

(1991) 06 GAU CK 0006

Gauhati High Court

Case No: Civil Revision Nos. 119 and 145 of 1991

Raj International ;
Assam Financial
Corporation

APPELLANT

Vs

Prakash Jute Industries
(P) Limited

RESPONDENT

Date of Decision: June 24, 1991

Acts Referred:

- Civil Procedure Code, 1908 - Order 21 Rule 61, Order 21 Rule 65, Order 21 Rule 77, Order 21 Rule 78, 47
- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 61, Order 21 Rule 65, Order 21 Rule 77, Order 21 Rule 78, 47

Citation: (1991) 2 GLJ 519 : (1993) GLR 277 Supp

Hon'ble Judges: S.N.Phukan, J

Bench: Single Bench

Advocate: D.N.Choudhary, R.Barua, P.G.Barua, N.Choudhary, G.N.Sahewalla, A.K.Sharma, A.K.Goswami, K.H.Choudhary, Advocates appearing for Parties

Judgement

1. By this common judgment and order, I propose to dispose of Civil Revision Nos. 119 and 145 of 1991 which were heard analogously.

2. In Civil Revision No. 119 of 1991, Prakash Jute Industries (Private) Ltd is the petitioner and Raj International is the opposite party. In Civil Revision No. 145 of 1991, Assam Financial Corporation is the petitioner and Prakash Jute Industries is the opposite party and Raj International and M/s Meghalaya Jute Manufacturing Company (P) Ltd. is proopposite parties.

3. The Assam Financial Corporation sanctioned two loans amounting to Rs. 7.45.000/ and Rs 24.50.000/ to Meghalaya Jute Manufacturing Company (P) Ltd. and 01 account of failure to pay the dues, an application under section 31 of the State Financial Corporation

Act, 1951 for short, "the Act" was filed before the District Judge/Additional Deputy Commissioner, Shillong which was registered as Misc. Case No. 10 (T) of 1987. It may be stated that to secure the loan, the company mortgaged the property by executing a deed of mortgage in favour of State Financial Corporation. The Financial Corporation also filed a petition under section 32 of the Act for attachment of both movable and immovable properties mortgaged which was allowed by order dated 29.2.88. As the company did not appear the proceeding proceeded ex parte and the learned Court held that a sum of Rs. 37, 60, 723.69 paise which included also the interest was payable on 30.9.86 to the Financial Corporation. By order dated 20.4. 89 the Court also directed recovery of the said amount and interest @ 15% till the amount is realised. It was also directed that attached property be sold by public auction. The Managing Director of the Financial Corporation was appointed to act as a Sale Officer for conducting the sale and it was further directed that the Manager (Law) and the Manager (Recovery) of the Financial Corporation would assist the Sale Officer. The Court further directed that the date of sale of public auction may be informed so that an officer of the Court may be deputed to observe . the proceeding of the auction sale and report. A proclamation of sale was published in the news paper, Assam Tribune on 21st and 22nd November, . 1990 and in the notice, it was mentioned that the public auction would take place on 21st December at 11.30 A.M. On that date, two parties submitted the bid and the said parties were M/s Goenka Woolen Mills (P) Ltd. and M/s Prakash Jute Industries (P) Ltd. Both the parties submitted the offer against only few machineries of the entire lot though the proclamation of sale was for entire plant and machinery described in the schedule to the sale notice. M/s Prakash Jute Industries (P) Ltd. sent a cheque for Rs. 1,05,478/ being 25% of the total bid money of Rs.4,21,100/for the machineries for which bid was made. A note was submitted by two officers, namely, the Manager (Legal) and Manager (Recovery) on 29.12.90 to the Managing Director, the Sale Officer where it was recorded that as the bid was made for few items, a fresh notice may be issued for resale and further in view of the restrictions on transfer of land in the State of Meghalaya, a separate notice may also be issued for the landed properties under the provisions of the Meghalaya Transfer of Land (Regulation) Act, 1971. It may be stated that in the present dispute the immovable properties are not the subject matter. The note was duly approved by the Managing Director and a fresh notice/was published fixing 4.2.91 as the date of auction.This was published on 6.1.91 in two leading news papers of this region, namely, Assam Tribune and the Meghalaya Guardian.

