

(2009) 04 MAD CK 0464

In the Madras High Court

Case No : C.A. No's. 1953 to 1956 of 2008 in C.A. No. 1983 of 2007 in C.P. No. 526 of 2000

TCI Distribution Centers

APPELLANT

Vs

Official Liquidator

RESPONDENT

Date of Decision : 13-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 91
Companies (Court) Rules, 1959 — Rule 232, 233, 272, 6, 9
Companies Act, 1956 — Section 456, 456(1A), 457, 460(6), 466(2)
Contract Act, 1872 — Section 17, 18, 20, 65
Transfer of Property Act, 1882 — Section 55

Citation : (2009) 8 MLJ 1238

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—The applicant in all these cases M/s. TCI Distribution Centers Limited is the purchaser, pursuant to the publication effected by the Official Liquidator, High Court, Madras, in respect of 41.12 Acres of freehold land belonging to M/s.Fidelity Industries Limited (in liquidation). The said lands are situated in two villages, viz., Kilai and Ulandai. The applicant was the highest bidder in the auction conducted by this Court on 6.2.2008 for an amount of Rs. 15.20 Crores and the sale was confirmed in favour of the applicant.

2. This Court has directed the payment of difference of EMD amount and balance sale consideration within ninety days, in two installments. It is stated that the applicant has remitted the balance EMD. On a request by the applicant for furnishing the title deeds and field map relating to the property, the Official Liquidator was directed to collect the documents from IDBI and the field map was also directed to be furnished.

3. It is stated that, on the due date of the first installment of the sale consideration, viz., on 20.3.2008, the said amount has been remitted by the

applicant. When the matter came up on 24.3.2008, the applicant is stated to have requested the Court to furnish copies of documents and to order survey of lands, however, there was a direction to remit the balance sale consideration as per the schedule. The due date for second installment was on 5.5.2008. However, the petitioner has paid the second and last installment on 30.4.2008 itself. It is stated that, on the said date, the IDBI has handed over some of the documents pertaining to the property and on 30.4.2008 there was a direction to hand over possession of the property, documents and for conveyance.

4. It is the case of the applicant that thereafter, IDBI has handed over only 26 documents covering an extent of 20 acres and the other documents were not delivered. When a request was made on 3.6.2008, the Official Liquidator handed over 26 original document and the date of handing over of possession was fixed on 12.6.2008. It is stated that the applicant was present on the said date for taking possession and the applicant found that it was a barren land and there were no boundary stones. It is stated that the Official Liquidator has also prepared minutes for handing over physical possession on the said date. It is the complaint of the applicant that the Official Liquidator has not handed over the physical possession of the properties with boundaries. However, it is stated that the applicant has taken possession of the property in full faith.

5. It is the case of the applicant that on a perusal of the documents submitted, the applicant was not able to identify the correct location of the lands. It is stated that the applicant has approached the Official Liquidator requesting for handing over of documents, survey of lands and requested not to disburse the sale consideration to any secured creditors. It is the complaint of the applicant that having remitted the full sale consideration, the applicant is unable to take possession of the entire property and the original documents are also not available.

6. Under these circumstances, the applicant has filed the present applications for the purpose of directing the Official Liquidator:

- (i) to trace the balance original documents pertaining to the property and hand over the same;
- (ii) to engage the services of concerned Revenue Officials to locate the lands, survey and to fix the boundaries and to lay revenue stones and deliver possession thereof;
- (iii) not to disburse the sale proceeds to the creditors till handing over of balance documents, suverying of lands and laying of boundary stones; and
- (iv) to return the sale consideration with interest in the event of non compliance of handing over of balance documents, surveying and laying of boundary stones within the time stipulated by this Court.

7. In the report filed by the Official Liquidator, it is stated that after the initial efforts taken for the sale of the property by the notification failed, ultimately, the

auction was held on 6.2.2008, in which the applicant as well as GATI were present with EMD amount. The applicant has quoted Rs. 15.20 Crores and the sale was confirmed by this Court. It is also stated that for the auction dated 6.2.2008, there was no sale notice published. That was due to the reason that as per the earlier sale notice, the date of auction was fixed as 4.1.2008, on which date there was only one bidder and therefore, the auction was cancelled and the matter was posted to 22.1.2008, directing the Official Liquidator to affix the sale notice at the site. However, on 24.1.2008, when the matter was in the list, the Official Liquidator has reported compliance of affixing the sale notice at the site, and the counsel for the purchaser submitted that he is having Rs. 1.5 Crores in demand draft being the EMD. As there were two more prospective buyers, who showed interest in purchasing the property, the matter was posted on 1.2.2008, to enable all the three intending purchasers to bring the EMD amount. However, on 1.2.2008, one of the purchasers, viz., GATI of Hyderabad and the present applicant were present with EMD amount. Since the third purchaser, viz., Universal Cable's counsel has informed that the Company's representative met with an accident, the matter was adjourned to 6.2.2008. It was by virtue of the said fact the matter stood posted to 6.2.2008 and not by virtue of publication.

8. It is also stated by the Official Liquidator in the report that the applicant has not sought for any inspection and no tender form was issued by the Official Liquidator and it was based on the bidding by the applicant in the Court on 6.2.2008 the sale was confirmed. It is stated that after the full sale consideration was paid and before execution of the sale deed, the applicant has raised some queries by letter dated 1.9.2008, for which a report was filed on 13.10.2008 based on various information and revenue records.

9. In respect of a query regarding the nature of lands in certain survey numbers, raised by the applicant, the same was taken up to the Valuer (ITCOT), who has also given a reply. It is the report of the Official Liquidator that in respect of a query with regard to the lands in Ulandai Village, viz., that the sale notice shows an extent of 13.28 Acres, while the documents produced only relate to 13.25 Acres, and therefore, there is a shortage of 0.03 Acres, it is stated that the Official Liquidator has sold only on "as is where is and whatever there is basis", and the buyer was aware of the terms and further, it is the buyer, who has voluntarily offered to purchase the property and he has never asked for physical inspection or verification of the documents.

10. In respect of a query regarding high tension electric tower, which is stated to have been constructed in Survey No. 375/11 and the high tension wire crossing in the middle of Survey Nos. 375/9 and 375/10 to the total extent of 0.59 Acres, it is stated the applicant was a voluntary purchaser and he was presumed to be aware of the physical nature of the property and could have also verified the property.

11. In respect of a query regarding land in Survey No. 353/9 relating to 0.09 Acres, on the basis that a Government allotted house, a water tank and a TV

room are situated, the report stated that the said land stands in the name of the Company in liquidation.

12. Likewise, in respect of various small extents of land, the queries raised by the applicant were replied by the Official Liquidator in his report. In respect of the production of original documents, it is stated that all the documents that the IDBI has handed over to the Official Liquidator have been given to the applicant and in respect of the other properties in Ulandai Village, it is stated that in respect of the properties, for which title deeds have been handed over, patta can be obtained by the purchaser and in respect of the other portions, the copies of the documents are available.

13. Similarly, in respect of lands in adjacent Kilai Village, it is the complaint of the applicant that as per the sale notice the extent advertised was 27.84 Acres, while as per the documents, the property is available to an extent of 30 Acres. It is also complained that only 18 documents covering an extent of 15.715 Acres were handed over. For the said query, the Official Liquidator has stated that whatever documents the IDBI, which has been secured creditor of the Company in liquidation, has given, the same were handed over to the applicant.

14. It is also stated in the report that there was no mistake of fact or misrepresentation by the Official Liquidator either in the notification or in the newspaper publication and the buyer should have been more diligent. It is also stated that the Official Liquidator has not made any false representation and in all these cases, the Official Liquidator goes by the report of the Valuer appointed by the Court. It is the further case of the Official Liquidator in the report that, after the payment of the first installment and before the final installment was due, there was sufficient time available and therefore, it cannot be said that no opportunity was given to the applicant to verify the nature of the lands and the title deeds relating to the lands. It is also reiterated that inasmuch as the offer made by the applicant was a voluntary one, not pursuant to the notification, they are expected to be more vigilant and by applying the principle "buyer beware", there cannot be any responsibility on the part of the Official Liquidator.

