

KAYJAY INDUSTRIES (P) LTD.

v.

ASNEW DRUMS (P) LTD. & ORS.

March 20, 1974

[D. G. PALEKAR, P. N. BHAGWATI AND V. R. KRISHNA IYER, JJ.]

Code of Civil Procedure (Act 5 of 1908), O. 21, r. 90 and State Financial Corporation Act, 1951, Sec. 31—Material irregularity in conduct of sale and substantial injury to judgment-debtor, what are.

The State Finance Corporation lent a sum of Rs. 10 lacs to the first respondent on the security of a mortgage of its land etc. The first respondent having failed to repay, the Corporation applied to the District Court under the State Financial Corporation Act, 1951, for recovering the amount by attachment and sale of the mortgaged properties. The sale proclamation was settled after notice to the parties, and after several adjournments, caused by the first respondent's dilatory tactics, the sale was held. The court felt that it was better to have some valuation report to serve as a basis and to guide it in deciding whether the offer of Rs. 11,10,000 was grossly unjust. The first respondent did not have the properties valued but the Corporation had the properties valued and the mortgaged properties were valued at about Rs. 17 lacs. Thereafter an auction was again held and the appellant was the highest bidder. His offer was less by about Rs. 40,000/- than the amount on the previous occasion. He however agreed to raise the offer to Rs. 11,50,000/- and the court concluded the sale at that amount. The first respondent applied under O. 21, r. 90, C.P.C. for setting aside the sale but the application was dismissed. His appeal was allowed by the High Court.

Allowing the appeal to this Court.

HELD : Under s. 32(8) of the Act, the Civil Procedure Code is attracted to proceedings for the realisation of the dues of the Corporation. Therefore, O. 21, r. 90 was applicable and if there was any material irregularity in the conduct of the sale and if it caused a substantial injury to the judgment-debtor, the sale could be set aside. Where a court mechanically conducts the sale not bothering to see if the offer is too low and a better price could have been obtained and if in fact the price is substantially inadequate, there is both irregularity and injury. But at the same time the court should not go on adjourning the sale till a good price is got as otherwise, decree-holders can never get the property of judgment debtors sold. There is always considerable difference between the court sale price and market price. A court sale is a forced sale, and notwithstanding the competitive element of a public auction, the best price is not always forthcoming. A valuer's report though good as a basis, is not as good as an actual offer and there are bound to be variations within limits between such an estimate, however careful, and the real bids by seasoned businessman. Mere inadequacy of price cannot demolish a court sale. Further, if court sales are too frequently adjourned with a view to obtaining a still higher price prospective bidders will lose faith in the actual sale taking place and may not attend at the auction. Nor is it right to judge the unfairness of the price in the light of the subsequent events which were not within the knowledge of the executing court at the time of the sale. What is expected of the court is to make a realistic appraisal of the factors in a pragmatic way and if satisfied that in the given circumstances the bid is acceptable it should conclude the sale. The court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation and several other factors depending on the facts of each case. If the court has fairly applied its mind to the relevant considerations while accepting the final bid it is not necessary to give a speaking order nor can its order be examined meticulously. [682 A-E; 683C; 684 A-F]

In the present case, the executing court had admittedly declined to affirm the highest bids on the previous occasions in its anxiety to secure a better price. Well known industrialists in the public and private sectors knew about it and bid at the auction. All interested parties were present at the auction and no one raised any objection regarding the conduct of the sale. The Corporation could not be put off indefinitely in recovering its dues on baseless expectations and distant prospects. The sale proceedings had been pending too long and the first respondent would not, even when given the opportunity, produce buyers by private negotiation. He did not even produce a valuer's report. He by his litigious attitude has contributed

A to possible buyers being afraid of hurdles thereafter. Therefore, it must be held that the executing court had committed no material irregularity in the conduct of the sale in accepting the highest offer of the appellant and in concluding the sale at Rs. 11,50,000/- though the market value may be over Rs. 17 lacs. [684G-685B] *Nayalkha and Sons v. Ramanya Das*, [1970] 3 S.C.R. 1, referred to.

B (2) The appeal is not against the approval of the sale by the executing court but against the High Court's order in appeal against an order refusing to set aside the sale, under O. 21, r. 90. Therefore, the question of the appellate court's power to review the discretion exercised by the trial court does not arise. [685F]

Ward v. James, [1966] 1 Q.B. 273 at 293, referred to.

