
(1990) 02 DEL CK 0045

In the Delhi High Court

Case No : Company Appeal No. 13 of 1986

Surrindra Stein Malt Co. Ltd.

APPELLANT

Vs

Uttar Pradesh Financial Corporation and Another

RESPONDENT

Date of Decision : 02-02-1990

Acts Referred:

Citation : (1990) 1 BC 406 : (1990) 41 DLT 586

Hon'ble Judges : P.K. Bahri, J; Leila Seth, J

Bench : Division Bench

Advocate : B.N. Nayar, P.P. Tripathi, P.C. Khanna and Reva Khetrapal, for the Appellant;

Judgement

Leila Seth, J.

(1) By this appeal, the appellant is challenging the order dated 4th April, 1986 passed by Mr. Justice B.N. Kirpal.

(2) We set out the relevant facts. The company was ordered to be wound up by an order of the Company Judge dated 13th December, 1977 in Company Petition No. 95 of 1976. The Official Liquidator, attached to the High Court of Delhi, Mr. S.C. Mittal was appointed as liquidator of the company and directed forthwith to take charge of all the property and effects of the company. From the date of the order of winding up the assets of the company came to be in the custody of the Court and under its supervision and control in view of Sections 456 and 529(2) of the Companies Act, 1956 (hereinafter referred to as the Act).

(3) The U.P. Financial Corporation (hereinafter referred to as the Corporation) was a secured creditor of the Company. It is a statutory Corporation incorporated under the State Financial Corporation Act 43 of 1951. It applied for permission/leave u/s 446 (537) of the Act "to continue with the petitioner's R.C. for recovery of Rs. 26,61,005.79 and interest against the Company...". This petition was numbered as C.A. 232 of 1978. It was averred in the said petition that the Corporation was a secured creditor of the Company and had not been made a

party to Company Petition 95 of 1976 and consequently it did not come to known of the proceedings before the Court. It further averred that it had advanced a sum of Rs. 20,00,000.00 to the Company through a registered deed of mortgage for "the purpose of constructing factory building, purchasing plant and machinery etc. and for the paying of the balance cost of the land bearing Nos. 10-A and 10-B, situated in the Industrial Area at South of G.T. Road, Ghaziabad, U.P." The said property was mortgaged to the Corporation and the loan amount of Rs. 20,00,000.00 carried an interest of three per cent "above the Reserve Bank of India rate subject to a minimum of 9.5% per annum."

(4) C.A. 232 of 1978 was heard and disposed of by the Company Judge, Mr. Justice H.L. Anand by his order dated 4th April, 1979 which reads:

"Leave is sought by the U.P. Financial Corporation, a statutory body, to recover Rs. 26,61,005.79, pursuant to the Recovery Certificate, by the auction and sale of mortgaged property belonging to Surendra Stein Malt Ltd. in liquidation on the ground that the Corporation, being a secured creditor of the Company, is outside the winding up proceedings and is, Therefore, entitled to recover its dues u/s 3(2) of the U.P. Public Moneys (Recovery of Dues) Act. There is no appearance on behalf of the respondents No. 2 and 3 and the prayer is not seriously disputed on behalf of the Official Liquidator but it is submitted that adequate safeguards be provided so that auction and sale fetches the maximum possible price leaving surplus which could be utilised for the payment of the other debts of the Company. Leave, is Therefore, granted to Uttar Pradesh Financial Corporation to recover its dues from the Company by the auction and sale of the mortgaged property subject, however, to the directions that the auction and sale would be carried out in consultation with the Official Liquidator attached to this Court and the sale proceeds, to the extent they exceed the entitlement of the Corporation would be deposited with the Official Liquidator within four weeks of the receipt thereof by the Corporation. C.A. 232 of 1978 is disposed of in these terms. No costs."

(5) The Corporation could not sell the mortgaged property till 1984 and consequently moved an application being C.A. 688 of 1984 before the Company Judge for directions.

