

ALLAHABAD BANK ETC. ETC.
v.
BENGAL PAPER MILLS CO. LTD. AND ORS. ETC.

OCTOBER 7, 2004

[R.C. LAHOTI, CJ., G.P. MATHUR AND
P.K. BALASUBRAMANYAN, JJ.]

Winding up of Company—Purchase of assets thereof—After a round of litigation sale set aside by Supreme Court on the ground of consideration being inadequate—Purchaser in possession of the assets for 10 years—Direction for refund of purchase price—Demand of interest thereon—Refusal by Official Liquidator—Application for clarification of the order clarifying interest on purchase price—Held: In view of principle embodied in Order XXI Rule 93 CPC, the Court in exercise of its discretion had refused to award interest on the purchase price—Even on principle of restitution claim would not succeed as there was no failure of consideration because the purchaser had the benefit of the assets—Principle of restitution is founded on the principle of unjust enrichment—Hence it would be necessary to investigate that aspect and advantage derived by each of the parties have to be determined—Code of Civil Procedure, 1908—Order XXI, Rule 93—Contract Act, 1872—Sections 65, 70 and 72—Principle of Restitution.

Winding up of Company—Purchase of assets thereof—After a round of litigation sale set aside by Supreme Court directing resale of assets—Offer for purchase of the assets as a going concern and counter offer for purchase on “as is where is basis”—Direction of Company Court to parties to get clarification from this Court regarding mode of sale—Applications seeking clarification—Held: Clarification not required—The decision regarding mode, manner and price of sale is that of the Company Court.

Respondent-Company was ordered to be wound up. The offer of purchaser-applicant to purchase the assets of the Company was accepted. Sale was ordered and the same was confirmed on 15.9.1989. Applicant was given possession of the assets of Company the very next day. Purchase price of Rs.2 crores was not paid in lump sum but in four quarterly

A instalments. Appeal against the sale and its confirmation was dismissed by Division Bench of High Court. Appeal against the same was allowed by this Court on 20.4.1999 setting aside the sale as the sale price was found to be very low, directing refund of purchase price and resale of assets of the Company. Official Liquidator refunded the purchase price, but refused to pay interest thereon as demanded by the applicant. Applicant filed present applications seeking clarification of the judgment of this Court as to whether applicant was entitled to interest on the purchase price from 15.9.1989 to 20.4.1999.

C Before the Company Court, one party made offer to purchase the assets of the Company as a going concern. Another party made counter offer to purchase the assets on “as is where is” basis. Company Court had directed the parties to get clarification from this Court as to the mode in which the assets should be sold. Labour union of the Company filed applications for clarification of its judgment by directing that the Company should be sold as a going concern. Another party filed application to intervene the application filed by the Union praying for sale of the Company on “as is where is” basis.

E Applicant, demanding interest contended that since the Official Liquidator had invested the purchase price, the interest earned on that was an accretion to the purchase price which would belong to the applicant since the sale in its favour had been set aside.

F Parties opposing the claim of interest contended that the applications actually sought an additional relief or a relief which was not granted by this Court and which in fact had been denied or deemed to have been denied by this Court; and that applicant was liable to account for the profits earned from the property which was in his possession for 10 years.

Dismissing the applications, the Court

G HELD: 1.1. Order XXI Rule 93 CPC provides that where a sale of immovable property is set aside under Rule 92 of Order XXI, the purchaser shall be entitled to an order for repayment of his purchase money with or without interest as the Court may direct against any person to whom it has been paid. Even though Order XXI Rule 93 may not *ipso facto* apply to a sale otherwise other than under CPC, the principle H embodied therein can be applied to other sales to order refund of the

purchase price with interest while setting aside a sale. [151-D, E]

1.2. Rule 93 of Order XXI gives a discretion to the Court setting aside a sale, either to award interest or not to award interest. Considered in the context of that discretion, it is clear from the Judgment rendered by this Court that this Court refused to direct the payment of interest to the applicant even while directing the refund of the purchase price paid by the applicant to the Official Liquidator. In such a situation it is not possible to accede to the prayer of the applicant to order the payment of interest on the purchase price paid by it, based on the principle embodied in Order XXI Rule 93 on this application for a clarification of the Judgment. In the circumstances of the present applications, the Court has to proceed on the basis that this Court has exercised its discretion not to award interest on the purchase price in the light of the directions issued by it in that behalf. [151-E, F, G]

Motors and Investment Ltd. v. New Bank of India and Ors., [1997] 11 SCC 271, distinguished.

