
(2005) 01 AHC CK 0095

In the Allahabad High Court

Case No : Special Appeal No. 53 of 2004

Sushila Pulp and Papers Ltd.

APPELLANT

Vs

Official Liquidator and Others

RESPONDENT

Date of Decision : 04-01-2005

Acts Referred:

Companies Act, 1956 — Section 445, 445(3), 457(1)

Citation : (2005) 3 BC 168 : (2005) 124 CompCas 281 : (2005) 62 SCL 502

Hon'ble Judges : Vikram Nath, J;S.R. Alam, J

Bench : Division Bench

Advocate : Anurag Khanna, R.N. Singh and Shakti Swaroop Nigam, S.G.
Hasnain and Kamala Mishra, for the Appellant; R.P. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

Vikram Nath, J.—This special appeal has been filed by M/s. Sushila Pulp and Papers Ltd., through its managing director Sri Girdhari Lal Tiwari praying for setting aside the order dated December 17, 2003, passed by the learned single judge in Misc. Application No. 119592 of 2002 arising out of Misc. Company Application No. 3 of 2000, whereby the plant and machinery of the company in liquidation has been auctioned in favour of M/s. S. S. Metals (respondent No. 4) and the sale was confirmed under rule 272 of the Companies (Court) Rules, 1959.

2. M/s. Sushila Pulp and Papers Ltd. a company incorporated in 1991 under the Companies Act, 1956, was set up for manufacturing of paper. Soon after it started production it faced problems and is lying closed since 1993 and has not been doing any business since then. It was directed to be wound up by order of the company judge dated November 1, 2001, pursuant to the recommendation of the Board for Industrial and Financial Reconstruction, made u/s 20 of the Sick Industrial Companies (Special Provisions) Act, 1985. Pursuant to the winding up order the official liquidator took possession of the assets of the company. The liquidator, after taking possession, obtained the report from valuer approved by the court. The valuer submitted its report dated January 25, 2002. In the said

valuation report the realisable value of the plant and machinery was shown to be Rs. 22,85,764.50. Auction sale notice was published in the news papers inviting offers for sale of the assets of the company in liquidation to be submitted on or before July 17, 2002. Sri Girdhari Lal Tiwari, ex-managing director of the company in liquidation appeared and objected to the auction sale on the ground that the valuation shown in the report dated January 25, 2002, was very low and in fact the value was much more. The court permitted him to file the objection before the official liquidator before July 24, 2002, and the sale was adjourned.

3. Sri Girdhari Lal Tiwari, ex-managing director of the company in liquidation filed objections dated July 22, 2002, before the liquidator requesting for fresh valuation report and till then the proceedings of the sale may remain in abeyance.

4. Pursuant to the said objection the liquidator called for a fresh report from valuer approved by the court and this time the valuer reported the net realisable value of the plant and machinery to be Rs. 17,00,000, vide valuation report dated April 7, 2003. The fresh valuation report having been obtained, notices were published in the newspapers again inviting offers by sealed tenders for sale of the assets of the company. As per the notice the inspection was permitted on November 28, 2003, and November 29, 2003, and the tenders were to be submitted by 1.00 p.m. on December 17, 2003. They were to be opened at 2.00 p.m. on the same day in the chambers of the company judge. The assets were divided in three lots. Lot No. 1 comprising land and building, lot No. 2 comprising plant and machinery and lot No. 3 was for the factory as a whole. On December 17, 2003, the tenders were opened. All the offers received were only in respect of lot No. 2, i.e., plant and machinery. The minimum offer received was for Rs. 5.25 lakhs and the highest offer was for Rs. 8.11 lakhs.

5. The company judge after considering the two valuation reports available and the bids offered which were not adequate asked the bidders to increase their bids. The bidders gradually increased their bids and finally M/s. S. S. Metals gave their final offer of purchasing the plant and machinery (in respect of lot No. 2) for Rs. 20 lakhs. As no other parties were willing to increase the bids further, the court accepted the bid of M/s. S. S. Metals not only in view of the fact that it was the highest bid but also considering the fact that it was more than the net realisable value given in the valuation report dated April 7, 2003. The auction purchaser M/s. S. S. Metals deposited the entire amount and accordingly the court confirmed the sale in favour of M/s. S. S. Metals. It also directed the liquidator to hand over possession to M/s. S. S. Metals and further authorised the auction purchaser M/s. S. S. Metals to remove plant and machinery except land and building of the company in liquidation.

