

VALJI KHIMJI AND COMPANY

v.

OFFICIAL LIQUIDATOR OF HINDUSTAN
NITRO PRODUCT (GUJARAT) LTD. AND ORS.
(Civil Appeal No. 4992 of 2008)

AUGUST 12, 2008

[ALTAMAS KABIR AND MARKANDEY KATJU, JJ.]

Company law: Auction sale of assets of liquidated company – After advertisement in well known newspapers having wide circulation – Highest bid accepted and sale confirmed – Subsequent fresh offer by two companies at higher price – Recalling of order of confirmation of sale by High Court – Correctness of – Held: Not correct as there was nothing to show that there was fraud or collusion in auction – sale – Once sale is confirmed, certain rights accrued in favour of auction – purchaser which could not be extinguished except in exceptional case such as fraud.

Words and Phrases: 'scrap' – Meaning of.

An Official Liquidator was appointed in respect of Company-in-liquidation. The assets of the company were proposed to be auctioned. The Official liquidator submitted the valuation report whereby the assets were valued at Rs.2.55 crores. The property was thereafter put to auction on 25.3.2003 after advertising it in various well known newspaper having wide circulation. Highest bid of appellant of Rs.3.51 crores was accepted and sale was confirmed on 30.7.2003. Court passed certain directions regarding deposit of the purchase price which was duly complied with by the appellant.

In October, 2003, respondent No.8 offered to buy the assets in question for Rs.3.75 crores. Again in August 2004, respondent no.9 made an offer of Rs.5 crores for

A the said assets. This offer was made more than one year after the confirmation of the sale in favour of the appellant. The prospective purchasers filed applications for recalling the order dated 30.7.2003 by which the sale was confirmed in favour of the appellant.

B The Single Judge of High Court set aside the confirmation of sale on the ground that while doing valuation of the assets, the potential of the company was overlooked and that the assets in question were wrongly given out to be scrap and thus a proper bid was not obtained.

C Appellant filed appeal which was dismissed by Division Bench of High Court. Hence the present appeal.

Allowing the appeal, the Court

D HELD: 1.1. The auction sale was done after adequate publicity in well-known newspapers. Even after the auction, the sale was confirmed by the High Court only on 30.7.2003, and any objection to the sale could have been filed prior to that date. However, entertaining objections after the sale is confirmed should not ordinarily be allowed, except on very limited grounds like fraud. If it is held that every confirmed sale can be set aside, the result is that no auction sale will ever be complete because always somebody can come after the auction or its confirmation offering a higher amount. [Paras 11, 31] [6, G-H; 7, A; 10,G]

F 1.2. It could have been a different matter if the auction had been held without adequate publicity in well-known newspapers having wide circulation, but where the auction sale was done after wide publicity, then setting aside the sale after its confirmation will create huge problems. When an auction sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same, and they are themselves to be blamed if they do not come forward to bid at the time of the auction. They cannot ordinarily later
G on be allowed after the bidding (or confirmation) is over
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to offer a higher price. If the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done. A

[Paras 32, 33] [10,H; 11,A-B,D]

2.1. There is nothing to show that the assets in question which were auction-sold were ever given out to be scrap. They were not mentioned as scrap in the advertisement or sale notice, nor was there any material to show that the valuer valued them treating them to be scrap. The word 'scrap' would ordinarily mean something which cannot be used for the same purpose for which it was being earlier used even after repairing or renovating the same. There is nothing to show that the items proposed to be auction-sold was scrap, i.e. they could not be used for the same purpose for which they were earlier used after repairing or reconditioning the same. Merely because the assets were not in a running condition it does not mean that they were scrap. [Paras 14, 17, 18] [7,D-E,H; 8,A-C] B C D

2.2. The Single Judge of the High Court wrongly observed that while doing the valuation the potential of the company was overlooked. Such potential has really no relevance. [Para 23] [9,C] E

3.1. The views of the Courts below cannot be accepted that any fraud took place in the auction sale. All the bidders in the auction knew what they were bidding for. Respondent No. 9 never participated in the auction. He could not start objecting to the auction more than one year after the same was confirmed. [Paras 19, 20] [8,E,F,G] F

Divya Manufacturing Company (P) Ltd. etc. v. Union Bank of India & Ors. etc. (2000) 6 SCC 69 – distinguished. G