C [It is odd that financial organisation in the public sector should have readily lent a huge amount of Rs 10 lacs and struggled for several years to recoup the amount. This aspect of the matter should receive the anxious attention of the concerned authorities so that public money may be handled by public servants with public responsibility and for public benefit.] [685D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2150 of 1972.

From the judgment and decree dated the 7th/8th February, 1972 of the Bombay High Court in Appeal No. 152 of 1970.

D *Som Nath Chatterjee*, *S. N. Saraf*, *Pramod Soroff* and *H. K. Puri*, for the appellant.

Hardayal Hardy, *Suresh Parekh* and *B. Dutta*, for respondents 1 and 2, *M. N. Phadke*, *Rameshwar Nath* and *Rajinder Narian* for respondents 4 & 5.

The Judgment of the Court was delivered by

E KRISHNA IYER, J. The appellant in this appeal, by certificate is the auction purchaser whose sale has been set aside by the High Court in reversal of the decision of the Executing Court which dismissed the application of the judgment debtor (first respondent herein) under Order XXI rule 90, C. P. C. Although many points were urged and considerable time was taken in the arguments, attention was principally focussed on one issue which we will mainly deal with. Of course, a brief F but sufficient reference will also be made to the other points.

G The Maharashtra State Finance Corporation (for short "the Corporation") plays the role of decree-holder in the present case. It had lent a sum of Rs. 10 lakhs to the first respondent, which is a drum manufacturing private limited company, in May 1961, on the security by way of mortgage of its land, factory building, plant and machinery situate at Kalwa, District Thana. Respondents 2 and 3 had guaranteed the repayment of the said loan. It is also seen from the facts that in or about 1964 the Dena Bank, now a nationalised institution but not a party to these proceedings had also advanced to the first respondent a sum of Rs. 20 lakhs presumably on the security of its plant and machinery and raw material stocks, although this aspect is not quite clear from the record and is not perhaps very relevant for the disposal of this appeal. We would only like to make it clear that the rights and remedies of the said Bank, whatever they are, against the appellant or the other respondents, are not dealt with in this appeal.

The first respondent which had taken the loan for an industrial purpose defaulted in making repayment and so a notice was issued to it by the fourth respondent, the Corporation, under s. 30 of the State Financial Corporation Act, 1951 (hereinafter referred to as the Act) demanding prompt discharge of the liability under the mortgage and indicating that in default of payment legal proceedings under s. 31 of the Act to realise the dues would be undertaken. No fruitful response was forthcoming and the Corporation, therefore, made an application, Miscellaneous Application No. 75 of 1965, in the District Court against respondents 1, 2 and 3, under s. 31 of the Act, seeking to levy by attachment and sale of the properties covered by the mortgage, the amounts due to it. The total amount recoverable was stated to be a little over Rs. 16 lakhs, but we are not concerned with the figure as it is not in dispute before us.

In June 1966 the Corporation moved the Court for the appointment of a receiver to take charge of the properties which had been by then attached and to sell them by court auction. A receiver was duly appointed, who entered on his duties and took steps for conducting the sale. A proclamation of sale was settled after notice to the parties, on December 5, 1967, and the sale was fixed to take place on January 8, 1968. However, the sale did not take place that day and the happenings thereafter culminating in the sale on September 3, 1969, wherein the present appellant was the highest bidder, and consequent purchase, are the subject matter of the present appeal.

We will take a close-up of certain pivotal events on which the fate of the appeal depends. With the consent of both parties, the Court decided to sell in two lots, presumably because that would fetch a better price, one lot being made up of the land and what was permanently fixed thereon, and the other the plant and machinery. There is no doubt that the items sold are of considerable value, land in that industrial area escalating in price as time passed, the machinery being imported and costly and the industry for which they were needed being of growing importance for the country. Even so, let us look at the panorama of forensic events as they unfolded from stage to stage. On January 11, 1966 the order for sale was made. Later, the judgment debtor applied for time to negotiate a private sale but failed to find a suitable buyer. On January 12, 1967, the Corporation applied for the sale of the entire unit. The sale was fixed to take place on January 8, 1968 when, at the instance of the Dena Bank, it was postponed on the plea that the machinery not fixed to the earth had not been shown separately. In August, 1968, the judgment debtor again prayed for postponement to enable him to raise funds to discharge the debt privately and the District Judge acceded to the request conditionally. The prayer was made on August 7, 1968 and the Court directed the judgment debtor to deposit Rs. 1½ lakhs by October, 15, 1968 and postponed the sale till the last week of October. The judgment debtor could not deposit the preliminary sum by the time fixed. Even so, the sale did not take place on October 28, 1968 since the Corporation and the Bank wanted the description of the machinery to be inserted in the proclamation of sale.