15. It is also stated that the Official Liquidator acts only based on the documents, which are received from the Company in Liquidation and not by scrutinizing the correctness or otherwise of the documents, and in liquidation proceedings, this has been the practice contemplated under the Companies (Court) Rules, 1959 for the past 50 years. It is denied that there has been fraud played for the purpose of setting aside the sale and stated that Order 21 Rule 90 of the CPC has no application.

16.1. It is the submission of Mr. S.R.Rajagopal, learned Counsel appearing for the applicant that the following discrepancies are found, on fact, viz.,

(i) that the description of the lands, as set out in the valuation report and the application filed by the Official Liquidator in C.A. No. 1983 of 2007, does not match with the lands;

- (ii) that several survey numbers shown to have been in Kilai Village are actually not in Kilai Village, but in Ulandai Village and vice versa;
- (iii) that the extent of land shown for each survey numbers does not match with the extents stated in the documents that were furnished;
- (iv) that 50% of the property does not have documents;
- (v) that the land is not contiguous;
- (vi) that the land does not have entrance from the village road and between the land and the village more than an acre belongs to Animal Husbandry Department and whereby the property cannot be assessed;
- (vii) that there is a channel, which is running in the land;
- (viii) that Survey No. 330/7 in Kilai Village, measuring 2.15 acres in the middle of the property is classified as "Cherri Natham" and allotted to Adi Dravida Community and pattas were issued;
- (ix) that insofar as the property in Survey No. 339/2, the company is not the owner of the property and it is the land locked amongst the land belonging to the Company and the ownership vests with some other person;
- (x) that there is high tension wire running over Survey Nos. 375/9, 375/10 and 375/11 to an extent of 59 cents in and whereby the land cannot be used;
- (xi) that in the land in Survey No. 353/9, a TV room and a house are constructed by a Villager for the common use and a portion of the land belonging to the Company is used for the TV room access;
- (xii) that insofar as Survey Nos. 370/6, 371/4 and 371/7 measuring an extent of 27 cents, there are disputes in title and revenue records reveal that certain other persons are the owners,

and therefore, the ownership of the land itself is in question and hence, the sale stands vitiated.

16.2. It is his contention that in the absence of specific rules under the Companies (Court) Rules, 1959 and in the absence of any methodology for sale to be effected by the Company Court, the provisions of the CPC will apply and according to him under Order 21 Rule 90 of the Code of Civil Procedure, in case of material irregularity, such sale is liable to be set aside.

16.3. It is his submission that since the description is erroneous, the sale certificate cannot be issued and therefore, the sale has to be set aside. It is his case that the statements made by the Official Liquidator, during the course of negotiation, were misleading and the Official Liquidator is duty bound to disclose about the above said vital points before the sale and he should have investigated the title before filing of report. It is also stated that the court sale is not merely creating a commercial relationship, but it is one of trust and confidence and

therefore, if the representations made are found to be false or untrue and the information furnished is incorrect, the sale is vitiated and his contention is that the Official Liquidator stands in fiduciary relationship and the contract is *Uberrimae fidei*.

16.4. The learned Counsel for the applicant's attack on the sale is also on the basis that it is mis-description and mistake. He submits that the mistake as to the title, description and ownership would vitiate the sale by applying Order 21 Rule 90 of the Code of Civil Procedure. He would also rely upon Rule 6 of the Companies (Court) Rules, 1959 to show that the provisions of the CPC are applicable to the proceedings under the Companies Act, especially in the circumstances that under Rule 272 of the Companies (Court) Rules, 1959 there is no procedure contemplated for effecting the sale.

16.5. The customary practice of the Official Liquidator in not allowing access to documents prior to confirmation of sale makes it abundantly clear that the relationship is of good faith. It is his submission that even in the notification there is no reference about the non-availability of documents in respect of the property. It is also his contention that the applicant, being auction purchaser, cannot be thrust with the properties, which do not belong to the Company at all.

16.6. It is also stated by the learned Counsel for the applicant that the proposal made during the course of arguments that alternative lands should be taken in consultation with the Tahsildars, especially for the purpose of giving access to the property, was also not acceptable and it is only thrusting on the applicant the property to cover up the lacunae created by the Official Liquidator and the contract is vitiated by fraud, misrepresentation and mis-description.

16.7. It is also his case that the third respondent/ secured creditor has no locus standi to oppose the applications, especially in the circumstances that the third respondent/secured creditor has not given the documents. It is his contention that the applicant had to borrow amounts from financial institutions to pay the consideration and in that regard, he has incurred huge loss due to misrepresentation.

16.8. The learned Counsel for the applicant would rely upon the judgments in

(i) Smt. Jatan Kumar Golcha Vs. Golcha Properties (P) Ltd., ;

(ii) 1971 (2) MLJ 59;

(iii) Full Bench decision of the Punjab and Haryana High Court in Kishan Chand Aggarwal Vs. Union of India (UOI) and Others, ; and

(iv) Mahendra Kumar Roongta Vs. The Official Liquidator, ,

to substantiate his contentions and vehemently contended for the purpose of setting aside of the sale.

17.1. On the other hand, the learned senior counsel appearing for the Official

Liquidator, Mr. Arvind Datar, would submit that the duty of the Official Liquidator, on a company being wound up, is to take into custody all the properties of the company in winding up. It is his submission that unlike in the case of insolvency proceedings, where, on declaration of insolvency, the property automatically vests with the Official Assignee, the property does not vest with the Official Liquidator and the Official Liquidator can only act as per the records of the Company.

17.2. He submitted that, while selling such properties, the Official Liquidator cannot hold any guarantee or warranty, relying upon the judgment of the Supreme Court in *United Bank of India Vs. Official Liquidator and Others*, . His further submission is that in case of auction sale, there is no warranty of title. Issuing of notification by the Official Liquidator does not amount to making an offer, but it is only an invitation to treat and in fact, the offer is made only by the bidder and acceptance is by the auctioneer, viz., the Official Liquidator and only after the acceptance, the contract concludes. Therefore, the purchaser, while making offer, of course, based on an advertisement, is expected to investigate the title before making such offer. There is no deception played by the Official Liquidator at any point willingly. It is his contention that only in a case where the Official Liquidator has willingly made certain false statement, there can be any interference by the Court and not in cases, where the Official Liquidator makes a report based on the available records of the company under liquidation. His contention is that there is absolutely no deception made by the Official Liquidator on the facts and circumstances of the case and there is absolutely no intention to deceive anyone, which is also not the case of the applicant.

17.3. His further submission is that the Official Liquidator can be called upon only in cases of negligent misstatement. In the circumstances that the Official Liquidator has no relationship with the auction purchaser, nor he holds out as a professional adviser, the concept of negligent misstatement would not arise.

17.4. The learned senior counsel would also submit that u/s 460(6) of the Companies Act, in case of any such conduct of the Official Liquidator, ultimately, the aggrieved person can only approach the Court, which can either confirm, reverse or modify the conduct of the Official Liquidator.

17.5. It is his submission that Order 21 of the Code of Civil Procedure, which applies to the execution proceedings, does not apply to the auction by the Official Liquidator and he would also rely upon the judgment of the Division Bench of this Court in *A.R. Ramanuja Mudaliar Vs. L.C. Sundara Varadachariar and Others*, . He would also further submit that even in a case where there is fraudulent sale, the purchaser can at the best refund the purchase money for that part of the property, in respect of which there is deficiency. He would submit that, even if Order 21 Rule 90 is applied, there is no material irregularity in the sale, which has been carried out only as per the Companies (Court) Rules, 1959. The Official Liquidator is only a custodian of the property and his submission is that, at the best, the sale can be set aside, if the Company has no saleable interest, but, in

the facts and circumstances of the case, that is not the case of the applicant.