Central Bank of India v. Ravindra and Ors., [2002] 1 SCC 367, referred to.

1.3. The application does not disclose under what provision the application was being filed. Nor does it set out any legal basis for obtaining interest on the purchase price deposited by the applicant. [149-F]

1.4. Even on the principle of restitution, the claim of the applicant may not succeed. This is not a case where the applicant was deprived of both his money and the property purchased by him. There was, therefore, no failure of consideration. By the subsequent order of Court, the sale was set aside; but during the interregnum, the applicant had the benefit of the assets he had purchased. In that situation the applicant might have the obligation to account for the profits. Certainly, while rendering the main Judgment, this Court was conscious of all these aspects while ordering refund only of the purchase price deposited without providing for payment of interest to the purchaser but at the same time leaving it open to the purchaser to work out its claim for the expenses incurred by it before the Company Court. Obtaining of possession by the purchaser on deposit of the purchase price has considerable relevance, in deciding whether the purchaser would be entitled to interest on the purchase price.

[152-D, H; 153-A-C]

A *Union of India v. Official Liquidator H.C. of Calcutta and Ors.*, [2000] 5 SCC 274, relied on.

B 1.5. The law of restitution is the law relating to all claims quasi contractual or otherwise, which are founded upon the principle of unjust enrichment. It will, therefore, be necessary to investigate that aspect even if Sections 70 and 72 of the Contract Act are invoked. Even if Section 65 of the Contract Act is invoked, the advantages derived by each of the parties will have to be determined and quantified in terms of money and any order in favour of the applicant can be made only after undertaking that exercise. This result cannot be achieved by seeking clarification of the Judgment. [153-D]

D 1.6. There was a change of position of the parties including the creditors pursuant to the sale and the applicant being put in possession. In that context, the adequacy of consideration paid by the applicant will be a relevant consideration. "Neither common law nor equity normally inquires into the adequacy of the consideration which the purchaser provides. But such an enquiry would be central to any defence solely based on a defence of change of position, for, it is a defence which operates to discharge, wholly or in part, a defendant's duty to make restitution". In the present case sale in favour of the applicant was set aside by this Court mainly on the ground that the consideration paid was grossly inadequate. [153-E, F]

F 2. The applications by the Labour Union and the Company are misconceived. The Company Judge was also in error in directing the parties to seek a clarification from this Court. This Court while setting aside the sale and issuing certain other directions, has very clearly directed that "the same shall be resold after a fresh valuation report thereof has been obtained, the reserved bid fixed and due advertisement published". It is for the Company Court to take a decision on the fresh sale to be conducted by it. There is no question of any clarification of the directions of this Court. The decision, at least in the first instance, has necessarily to be that of the Company Court as to the mode and manner of sale and the price at which it is to be sold. [154-F, G, H; 155-A]

CIVIL APPELLATE JURISDICTION : I.A. Nos. 9-11.

IN

H Civil Appeal No. 4191-4193 of 1991.

WITH

A

I.A. NOS. 13,14 AND 15

IN

Civil Appeal No. 4119 of 1991.

B

From the Judgment and Order dated 9.7.90 of the Calcutta High Court in A.No. 169 of 1990.

Soli J. Sorabjee, Ranjit Kumar, Dushyant A. Dave, R.P. Gupta, Sushendra Kumar Chauhan, Millan Mukerjee, Rana Mukherjee, Suchit Mohanty, Siddharth Gautam, Goodwill Indeevar, Ms. Pragya Singh Bghel, Ms. Manik Karanjawala, Dhruv Mehta, Ms. Shalini Gupta, Mohit Chudhary for S.K. Mehta, A.D. Sikri, Ranjan Mukerjee, M.T. George, Janarajan Das, Swetaketu Mishra, Ms. Moushumi Gahlot, Tara Chandra Sharma, Ms. Neelam Sharma, Ashok Kumar, (NP) for M/s. Sandersons & Morgans Co., (NP) with them for the appearing parties.