(6) In the said application it was asserted that the Corporation had made "a number of efforts to carry out the auction and sale in consultation with the Official Liquidator" and had deputed Mr. R.N. Mehra, Senior Manager (Finance) and Mr. S.K. Sinha, Deputy Senior Manager (Law) to contact him and discuss the matter so that the modalities for holding the auction could be evolved. They contacted the Official Liquidator on 26th November, 1983 when he made the following suggestions :

"1. Wide publicity may be made in the important English Newspapers of Delhi, Bombay and Calcutta Along with one of the local newspaper in the regional language in the above cities in order to receive the maximum purchaser on the

high price. 2. The Corporation should neither issue Recovery Certificate nor proceed u/s 29 of State Financial Corporations Act and should not finalise the tenders without the approval of the Official Liquidator since the possession of the property is with the Official Liquidator as per the orders of the Hon"ble Delhi High Court, as Corporation can only auction the property at site in presence of the Official Liquidator. 3. If the Corporation is unable to auction the above property, it may inform the Official Liquidator to proceed with the auction sale with the permission of the Hon"ble Court since approximately three years has already been passed from the date of judgment and the auction could not be finalised. 4. The Official Liquidator has desired that the auction may be completed within one month time and he may be informed accordingly."

(7) The Official Liquidator was informed that the Corporation had already invited tenders through advertisement in important newspapers on 18th January, 1982 but "no adequate offer was received." It was further averred that it was not possible "to coordinate the matter of sale with the Official Liquidator for the last more than four years and in the meanwhile the value of the assets of the Company in liquidation are depreciating, depleting and diminishing".

(8) "CONSEQUENTLY, it was requested that the Court's order dated 4th April, 1979 be modified to a very limited extent that is, that the Corporation be permitted to recover its dues from the Company by sale and auction of the properties mortgaged to it even without consulting the Official Liquidator."

(9) The prayer made in the said application is as follows :-

(A) grant to the petitioner Corporation, the necessary leave/permission u/s 446 of the Companies Act to recover its dues from the Company by putting the mortgaged property of the Company in liquidation through auction by sale subject to the condition that sale proceeds to the extent they exceed the entitlement of the Corporation and the costs shall be deposited with the Official Liquidator, within two months of the receipt thereof by the Corporation and, (b) Pass such other and further order or orders as this Hon"ble Court deems lit and proper in the matter."

10. This application was filed on 30th December, 1984. The Official Liquidator, Mr. O. P. Gupta filed an affidavit affirmed on 2nd February, 1985 and requested that orders be deferred because attempts to sell the plant and machinery had "not yielded any positive results as purchase offers fall far short of the estimated value of the mortgaged property."

(11) It was further averred that various chambers of Commerce and Industry as also companies engaged in food processing and beverage had been contacted to take over the unit as a running concern; that some parties had shown interest and a list of 15 names was indicated; but since it involved a large sum of money, the parties sought a good deal of technical information and got the plant inspected by experts, but ultimately none of them were interested as it appears that the unit was not suitable as per their requirements. Consequently, the

Official Liquidator prayed as follows :

"THAT keeping in view the fact that all efforts to take over the Company or buy the plant in question have turned to be futile, this Hon"ble Court be pleased to order the sale of the assets of the Company in a court auction."

(12) On 14th March, 1985 the Court made the following order :

"Rejoinder has not been filed apparently because the copy of the reply was not furnished. Counsel for the petitioner states that in view of the stand taken in the reply, rejoinder would not be necessary. Respondents 2 and 3 are still unserved. In the connected proceedings u/s 454(5) of the Act, it was stated that these respondents have since migrated to U.S.A. counsel for the petitioner, Therefore, states that the names of these respondents be struck off from the array of the respondents, and he may be allowed to amend the cause title. I direct accordingly. Notice to these respondents would be unnecessary. Counsel for the petitioner states that the petitioner has a firm offer of Rs. 46 lacs and odd for the entire assets of the Company. This offer he states is part of package deal in which the petitioner Corporation would advance funds to the proposed buyer. Corporation, however, has no objection to the fresh advertisement being published in respect of the property. Advertisement be published in the Statesman (Calcutta), Times of India (Bombay) and Hindustan Times (Delhi). List for further directions on 15.7.1985. Official Liquidator would make a rough estimate of the total indebtedness of the Company in addition to the claim of the Corporation."