17.6. It is his submission that any substantial injury, if the same has been incurred by the applicant, must be proved, but in the case on hand, no evidence has been adduced to substantiate the plea of substantial injury. Moreover, when an alternative proposal was made during the course of the argument for the purpose of providing access, the same was also rejected by the applicant.

17.7. It is his further submission that many of the deficiencies stated are per se discoverable by due diligence, if the auction purchaser acted in a reasonable prudent manner. In the absence of pleadings to show that steps were taken by the applicant for verification of title, inspection of site, etc., his submission is that the applicant is only taking advantage of the falling real estate prices and the applicant really wants to back out from the offer made by him and the same cannot be permitted.

17.8. It is also his contention that even in the original advertisement notification issued by the Official Liquidator, it was clearly stated that the sale was intended to be effected "as is where is and whatever there is basis" and also in Clause 12 of the terms and conditions, it is clearly stated that the buyers were to satisfy themselves about the condition of the property.

17.9. The learned senior counsel would also rely upon Section 18 of the Indian Contract Act to show that there is no misrepresentation or fraud committed by the Official Liquidator in any of the proceedings before sale was effected. He would also submit that there is absolutely no mistake and even assuming there are some mutual mistakes regarding the nature of the lands, the same will not affect the assent, unless the mistake is by both the parties. It is his submission that it is well established legal principle that mistake as to the quality will not generally avoid the contract.

17.10. It is his submission that out of total 41 Acres of land, two acres were reserved lands and that cannot be treated as mistake as to the substance of the transaction. It is stated that the Official Liquidator is looking after 450 companies situated in the State of Tamil Nadu under the direct control and supervision of the Madras High Court and he has to dispose of assets, viz., movable and immovable, of all these companies and it would be practically impossible for the Official Liquidator to scrutinise the correctness of title, measurement of properties, defects, if any, in all these assets. The Official Liquidator has no personal knowledge about the properties at all and he takes control of the properties only after the winding up order is passed.

17.11. Therefore, according to the learned senior counsel, the submissions of the applicant, as such, are not maintainable and the defects pointed out by the applicant do not merit cancellation of sale and mistakes of trivial nature do not cause any prejudice. As far as the overhead tank, TV room, etc., they are visible to any human eye and it is not open to the applicant to complain about the same. As far as the non-availability of the documents is concerned, it is his

submission that the Official Liquidator will only have the original documents, which are available with the company and in respect of other cases, where documents are not available, the certified copies of the documents have been furnished.

17.12. He also brought to the notice of this Court that in respect of some of the extents of properties, documents and revenue records were not available and his submission is that out of 41 acres of land, the documents are not available only in respect of 0.27 cents, which is extremely minimal. In respect of the complaint that the land in Survey No. 330/7 is classified as Cheri Natham, it is his submission that, even though the "A" Register shows like that, the revenue records as on 2003 indicate the land as agricultural land and in 2007, it was classified as residential area and not as a Cheri Natham. It is stated that even if 2.15 acres of cheri natham land is excluded, the applicant gets an additional extent of 2.15 acres in another survey number and therefore, according to the learned senior counsel, there is absolutely no point in the surmises and conjectures of the applicant, who, for the reasons best known, is intending to back out from the offer, which is consciously made by them.

18.1. The learned Counsel for the third respondent/ secured creditor, by adopting the arguments of the learned senior counsel appearing for the Official Liquidator that all available original documents have been handed over and certified copies have been provided for inspection, would submit that the physically verifiable facts cannot be the ground for setting aside an auction sale. It is his further submission that revenue records can always be mutated.

18.2. It is his submission that mere rough sketch would not amount to any representation. It is his further case that the doctrine of caveat emptor applies to auction purchaser, especially in respect of sales by the Official Liquidator, who has no knowledge of the extent and nature of the property belonging to the company. It is his contention that the sale is effected by the Official Liquidator pursuant to the order of this Court and not suo motu by the Official Liquidator.

18.3. He would again reiterate the judgment of the Supreme Court in *United Bank of India Vs. Official Liquidator and Others*, . He would also rely upon the judgment of the Delhi High Court in *Karamchand Appliances Pvt. Ltd. v. Bharat Carpets Ltd.* 103 Comp Cas 552 (Delhi).

18.4. He would also reiterate that the sale by the Official Liquidator is not bound by Order 21 of the Code of Civil Procedure. His submission is that the Official Liquidator does not stand in fiduciary relationship with the applicant and the sale by the Official Liquidator is not *Uberrimae fidei*.

19. On a perusal of the entire documents and after hearing the learned Counsel for the applicant, the learned senior counsel appearing for the Official Liquidator and the learned Counsel for the third respondent/secured creditor, the points to be answered in these cases are as follows:

(i) What is the nature and duty of care to be taken by the Official Liquidator to the purchaser in an auction sale and the remedies available to the purchaser, if there are any grievances?

(ii) What is the extent of applicability of Order 21 Rules 90 and 91 of the CPC to an auction conducted by the Official Liquidator under the supervision of the Court?

(iii) What are the duties of the auction purchaser, and on the facts of the present case, where the sale was held on "as is where is and whatever there is basis", what is the duty of care to be taken by the auction purchaser and whether there is any fraud, misrepresentation or mistake on the facts of the present case and in such event, whether the same will make the sale as void or voidable to enable the purchaser to recover the purchase money paid? and

(iv) Whether a sale effected by the Official Liquidator can be set aside, on the basis of the submission of the learned Counsel appearing for the applicant that the applicant intends to stick on for setting aside of sale?

20. On facts, it is clear that pursuant to the directions given by this Court on 7.11.2007 in C.A. No. 1983 of 2007, in respect of the company in liquidation, viz., M/s.Fidelity Industries Limited, the Official Liquidator has published a sale notice for sale of 41.12 Acres belonging to the said company under liquidation and situated in two villages, viz., Kilai and Ulandai. The said sale notice issued by the Official Liquidator, as per the direction of this Court, has made clear that the proposed sale is on "as is where is and whatever there is basis". The said notification, which was issued on 7.12.2007, also states that the date of inspection of the property by the intending purchasers was on 21.12.2007 and 22.12.2007 between 11 A.M. and 4 P.M. and that the last date for submission of tenders as 2.1.2008. Therefore, from the date of the notification, namely 7.12.2007, the intending purchasers had time to decide up to 2.1.2008 and the date for opening of tender by this Court was held as 4.1.2008.

21. The above said advertisement has been given in "The Hindu" and the "Daily Thanthi". One of the conditions of the terms and conditions issued by the Official Liquidator, in Clause 12, is as follows:

All the prospective buyers desirous of submitting tender for purchase of the assets are to satisfy themselves about the condition of the assets.

Under Clause 17, it is stated that on payment of the entire sale consideration, after confirmation of sale by this Court, the possession of the property will be handed over to the purchaser by the Official Liquidator within thirty days, after realization of full consideration.