A Early in December the judgment debtor applied that the sale should be of the whole property in one lot, which was turned down by the Court on December, 12, 1968 since the sale in two lots was a course already consented to by him and the move was purely dilatory. However, the judgment-debtor moved the High Court and obtained stay of sale, and the appeal was withdrawn by him on February 26, 1969 whereupon he filed a suit for declaration that the order for sale was without jurisdiction. When he found that an interim injunction against holding the sale was refused, he withdrew the suit on April 16, 1969. Naturally, the sale fixed for May 1, 1969 could not take place for want of bidders although a neighbouring industrial concern, Mukund Iron, gave an offer of Rs. 2.20 lakhs for the land and buildings only. The next attempt was to hold the sale on May 16, 1969 and the highest bids then offered were Rs. 2 lakhs for land and building and Rs. 80,000/- for the machinery. The Court considered the bids too low and preferred to adjourn the sale. This circumstance certainly discloses that the Court was alert to see that a fair price was obtained, and the fact that it was a court auction was not allowed to operate to the detriment of the judgment debtor. A sale was again attempted on June 5, 1969 when the highest offers for land and building went up to Rs. 2.60 lakhs and for machinery Rs. 2.10 lakhs. The judge endeavoured to secure a better price since the Corporation pleaded that the offers were inadequate. In the circumstances, the judge postponed the sale.

We now come closer to the final. On August 28, 1969 a sale was held and the highest bids for land and buildings went up to Rs. 5.70 lakhs and for machinery 5.40 lakhs. It must be noted that at this time the Judge, who was then holding the sale, was not the presiding officer but another judge, since the former was on leave. It was felt by the latter that it would be better to have some valuation report to serve as a basis and to guide the court in concluding whether a grossly unjust offer was being fobbed off on it. The Receiver who was in charge requested both the judgment debtor and the Corporation to get valuation reports from competent valuers and the sale itself stood adjourned. The judgment debtor did not bother to have the properties valued but the Corporation secured the services of a competent valuer, M/s. Corona Electricals of Bombay, who estimated the land and buildings to be worth Rs. 10,46,096/- and the machinery Rs. 7,02,000/-. The total value thus arrived at was Rs. 17,48,096/-. In the light of various facts, including the absence of an alternative evaluation report from the judgment debtor's side, these Corona figures were rightly treated by both courts as tentatively sound. The auction held on September 3, 1969, however, fetched the highest offer for the two lots of only Rs. 5,65,000/- and Rs. 5,00,000/- respectively, in the latter case Rs. 40,000/- less than on the previous occasion. After considerable persuasion by the Judge, the appellant agreed to raise the offer for both lots together to a gross sum of Rs. 11,50,000/- and making an intelligent guess on the given circumstances the Court approved the sale, which is now being challenged in these proceedings as an insensible and injurious sanctioning of the sale, ignoring the hopeful prospects of higher prices had the auction been adjourned and better and fuller publicity given.

Certain salient facts may be highlighted in this context. A court sale is a forced sale and, notwithstanding the competitive element of a public auction, the best price is not often forthcoming. The judge must make a certain margin for this factor. A valuer's report, good as a basis, is not as good as an actual offer and variations within limits between such an estimate, however careful, and real bids by seasoned businessmen before the auctioneer are quite on the cards. More so, when the subject-matter is a specialised industrial plant, which has been out of commission for a few years, as in this case, and buyers for cash are bound to be limited. The brooding fear of something out of the imported machinery going out of gear, the vague apprehensions of possible claims by the Dena Bank which had a huge claim and was not a party, and the litigious sequel at the judgment-debtor's instance, have 'scare' value in inhibiting intending buyers from coming forward with the best offers. Businessmen make uncanny calculations before striking a bargain and that circumstance must enter the judicial verdict before deciding whether a better price could be had by a postponement of the sale. Indeed, in the present case, the executing court had admittedly declined to affirm the highest bids made on May 16, 1969 June 5, 1969 and August 28, 1969, its anxiety to secure a better price being the main reason. 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 auction being uncertain that the sale would at all go through. The judgment debtor's plea for postponement in the expectation of a higher price in the future may strain the credibility of the court sale itself and may yield diminishing returns as was proved in this very case.