4. According to the State Financial Corproation the auction was held ob 4. 2.91 in which two parties, namely, M/s Raj International of Calcutta (a group of M/s Indian Stoves Manufacturing Company Ltd) and M/s National Engineering Works of Gauhati participated. M/s Raj International! of Calcutta offered a sum of Rs. 15, 51,(0"/for the entire machineries and equipments and also deposited a sum of Rs. 4,01,000/ being the 25% of the hid money. It has also been stated on behalf of the Corporation that the auction was held in the premises of judgmentdebtor at Burnihat on 4.2.91 where the Managing Director, the Manager Legal), the Manager (Recovery) and the Court

Observer, namely Mr. R. K, Sangma, Munsiff and Assistant Judicial. Shillong were present and they accepted the bid of M/s Raj International and also confirmed the auction sale. M/s National Engineering Works, Gauhati offered to purchase only one number D.G. Set for Rs. 40,000/ which was rejected. It has also been stated on behalf of the Corporation that the learned District Judge was informed "f the above fact and that the balance amount of Rs. 11,50,000/ was depos"ted by M/s Raj International on 14.3.91 which was duly acknowledged by the Corporation on 16.3.91. The Corporation was also informed by Sri D. Mahanta, learned Advocate for the Corporation by a letter that the learned District Judge expressed the opinion that the immovable property may be disposed of. It has also been stated that after receiving the full amount the Managing Director of the Corporation issued a formal letter of sale and delivery order to M/s Raj International. According to the Corporation the earlier amount of Rs. 1,05,475/deposited by M/s Prakash Jute Industries (P) Ltd was returned on 16.3.91. According to the Corporation on the next date of auction i.e. on 5.2.91 M/s Prakash Jute Industries (P) Ltd. submitted an offer for the entire machinery for a sum of Rs. 16,25, 500,". But it was not accepted a", the said firm did not take part in ,the auction sale.

5. According to the Financial Corporation on 2.4.91, it came to the knowledge of the Corporation that M/s Prakash Jute Industries filed a petition under section 47 and/or section 151 read with Order 39 Rules 1 and 2 and under section 94 of the CPC before the learned District Judge for staying the sale. When the matter came up for hearing Mr. D. Mahanta who was the learned counsel for the Corporation in the District Court, was present in the Court. On the said petition, the learned District Judge passed an order on 7.3.91 keeping the sale in abeyance and fixed 2.4.91 for showing cause, but no notice was served on the State Financial Corporation. The Court also directed by order dated 30.3.91 the O/C, Burnihat P.S. to restrain M/s Raj International for removing or lifting any machine from the factory side of the judgmentdebtor. It has been alleged that the above orders are illegal and without jurisdiction. Thereafter M/s Raj International filed a petition under section 115 and/or 151 CPC and/or Article 227 of the Constitution before this Court and by order dated 11.4.91 orders passed by the learned District Judge were stayed. On 11.4.91 the learned District we passed the final order which has been impugned. The said order is at are to the petition filed by the State Financial Corporation.

6. In Civil Revision No. H9 of 1991 which has been filed by Raj International, the orders dated 7th, 22nd and 30th of March, 1991 passed by the learned District Judge have been assailed. It has been stated that in the second auction held on 4.2.91 the offer made by the petitioner was accepted. Thereafter full amount was paid and Corporation directed lifting of entire machineries within 4.5. 91 and for such lifting elaborate arrangements were made incurring heavy expenditure. In view of the subsequent order passed by the learned District Judge great injustice has been done. Orders have been assailed on the grounds stated in the petition.

7. In the affidavit filed by Prakash Jute Industries (P) Ltd., it has been stated that after payment of earnest money the financial Corporation was approached for receiving the

balance, but the Corporation refused to accept the amount.

8. That the petitioner had no notice till 4.2.91 about the second auction sale and on coming to know about the auction sale the subsequent offer of Rs. 16,25,000, was made and this being highest offer, the learned District Judge by the impugned order rightly refused to confirm the sale and set it aside and further direction of the learned District Judge to treat the offer of Prakash Jute Mill Industries of Rs. 16,25,000; as a first bid and thereafter to give an opportunity to M/s Raj International was legal and justified.

9. Heard Mr. D. N. Choudhury for the State Financial Corporation, Mr. P. G. Baruah for Raj International and Mr. G. N. Sahewalla for Prakash Jute Industries (P) Ltd.