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The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J.

I.A. NOS.9-11 IN CIVIL APPEAL NOS. 4191-4193 OF 1991

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These are applications by Respondent No.2 in the above mentioned appeals, C.A. Nos.4191-4193 of 1991. The prayer therein is for a clarification of the Judgment in the appeals rendered by this Court on 20.4.1999 by providing that the applicant was also entitled to the amount of Rs.1,56,21,839.25 being the interest that has accrued on the purchase price of Rs.2 crores paid by it for the assets of the Bengal Paper Mills Co. Ltd., a company in liquidation. The applications are opposed by the creditors some of whom were the appellants in the appeals.

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The Bengal Paper Mills Co. Ltd. was ordered to be wound up in a winding up petition filed by its creditors. The order was passed on 24.4.1987. Even before the order for winding up, the assets were put in possession of two joint receivers appointed in a suit by one of the creditors. On the Official Liquidator being appointed in liquidation, the joint receivers were directed to put the Official Liquidator in possession of the assets of the debtor company. They put him in possession. The possession was thus obtained by the Official

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A Liquidator. After getting the assets valued, the Company Court on 29.6.1989 granted leave to the Official Liquidator to sell the assets and properties of the company in liquidation. Pursuant thereto, the Official Liquidator issued a sale notice on 14.9.1989. Respondent No.2 in the appeal, the applicant, made an offer on 14.9.1989. The offer was accepted and the sale was ordered on 15.9.1989. It is seen that the sale was confirmed the same day and possession was given to the purchaser, the applicant on 16.9.1989. But, it may be noticed that the purchase price of Rs.2 crores was not collected at once and the purchaser was permitted to pay the price in four quarterly instalments. The sale was confirmed on the terms quoted in the Judgment of this Court. The sale and its confirmation by the Company Judge was challenged in appeals before the Division Bench of the Calcutta High Court. The Division Bench of the High Court in spite of noticing various irregularities and infirmities in the sale and the inadequacy of the price in the light of the valuation of the assets, proceeded to dismiss the appeals. The creditors challenged that decision in the above appeals before this Court. This Court by its Judgment dated 20.04.1999, allowed the appeals and set aside the sale on the grounds set out therein. It is seen that the applicant herein prayed before this Court that the amount of Rs.2 crores paid by it in instalments by way of purchase price, may be refunded to it and that it may also be repaid the sums which it had allegedly expended for the revival of the company. This Court, in the Judgment, dealt with the claim of the applicant as follows:

E “Learned counsel for the second respondent submitted that the second respondent would be entitled to recover the sale price as also all expenditure that it had incurred consequent upon the order of sale. We are in no doubt that the Official Liquidator must refund to the second respondent the sum of Rs.2 crores. As to any other expenditure, the second respondent must apply to the High Court and satisfy it, first, that it was incurred and, secondly, that in law, the second respondent is entitled to recover it.

F The appeals are allowed. The judgment and order under appeal is set aside as also the order of sale dated 15th September, 1989 in favour of the second respondent. The Official Liquidator shall forthwith recover possession, from whoever is in possession, of the assets and properties covered by the said order of sale. The same shall be resold after a fresh valuation report thereof has been obtained, a reserve bid fixed and due advertisements published. The second respondent shall be repaid the purchase price of Rs.2 crores by the

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Official Liquidator subsequent to recovery of possession as aforesaid.”

On 4.6.1999, the applicant requested the Official Liquidator to refund the amount of Rs.2 crores deposited by it towards the purchase price as directed in the Judgment. The Official Liquidator promptly refunded a sum of Rs.2 crores to the applicant on 6.7.1999. It is the case of the applicant that it had claimed that it was also entitled to the interest earned by the Official Liquidator on investment of the sum of Rs.2 crores, but that the Official Liquidator refused to pay any interest. It is in that context that the present applications have been filed by the applicant seeking what it calls a clarification of the Judgment rendered by this Court.