6. We have been informed that after the order dated December 17, 2003, the auction purchaser has taken possession of the plant and machinery on January 1, 2004. Aggrieved by the order dated December 17, 2003, the present appeal was filed in which an interim order of status quo was passed on January 20, 2004, to be operative till January 28, 2004, which was subsequently extended

from time to time.

7. We have heard Sri R. N. Singh, learned senior counsel assisted by Sri Shakti Swaroop Nigam for the appellants, Sri R. P. Agarwal, learned counsel for the official liquidator, Sri S. G. Hasnain, learned senior counsel assisted by Smt. Kamala Mishra for the auction purchaser and Sri Anurag Khanna learned counsel for PICUP.

8. A preliminary objection has been raised by Sri R. P. Agarwal, learned counsel appearing for the liquidator that this appeal is not maintainable on behalf of the company through its managing director. It is contended that company has already been ordered to be wound up vide order dated November 1, 2001, which has not been challenged by any party and has become final. In view of the provisions contained in Section 445(3) of the Companies Act, 1956, all officers and directors ceased to act for and on behalf of the company. Further u/s 457(1) (a) of the Companies Act, 1956, only the official liquidator can initiate or take proceedings by or on behalf of companies under liquidation. Sections 445(3) and 457(1)(a) of the Companies Act, 1956, reads as under :

"Section 445. Copy of winding up order to be filed with Registrar,-. . .

(3) Such order shall be deemed to be notice of discharge to the officers and employees of the company, except when the business of the company is continued.

Section 457. Powers of liquidator.-(1) The liquidator in a winding up by the court shall have power, with the sanction of the court,-

(a) to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company ;"

9. In view of the provisions contained in sections 445(3) and 457(1)(a) of the Act the company under liquidation could be represented only by the official liquidator and any action taken for or against the company was to be taken through the official liquidator alone. The directors could not have filed the appeal after the winding up order had been passed except where the business of the company was continuing. In the present case the factory had been closed in 1993 and there is no averment that any business was continuing. It is submitted that in view of these two provisions, the appeal on behalf of M/s. Sushila Pulp and Papers Ltd. through its managing director Girdhari Lal Tiwari was not maintainable. Learned counsel for the liquidator has relied upon the judgment of the Supreme Court in the case of Great Indian Motor Works Ltd. and Another Vs. Their Employees and Others,

10. In the said case a question arose whether after the company had been ordered to be wound up, an appeal filed on behalf of the company through the managing director was competent or not. The hon"ble Supreme Court has held as under (page 1190) :

"Under the provisions of the Indian Companies Act, the affairs of the company under liquidation, are placed in charge of the official liquidator, and u/s 457, it is only the liquidator who is authorised with the sanction of the court, to institute any suit or other legal proceedings in the name and on behalf of the company. Thus, there is no inconsistency between the aforesaid provisions of the Act and the Companies Act, which only laid down a condition precedent to the filing of an appeal, if it is has to be, by a liquidator of a company in the process of winding up. It concerns a very special case and has no bearing on the general right of appeal. As, in the instant case, the court refused the necessary sanction to the liquidators to prefer the appeal, no appeal could have been filed on behalf of the company. Hence, in so far as the appeal purported to be on behalf of the company, through the managing director aforesaid, it was wholly incompetent."

11. In reply Sri R. N. Singh, learned senior counsel appearing for the appellant, has submitted that the appeal was maintainable as the director was also a contributory and as the appeal has been filed by Girdhari Lal Tewari, managing director, therefore, the contention of the respondent cannot be accepted.

12. We have carefully examined the record and also the rival submissions made by the parties. From the provisions contained under sections 445(3) and 457 of the Act it can be easily deciphered that after the order of winding up has been passed, the director/officers of the company cannot file an appeal on behalf of the company and it is only the liquidator, who is competent to act for and on behalf of the company for liquidation and/or institute any suit or other legal proceedings in the name and on behalf of company and that too under the supervision of the court. The directors could not have filed the present appeal on behalf of the company which was in liquidation after the winding up order had been passed and, therefore, the appeal would not be maintainable.

13. The directors may have independent right in personal capacity to file an appeal but not on behalf of company, which has been ordered to be wound up. In the present case, since Sri Girdhari Lal Tiwari, had filed the objection before the liquidator and has also filed the appeal as managing director, instead of dismissing the appeal on the ground of maintainability we are proceeding to examine the merits of the order dated December 17, 2003, impugned in the present special appeal.