(13) Thereafter, on 15th July, 1985, 23rd August, 1985 and 4th November, 1985 no one appeared for the applicant nor was any information available as to whether any advertisement had been published in terms of the order of 14th March, 1985. Consequently, on 4th November, 1985, the application was dismissed in default.

(14) The Corporation then moved an application being C.A. 339 of 1986. This was filed on 28th February, 1986 and it was asserted in the prayer that it is an application "for direction that the condition of sale as per order passed by this Hon"ble Court on 14th March, 1985 may be approved."

(15) In the said application it was averred that an amount of Rs. 62,37,406.12 was due to the Corporation and that "in obedience of" the order of 14th March, 1985, public notices had been published "in various newspapers published from Bombay, Calcutta, Delhi." The details of the offers received from the various parties in response to the said advertisements were mentioned:

_____ Name of the Offered	Offered amount	Earnest Money	_____
_____	1. Power Plant		
Supply 36 lacs	No amount deposited	Corporation, New Delhi.	2. Aggarwal Multi
Steels 46 lacs	Withdrawn subsequently in March, 85.	3. Malt Co. India (P)	30.45

lacs Rs. 51.000.00 by cheque. Ltd., Gurgaon. 4. Ceekay Associates 26 lacs Rs. 2.000.00 by draft. (P) Ltd., Rampur. 5. M/s Angel Food (P) 18 lacs Rs. 25.000.00 draft. Ltd. (Under Inc.), New Delhi. 6. M/s Shri R.C. Goenka, 19.56 lacs No earnest money D.N. Road, Bombay. 7. M/s Ajit Cotton Ginning 37.00 lacs Rs. 20,000.00 by draft. Pressing Dall and Steel Rolling Mills. Mandi, Punjab.

Paragraphs 16, 17 and 18 of the application read :

"16 That M/s Agarwal Multi Steels Ltd. backed out from its offer stating that the plant was not viable. 17. That the Board of Directors of the petitioner at its meeting held on January 29, 1986 considered the offers made by various offers and found the offer made by M/s Ajit Cotton Ginning, Pressing Dall and Steels Mills, Mandi, Gobindgarh, Punjab to be acceptable. It, Therefore, decided to accept the offer subject to the approval by this Hon'ble Court and on the following terms and conditions :- (1) The sale consideration of the assets is Rs. 42.00 lacs. (2) The intending purchaser shall pay 25% of the offered amount as down payment at the time of accepting the offer/handing over of the possession. (3) Balance 75% will be paid in 6 years in equal half yearly Installments with a gestation period of one year from the date of possession. (4) The intending purchaser will bear the statutory dues on fixed assets and the unpaid dues of Upside and Upseb, etc. (5) The intending purchaser shall obtain the no objection certificate from Upside. (6) The balance outstanding amount will bear current rate of interest. (7) The un-recovered amount will be realised from the original borrower.

(18) That the petitioner, Therefore, most respectfully prays that this Hon'ble Court be pleased to :

(A) Grant sanction to the sale of respondent No. 1's factory on the terms and conditions (1) to (7) set out in paragraph I? of this application; and (b) Pass such other further order or orders as this Hon'ble Court deems fit and proper in the matter."

(16) The Official Liquidator filed a reply to the said application on 25th March, 1986. He asserted that the statement of the Corporation, that it was not possible to coordinate with the Official Liquidator for more than four years, "is not due to any fault of the Official Liquidator. The Corporation was apparently not keen and allowed the matter to drift. It cannot legitimately lay any blame on the Official Liquidator nor can it seek an order that Official Liquidator in charge of a company in winding up should be kept out of the sale of its entire assets by a single secured creditor". He also averred that it had not been stated by the Corporation whether the requirement "to publish widely and invite offers for the purchase of the factory of the Company" had been complied with and whether the advertisements had appeared in the three newspapers as directed by the order of 14th March, 1985. He further said that though there was no direction to exclude the Official Liquidator from participating in the proceedings, he had not been consulted. He went on to add :

"The proposal that the offers received by the U.P.F.C. may be subjected to competitive bidding among those whose valid tenders are on record in an open auction to be held by the Court after giving due publicity is not inconsistent with the earlier order; it has been the practice followed in several other cases. It's only to fetch a better price and it is submitted that there should be no objection to that course. The Corporation may be allowed to sell but the choice of the purchaser and the price on which it may be sold should be determined by the Court after following the procedure indicated above. The sale is subject to confirmation of this Court."