22. The schedule, which is annexed to the terms and conditions contains 98 items of immovable properties with extent and also prescribing the name of the village as under:

S. No. Survey No. Village Extent of Extent of Land in Cents and in Acres
 294/1G Ulandai 118 1.18 2 371/10 Ulandai 38 0.38 3 371/6 Ulandai 22 0.22 4
 370/4 Ulandai 32 0.32 5 370/6 Ulandai 3 0.03 6 369/9 Ulandai 42 0.42 7 369/10
 Ulandai 48 0.48 8 368/14 Ulandai 22 0.22 9 369/9 Ulandai 15 0.15 10 369/10
 Ulandai 15 0.15 11 369/12 Ulandai 15 0.15 12 330/6A1 Ulandai 21 0.21 13
 330/6A2 Ulandai 20 0.2 14 330/6A3 Ulandai 20 0.2 15 330/6B1 Ulandai 20 0.2
 16 330/6B2 Ulandai 15 0.15 17 330/6B3 Ulandai 14 0.14 18 330/6C1 Ulandai 16
 0.16 19 330/6C2 Ulandai 17 0.17 20 330/6D1 Ulandai 26 0.26 21 330/6E1
 Ulandai 5 0.05 22 369/4 Ulandai 25 0.25 23 370/5 Ulandai 51 0.51 24 368/14
 Ulandai 11 0.11 25 369/12 Ulandai 100 1.00 26 353/9 Ulandai 9 0.09 27 368/13
 Ulandai 112 1.12 28 365/5 Ulandai 35 0.35 29 371/11 Ulandai 23 0.23 30 375/8
 Ulandai 16 0.16 31 375/10 Ulandai 23 0.23 32 375/11 Ulandai 21 0.21 33
 375/7B Ulandai 7 0.07 34 375/13 Ulandai 19 0.19 35 375/7A Ulandai 10 0.10 36
 375/12A Ulandai 22 0.22 37 375/12B Ulandai 20 0.2 38 375/15 Ulandai 15 0.15
 39 375/9 Ulandai 15 0.15 40 375/14 Ulandai 39 0.39 41 375/14 Ulandai 22 0.22
 42 375/14 Ulandai 26 0.26 43 375/14 Ulandai 26 0.26 44 375/14 Ulandai 11
 0.11 45 369/7 Ulandai 30 0.3 46 370/11 Ulandai 37 0.37 47 369/8 Ulandai 28
 0.28 48 370/1 Ulandai 28 0.28 49 371/4 Ulandai 3 0.03

Total land in Ulandai Village 1328 13.28

50 371/16 Kilai 64 0.64 51 296/1 Kilai 21 0.21 52 296/2 Kilai 21 0.21 53 369/11
 Kilai 96 0.96 54 294/2D Kilai 111 1.11 55 297/2A1B Kilai 84 0.84 56 297/2A1A
 Kilai 94 0.94 57 330/7 Kilai 6.5 0.07 58 295/1 Kilai 42 0.42 59 295/4 Kilai 27
 0.27 60 295/2 Kilai 2 0.02 61 297/1B Kilai 102 1.02 62 294/1E Kilai 110 1.10 63
 330/7 Kilai 81 0.81 64 330/7 Kilai 78.5 0.79 65 294/1C2 Kilai 72 0.72 66
 294/1C1 Kilai 62 0.62 67 330/6E Kilai 42 0.42 68 330/6D Kilai 24 0.24 69
 330/6E Kilai 3 0.03 70 330/6E Kilai 20 0.20 71 330/6D Kilai 12 0.12 72 330/7
 Kilai 66 0.66 73 295/3 Kilai 86 0.86 74 330/6C5 Kilai 16 0.16 75 330/6C6 Kilai
 15 0.15 76 330/6D3 Kilai 25 0.25 77 330/6D4 Kilai 12 0.12 78 330/6E3 Kilai 5
 0.05 79 330/6E4 Kilai 18 0.18 80 330/6E5 Kilai 34 0.34 81 330/6A4 Kilai 125
 1.25 82 370/2 Kilai 37 0.37 83 371/7 Kilai 7 0.07 84 369/3 Kilai 18 0.18 85
 330/1B2B Kilai 146 1.46 86 330/1B2A Kilai 69 0.69 87 330/1B1 Kilai 107 1.07
 88 297/2A2 Kilai 78 0.78 89 297/1A Kilai 106 1.06 90 294/1F Kilai 28 0.28 91
 294/2A Kilai 88 0.88 92 294/1H Kilai 120 1.20 93 369/6 Kilai 35 0.35 94 371/5
 Kilai 32 0.32 95 294/1A Kilai 110 1.10 96 294/2C Kilai 70.5 0.71 97 294/2B Kilai
 76 0.76 98 297/2B Kilai 79 0.79

Total land in Kilai Village 27.84

Total Extent of Land 41.12

23. Of course, on 4.1.2008, since there was only one bidder, this Court has adjourned the matter to 22.1.2008, directing the Official Liquidator to affix the sale notice at the site. Since there were three purchasers interested, the matter was posted on 1.2.2008 to enable them to bring EMD amount and auction was fixed on 1.2.2008 and ultimately, the auction stood adjourned to 6.2.2008, on

which date the applicant and one other intending purchaser GATI were present and the applicant was the highest bidder for Rs. 15.20 Crores and this Court confirmed the said sale to the applicant. After the payment of balance EMD amount, the applicant has, in fact, paid the first installment in time and the second installment even in April, 2008, viz., before the time granted for the payment of second and final installment.

24. Before the execution of the sale deed, the applicant has raised certain queries in his letter dated 1.9.2008, for which the Official Liquidator has filed his report dated 13.10.2008, based on various information from the Revenue authorities, during survey of land along with revenue records. The valuation report from ITCOT was also obtained.

25. The applicant has raised many objections, out of which a few are considered to be relevant for the purpose of these applications. It is not in dispute that Ulandai and Kilai Villages are adjacent villages. The main objection is that on the south-eastern side of the property abutting the existing village road, an extent of land has been shown as entrance, beyond which the properties in Survey Nos. 297/1B2B, 297/1B2A and 297/1B1 are situated. The objection is that, after the existing village road, before entering into the lands, a vast extent, which is the real entrance, belongs to the Government and therefore, there is no approach. It is also relevant to point out, at this stage, that the entire stretch of land is a barren land. It is also pertinent to state that during the hearing of the said applications, the learned Government Pleader has been called for with records and in fact, a suggestion was made by which the Government was willing to consider the claim of the applicant to provide proper entrance and ultimately, the same was not agreeable to the applicant.

26. One other objection is in respect of the land in Survey No. 330/7 in Kilai Village of an extent of 2.13 Acres, which is situated in the middle of the property stated to be classified in the revenue records as Cheri Natham. The case of the applicant is that in the middle of the entire property, when a portion to an extent of 2.13 Acres is Cheri Natham, it is not possible for the applicant to use the entire stretch of property as a contiguous one. However, in the valuation by the ITCOT, it is stated that the revenue records classifies the said land as agricultural lands and treating it as a residential area, the guideline value has been fixed. The property stands in the name of the Company and it is not known as to how it is subsequently converted into cheri natham, which is to be worked out. In fact, it was suggested that by the order of Court u/s 466(2) of the Companies Act, a reclassification can be possible.

27. The next objection relates to some discrepancies between the ITCOT report and the proclamation. Apart from that, the objections relate to the high tension wire in Ulandai Village in Survey Nos. 375/9, 375/10 and 375/11; and again in Ulandai Village in Survey No. 353/9, there is stated to be a small structure put up for the benefit of the villagers.

28. That apart, the further complaint is that the secured creditors have not produced the documents and the Official Liquidator ought to have taken steps to see that the correctness of the entire documents are investigated before bringing the property for sale.

29. It is in the light of the above said factual allegations, stated to be material irregularities by the applicant, the applicant seeks the relief as stated above and ultimately, as submitted by the learned Counsel for the applicant, in effect, the applicant wants to back out from the sale, which has been confirmed by this Court. In this context, it has to be decided as to the nature of sale and the responsibilities of the Official Liquidator, in effect, in such a sale.