M/s Kayjay Industries (P) Ltd. v. M/s. Asnew Drums (P) Ltd & Ors. (1974) SCC 213; Dr. Rajbir Singh Dalal v. Chaudhary Devi Lal University, Sirsa & Anr JT 2008(8) SC 621 – referred to. H

A 3.2. Where the auction is not subject to confirmation
 by any authority, the auction is complete on the fall of the
 hammer, and certain rights accrue in favour of the auction
 purchaser. However, where the auction is subject to subse-
 B quent confirmation by some authority (under a statute or
 terms of the auction) the auction is not complete and no
 rights accrue until the sale is confirmed by the said author-
 ity. Once, however, the sale is confirmed by that authority,
 certain rights accrue in favour of the auction purchaser, and
 these rights cannot be extinguished except in exceptional
 C cases such as fraud. [Paras 34, 35] [11 E-H; 12 A]

3.3. In the instant case, the auction having been con-
 firmed on 30.7.2003 by the Court it cannot be set aside
 unless some fraud or collusion has been proved. No fraud
 or collusion has been established by any one in this case.
 D [Para 36] [12 B]

Case Law Reference

	(1974) SCC 213	referred to	Para 26
E	(2000) 6 SCC 69	distinguished	Para 27, 30
	JT 2008(8) SC 621	referred to	Para 30

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F From the final Judgment and Order dated 25.8.2005 and
 28.8.2005 of the High Court of Gujarat at Ahmedabad in O.J.
 Appeal Nos. 69 & 70 of 2004 in O.J. Misc Civil Application No.
 175 of 2003 & C.A. No. 311 of 2004 in Official Liquidator Re-
 port No. 49 of 2003 respectively.

G C.A. Sundaram, Bhargava V. Desai, Abhishek Gupta,
 Rohini Musa and Zafar Inayat for the Appellant.

H Sanjay Sarin, Samina Shaikh, Ashok Mathur, Sanjay Bhatt,
 S. Mahendran, Subramonium Prasad, Abinav Ramakrishna and
 Rajiv Talwar for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. Leave granted.

2. This appeal has been filed against the impugned final judgment & order dated 25.8.2005 & 26.8.2005 passed by the High Court of Gujarat at Ahmedabad in O.J. Appeal No. 69 and 70 of 2004 in O.J. Misc. Civil Application No. 175 of 2003 and CA No. 311 of 2004 respectively in Official Liquidator Report No. 49 of 2003.

3. Heard learned counsel for the parties and perused the record.

4. The facts of the case are that Hindustan Nitro Product (Gujarat) Ltd. was put under liquidation, and an official liquidator was appointed for it. The assets of the company were proposed to be auctioned, and hence the Court asked the official liquidator to obtain a valuation report. The official liquidator after obtaining the valuation report submitted it to the Court. The valuation of these assets, according to the official liquidator, was Rs.2.55 crores. The property was then put up for auction on 25.3.2003 after advertising it in various well-known newspapers having wide circulation, including 'The Economic Times' which is a well known newspaper having wide circulation in the business community.

5. Several bids were received and were opened in the Court. The highest bid was that of the appellant M/s. Valji Khimji & Company amounting to Rs. 3.51 crores. With the consent of the learned advocates representing the secured creditors, the said bid was accepted and the sale was confirmed on 30.7.2003. The Court directed the appellant to deposit 25% of the purchase price i.e. Rs.63,98,000/- within 30 days from the said day and to deposit the balance amount within the next three months. The Court also directed that the amount may be deposited in installments, but no installment should be less than Rs.5 lakhs. These conditions were complied with by the appellant.

A 6. Although the sale was confirmed in favour of the appel-
lant on 30.7.2003, a letter dated 22.10.2003 was sent to the
official liquidator by one M/s. Manibhadra Sales Corporation
(respondent No. 8 herein) offering to buy the assets in question
for Rs.3.75 crores (though this offer was admittedly withdrawn
B later on).

7. Subsequently in August 2004, M/s. Castwell Alloys Lim-
ited (respondent No. 9 herein) made an offer of Rs.5 crores for
the said assets. This offer was made more than one year after
the confirmation of the sale in favour of the appellant.

C 8. Both M/s. Manibhadra Sales Corporation and M/s.
Castwell Alloys Limited filed applications praying for recall of
the order dated 30.7.2003 by which the sale was confirmed in
favour of the appellant. On 10.9.2004, the learned Company
D Judge took up both these applications and passed an order
dated 10.9.2004 recalling the order dated 30.7.2003 by which
the sale was confirmed.