10. The petition filed by the Financial Corporation under section 31 of the Act against the borrower, namely, M/s Meghalaya Jute Manufacturing Company (P) Ltd. was disposed of by the learned Court below by order dated

20.4.89 passed in Misc. Case No.10 (7) 87. In the said proceeding the borrower did not appear and as such this order is not under challenge. The learned Court directed that assets and properties under attachment be sold by public auction and the amount of unsecured loan if any shall be paid and realised jointly and severally from the borrower and the guarantor by attachment and sale of their individual properties. It was also stated in the order that the Court shall appoint an officer for conducting the sale by public auction and the said judgment is at Annexure A to the Civil Revision No. 145 of 1991. The Managing Director was appointed as Sale Officer for conducting the sale of the mortgaged property in terms of the judgment and it was directed that Manager (Law) and Manager (Recovery) would assist the Sale Officer. Court also decided to send an Officer of the Court as an observer. This order dated

18.5.90 is available at Annexure B to the above Civil Revision. The first advertisement was made in newspaper and a copy is available at Annexure C to the above Civil Revision. In the schedule description of the land and plant and machineries have been given. The said notice was issued by the Managing Director who was (the Sale Officer. In the notice, it was inter alia, stated that "Sale will be in public auction and the highest bidder will be treated as auction purchaser subject to deposition of 25% of the sale price to the Sale Officer at the time of auction. The balance 75% of the sale price has to be deposited by the auction purchaser on or before 15 days from the date of auction of the properties. If the said balance amount of the bid money is not deposited within stipulated period, the property will again be put to sale in which 25% of the sale price deposited by the highest bidder will be forfeited. "There is no dispute that two firms including M/s Prakash Jute Industries gave bid not for entire lot of machineries, but for few items and that Prakash Jute Industries deposited only the earnest money of Rs. 1,00,000/ and odd as stated above. Subsequently, the second proclamation of sale was issued which is available at Annexure E to the above Civil Revision. In the sale notice also, the conditions regarding sale quoted above was also notified and also the entire plant and machineries

including the machineries for which Prakash Jute Industries gave bid were notified for sale.

11. Now the first question is whether by giving bid only for few items of machineries and by depositing earnest money, M/s Prakash Jute Industries has acquired any right over these machineries.

12. Subsection (8) of section 32 of the Act, inter alia, provides that an order of attachment or sale of property under the said section 32 shall be carried out into effect as far as practicable in the manner provided in the CPC for attachment or sale of property in execution of a decree as if the Financial Corporation was the decree holder. For the present purpose Rule 65 to Rule 69, Rule 77 to 79 of Order 21, CPC are relevant.

13. Rule 65 inter alia, provides that save as otherwise prescribed every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may in this behalf appoint and shall be made by public auction as in the manner prescribed. Rule 66 inter alia, provides that where any property is ordered to be sold by public auction in execution of a decree, a proclamation of the intended sale has to be made. According to Rule 67 every sale proclamation shall be made and published in the manner prescribed by Rule 54 (2) and where so Court direct shall be published in Official Gazette or in local newspaper or in both. Under Rule 68 no sale shall take place until after expiry of at least 7 days in case of movable properties and 15 days in case of immovable properties after issuance of sale notice. Rule 69 empowers the Court at its discretion to adjourn any sale and the officer conducting any such sale may also in his discretion adjourn the sale recording his reason.

14. Rule 77 of Order 21 which is very much relevant for the present purpose is quoted below ;

"77. Sale by public auction.(1) Where movable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be resold.

(2) On payment of the purchase money, the officer or other person holding the sale shall grant a receipt for the same and the sale shall become absolute.

(3) Where the movable property to be sold is a share in goods belonging to the judgmentdebtor and a coowner, and two or more persons of whom one is such coowner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the coowner."

According to Rule 79 where any movable property sold it shall be delivered to the purchaser. To state the procedure, regarding sale of immovable property according to Rule 89 of Order 21 where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of

making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in the Court, the amount stated in the said rule. Rule 90 provides for application for having the sale shall be set aside on the ground of irregularity or fraud. Subrule (1) 01 Rule 92 of Order XXI provides that where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

15. Thus from the above risks the following procedures emerge :

(i) Sale in execution of a decree can be made only by publicist" a proclamation of sale, such proclamation may be issued in a news paper also, (ii) Instead of conducting the sale, it can be conducted by any other person appointed by the Court.

(iii) Sale can be adjourned at the discretion of the Court or by the officer conducting the sale in his discretion.

(iv) In case of movable property the price of each lot shall be paid at the time of sale or as soon after the Court or other person holding the sale directs and in default of payment the property shall forthwith be resold and that on payment of purchase money the officer or other person holding the sale shall grant a receipt for the sale, and sale shall become absolute.

(v) Property sold shall be delivered to the purchaser.

(vi) In case of sale of immovable property, application can be made to set aside the sale under the condition laid down in Rule 89 and Rule 90 of Order 21.

(vii) In case of immovable property the sale become absolute after it is confirmed by the Court under Rule 92 of Order 21.

K. In the case in hand, there is no dispute that a Sale Officer, namely, the Managing Director was appointed by the Court. The learned Court below also sent an observer of the Court and it is not clear to me under what provision of law such observer was appointed and under what was the Rule. I am, therefore, of the opinion that after appointment of Sale Officer, appointment of an observer was superfluous.