30. Section 456 of the Companies Act enables the Official Liquidator to take into his custody or control all the properties to which the Company in liquidation are entitled to and when once the control is taken by the Official Liquidator, the properties and the effects of the company are deemed to be in the custody of the Court. Section 456 of the Companies Act, is as follows:

456. Custody of company's property.

(1) Where a winding up order has been made or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator, as the case may be, shall take into his custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

(1A) For the purpose of enabling the liquidator or the provisional liquidator, as the case may be, to take into his custody or under his control, any property, effects or actionable claims to which the company is or appears to be entitled, the liquidator or the provisional liquidator, as the case may be, may by writing request the Chief Presidency Magistrate or the District Magistrate within whose jurisdiction such property, effects or actionable claims or any books of account or other documents of the company may be found, to take possession thereof, and the Chief Presidency magistrate or the District Magistrate may thereupon after such notice as he may think fit to give to any party, take possession of such property, effects, actionable claims, books of account or other documents and deliver possession thereof to the liquidator or the provisional liquidator.

(1B) For the purpose of securing compliance with the provisions of Sub-section (1A), the Chief Presidency Magistrate or the District Magistrate may take or cause to be taken such steps and use or cause to be used such force as may in his opinion be necessary.

(2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company.

31. That apart, the powers of the Liquidator are given u/s 457 of the Companies Act, which reads as under:

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;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;

(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate, or to sell the same in parcels;

(d) to rise on the security of the assets of the company any money requisite;

(e) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

(2) The liquidator in a winding up by the Court shall have power-

(i) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use when necessary, the company's seal;

(ia) to inspect the records and returns of the company on the files of the Registrar without payment of any fee;

(ii) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(iii) to draw, accept, make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(iv) to take out, in his official name, letters of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself:

Provided that nothing herein empowered shall be deemed to affect the rights, duties, and privileges of any Administrator-General;

(v) to appoint an agent to do any business which the liquidator is unable to do himself.

(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court; and any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of any of the powers conferred by this section.

Therefore, the exercise of the powers by the Official Liquidator in a winding up proceeding is under the control of the Court and in every stage, the sanction of the Court is required.

32. Under the Companies (Court) Rules, 1959, framed by the Supreme Court of India, as per the powers conferred u/s 643(1) and 643(2) of the Companies Act, Rule 232, which deals with the powers of the Official Liquidator, reads as follows:

232. Powers of Official Liquidator:

The duties imposed on the Court by Sub-section (1) of Section 467 with regard to the collection of the assets of the company and the application of the assets in discharge of the company's liabilities shall be discharged by the Official Liquidator as an officer of the Court, subject to the control of the Court and to the proviso in Section 643(2).

Thus, the Official Liquidator is made an Officer of the Court, subject to the control of the Court.

33. Rule 233 of the Companies (Court) Rules, 1959 places the Official Liquidator in a position of a receiver appointed by the Court. The said Rule reads as follows:

233. Official Liquidator to be in the position of a Receiver:

For the discharge by the Official Liquidator of the duties imposed by Sub-section (1) of Section 467 and the last preceding rule the Official Liquidator shall, for the purpose of acquiring and retaining possession of the property of the company, be in the same position as if he were a Receiver of the property appointed by the Court, and the court may on his application enforce such acquisition or retention accordingly.

34. As correctly submitted by the learned Senior Counsel, Mr. Arvind Datar, the said powers of the Official Liquidator are distinct from the powers of the Official Assignee under the Insolvency law. Under the Companies Act, the Official Liquidator takes control of the properties on passing of the order of winding up by the Court, while in the insolvency law, on a person having been declared insolvent, the properties of the insolvent automatically vest with the Official Assignee.

35. In *United Bank of India Vs. Official Liquidator and Others*, , which is almost a similar case as that of the present case, viz., in the said case also, in respect of some of the properties, which were under the custody of the Official Liquidator

and sold by him, it was alleged that the company in liquidation did not own the said properties, the Supreme Court held that the sale by the Official Liquidator was on "as is where is basis". On the said factual matrix, it was laid down by the Supreme Court that the sale by the Official Liquidator does not mean that he holds out a warranty or guarantee in respect thereof and it is distinguishable from the sale effected by the individuals selling immovable properties. The relevant portion of the judgment of the Supreme Court, for the purpose of this case, is as follows:

13. In our view, the complete answer to Triputi's allegation in regard to the failure of the Official Liquidator to hand over to it possession of certain properties which were sold to it, which, according to it, the company in liquidation did not even own, is contained in Clause 2 of the Terms and Conditions of Sale upon the basis of which the property and assets of the company in liquidation were sold by the Official Liquidator to Triputi under the orders of this Court. Clause 2 reads thus:

2. The sale will be as per inventory list on "as is where is basis" and subject to the confirmation of the Hon"ble Supreme Court of India. The Official Liquidator shall not provide any guarantee and/or warranty in respect of the immovable properties and as to the quality, quantity or specification of the movable assets. The intending purchaser must satisfy themselves in all respect as regards the movable and immovable assets, as to their title, encumbrances, area, boundary, description, quality, quantity, and volume etc. and the purchaser will be deemed to offer with full knowledge as to the description, area etc. of the properties and defects thereof, if any. The purchaser shall not be entitled to claim any compensation or deduction in price on any account whatsoever and shall be deemed to have purchased the property subject to all encumbrances, liens and claims including those under the existing legislation affecting labour, staff etc. The Official Liquidator shall not entertain any complaint in this regard after the sale is over. Any mistake in the notice inviting tender shall not vitiate the sale.

14. When the Official Liquidator sells the property and assets of a company in liquidation under the orders of the Court he cannot and does not hold out any guarantee or warranty in respect thereof. This is because he must proceed upon the basis of what the records of the company in liquidation show. It is for the intending purchaser to satisfy himself in all respects as to the title, encumbrances and so forth of the immovable property that he proposes to purchase. He cannot after having purchased the property on such terms then claim diminution in the price on the ground of defect in title or description of the property. The case of the Official Liquidator selling the property of a company in liquidation under the orders of the Court is altogether different from the case of an individual selling immovable property belonging to himself. There is, therefore, no merit in the application made on behalf of Triputi that there should be a diminution in price or that it should not be made liable to pay interest on the sum of Rs 1 crore 98 lakhs.

The Supreme Court, in no uncertain terms, has held that after the purchase, the purchasers cannot raise the question as to defect in title or description of the property or diminution in price.

36. In the earlier judgment of the Supreme Court in *The Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdulgafur Haji Hussienbhai*, , where the issue was relating to a sale effected by the Municipal Corporation under the Bombay Provincial (Municipal Corporation) Act, 1949, for recovery of municipal taxes, the Supreme Court, while construing the sale effected by the Civil Court, which can be set aside under Order 21 Rule 91 of the Code of Civil Procedure, on the basis that the judgment debtor has no saleable interest, has held that the same is different from the sale effected in respect of the statutory charges due. It was held that there is no warranty of title in an auction sale and the purchaser at the auction sale takes the property subject to all the defects of the title and therefore, the doctrine of caveat emptor (let the purchaser beware) applies to such purchaser, and that Order 21 Rule 91 of the CPC is different and the doctrine has no application. The Supreme Court has observed as follows:

3. To begin with it was contended that there is no warranty of title in an auction sale. This general contention seems to us to be well-founded because it is axiomatic that the purchaser at auction sale takes the property subject to all the defects of title and the doctrine caveat emptor (let the purchaser beware) applies to such purchaser. The case of the judgment-debtor having no saleable interest at all in the property sold such as is contemplated by Order 21 Rule 91 CPC is, however, different and is not covered by this doctrine.

37. As submitted by Mr. Arvind Datar, learned senior counsel appearing for the Official Liquidator, the Official Liquidator cannot be equated to that of a vendor or seller u/s 55 of the Transfer of Property Act. However, it is clear that even though the Official Liquidator has no personal knowledge about the nature of the property, it does not mean that the Official Liquidator can play deception either on the creditor or the purchaser. The Official Liquidator, who does not give any warranty or guarantee in respect of the title of the properties, which comes to his hands as per the order of the Court on winding up, is not expected to make any negligent or willful misstatement, which may result in deception of the purchasers. Therefore, the willful or negligent misstatement of the Official Liquidator, which is actually a civil wrong, cannot be made by the Official Liquidator. In fact, in such event, the affected person has a right to approach the court, which ultimately, either confirms or reverses or modifies such acts. The powers of the Court, in such event, are available u/s 460(6) of the Companies Act, which reads as follows

460. Exercise and control of liquidator's powers:

(6) Any person aggrieved by any act or decision of the liquidator may apply to the Court; and the Court may confirm, reverse or modify the act or decision complained of and make such further order as it thinks just in the circumstances.