According to the applicant, its claim for interest was for the period from 15.9.1989 to 20.4.1999 on the sum of Rs.2 crores. This Court had passed an order on 20.1.2000 calling upon the Official Liquidator to furnish information on the investment of the sum of Rs.2 crores and the interest that had been earned and the Official Liquidator had filed a statement which indicated that the interest that was earned for the period in question was Rs.1,56,21,839.25.

It is also seen that pursuant to the liberty given by this Court the applicant has filed an application before the Company Court claiming payment out of a sum of Rs.21 crores as the amount expended by it for the revival of the company. It is said that the said application was allowed in spite of being opposed but that an appeal has been filed against it and the recovery thereunder stood stayed and the appeal was still pending.

The application does not disclose under what provision the same was being filed. Nor does it set out any legal basis for claiming interest on the purchase price deposited by the applicant. The two aspects put forward are that during the 10 years the applicant was in possession of the assets pursuant to the sale, the company had made losses except for two years and that the Official Liquidator had invested the purchase price and had earned interest and the interest earned was an accretion to the purchase price which would belong the applicant since the sale in its favour had been set aside.

The applications are opposed. It is submitted that the applications were not maintainable as what the applications really sought was not a clarification of the Judgment but an additional relief or a relief which was not granted by this Court and which, in fact, has been denied or *which should be deemed*

A to have been denied. It is pointed out that the shockingly low purchase price was not even paid in a lump on 15.9.1989 from which date the interest was being claimed, but the same was paid only in four quarterly instalments and the claim for interest was untenable. It was further submitted that the applicant had the enjoyment of the assets valued at more than Rs.16 crores for a period of 10 years and the applicant had not accounted for the profits for that period.

B It was pointed out that the claim that the company had made losses during the said 10 years other than for two years, was being seriously disputed. As a matter of fact, the applicant was liable to account for the profits earned from the properties during the period of 10 years it had been in possession. The applications were misconceived and were liable to be dismissed.

C Learned senior counsel appearing for the applicant submitted that the amount of Rs.2 crores paid into the hands of the Official Liquidator by the company had earned interest amounting to Rs.1,56,21,839.25 and that the said interest was really an accretion to the purchase price paid by the applicant and once the purchase price was directed to be refunded to the applicant by setting aside the sale, the applicant was also entitled to the interest accrued, as an accretion to the asset. He, therefore, submitted that the Judgment of this Court required a clarification in that regard and really no review of the Judgment was necessary and relief could be granted to the applicant on these applications. Counsel appearing for the creditors, on the other hand, submitted

D that the relief now being claimed must be deemed to have been refused by this Court while it ordered the refund of the purchase price of Rs.2 crores and also allowed the applicant to make an application before the Company Court claiming payment out of the amounts allegedly expended by it for the revival of the company. The prayer made was beyond the scope of a petition for clarification of the Judgment and it was really a claim for further relief and

E such a relief cannot be granted on these applications. The applicant had enjoyment of the properties and its profits for a period of 10 years and really it was a case where the applicant had to account for those profits and, there could be no unilateral direction for making over the interest to the applicant without imposing a corresponding obligation on the applicant to account for

F the profits of the properties. The ordering of such a mutual accounting was beyond the scope of the present applications.

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H Certain salient facts may be noticed. This Court has found that the purchase price paid by the applicant was a shockingly low considering the value of the assets that were sold by the Official Liquidator. Even this low

price of Rs.2 crores, as can be seen from the affidavit of the official liquidator dated 29.3.2000, was paid not in a lump by the applicant-the purchaser and the amount was allowed to be paid in four quarterly installments but even before payment of the entire purchase price, the properties were put in the possession of the applicant on 16.9.1989, the day next to the sale. The possession was returned only on 5.5.1999 about ten years after the applicant was put in possession. Until then, the applicant had the enjoyment of the properties.