14. Sri R. N. Singh, learned senior counsel has submitted that the managing director Sri G. L. Tiwari had filed objections on July 22, 2002, but the said objections have not been referred to or considered by the learned company judge. They have not been decided by the learned company judge before accepting and confirming the offer of M/s. S. S. Metals and therefore the impugned order is vitiated in law. It was submitted that the impugned order does not mention about the objections, which specifically related to the valuation reports obtained by the liquidator on January 25, 2002.

15. Learned counsel for the respondents have urged that after the objections

were received by the liquidator from Sri Girdhari Lal Tewari, managing director on July 22, 2002, a fresh report was called for by the liquidator in order to verify the correctness of the first report and also to be doubly sure that the correct valuation is placed before the court. In the second report submitted by the valuer on April 7, 2003, the value of the plant and machinery had been reduced due to further deterioration of the plant and machinery. The value had therefore further depreciated and the net realizable value was reported to be only Rs. 17 lakhs. It was thereafter, that the fresh auction notice was published in the daily newspapers inviting fresh offers for sale of assets of the company in liquidation. On December 17, 2003, no objections were raised by the managing director Sri Girdhari Lal Tewari or his counsel. The court after considering the valuation report, and there being no other valuation report indicating any higher value, the court accepted the highest offer of Rs. 20 lakhs and confirmed the same. The appellant was unable to show any material on record that there can be any different valuation of the plant and machinery indicating higher amount as net realisable value. The report which has been relied upon by the appellant is of the year 2000, whereas the possession of the plant and machinery was handed over to the liquidator only after November 1, 2001, when the winding up order was passed. There is no report by the objector appellant subsequent to the two reports obtained by the liquidator in 2002 and 2003. No reliance could be placed on the valuation report of 2000, when the possession itself had been taken by the liquidator after that. There is no objection to the inventory prepared by the liquidator at the time of taking over possession. The only objection is that the valuation report did not give the correct value. In the absence of any material in support of the contention there was no occasion to disbelieve the two reports already on record.

16. Further after the fresh report was called by the liquidator which was submitted on April 7, 2003, the appellant or Sri Girdhari Lal Tiwari did not file any objection either before the company judge or before the official liquidator. In the circumstances there was no occasion to consider the objections dated July 22, 2002, by the learned company judge which already stood allowed by the liquidator by accepting the prayer therein for a fresh valuation report.

17. The appellants have also not filed any objection before the company judge even after the advertisement for sale had been published fixing December 17, 2003, as the date for the opening of the tenders. Hence it does not lie in the mouth of the appellant to urge that their objections have not been considered. The objections dated July 22, 2002, were filed before the liquidator stood virtually allowed as a fresh report seeking valuation of the assets of the company was called for, which was the prayer made in the said objection/representation. After the second valuation, there is nothing on record which has not been considered or ignored by the learned company judge.

18. It may also be noted that the objector appellants have not come forward with any buyer willing to offer a higher price than what has been offered by M/s. S. S.

Metals and accepted by the hon'ble company judge. Under the said circumstances also the objection and grounds taken by the appellant appear to be only hollow.

19. Apart from the aforesaid argument, learned counsel for the appellant has not been able to point out any material on record and has also not been able to show that the sale has been made for inadequate price. Until and unless any of these two grounds are substantiated, the auction sale held on December 17, 2003, cannot be attacked. Sri R. P. Agrawal, learned counsel for the liquidator has relied upon the judgment of the Supreme Court in the case of Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others,

20. In the said case, the Supreme Court while considering court sales, observed as follows (page 1335) :

"What is expected of the judge is not to be a prophet but a prag-matist and merely to make a realistic appraisal of the factors, and if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale. The court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of court sales will be introduced."

21. It may be worth noting that the secured creditor, viz., PICUP represented by Sri Anurag Khanna, advocate has also given his consent for the prices accepted by the learned company judge through its counsel. This is also based upon the fact that the price received was more than the net realisable value indicated in the valuation report. Once the secured creditor after consideration has recorded its approval to the adequacy of the price received, there does not appear to be any justification to consider that the price offered was not adequate.

22. The order of the learned company judge has taken into consideration all the relevant factors necessary for accepting the offer of M/s. S. S. Metals for purchase of the plant and machinery of the company in liquidation. Therefore, we are of the view that the price accepted by the learned company judge for the sale of the plant and machinery appears to be fair value and there is no material on record to take a contrary view.

23. In view of the above discussion, the appeal is devoid of merits. It is accordingly dismissed. However, there shall be no order as to costs.