demarcating the land belonged to the company in liquidation as also Siddheswari. The Official Liquidator came to know from the records of the Revenue Authority that the company in liquidation, owned 11.73 acres of land. When the Official Liquidator attempted to take possession of the said land measuring about 11.73 acres

Siddheswari objected. They subsequently made application for disclaimer of two acres of land which, according to them, being possessed by the company in liquidation. Despite several attempts, the land could not be demarcated. The Official Liquidator appointed valuer who valued the property as per the physical measurement as well as consulting land revenue records. The Official Liquidator then put up the property for auction. M/s. Bharat Metal Stores gave the highest offer of Rs. 2.75 crores and the Court concluded the sale in their favour. Subsequently, Siddheswari made application for disclaimer as referred to above. They claimed, two rooms in possession of the Official Liquidator actually belonged to them. The workers also filed application for settling their claim. The learned Company Judge passed an order of disclaimer on March 3, 2005 when the new purchaser was not given any notice. From the order it appears, the issue was not seriously gone into. The order of His Lordship is quoted below :-

There will be an order in terms of prayer (a) & (b) of the partition. The O.L. shall take steps to hand over possession within a period of 4 weeks from date.

All parties to act on a signed copy of the minutes of this order on usual undertaking.

2. Several orders were passed directing settlement of claim of the workers followed by direction for disbursement. On September 28, 2005 after about one year of sale Siddheswari filed an application for a direction upon Official Liquidator to identify and demarcate the land in question. Several orders were passed. However, despite attempts it could not be implemented. There were rival acquisitions. We do not wish to go into this question on this stage.

3. After about two years of sale, Bharat Metal, for the first time, raised an issue that they could not get possession of the total land that was purchased by them being 11.73 acres. Several orders were passed from time to time. By an order dated January 11, 2010 the learned Company Judge set aside the sale of the land in question and directed the Official Liquidator to apportion the value of the land followed by a direction to refund of the said sum to Bharat Metal. Accordingly, a sum of rupees seventy lakhs was refunded to Bharat Metal and sale in their favour in respect of the rest of the assets was thus confirmed and made absolute. Several attempts were again made for survey of land. Ultimately, the learned company Judge directed sale of the land in question afresh to the extent of 6.17 acres of land that was found to be admittedly belonged to the company in liquidation as per the minutes of the meeting of the Official Liquidator held on April 20, 2007 followed by several searches being made in the office of the Land Revenue. The learned Judge relied on the report of the Official Liquidator in this regard.

4. By an order dated January 17, 2011 the learned Single Judge directed sale of the land belonging to the company in liquidation privately to Siddheswari at and for a sum of rupees thirty-seven lakhs. His Lordship did not hold any public auction. His Lordship's order, as we find from pages 441-445 of the paper book,

was the result of frustration and inordinate delay in beneficial winding up of the company. According to His Lordship, despite attempts being made for years together the land could not be demarcated. His Lordship assigned four reasons that are quoted below :-

- a) the applicant is prepared to pay purchase price matching valuation,
- b) as the land cannot be demarcated, it would be difficult to find a better purchaser in the market,
- c) Section 457(1)(C) empowers the Official Liquidator to sell land by private treaty in appropriate cases.
- d) The secured creditors, represented today, do not have any objection.

5. Being aggrieved, the workers approached the learned single Judge. By that time the determination got changed and another learned Judge heard the application of the workers and all other pending applications. By an order dated August 24, 2012 appearing at page 608-614, His Lordship set aside the sale confirmed in favour of Siddheswari.

6. Being aggrieved, Siddheswari preferred the instant appeal that we heard on the above mentioned dates.

7. Mr. Ratnanko Banerjee, learned counsel advanced the arguments on behalf of the appellant. He contended, u/s 457 of the Companies Act, 1956 the Official Liquidator was not bound to hold public auction as a matter of course, in suitable cases the sale could also be held by private treaty. The learned single Judge sold the property by private treaty after several attempts being made to sell the assets. His Lordship assigned reasons in support of such exceptional mode of sale. Another learned single Judge taking advantage of the change of determination could not have recalled and/or set aside the sale being a Court of co-ordinate jurisdiction.