17. There is no dispute that an advertisement was issued informing that the sale will take place on 21.12.90. at 11.30 AM and the conditions which I have quoted regarding the sale. There is also no dispute that Prakash Jute Industries gave bid only for few items and paid earnest money and the balance of 75% of the amount was not paid. According to the condition in the sale notice, the balance was to be deposited by the auction purchaser on or before 15 days from the date of auction. It has been urged on behalf of Prakash Jute Industries that the Managing Director conducting the sale did not accept the balance amount though it was offered. I am not at all inclined to accept the statement as the

amount could have been sent in the way the earnest money was sent or in the alternative the learned Court could have been approached. As the balance of the amount was not paid Prakash Industries has no right to claim the properties for which bid was given. Therefore, there was no sale as laid down in the CPC and Prakash Industries has no locus stand and as did not take part in the second sale and therefore cannot make any grievance against the subsequent sale.

18. As stated above, the officer conducting any sale in his discretion may adjourn the sale recording his reason for such adjournment. From record, it is clear that first offer was not accepted as there was no bid for entire lot of machineries. It is, therefore, within the jurisdiction of the officer conducting the sale, in view of the provisions contained in Rule 61 of Order 21, to adjourn the sale and in this case it was rightly adjourned. I may also refer to note at Annexure D to Civil Revision No. 145 of 1991 put up by Manager assisting the Managing Director in conducting the sale and according to the said note it was suggested that fresh sale notice may be issued.

19. In the second sale notice which was also published in the newspaper, it was notified that the sale would take place on 4.2.91 and the condition of sale was the same as was in the first notice, which I have already reproduced. In the schedule all the properties including the properties for which Prakash Jute Industries gave bid were also included. This notice was published in two news papers on 16.1.91 i.e. clearly 15 days before the sale. Sale was conducted, the bid of M/s Raj International amounting to Rs. 15.51 lakhs was accepted and sale certificate was issued on 6.3.91 and delivery order was also issued on 21.6.91. The said letter and the delivery order are at Annexures f and J in Civil Revision No. 145 of 1991. It has been urged that Raj International was not the bidder and my attention has been drawn to the proceeding of the auction sale which is available in the record of the learned lower Court. I find that the name of the bidder was Indian Stove Manufacturing Company and (Raj International) was also mentioned. I also find from record that sale letter and delivery orders were issued in favour of Raj International for the purpose of tax. Admittedly, Prakash Jute Industries did not give any bid. It has been urged that Prakash Jute Industries did not do so as they did not see the advertisement for sale. From the provisions of Rule 77 of Order 21 in case of movable property on payment of purchase money, the sale become absolute and unlike immovable property confirmation by the Court is not necessary.

From the facts stated above, it is clear that the sale become absolute as soon as the entire amount was paid and this cannot be reagitated in the Court. The plea that Prakash Jute Industries was not aware about second sale notice even if is true is of no help as once the sale becomes absolute, the Court becomes in functus officio. I may also refer to Rule 78 of Order 21 which inter alia provides that no irregularity in publishing or conducting the sale of movable property shall vitiate the sale but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

Another aspect of the matter is that it has been urged before this Court that the present petition under section 47 CPC is not maintainable as Prakash Industries was not an auction bidder. This contention has considerable force and I accept the same. It has been urged that auction did not take place on the place specified and it took place in the office of the Financial Corporation. Even if this contention is accepted, such an irregularity will not vitiate the sale in view of the facts and circumstances of the present case.

20. Various contentions have been made regarding the impugned order dated 11.4.91 vide Annexure O to the Civil Revision No. 145 of 1991. It is not necessary to consider all the contentions and it will be sufficient to record the Court proceeded with wrong assumption that confirmation of sale is necessary. I have already stated that in respect of sale of movable property such confirmation is not necessary and in the case in hand, the sale become absolute as soon as the money was paid by Raj International. That apart the impugned order is also bad in law inasmuch as it was passed without hearing the auction purchaser, namely, Raj International and also taking into account the subsequent offer made by M/s Prakash Industries. I therefore, set aside the impugned order and hold that bid given by Raj International became absolute on payment of the amount and also subsequent letter of sale and delivery order.

Considering the facts and circumstances of the case as stated above both the petitions are allowed and the impugned judgment and order dated 11.4.91 passed by the learned District Judge/Additional Deputy Commissioner in Misc. Case No. 10 (7) of 1987 are set aside and consequently orders passed prior to the above order. Stay order if any passed by this Court stands vacated.