Therefore, there is always a check and balance theory, which is made applicable, in respect of the function of the Official Liquidator.

38. Law is clear that in cases of either making of a false statement of fact or deliberate concealment of a material fact, with the knowledge of its falsity, there is possibility for award of damages and the contract may be made either void or voidable as per Sections 17 or 18 of the Indian Contract Act. In view of the categorical legal position of the Official Liquidator in law and applying the same to the facts of the present case, it is not possible to accept the contention of the learned Counsel for the applicant in this regard, especially in the circumstances that there is absolutely no reason to believe that the Official Liquidator has made any willful false statement or fraudulent misrepresentation about the properties of the company in liquidation. In any event, the sale, as it is notified in the earlier notification effected by the Official Liquidator, as per the directions of this Court, is on "as is where is and whatever there is basis". The applicant having got sufficient time to investigate the title ought to have been more vigilant while participating in the auction. In the absence of any willful misstatement about the description of the properties by the Official Liquidator, it can never be said that the sale effected, as per the order of this Court, would be vitiated.

39. Next, in respect of the applicability of Order 21 of the Code of Civil Procedure, while it is true that under Rule 6 of the Companies (Court) Rules, 1959, the provisions of the CPC are applicable so far as the same are applicable, but it cannot be said that the provisions regarding the execution proceedings in a sale effected through Court can be equated to a sale effected by the Official Liquidator as per the orders of this Court under the Companies Act. Rule 6 of the Companies (Court) Rules, 1959 reads as under:

6. Practice and procedure of the Court and provisions of the Code to apply:

Save as provided by the Act or by these Rules, the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these Rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these Rules or the practice and procedure of the Court.

40. In *A.R. Ramanuja Mudaliar Vs. L.C. Sundara Varadachariar and Others*, , a Division Bench of this Court with Leach, C.J., and Burn, J., in a case where under a compulsory winding up of a company the Official Liquidator sells a decree standing in the name of the Directors of the company in liquidation by auction and when the liquidator assigns the decree to the purchaser with the permission of the Court, it was held that the principles enunciated under Order 21 Rule 90 of the CPC do not apply and the Court cannot set aside such sale. The Division Bench has held as follows:

It is clear that the learned District Judge had no power to set aside the sale. The decree was sold by auction and the appellant was the highest bidder. The appellant having become the purchaser, the official liquidators with the sanction

of the Court assigned the decree to him. In these circumstances the Court had no right to set aside the contract. The principles of Order 21, Rule 90, Civil Procedure Code, do not apply, but even if they did there would be no ground for setting aside the sale. It is not suggested that the appellant was a party to any fraud. The appellant having bought the decree is entitled to the benefit of it, and the order of the learned District Judge must therefore be set aside. Having succeeded, the appellant is entitled to costs which will be paid out of the assets of the Company.

41. Even assuming, as submitted by the learned senior counsel, Mr. Arvind Datar, that Order 21 Rules 90 or 91 of the CPC applies, there is absolutely no material irregularity on the facts of the present case to invoke the said provisions of the Code of Civil Procedure. Therefore, the concept of setting aside of sale, on the basis that the judgment debtor was having no saleable interest in the property, has no application to the sale effected by the Official Liquidator. On the facts of the present case, it cannot be held that the company in liquidation, namely M/s. Fidelity Industries Limited has no saleable interest, especially in the circumstances that in respect of the major portion of the property, the documents in original have been produced, as the same was received from the secured creditor, and in respect of the other small portion, copies have been furnished and certainly, law enables the purchaser to have the said copies of documents as copies of title, of course, subject to certain proceedings to be initiated.

42. It is also relevant to point out that even in respect of 2.41 Acres, which is stated to be 2.15 Acres as per the records of the Official Liquidator, as forming part of Cheri Natham, it is not even the case of the applicant that the applicant incurred substantial injury because of the same and therefore, it can never be construed that there has been material irregularity, which will go into the very root of the sale effected by the Official Liquidator, to think about the setting aside of the sale by this Court, by exercise of its inherent powers conferred under Rule 9 of the Companies (Court) Rules, 1959, which is as follows:

9. Inherent Powers of Court.

Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

43. While law has been laid down by the Hon'ble Supreme Court that the intending purchaser has to satisfy himself in respect of the title, encumbrances and so forth of the immovable property before he proposes to purchase the property, it is true that suppression of a material fact would amount to suggestion of a false fact, which can be even equated to a deception, for the law is "suppressio veri suggestio falsi".

44. On the facts of the case, it is not known as to what suppression has been made by the Official Liquidator, especially in the circumstances that the applicant

was having sufficient time to investigate the title. It is, particularly, relevant to note that the applicant has chosen to state that even a patent material, which is visible to any naked eye like that of the passing of the high tension wire in a small portion of the property, subject matter of the sale, and construction of a small room as a T.V. Room, which can be seen by any person, who inspects the property, is used for the purpose of setting aside the sale, which only raises a doubt that the applicant, having deliberately participated in the auction conducted before this Court, wants to back out for the reasons best known to him and such reasons, certainly, cannot be on the basis of either fraud or deception played by the Official Liquidator. The applicant having chosen to purchase the property for huge value of Rs. 15.20 Crores would not have entered into such a venture without any inspection, which is expected of an ordinary prudent man. It is in these circumstances and on the established fact available in the world parlour of economic recession and the falling of the real estate price, the applicant seeks to wriggle free from the situation and that can never be accepted as a ground to set aside the sale.

45. In such view of the matter and for the reasons as stated above, the decision of the Bombay High Court in Jaikisandas Balchand Pamnani and another Vs. Municipal Corporation of Greater Bombay and others, , relied upon by the learned Counsel for the applicant, Mr. S.R.Rajagopal, is not applicable to the facts and circumstances of the case. That was a case of Court auction sale sought to be set aside under Order 21 Rule 90 of the Code of Civil Procedure, on the basis of mis-description in the sale proclamation. When there was a vast difference in the description of the property, namely when property of 813.112 sq.mtrs. was described as 244.91 sq.mtrs., the word "thereabout" in the advertisement was construed to be a material mis-description. The judgment rendered in the facts of the said case cannot be made applicable to the facts and circumstances of the case on hand.

46. In fact, in respect of a portion stated to be categorised as Cheri Natham in the revenue records, there was a proposal for exchange made by the Government as per the Board Standing Order 26A, especially Order 1(vi), for which, admittedly, the applicant has not shown any interest. The Order 1(vi) reads as under:

1. When exchange may be made.- The grant of land, at the disposal of the Government for land owned privately may be made in circumstances such as the following:

(vi) where a private owner is willing to provide land for the extension of village sites in exchange for land at the disposal of the Government.

47. Reliance placed by Mr. S.R.Rajagopal, learned Counsel for the applicant, on the judgment of the Calcutta High Court in Mahendra Kumar Roongta Vs. The Official Liquidator, , cannot also be accepted for the reason that there, as per the direction of the Court, the purchaser before confirmation of the sale has put up a

boundary wall stated to have been damaged by anti-social elements and therefore, there was no possibility for taking possession of the extent of the property, which was the subject matter of the sale. By virtue of the pendency of some litigations, which were not known to the Official Liquidator or purchaser, regarding the extent of the property, it was held that physical possession of the entire land could not be given by the Official Liquidator and on the said facts and circumstances of the case, the Calcutta High Court, having taken note of the fact that the purchaser is at no fault, has interfered with the sale and directed the refund of the amount paid. The facts and circumstances of the said case cannot be equated to the facts of the present case and it cannot be said that the contract becomes void to enable the applicant for the refund of sale consideration, by applying Section 65 of the Indian Contract Act.