A material circumstance which weakens the first respondent's case is that on both the dates—August 28 and September 3 Shri B. Paul director of the judgment debtor company was present at the auction and never voiced any grievance about the conduct of the sale or asked for its postponement on the ground that better price may be obtained on a later date. Equally significant is the fact sworn to by the authorised officer of the Corporation that 'the valuation of the total assets' was around Rs. 15 lakhs 'when the application was made by the petitioner Corporation for sale of the assets under sec. 31 of the State Financial Corporation Act' and 'that the said estimate was given on the basis of the information supplied by the applicants at the time of the disbursement of the loan'. The Dena Bank the second charge holder with considerable stakes in the sale was present on the August and September auctions through a senior representative and did not think it necessary to raise any objection regarding the conduct of the sale or the price tendered. Nor do the proceedings disclose an unfair undervalue on account of the absence of effective bidders or inertness of the Judge. On both occasions there were about 30 or 40 bidders. The judgment debtor the second charge holder the Indian Oil Corporation and other leading industrial concerns interested in the drum industry were represented. All the bidders on the 28th August were told of the next auction date and most of them participated passively

A or actively in the September sale. On both the sale dates the judges (they were different on the two days) were keen on maximising the price. A total of Rs. 11,10,000/- was the highest bid in late August and in early September the best offer for lot No. 2 sagged from Rs. 5,40,000/- to Rs. 5,00,000/-. This downward trend could have persisted if further postponements of sale had taken place and the judge did his best to boost the total price to Rs. 11.5 lakhs and finalised it taking no chances by adjourning the auction. The trend of to-day may be the silhouette of tomorrow and the reduced offer for lot No. 2 this time may well infect lot No. 1 next time. The Court did a good job taking a conspectus of the circumstances and avoiding the ominous maybes of future auctions. Such are the broad facts to which the law must be applied. Section 32(8) of the Act attracts the Code of Civil Procedure as far as practicable in the realisation of the dues of the Corporation, and so it may be right to apply the provisions of Order XXI r. 90. In short was there any *material irregularity* in the conduct of the sale and did it cause *substantial injury* to the debtor?

The first respondent's counsel Shri Parekh drew our attention to condition No. 3 in the present proclamation of sale which is as follows:

D "The highest bidders for the two lots shall be declared to be the purchasers of the respective lots, provided always that he or they are legally qualified to bid and provided that it shall be in the discretion of the undersigned Receiver holding the sale to decline acceptance of the highest bid for any lot when the price offered for any of the two lots appears so manifestly inadequate as to make its acceptance inadvisable. The highest bid offered by any bidders for any of the two lots shall be subject to the sanction and approval of the District Judge Thana."

E Form 29 prescribed in Appendix E to the Code contains condition No. 3 which is in like terms. The court's activist obligation to exercise a discretion to make a fair sale out of a court auction and avert a distress sale is underscored by this provision. In all public sales the authority must protect the interests of the parties and the rule is stated by this Court in *Nayalkha and Sons vs. Ramanya Das* (1) thus:

F "The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offerer does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is unreasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion."

(1) [1970] 3 S.C.R. 1.