(16) It was also suggested that the property should be valued by a valuer to be appointed by the Court before the property is sold.

(17) M/S. Ajit Cotton Ginning Pressing Dall and Steel Rolling Mills filed an application, being C.A. 502 of 1986 on 29th March, 1986 for being imp leaded and made a similar prayer as in C.A. 339 of 1986. On 4th April, 1986 Mr. Justice B.N. Kirpal passed the impugned order allowing the applications and granting sanction of the sale of the company's factory on the seven terms and conditions mentioned.

(18) Mr. Nayyar, learned counsel appearing for the Official Liquidator submitted that the above mentioned order of the learned Company Judge was passed as counsel for the Official Liquidator did "not object to the sale of the assets to Ajit Cotton". Consequently, his first contention was that this concession of counsel was contrary to the objections "raised in in writing the reply to C.A. 339 of 1986 and contrary to the instructions of the Official Liquidator.....".

(19) He further submitted that the learned Company Judge acted on this concession alone and did not apply his mind independently in sanctioning the sale. As such his second contention was that the Company Judge was duty bound to independently satisfy himself that the price fetched was reasonable before confirming the sale in view of the provisions of the Act and Rules and in particular Rule 273 of the Companies Court Rules 1959.

(20) His third argument was that the learned Company Judge did not appreciate the true scope of the terms and conditions of the sale, particularly condition No. 3, requiring 75 per cent of the amount to be paid in six years in equal half yearly Installments with the gestation period of one year from the date of possession and condition No. 6 regarding the balance outstanding amount to bear the current rate of interest and condition No. 7 which provided that the un-recovered amount will be realised from the original borrower (i.e. the company in liquidation), which are really very harsh. Further it was not clear as to how much of the amount was payable to the Corporation and "how much liability as a result of the acceptance of the sale conditions was being apportioned" to the Company. Consequently, he argued that the order is contrary to the mandate of the Companies Act, the Companies Court Rules and against the interests of the Company and public policy.

(21) Dealing with the last point first, it appears to us that the Official Liquidator has basically mis-understood the conditions of sale and their meaning and effect on the Company. This has now been clearly clarified by the affidavits of the Corporation and Mr. Jagdish Raj Bansal, partner of Ajit Cotton Ginning Pressing Dall and Steel Rolling Mills, Mandi, Punjab (hereinafter to be referred to as Ajit Cotton), the proposed purchaser. In the said affidavits it has been clearly stated that condition No. 6 which pertains to the current rate of interest on the balance outstanding amount is to be paid by the eventual purchaser and will not accrue against the Company in liquidation. As far as the Company is concerned, the sale consideration of Rs. 42,00,000.00 which was to be paid by Ajit Cotton to the Corporation would be deemed to be recovery of the amount due to the Corporation from the Company. Further, the fact that the Corporation had agreed to recover the amount in installments from Ajit Cotton as it was not possible for Ajit Cotton to pay the entire amount at once did not cause any prejudice to the Company as it was a deemed receipt of the entire sale consideration by the Corporation. It was also asserted in the said affidavit of the Corporation that as far as they are aware the company does not have any other assets apart from the land, building and fixtures. Ajit Cotton has also undertaken to pay the labour dues amounting to Rs. 23,000.00. Consequently, it appears to us that the point pertaining to harshness of the terms of sale is not really relevant.

(22) Mr. Nayyar addressed a great deal of argument on the aspect as to whether the statement of Mr. Nandrajog, counsel for the Official Liquidator as recorded in the impugned order that he had no objection to the sale, amounted to a compromise and was unauthorised and/or in excess of authority. It was contended that in view of the amended provisions of Order 23 rule 3 of the Code of Civil Procedure, a compromise could only be made by the parties in writing and counsel was not entitled to compromise the matter and consequently his statements were in excess of authority.