48. In *Hi-Q Electronics Pvt. Ltd. 679, 10th Main, 4th Block, Koramangala, Bangalore 560 034 Vs. Branch Manager, Tamil Nadu Industrial Investment Corpn. Ltd., P.S.No. 49, 7 II Cross, Kamaraj Colony, Hosur 635 109 and 2 others, , K.Govindarajan,J*, as he then was, has held that non disclosure of sales tax liability does not amount to fraud on the part of the seller. The learned Judge has held that if there is a mistake on the part of the auction purchaser that the judgment-debtor has a saleable interest on the property, it does not mean that the sale will be vitiated. It was also held that in an auction purchase, no one guarantees to the purchaser that the judgment-debtor has good title. The learned Judge, by quoting a similar case from Rajasthan High Court in *Thakarlal Vs. Smt. Rama and Others, ,* has held as follows:

9. In this case, admittedly, the petitioner is the successful bidder and his bid has been confirmed. It is not the case of the petitioner that the respondents 1 and 2 have no right to sell the properties. Now it is alleged by the petitioner that he cannot pay the entire amount, in view of the fact that the Sales Tax Department has attached the properties so as to enable them to recover the sales tax arrears. The respondents 1 and 2 relying on Clause 16 have come forward with the plea that having agreed for the terms and conditions of the sale, the petitioner cannot now refuse to pay the entire amount, and so they are entitled to forfeit the Earnest Money Deposit amount. It is also not the case of the petitioner that the sale in his favour has been set aside and the respondents 1 and 2 have no right at all to bring the properties for sale. While dealing with similar issue, in the decision in *Thakarlal Vs. Smt. Rama and Others, ,* it has been held as follows:

(10) In the Lahore case AIR 1932 Lah. 401 (FB) the decision of the Privy Council in *Kissorimohan Roy v. Harsukh Das* ILR 17 Cal. 436 in which it was held that an illegal attachment under the CPC is a direct act of the decree-holder, for which he is responsible in law was referred to together with the provisions of Order 21 and the forms prescribed in Appendix E.Schedule I, C.P.C. and it was inferred that in a Court sale there was representation by the decree-holder that the judgment-debtor had a saleable interest in the property against which he was proceeding in

execution.

In the execution application which is filed in form No. 6 Appendix E. Schedule 1, C.P.C. with regard to the particulars furnished under columns 1 to 10 the decree-holder is required to declare that what is stated therein is true to the best of his knowledge and belief. But with regard to the interest of the judgment-debtor in the immovable property sought to be proceeded against all that the decree-holder is required to declare is that, so far as he has been able to ascertain, his interest in the property is as specified.

No publicity is given to the declaration contained in the execution application. Publicity is only given to the sale proclamation which is issued by the Court. It is this proclamation which invites bidders to come and bid for the property at the auction sale. Whatever representation is made to the auction purchaser is contained in the sale proclamation. This representation is not made on behalf of the decree-holder. It is made by the Court on its behalf. It is in Form No. 29, Appendix E, Schedule I C.P.C. the following condition of sale is specifically mentioned in this proclamation:

The particulars specified in the Schedule below have been stated to be the best of the information of the Court, but the Court will not be answerable for any error, misstatement or omissions in the proclamation.

It is thus clear that there is no question of any representation by the decree-holder to the auction-purchaser that the judgment-debtor has a saleable interest in the property.

(11) The Oudh and Labour cases have also taken the view that the sale can be rescinded at the instance of the auction-purchaser on the ground of mistake. Section 20 of the Contract Act lays down that where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. It is clear that to attract the provisions of Section 20 there must be a mutual mistake of the contracting parties. An auction sale cannot be regarded as a sale by the decree-holder in favour of the auction purchaser. It cannot therefore be regarded as a case of mutual mistake.

(15) Now the auction purchaser is not bound to purchase the property at an auction sale. His mistake in thinking that the judgment-debtor has a saleable interest in the property does not therefore entitle him to a refund of the purchase money merely on the ground that he subsequently discovers that he has no such interest. It appears to me that money paid under a mistake of fact can only be recovered in the circumstances specified by Farewell, J., in the above case.

(16) Another aspect of the matter is that a purchaser at an auction sale knows that no one guarantees to him that the judgment-debtor has good title and he purchases the property with his eyes open and regulates the price which he bids for the property with reference to the circumstances under which he is purchasing and the risk he runs. There seems to be no reason why the decree-

holder who is bona fide trying to realise his decree by executing it should be penalized in order to safeguard the interest of the auction purchaser.

In case the decree-holder is ordered to refund the money to the auction purchaser, he shall have no right to further execution of his decree which has once been satisfied in full. As was pointed out in the Allahabad Full Bench case AIR 1988 All 593, if the decree-holder perpetrates a fraud on the auction purchaser then certainly the latter would have an independent right of action to recover the purchase-money.

49. While considering Section 20 of the Indian Contract Act, 1872, in respect of the mistake of one of the parties as to the fact regarding the nature of the company's interest in the lands, which would make the contract of sale void ab initio, it was held by the Delhi High Court in *Karamchand Appliances Pvt. Ltd. v. Bharat Carpets Limited (In Liquidation) and Ors.* (2001) 103 Comp Cas 552, as follows:

I also find from the record that an application (C.A. No. 263 of 1997) was filed by the applicant, seeking a direction to the Official Liquidator to transfer the marketable title to the lands admeasuring 6,875 sq.yds. and 5,354 sq.yds. to the applicant and along with the application a draft sale deed, which the applicant wanted the Official Liquidator to execute in their favour, was annexed. I feel that in the event of execution of sale deed in the format furnished by the applicant, the applicant-company will acquire a clear title in the lands in question and no cause for the applicant's grievance in this behalf will survive.

Relying on Section 20 of the Indian Contract Act, 1872, it was submitted by learned Counsel for the applicant that since the applicant had submitted their bid under a mistake as to a matter of fact regarding the nature of the company's interest in the lands in question, the said bid was void ab initio. Since I have found that there has been no mistake of any fact in the advertisement, inserted for sale of assets of the company in liquidation, the applicant's bid cannot be held to be void.

Relying on *Sri Tarsem Singh Vs. Sri Sukhminder Singh*, , the submission of Mr. Bhattacharjee, learned Counsel for the applicant that when the bid in question was itself void, the Official Liquidator, who has received part of the bid amount under the said bid in terms of the order dated December 17, 1996, is bound to refund the amount so paid by the applicant along with interest thereon is equally untenable. In view of my finding that there was neither any mistake of fact nor was it so understood by either of the parties, I am not persuaded to accept the contention.

50. In *I.T.C. Limited Vs. George Joseph Fernandes and Another*, , the Supreme Court, while referring to Section 20 of the Indian Contract Act, in respect of mistake of fact essential to the agreement, which would otherwise make the agreement void, has held that the contract becomes void only if some terms can be implied in both offer and acceptance, which prevents the contract from

coming into operation, by relying upon the judgment of Lord Denning in *Solle v. Butcher* (1949) 2 All ER 1107, 1119 and also the judgment of Lord Atkin in *Bell v. Lever Bros Ltd.* (1931) All ER 1, 27 and the narration of various English judgments along with the legal principles of Cheshire and Fifoot, making it a treasure for the posterity in the field of law. The following observations are worth reproducing:

21. The next question is whether the courts below were correct in holding that there was no mutual mistake so as to render the agreement void ab initio u/s 20 of the Contract Act.