8. Elaborating his argument, Mr. Banerjee further contended, neither the secured creditors nor the workers made any contemporaneous grievance on the sale being conducted in favour of Siddheswari, even the secured creditors did not come forward to support the workers' cause. Hence, the learned Judge should not have upset the sale that too, after a considerable period when Siddheswari already spent huge sums in putting the unit in operation. According to Mr. Banerjee, the order was already acted upon. The Official Liquidator executed Conveyance. The purchaser altered their position by investing sums. Hence, the order of recall at a belated stage was liable to be set aside. He relied on the affidavit of Siddheswari giving details of expenses incurred by them subsequent to conclusion of sale. Despite best efforts the Official Liquidator could not demarcate the land belonging to the company in liquidation. Unless and until the land was demarcated the assertion that the company owned and possessed 11.73 acres of land, would be without any basis. He relied on the decision of a learned single Judge of this Court in the case of Pradip Kumar Dasgupta Vs.

Official Liquidator reported in 2005 124 CC 168 to support his contention, the sale once confirmed should not be upset except on cogent reasons. He also relied upon the decision in the case of A.P. State Financial Corporation Vs. Nagarjuna Chlorates Ltd. reported in 2000 5 CLJ 135 and in the case of United Bank of India Vs. Bharat Electrical Industries Ltd. reported in 1993 76 CC 317 to contend, the balance of convenience would deserve retention of the order of sale particularly when the secured creditors did not object to it.

9. Mr. Dhruba Ghosh, learned counsel, appearing for the workers, contended, the sale by a private treaty was contrary to earlier orders of the Court and the learned Judge should not have adopted such exceptional mode particularly when the revenue records would speak for more land belonging to the company in liquidation than what was claimed by Siddheswari. He contended, the workers had a valid claim ranking *pari pasu* with the secured creditor. Hence, they were having *locus standi* to challenge the same and insist the Official Liquidator to go for public auction to have the best possible price.

10. Distinguishing the cases, Mr. Ghosh contended, the decision of the learned Single Judge in case of Pradip Kumar Dasgupta (*supra*) would also support his contention as the learned Single Judge failed to assign cogent reason as to why he would ignore the earlier directions of the other Company Judges already on record. Distinguishing the decision in the case of Bharat Electrical Industries (*supra*) he referred to the facts of the case to contend, five attempts to sell the company failed when the Division Bench permitted private treaty. He cited three decisions of the Apex Court two decisions in the case of LICA (P.) Ltd. (No. 1) Vs. Official Liquidator and Another, and the one in the case of Divya Manufacturing Company (P) Ltd. Vs. Union Bank of India and Others, He relied on rule 272 and 273 of the Company (Court) Rules, 1959 to contend, it was the usual rule to have a public auction rather than to sell the assets by private treaty that would pre-empt the Official Liquidator to go for a best possible price.

11. Commenting on their conduct as suggested by Mr. Banerjee, Mr. Ghosh contended, the workers were insisting on disbursement of their claim that would not preclude them to insist the Official Liquidator to go for a best possible price rather than to sell it by private treaty that would foreclose their opportunity to recover their dues to a substantial extent.

12. Appearing for the Official Liquidator, Mr. Debangshu Basak, learned counsel commented on the supplementary affidavit and its contents including the photographs annexed thereto. According to Mr. Basak, the attempt of Siddheswari to give a different picture of the land in question was far from truth. The land was easily accessible and it was very close to the High Way. He also relied upon the decision in the case of Divya Manufacturing Company (P) Ltd. (*supra*). In addition he referred to the decision of the Apex Court in the case of FCS Software Solutions Ltd. Vs. LA Medical Devices Ltd. and Others, wherein the Apex Court discussed the necessity of public auction to get the best possible price.