The Official Liquidator, in winding up proceedings by court, has the power to sell the immovable properties of the company wound up, under Section 457(1)[c] of the Companies Act, 1956. Rule 272 of the Companies (Court) Rules, 1959 provides that an Official Liquidator can sell the property belonging to the company only with the previous sanction of the court and that every sale shall be subject to confirmation by the court. Rule 273 lays down the procedure for sale and Rule 274 deals with the meeting of the expenses of the sale. Order XXI Rule 93 of the Code of Civil Procedure (for short 'the Code') provides that where a sale of immovable property is set aside under Rule 92 of Order XXI, the purchaser shall be entitled to an order for repayment of his purchase money with or without interest as the court may direct, against any person to whom it has been paid. It has been held that even though Order XXI Rule 93 of the Code may not *ipso facto* apply to a sale otherwise other than under the Code, the principle embodied therein can be applied to other sales to order refund of the purchase price with interest while setting aside a sale. But it has to be seen that Rule 93 of Order XXI of the Code gives a discretion to the court setting aside a sale, either to award interest or not to award interest. Considered in the context of that discretion, it is clear from the Judgment rendered by this Court that this Court refused to direct the payment of interest to the applicant even while directing the refund of the purchase price paid by the applicant to the Official Liquidator. In such a situation it is not possible to accede to the prayer of the applicant to order the payment of interest on the purchase price paid by it, based on the principle embodied in Order XXI Rule 93 of the Code on this application for a clarification of the Judgment. In the circumstances of the present applications, we have to proceed on the basis that this Court has exercised its discretion not to award interest on the purchase price in the light of the directions issued by it in that behalf.

Learned counsel for the applicant relied on the decision in *Motors and Investment Ltd. v. New Bank of India and Ors.*, [1997] 11 SCC 271 and

A submitted that in that case the Court ordered payment of interest to the purchaser on the sale being set aside. On an examination of paragraph 6 of the said decision, it is seen that the question was not discussed as such. But the Court did order the interest earned by the purchase price to be refunded to the purchaser or in the alternative to pay interest on the amount at 18 per cent per annum. In the case of *Central Bank of India v. Ravindra and Ors.*, [2002] 1 SCC 367 this Court discussed the concept of interest to point out that it was the payment fixed by agreement or allowed by law for use or detention of money. In other words, what was indicated was that interest was really compensation for the use of the money which the purchaser was deprived of. Going by the principle of compensation indicated in the said Judgment, the question would arise whether the applicant, in the circumstances of this case, when it had enjoyed the assets for about ten years on deposit of the purchase price, would be entitled to any compensation at all, or to compensation with an obligation to account for the profits, an issue, that has to be adjudicated in an appropriate manner and not certainly while considering an application for clarification. We find that the obtaining of possession by the purchaser on deposit of the purchase price has considerable relevance, in deciding whether the purchaser would be entitled to interest on the purchase price as indicated by the decision of this Court in *Union of India v. Official Liquidator H.C. of Calcutta and Ors* [2000] 5 SCC 274 . Therein, after referring to the decision in *Motors and Investment Ltd. v. New Bank of India and Ors.* (supra) relied on by counsel for the applicant and the direction for payment of interest made therein, this Court declined the award of interest on the distinction that, in that case, possession had passed to the purchaser. The Court stated that the Judgment in *Motors and Investment Ltd. v. New Bank of India and Ors.* (supra) had no bearing mainly because as soon as the amount was deposited by the purchaser, possession of the property was handed over to him. No doubt the learned Judges thereafter, also referred to the decision in the present case and the non award of interest therein. But, in our view, that makes no difference, since the distinguishing feature relied on by the said decision, was the non-passing of possession to the purchaser. In this case, as we have noticed, the applicant, the purchaser, obtained possession even before he had paid the entire purchase price and had paid only 25 per cent or so of the purchase price and kept that possession for 10 years.

Even on the principle of restitution, the claim of the applicant may not succeed. This is not a case where the applicant was deprived of both his money and the property purchased by him. There was, therefore, no failure of consideration. By the subsequent order of Court, the sale was set aside; but

during the interregnum, the applicant had the benefit of the assets he had purchased. The other contracting party, the company in liquidation was deprived of the use of its assets. The creditors who held the properties as security were deprived of their right to deal with the security or to enjoy the benefits of the security during the interregnum. In fact, the securities available to the creditors were utilized by the auction purchaser-the applicant. In that situation, the applicant might have the obligation to account for the profits. Certainly, while rendering the main Judgment, this Court was conscious of all these aspects while ordering refund only of the purchase price deposited without providing for payment of interest to the purchaser but at the same time leaving it open to the purchaser to work out its claim for the expenses incurred by it before the Company Court.