22. Section 20 of the Indian Contract Act, 1872 provides that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. The explanation to the section says that an erroneous opinion as to the value of the thing which forms subject matter of the agreement is not to be deemed a mistake as to a matter of fact. Where the parties make mutual mistake misunderstanding each other and are at cross purposes, there is no real correspondence of offer and acceptance and the parties are not really consensus ad idem. There is thus no agreement at all; and the contract is also void. A common mistake is there where both parties are mistaken about the same vital fact although both parties are ad idem, e.g. the subject matter of the contract has already perished. The contract in such a case is void as the illustrations to the section make clear. In *U.P. Government Vs. Lala Nanhoo Mal Gupta*, it has been observed that Section 20 is concerned with common mistake of fact and not mutual mistake. A common mistake is made or shared alike by both while mutual means made or entertained by each of the persons towards or with regard to each other. In *Cooper v. Phibbs* 15 WR 1049 (HL) A agreed to take a lease of a fishery from B, though contrary to the belief of both parties at the time, A was tenant for life of the fishery and B had no title at all. Lord Westbury applied the principle that if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. The transfer of ownership being impossible, the stipulation was *naturali ratione inunitilis*. This principle of *Cooper v. Phibbs* 15 WR 1049 (HL) has been followed in *Earl Beauchamp v. Winn* (1873) 6 HL 223 and *Huddersfield Banking Co. v. Lister (Henry) & Sons* (1895) 2 Ch 273. However, Lord Atkin in *Bell v. Lever Bros. Ltd.* (1931) All ER 1, 27 following *Kennedy v. Panama Royal Mail Co.* 36 LJ QB 260 and *Smith v. Hughes* 40 LJ QB 221 described the statement of Westbury too wide and said that the correct view was that there was a contract which the vender was either incapable of performing or had committed breach of a stipulation as to title; the contract was unenforceable but not void. In *Bell v. Lever Bros. Ltd.* (1931) All ER 1, 27 an agreement of service between the company and two of the directors of its subsidiary company was terminated on payment of compensation. The parties proceeded on the assumption that the service agreement was not liable to immediate termination by reason of misconduct of the directors which assumption proved to be

mistaken. Fraud was however negated. In an action by the company for rescission of contract and repayment of moneys paid the agreement was set aside on the ground of mutual mistake as to the quality of the service contract. The accepted proposition was that whenever it is to be inferred from the terms of the contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided; i.e. it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact. The assumption must have been fundamental to the continued validity of the contract or a foundation essential to its existence. Lord Atkins observed that the common standard for mutual mistake and implied conditions as to the existing or as to future fact is: Does the state of new facts destroy the identity of the subject matter as it was in the original state of facts? In the words of Lord Thankerton the error must be such that it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject matter of the contract or was an inevitable inference from the nature of the contract that all parties so regarded it. Where each party is mistaken as to the other's intention, though neither realises that the respective promises have been misunderstood, there is mutual mistake. The illustration in *Cheshire and Fifoot's Law of Contract* is, if B were to offer to sell his Ford Cortina car to A and A were to accept in the belief that the offer related to a Ford Zephyr. In such a case, no doubt, if the minds of the parties could be probed, genuine consent would be found wanting. But the question is not what the parties had in their minds, but what reasonable third parties would infer from their words or conduct. The court has to ascertain "the sense of the promises". In other words, it decides whether a sensible third party would take the agreement to mean what A understood it to mean or what B understood it to mean, or whether indeed any meaning can be attributed to it at all. Blackburn, J. in *Smith v. Hughes* LR (1871) 6 QB 597 at p. 607 said:

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree the other party's terms.

23. This case establishes that a contract is void at law only if some term can be implied in both offer and acceptance which prevents the contract from coming into operation. In *Solle v. Butcher* (1949) 2 All ER 1107, 1119 Lord Denning said that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely upon his own mistake to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental,

and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know the mistake, but shared it. There is no doubt that the application of the doctrine of mutual mistake depends upon the true construction of the contract made between the parties. A mutual misunderstanding will not nullify a contract but only if the terms of the contract construed in the light of the nature of the contract and of the circumstances believed to exist at the time it was done show that it was never intended to apply to the situation which in reality existed at that time, will the contract be held void. Mistake as to the quality of the article contracted for may not always avoid the contract. As Lord Atkin said in *Bell v. Lever Bros. Ltd.* mistake as to the quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. A distinction has, therefore, to be made between a mistake as to substance or essence on the one hand, and a mistake as to quality or attributes on the other. A mistake of the former type, will avoid the contract whereas a mistake of the latter type will not. Such a distinction was made in *Kennedy v. Panama Royal Mail Co. Ltd.* It may be said that if there be misapprehension as to the substance of the thing there is no contract; but if it be a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. Thus a mistake as to an essential and integral element in the subject matter of the contract will avoid the contract. A mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. A distinction, therefore, should be drawn between a mistake as to the substance of the thing contracted for, which will avoid the contract and mistake as to its quality which will be without effect. According to circumstances even a mistake as to the substance of the thing contracted for may not necessarily render a contract void as was observed in *Solle v. Butcher*. Similarly in *Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co. Ltd.* (1953) 2 All ER 739 where both parties entered into a contract for the sale of horse-beans, which were quite different from the feveroles which they each believed them to be, yet the contract was held not to be void. Thus there must be a difference so complete that, if the contract were enforced in the actual circumstances which have unexpectedly emerged, this would involve an obligation fundamentally different from that which the parties believed they were undertaking. In *Sheikh Brothers Ltd. v. Arnold* (1957) 2 WLR 254; *Bell v. Lever Bros.* was applied.

51. Applying the yardstick laid down by the eminent authors on the Law of Contract with regard to Section 20 of the Indian Contract Act to the facts of the present case, it is certainly not possible to accept the contention of the learned Counsel for the applicant that there has been any mistake in the minds of the parties, which would vitiate the contract of sale. The pre-contractual

representations made by the Official Liquidator, either by notification or subsequent filing of report, which has culminated into the sale effected by the Court and the consequent confirmation of sale on the facts of the present case, can never be said to be lacking good faith, apart from the fact that it can never be treated as a willful misstatement by any stretch of imagination.

52. As correctly submitted by the learned Senior Counsel appearing for the Official Liquidator, Mr. Arvind Datar, the words "as is where is and whatever there is basis" is relevant to be considered in the context of the volume of work entrusted to the Official Liquidator in discharging his duties, especially relating to the entrustment of the properties of the companies in liquidation, as custodian. As it is stated that the Official Liquidator is looking after the affairs of 450 companies in Tamil Nadu, which are under the control and supervision of the High Court, certainly, it is not possible for the Official Liquidator to investigate into the title of the properties under liquidation, every time when there has been an order of winding up and it is not also his duty to scrutinise the correctness of title and find out the defects so as to inform the same to the purchasers.

53. When there is enough time given to the purchasers, after the publication is issued by the Official Liquidator as per the orders of the Court, an utmost duty is cast on such purchasers to investigate into the title, by exercising the principles of caveat emptor to the fullest possible extent and having failed in such efforts, it is not open to the applicant to find fault with the sale effected by the Official Liquidator. That apart, mere presence of an overhead tank or TV room are not substantial grounds for the purpose of setting aside the sale, even by this Court exercising the power under Rule 9 of the Companies (Court) Rules, 1959. The absence of documents and revenue records in respect of 0.27 cents, which is to a minimal extent also cannot be a ground for setting aside the sale.

54. In such view of the matter, I have no hesitation to hold that the applications filed by the purchaser are misconceived and there are absolutely no grounds to interfere with the sale, which has been confirmed by this Court. On the factual matrix that the Official Liquidator has also handed over possession of the property to the applicant, it is not possible to interfere at this stage and therefore, the applications stand dismissed.

Before parting, I would like to place on record my deep sense of appreciation for Mr. Arvind Datar, learned senior counsel, for the efforts taken by him in bringing out various principles on the points of discussion, including the judgments of the English Courts.