Be it by a receiver, commissioner, liquidator or court this principle must govern. This proposition has been propounded in many rulings cited before us and summed up by the High Courts. The expressions 'material irregularity in the conduct of the sale' must be benignantly construed to cover the climax act of the court accepting the highest bid. Indeed under the Civil Procedure Code it is the court which conducts the sale and its duty to apply its mind to the material factors bearing on the reasonableness of the price offered is part of the process of obtaining a proper price in the course of the sale. Therefore failure to apply its mind to this aspect of the conduct of the sale may amount to material irregularity. Here substantial injury without material irregularity is not enough even as material irregularity not linked directly to inadequacy of the price is insufficient. And where a court mechanically conducts the sale or routinely signs assent to the sale papers not bothering to see if the offer is too low and a better price could have been obtained and in fact the price is substantially inadequate there is the presence of both the elements of irregularity and injury. But it is not as if the court should go on adjourning the sale till a good price is got it being a notorious fact that court sales and market prices are distant neighbours. Otherwise decree holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. May be subsequent events not within the ken of the executing court when holding the sale may prove that had the sale been adjourned a better price could have been had. What is expected of the judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors and if satisfied that in the given circumstances the bid is acceptable conclude the sale. The court may consider the fair value of the property, the general economic trends the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the court has fairly, even if silently applied its mind to the relevant considerations before him while accepting the final bid no probe in retrospect is permissible. Otherwise, a new threat to certainty of court sales will be introduced.

So viewed, we are satisfied that the district court had exercised a conscientious and lively discretion in concluding the sale at Rs. 11.5 lakhs. If the market value was over 17 lakhs, it is unfortunate that a lesser price was fetched. Mere inadequacy of price cannot demolish every court sale. Here, the court tried its best, time after time, to raise the price, well-known industrialists in the public and private sectors knew about it and turned up. Offers reached a stationary level. Nor could the Corporation be put off indefinitely in recovering its dues on baseless expectations and distant prospects. The judgment debtor himself, by his litigious exercises, would have contributed to the possible buyers being afraid of hurdles ahead. After all, producing around Rs. 11.5 lakhs *openly* to buy an industry is not easy even for an

A apparently affluent businessmen. The sale proceedings had been pending too long and the first respondent could not, even when given the opportunity, produce buyers by private negotiation. Not even a valuer's report was produced by him, we are satisfied that the District Judge had committed no material irregularity in the conduct of the sale in accepting the highest offer of the appellant on September 3, 1969.

B

Shri Parekh has levelled a number of criticisms of the court sale which we regret are more captious than substantial, more fictitious than genuine. Complaining about the rains in Bombay that day, i.e. September 3, dissecting the Corona Electricals' valuation for minor omissions and errors, holding up the exaggerated figure of about Rs. 36 lakhs as the market value of the property and other like circumstances can hardly convince anyone that the hoped-for happy day would arrive when a handsome price would be forthcoming if the auction were adjourned *ad libitum* at the instance of the judgment debtor. *Prima facie* it may look a little odd that a financial organisation in the public sector, with a special responsibility to the people not to play with public funds or advance for shady enterprises or persons should have readily lent a huge amount of Rs. 10 lakhs on a valuation obviously bloated as is established by the sequel, and struggled for long years to recoup the money. This aspect of the matter, we hope, will receive the anxious attention of the concerned authorities so that public money may be handled by public servants with public responsibility and concern for public benefit. However, we do not wish to express any opinion because we have no material before us as to what were the circumstances in which Dena Bank advanced the loan, what were the other securities given by the Company; and what was the then worth of the guarantors.

E

Several other unsuccessful grounds were urged before the High Court by the judgment debtor and we need not go over those grounds again as they possess little merit. Nor need we consider the ambit of appellate power to review discretion exercised by the trial court (vide *Ward v. James* (1) since here we are concerned with no appeal against the approval of the sale by the executing court but with an order refusing to set aside the sale under Order XXI r. 90, and an appeal therefrom.

F

We see no merit in the application to set aside the sale and are constrained to allow the appeal. Mr. Somnath Chatterjee, who argued the appeal with thoroughness and fairness, in his opening submissions, told the court that, regardless of the outcome, he had persuaded his client to raise the price to a sum equal to the amount at which the properties, lots 1 and 2, were estimated by M/s Corona Electricals, namely, Rs. 17,48,096/-. He stuck to it to the end a good gesture. Consequently, we shall accept that as the price offered by the auction-purchaser-appellant and direct that the appellant do deposit the balance of this amount of Rs. 17,48,096/- over what he has already paid into

G

H

(1) [1966] 1 Q.B. 273 at 293.

court (Rs. 2,75,000/-) within two months from to-day, in the District Court, Thana, in which event the appellant will be put in possession of the properties purchased by him forthwith. Liberty is given to the Corporation to withdraw to the extent of its dues with up-to-date interest.

We think that the circumstances of the case warrant the direction that parties will bear their costs throughout.

V.P.S.

Appeal allowed.