9. Aggrieved against the said order dated 10.9.2004 the
appellant filed an appeal before the Division Bench of the High
E Court which was dismissed by the impugned judgment dated
25.8.2005 and 26.8.2005. Aggrieved, this appeal has been filed
before us by way of Special Leave.

F 10. We have carefully perused the impugned judgment &
order of the learned Division Bench as well as the order dated
10.9.2004 of the learned Single Judge and are of the opinion
that the same cannot be sustained.

G 11. It may be noted that the auction sale was done after
adequate publicity in well-known newspapers. Hence, if any one
wanted to make a bid in the auction he should have partici-
pated in the said auction and made his bid. Moreover even
after the auction the sale was confirmed by the High Court only
on 30.7.2003, and any objection to the sale could have been
H filed prior to that date. However, in our opinion, entertaining ob-
jections after the sale is confirmed should not ordinarily be al-

lowed, except on very limited grounds like fraud, otherwise no auction sale will ever be complete. A

12. It is not in dispute that the auction was an open auction after wide publicity in well-known newspapers. Hence, there was nothing to prevent M/s. Manibhadra Sales Corporation and M/s. Castwell Alloys Limited to have participated in the auction, but they did not do so. There is no allegation of fraud either in this case. Hence, in our opinion, there was no justification to set aside the confirmation of the sale. B

13. It appears that the reasoning of the learned Single Judge, as also of the Division Bench, was that the valuation of the assets of the company was made as if these assets were scrap. The reasoning of the learned Single Judge of the High Court thus seems to be that the assets in question was wrongly given out to be scrap and thus a proper bid was not obtained. C D

14. In our opinion, there is nothing to show that the assets in question which were auctioned-sold were ever given out to be scrap. They are not mentioned as scrap in the advertisement or sale notice, nor is there any material to show that the valuer valued them treating them to be scrap. E

15. We have carefully perused the sale notice and we find that it is nowhere mentioned therein that the assets in question are scrap.

16. No doubt, the assets of M/s. Hindustan Nitro Product (Gujarat) Limited offered to be sold in the auction sale were offered in lots (as mentioned in the sale notice). The first lot was plant machineries and all other movables excluding building structure, records and compound wall, the second lot was the building structure except T.K. Office, records & compound wall, the third lot was a composite offer (I & II) above, the fourth lot was land except records, and the fifth lot was a composite offer (i.e. III & IV above). In our opinion, this cannot be described as scrap. F G

17. The word 'scrap' would ordinarily mean something which cannot be used for the same purpose for which it was H

A being earlier used even after repairing or renovating the same. There is nothing to show that the items proposed to be auctioned sold was scrap, i.e. they could not be used for the same purpose for which they were earlier used after repairing or re-conditioning the same.

B 18. Learned counsel for the respondents submitted that the assets proposed to be auctioned sold were not in a running condition and hence were 'scrap'. We cannot agree. In our opinion merely because the assets were not in a running condition it does not mean that they were scrap. For instance, if the engine of a motor car is not functioning due to some defect, that
C does not mean that the motor car has become scrap. The motor car can be towed to a garage where a motor mechanic can repair it and then it can again become in running condition. The motor car will become scrap only if it is in such a dilapidated
D condition that it can never be made in running condition again despite repairs and renovation, and hence it will have to be sold as a piece of metal.

E 19. Hence, we cannot agree with the views of the Courts below that any fraud took place in the auction sale.

F 20. Moreover, whenever anyone goes to buy some property in an auction sale, the person proposing to bid always makes enquiries about the properties for which he is proposing to make the bid. In fact, he will in all probability inspect the said property/assets, and he will not make any bid without making thorough enquiries about the said properties/assets. Hence, we are of the opinion that all the bidders in the auction knew what they were bidding for. Respondent No. 9 never participated in the auction and we fail to understand how he could start objecting to the auction more than one year after the same was confirmed.
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H 21. The other reasoning of the learned Single Judge by which he set aside the confirmation of the sale is that the company was entitled to incentives and benefits like sales tax exemption and modvat. The learned Single Judge has observed

that the company M/s. Hindustan Nitro Product (Gujarat) Limited had made huge investments in development of an effluent treatment plant, and received permission for supply of gas for fuel from GAIL. The learned Single Judge was of the view that the intangible assets were required to be considered while fixing the value of the property. A B

22. We fail to understand how all this is relevant at all. After all, what was being sold was the assets of the company, and not the shares of the company, and these assets were fully described in the sale notice. C