As stated in Goff and Jones The Law of Restitution (sixth edition) the law of restitution is the law relating to all claims quasi contractual or otherwise, which are founded upon the principle of unjust enrichment. It will, therefore, be necessary to investigate that aspect even if we invoke Sections 70 and 72 of the Indian Contract Act. Even if we invoke Section 65 of the Contract Act, the advantages derived by each of the parties will have to be determined and quantified in terms of money and any order in favour of the applicant can be made only after undertaking that exercise. This result cannot be achieved by seeking a clarification of the Judgment as now done.

It also appears to us that there was a change of position of the parties including the creditors pursuant to the sale and the applicant being put in possession. In that context, the adequacy of consideration paid by the applicant will be a relevant consideration. As observed in Goff and Jones in paragraph 42-004, "neither common law nor equity normally inquires into the adequacy of the consideration which the purchaser provides. But such an enquiry would be central to any defence solely based on a defence of change of possession, for, it is a defence which operates to discharge, wholly or in part, a defendant's duty to make restitution". Be it noted that the sale in favour of the applicant was set aside by this Court mainly on the ground that the consideration paid was grossly inadequate.

The upshot of the above discussion is that the prayer for clarification as made cannot be granted. The applications are liable to be dismissed. Hence, they are dismissed.

A *I.A. NOS.13, 14 AND 15 IN C.A. NO. 4191 OF 1991*

B *I.A. No.13/2004* is an application filed by the Bengal Paper Mill Mazdoor Union, the Labour Union of the wound up industry, for a clarification of the Judgment dated 20.4.1999 by directing that the company in liquidation may be sold as a going concern. *I.A. No.14 of 2004* is by the same Union seeking permission to file a supplementary affidavit in support of its above prayer. *I.A. No.15 of 2004* is by the company which had made an offer for purchase of the assets of the company in liquidation “as is where is” praying for permission to intervene in *I.A. No.13 of 2004* filed by the said Union. According to the Union, before the company court an offer had been made

C by M/s Madhuri Traders Ltd. for purchase of the assets of the company in liquidation as a going concern for a price of Rs.10 crores. But a counter offer was received from M/s Zoom Traders and Realty Ltd., the applicant in *I.A. No.15 of 2004*, for Rs.17.75 crores for the entire assets of the company in liquidation on “as is where is” basis. In this situation, the company court has directed the parties to get a clarification from this Court as to the mode in

D which the assets should be sold, whether as a going concern or as property “as is where is”, meaning thereby that the purchaser will be free to dispose of the land, machinery and other equipments as he pleased. It is the submission of the Union that the workers of the Union will be benefited if the property is sold as a unit and a going concern and it is in that context that they have filed *I.A. No.13 of 2004* for clarification. It is in that application that M/s

E Zoom Traders & Realty Ltd. wants to intervene, to press its claim for purchase of the assets “as is where is” but not with a view to run the industry or revive the industry.

F We find that these applications are misconceived. The learned company judge was also in error in directing the parties to seek a clarification from this Court. In liquidation, the assets had been sold by the liquidator and the sale was confirmed by the company court. But the same was set aside by this Court. This Court while setting aside the sale and issuing certain other directions, has very clearly directed that “the same shall be resold after a fresh valuation report thereof has been obtained, the reserved bid fixed and due advertisement published”. Obviously, this Court intended that a proper price should be fetched for the assets of the company in liquidation. It has left the question to the company court. It is for the company court to take a decision on the fresh sale to be conducted by it. There is no question of any clarification of the directions of this Court. No need for such a clarification

G arises. The decision, at least in the first instance, has necessarily to be that

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of the company court as to the mode and manner of sale and the price at which it is to be sold. In this situation, we are satisfied that these applications filed in this Court are misconceived and they are liable to be dismissed.

We, therefore, dismiss these applications leaving it to the company court to take a proper decision on the matters forming subject matter of these applications.

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Applications dismissed.