(23) The question whether the statement of counsel as recorded in the order is a compromise or a concession which is in excess of authority need not be gone into in this case in view of what appears to us to be the correct position with regard to the second submission of Mr. Nayyar.

(24) It is no doubt true, that from the order it is apparent that the Company Judge allowed the application and granted sanction of the sale of the company's factory on the seven terms mentioned above after recording that "there is no objection" to the sale by the Official Liquidator or any one else. But it appears to us that the Company Judge had a duty to apply his mind independently of the concession, because the assets are as it were under his custody and he is responsible for ensuring that the best price is available. From a perusal to the order, it is not apparent that the learned Company Judge applied his mind independently. It is correct, that it is not necessary for him to say so in so many words or to actually record his satisfaction. If there was material before him and it was apparent that he had looked into the matter and then arrived at his

decision, it can be presumed that the Company Judge while passing the order applied his mind and came to the conclusion that the sale was in the best interests of the company.

(25) But in the present case, the only material that was before the Company Judge is that which has been set out above. Admittedly, none of the parties bids were before the Company Judge; even copies of the advertisements were not before him; nor was there any indication whether the said advertisements had been advertised in the papers indicated by the Company Judge i.e. the Statesmen (Calcutta), the Times of India (Bombay) and the Hindustan Times (Delhi).

(26) In this court when we sought to ascertain whether the advertisements had, in fact, been published and what were their contents, Mr. R.K. Soni Manager (Law) of the Corporation filed an affidavit affirmed on 4th September, 1989 and furnished photo copies of two advertisements. From the said affidavit it appears that the advertisements were published in the following papers:-

(I) The issue dated 28th April, 1985 of the New Edition of the English Daily of the "Economic Times". (ii) The issue dated 29th April, 1985 of the New Delhi Edition of the Hindi Daily of "Hindustan". (iii) The issue dated 3rd May, 1985 of the New Delhi Edition of the English Daily of the "Hindustan Times". (iv) The issue dated 4th May, 1985 of the Jalandhar edition of the Hindi Daily of "Punjab Kesari". (v) The issue dated 28th October, 1985 of the New Delhi edition of the English Daily of "Financial Express". (vi) The issue dated 31st October, 1985 of the Calcutta edition of the English Daily of the "Economic Times". (vii) The issue dated 31st October, 1985 of the Bombay edition of the English Daily of "Financial Express."

(27) It is, Therefore, apparent that the advertisements were not published in the Statesmen (Calcutta) and the Times of India (Bombay) as directed by the Company Judge but instead were published in the Economic Times (Calcutta) and the Financial Express (Bombay).

(28) From a perusal of the advertisement pertaining to Serial Nos. (i) to (iv) above indicated it appears, that the intending purchaser was required to submit its offer in a sealed cover Along with 25% of the offered amount to the Corporation on or before 10th May, 1985 whereas with regard to the advertisement pertaining to Serial Nos. (v) to (vii) the sealed offer with a bank draft of Rs.25,000.00 was to reach the Corporation by 18th November, 1985. The terms in the two advertisements also appear to be slightly different. The first group provided that payment was to be either on cash down or deferred payment basis whereas the advertisement pertaining to the second group indicated that the intending purchaser could come for negotiations on 18th November, 1985.

(29) This material was not before the Company Judge when he passed the impugned order. The only material that was before him was what had been asserted in the application i.e. the names of the parties ,the amounts offered and the subsistence of the offers.

(30) From the tenor of the order it does not appear that the Company Judge applied his mind to the aspect of being independently satisfied. All that the Company Judge has observed is that the highest offer has been withdrawn, the second offer is of 42 lacs and there is no objection to the sale by the Official Liquidator or any one else. He has not examined the various offers nor the conditions specified in the said offers, as indeed, he could not have, because the offers were admittedly not before him, not having been filed. Though, it is possible that he may have arrived at the same decision if the offers had been before him and he had examined the various conditions etc., this cannot be presumed.