23. The learned Single Judge in our opinion also wrongly observed that while doing the valuation the potential of the company was overlooked. Such potential has really no relevance in our opinion. D

24. The learned Single Judge has observed that the valuation was made as if the assets of the company to be sold were scrap, and instead the valuation should have been done as if it was a going concern. We have already observed above that this observation is really based on no material as there is nothing to show that the valuation of the assets was done as if they were scrap. E

25. The learned Division Bench in its impugned judgment has broadly adopted the reasoning of the learned Single Judge. Hence for the same reason given above the judgment of the learned Division Bench also cannot be sustained. F

26. Learned counsel for the appellant Mr. Sundaram has relied upon the decision of this Court in *M/s Kayjay Industries (P) Ltd. vs. M/s. Asnew Drums (P) Ltd & Ors.* (1974) SCC 213 in which it was observed that mere inadequacy of price cannot demolish every court sale. The Court also observed in para 7, as under: G

"If Court sales are too frequently adjourned with a view to obtaining a still higher price it may prove a self-defeating exercise, for industrialists will lose faith in the actual sale taking place and may not care to travel up to the place of H

A auction being uncertain that the sale would at all go through”

27. On the other hand, learned counsel for the respondents relied upon a decision of this Court in *Divya Manufacturing Company (P) Ltd. etc. vs. Union Bank of India & Ors. etc.* (2000) 6 SCC 69. We have carefully perused the above decision and we find that it is clearly distinguishable.

28. The facts of the case were that at the initial stage the appellant offered 37 lakhs for purchasing the property in question. At the intervention of the court the price was raised to 1.3 crores, and ultimately it was found that the property could be sold for Rs.2 crores. It was on these facts that this Court held that even after confirmation of the sale the same could be set aside.

29. Thus, the ratio in *Divya Manufacturing Company (P) Ltd.* (supra) was that if there is fraud then even after the confirmation the sale can be set aside because it is well-settled that fraud vitiates everything. On the facts of that case, the Court was of the view that that confirmed sale deserved to be set aside.

30. In our opinion the decision of this Court in *Divya Manufacturing Company (P) Ltd.* (supra) cannot be treated as laying down any absolute rule that a confirmed sale can be set aside in all circumstances. As observed by one of us (Hon. Katju, J.) in his judgment in Civil Appeal No. 4908/2008 *Dr. Rajbir Singh Dalal vs. Chaudhary Devi Lal University, Sirsa & Anr* pronounced on 6.8.2008, a decision of a Court cannot be treated as Euclid's formula and read and understood mechanically. A decision must be considered on the facts of that particular case.

31. If it is held that every confirmed sale can be set aside the result would be that no auction sale will ever be complete because always somebody can come after the auction or its confirmation offering a higher amount.

32. It could have been a different matter if the auction had

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been held without adequate publicity in well-known newspapers having wide circulation, but where the auction sale was done after wide publicity, then setting aside the sale after its confirmation will create huge problems. When an auction sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same, and they will be themselves be to blame if they do not come forward to bid at the time of the auction. They cannot ordinarily later on be allowed after the bidding (or confirmation) is over to offer a higher price.

33. Of course, the situation may be different if an auction sale is finalized say for Rs.1 crore, and subsequently somebody turns up offering Rs. 10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers 10 crores, then an inference can be drawn that an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done.

34. In the present case we are satisfied that there is no fraud in the auction sale. It may be mentioned that auctions are of two types – (1) where the auction is not subject to subsequent confirmation and (2) where the auction is subject to subsequent confirmation by some authority after the auction is held.

35. In the first case mentioned above, i.e. where the auction is not subject to confirmation by any authority, the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction purchaser. However, where the auction is subject to subsequent confirmation by some authority (under a statute or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction purchaser, and these rights cannot be extinguished except in exceptional cases such as

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A fraud.

36. In the present case, the auction having been confirmed on 30.7.2003 by the Court it cannot be set aside unless some fraud or collusion has been proved. We are satisfied that no fraud or collusion has been established by any one in this case.

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37. In view of the above, we allow this appeal and set aside the impugned judgments and orders of the learned Single Judge as well as the Division Bench dated 25.8.2005 and 26.8.2005. The confirmation of the auction sale dated 30.7.2003 in favour of the appellant stands upheld. There shall be no order as to costs.

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D.G.

Appeal allowed.