13. Replying to what was argued by Mr. Ghosh and Mr. Basak, Mr. Banerjee once again contended, the points raised by him did not find any answer from either of the counsel opposing the appeal. According to him, a sale already concluded, could not be re-opened except in an exceptional situation, particularly when the purchaser already altered their position by investing huge sums on it. Once the Court sold it, exercising discretion that was permitted u/s 457 (1)(c) of the Companies Act of 1956, it could be undone without appropriate reason. In any event, the order of review/recall passed by a Coordinate Bench was liable to be set aside as the learned Judge did not have appropriate authority to do so. He distinguished the cases cited at the Bar to say that in case of Lica (P) Ltd. (supra) sale was not concluded. He refers to paragraph-38 of the decision in the case of FCS Software (supra) to contend, it would rather support his argument. He would end up his argument by summing it up on the following issues :

- (i) The order was bad being passed by a Coordinate Bench;
- (ii) No reason was disclosed to upset the sale;
- (iii) The purchaser having altered his status by pending huge sum, would be a relevant factor that was ignored by the learned Judge.
- (iv) The Official Liquidator assisted the learned Judge by submitting a report prior to passing of the order dated January 17, 2011. Hence, he was not entitled to change his stand on the change of determination that too, without any valid reason.

14. On instruction, Mr. Banerjee lastly contended, he was initially having instruction to offer to pay another Rs. 20 lacs in case this Court would insist upon the same. However, his client would also be agreeable to pay another Rs. 13 lacs to match the amount that was refunded to Bharat Metal in terms of the earlier order of the learned Single Judge passed on January 11, 2010.

15. We have considered the rival contentions. We have carefully perused both the orders of two different learned Judges being dated January 17, 2011 and August 24, 2012. The issue is little bit complicated. We are confronted with the controversy where the argument on both sides would have equal force. Even there is a tilt, it is difficult to find out the same.

16. The arguments so advanced by Mr. Banerjee were quite convincing. He purchased the control of Siddheswari when Siddheswari did not have a demarcated area. Anantapur also did not have a demarcated area as on the date of liquidation. Mr. Basak strenuously contended, it was specifically done. Such contention, Mr. Banerjee confronted. We do not wish to go into that question in detail. A property was sold to the appellant pursuant to an order of Court. The learned Single Judge passed the order of sale on January 17, 2011. The Official Liquidator executed the Deed of Conveyance on March 30, 2011. There were subsequent orders of the Division Bench for disbursement of sale proceeds. The workers prayed for recall after about eight months. The workers did not object to

the sale to be held by private treaty. They were insisting upon their payment. Mr. Ghosh's contention that he had locus standi, is correct. However, we cannot brush aside the fact, the purchaser altered their position by investing sums after conclusion of sale. Even if we ignore the investments made by the purchaser the stamp duty paid on the Deed of Conveyance admittedly by the purchaser, was also a substantial sum that could be avoided in case there was any contemporaneous objection. Neither the secured creditors nor the workers objected to the sale being concluded in favour of the purchaser. Their belated objection, thus weakens their case. We also find substantial force in the contention of Mr. Banerjee that there has to be a sanctity to the order of Court otherwise the Court orders would be meaningless. An order of the Court may be set aside by a higher Court. A Court of coordinate jurisdiction should ordinarily not recall the order of another learned Judge unless and until there was an ex facie apparent error on the face of the record. Moreover, if it was to be done, it should be done by the same Judge if he was available. To that extent, we are with Mr. Banerjee.