(31) It is no doubt true, that if the tenor of the order indicates that the court is satisfied with regard to the adequacy of the sale price, it is not necessary for the court to use the specific words. But the court is the custodian of the property of a company which is being wound-up. It is its duty to independently arrive at a decision about the sale price being the best price available. Since there was no material before the court, except as mentioned in the application, it had no opportunity to examine the matter independently. In fact, as it now appears the advertisements were not even published in the papers according to the court's directions. The court has a duty to satisfy itself with regard to the adequacy of the price even if there is no suggestion of irregularity or fraud. (See : Navalkha and Sons Vs. Ramanuja Das and Others,).

(32) Mr. Prag Tripathi, learned counsel for respondent No. I urged that a secured creditor is outside the pale of winding up and consequently respondent No. I need not have applied u/s 537 of the Companies Act; further the amendment of the provisions of the Companies Act in 1985 did not effect the right of the secured creditor to sell the property even though workers have been brought in and given rights ranking pari passu with the secured creditor.

(33) It is not necessary for us to dilate on this aspect of the matter as, in fact, in this case, an application has been moved u/s 446(537) of the Act and the Corporation-respondent No. 1 has not at any stage withdrawn its application.

(34) It was further contended that the order dated 4th April, 1979 had been modified by the order dated 14th March, 1985 and this was ratified by the impugned order of 4th April, 1986.

(35) Rule 273 requires that all sales shall be by public auction or by inviting sealed tenders "or in such manners as the Judge may direct". By its order dated 4th April, 1979, set out above, the Court directed auction and sale to be "carried out in consultation with the Official Liquidator.....". The subsequent order of 14th March, 1985, set out above, notes that the Corporation has "a firm offer of Rs. 46 lacs and odd for the entire assets" of the company and this is "a part of a package deal" in which the Corporation "would advance funds to the proposed buyer", but the Company Judge does not direct the sale. He notices that the Corporation has no objection to "fresh advertisement being published in respect

of the property". He directs advertisements "to be published in the Statesman (Calcutta), the Times of India (Bombay) and the Hindustan Times (Delhi)". He orders that the matter be listed for further directions on 15th July, 1985 and directs the Official Liquidator to make a rough estimate of the total indebtedness of the Company in addition to the claims of the Corporation.

(36) Though the application, on which this order is passed contains a specific request that the action and sale ordered to be held "be done without the requirement of consultation of the Official Liquidator", no such direction is given, nor does there appear to be anything in this order to indicate that the earlier order of 4th April, 1979 ordering auction and sale to be carried out in consultation with the Official Liquidator has been modified. Consequently, the question of the order of 4th April, 1986 ratifying the modification made by the order of 14th March, 1985 to the order of 4th April, 1979, does not arise. Consequently it appears to us that the learned Company Judge was duty bound to examine whether there had been due publicity, whether the publicity was in terms of the orders of the court and whether the price was the best available.

(37) If we could arrive at the conclusion that at some stage the court applied its mind to the matters in issue and was satisfied, then, it is correct, that the prerequisite satisfaction need not be manifestly borne out from the order. (See : K.K. Chari Vs. R.M. Seshadri, .).

(38) But, it is clear to us from the facts noticed above, that the learned Company Judge did not apply his mind independently to these aspects with regard to ascertaining whether the best price had been obtained but passed an order mainly based on the concession of counsel. He did not even examine whether the Corporation had acted in conformity with its earlier orders dated 4th April, 1979 and 14th March, 1985. Therefore, it is not possible to draw an inference that he was independently satisfied on the material before him regarding obtaining the best price.

(39) Counsels for the respondents have raised a technical point regarding the right of the Official Liquidator to file an appeal in the facts and circumstances of the case as they allege it is a consent decree. It appears to us that the order is not a consent order and in any case the Company Judge has not complied with his duty to examine the material and satisfy himself that the best price had been obtained.

(40) For the reasons outlined above, we allow the appeal and set aside the judgment and order and remand the case to the learned Company Judge to decide the matter in accordance with law. However, in the circumstances of the case, we make no order as to costs.