17. We cannot at the same time ignore the submission of the workers. They were clamoring for their dues. They were not present right on the date of sale. They had their locus standi in insisting upon the Official Liquidator to attempt fresh sale by public auction to get the best possible price so that they could realise their dues ranking pari passu with the secured creditor. It is true, secured creditors did not object. In their wisdom they did not do so. That would not debar the workers to make their application as they did. The learned Judge, while recalling the order, considered the fact that the sale that was cancelled by the order dated January 11, 2010 recognized the value of the land at and for a sum of Rs. 70 lacs received by the Official Liquidator. The learned Judge while passing the said order, directed refund as the Official Liquidator could not hand over 11.73 acres of land that would not mean, the company did not have the land at all. The land revenue records would depict so. Hence, it was the duty of the Official Liquidator to hand over the said land in question to Bharat Metal which they failed. Hence, they were obliged to take possession of the said land in question and re-sale it. Once it was done by public auction, the next sale should have been through public auction. The learned Judge concluded the sale for Rs. 37 lacs in 2011 assuming that the company owned 6.17 acres of land that was without any basis. Hence, the other learned Judge rightly recalled the order. It would have been nice, His Lordship, instead of passing the said order, himself referred the matter to the same learned Judge pointing out the issue that was possibly overlooked by His Lordship earlier. It would however, not per se make the order impugned illegal. We would rather call it argue. We would rather so it irregular. We would say, it could have been avoided.

18. It would have been nice if the learned Judge directed advertisement to be published for inviting offers from intending bidders and then give opportunity to Siddheswari to match the offer of the highest bidder to retain the contiguous plot. The learned Judge, while passing the order dated January 17, 2011, did not

adopt such mode. His Lordship relied on their assertion that the company in liquidation did have a lesser area of land and sold it by private treaty relying on the valuer's report. Such exercise was certainly irregular. However, it was not illegal so as to undo the process as it would amount to grave injustice and would cause immense prejudice to Siddheswari who should not suffer for act of Court.

19. If we go by the strict letters of law, we would have to accept the submissions of Mr. Banerjee and allow his application by setting aside the order for recall. However, our conscience would prick confirming the sale at Rs. 37 lacs. Being the Court of Appeal we are competent to modify the original order dated January 17, 2011. Mr. Banerjee on instruction agreed to match the amount that was refunded by the Official Liquidator to Bharat Metal in terms of the order dated January 11, 2010.

20. If we try to find out a solution by looking into the problem in a different way we would find, the sale in favour of Bharat Metal did not have any resistance from any corner. The Court was also satisfied with the price that was offered by Bharat Metal. Bharat Metal approached the Court for reduction of price as they could not get actual area of land that was offered for sale. The learned Judge directed refund of a sum of rupees seventy lacs that, according to His Lordship, was the value of the land, that was offered by Bharat Metal and confirmed by Court. If Bharat Metal would not have approached, the controversy, that is arising today, would not have been there at all. Hence, if we restore rupees seventy lacs as on January 11, 2010 being the date of the order when Official Liquidator was asked to refund the said sum together with reasonable interest for the period when Official Liquidator was out of pocket to the extent of rupees seventy lacs we feel, it would meet ends of justice. Hence, the sum of rupees thirty-seven lacs that was paid by Siddheswari should attract interest at the rate of six per cent per annum on and from January 11, 2010 till the date of payment of the said sum to the Official Liquidator. The balance sum of rupees thirty-three lacs would also carry interest at the same rate on the reducing balance on and from January 11, 2010 till the respective dates of payment.

21. We thus direct as under :

- i) The appellant Siddheswari would pay Rs. 20 lacs by December 31, 2012.
- ii) They would make payment of the balance sum of Rs. 13 lacs by six equal monthly installments payable on the last day of each succeeding month.
- iii) The interest component as above, may be paid as the last (seventh) installment.
- iv) In default of any one installment, the Official Liquidator would re-possess the land immediately and put it for sale in public auction for realization of the balance amount then remain due and payable by Siddheswari in terms of the foregoing order.

22. The appeal succeeds in part. The order of the learned Single Judge passed on

August 24, 2012 is set aside. The order dated January 17, 2011 is modified to the above extent.

23. Appeals are accordingly disposed of without any order as to costs. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir (Sinha), J.

I agree.