

(2007) 05 CAL CK 0044

Calcutta High Court

Case No: C.A. No. 161 of 2007 in B.I.F.R. No. 508 of 1992

Cycle Corporation of India Ltd.
(In Liquidation)

APPELLANT

Vs

West Bengal Small Industries
Development Corporation Ltd.

RESPONDENT

Date of Decision: May 15, 2007

Acts Referred:

- Companies Act, 1956 - Section 535
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 22

Citation: (2008) 87 SCL 267

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Mukti Ghosh and M. Sen and D. Basak, Reetabrata Mitra and K.L. Yadav, for Purchaser, for the Appellant; Ahin Choudhary, Prabir Roy Chowdhury, Subhasis Sarkar and Subrata Bhattacharya, for the Respondent

Final Decision: Dismissed

Judgement

Sanjib Banerjee, J.

Some startling facts have come to light upon this apparently innocuous application and innocent prayers made by the official liquidator. His action in the entire matter calls for a strict scrutiny as indicated hereinafter.

2. The company (in liquidation) had use of a land at the Kalyani Industrial Estate. It appears from the valuer's report that was obtained before the company's assets were put up for sale that sheds 2 to 6 out of the immovable property occupied by the company (in liquidation) had been let out by the Government of West Bengal or one of its agencies, to the company (in liquidation). The unpriced copy of the valuer's report relied upon in the official liquidator's affidavit-in-reply has this to say on the matter:

Factory - Units-I and II at Kalyani - Factory units-I and II of the aforesaid liquidated company have been established on monthly rental basis in the Kalyani Industrial Estate. The verbal informations what I have gathered from Sri Tanmoy Bhattacharjee, SAE, of ficer-in-charge of Kalyani Industrial Estate Phase II, under West Bengal Industrial Development Corporation Ltd., Government of West Bengal, that the total number of sheds let out to the said liquidated company is about five (S2 to S6) having covered an area of about 79,173 sq.ft., and uncovered area of 1,69,692 sq.ft. It further appears from him that the monthly shed rent inclusive of land rent is about Rs. 9,133 per month. Municipal tax apart from this is about Rs. 6,802 per month. Outstanding arrears of rent and municipal taxes reportedly lying against the name of the said liquidated company are about Rs. 25,48,227 and Rs. 15,78,129, respectively, for the period ending January, 2004.

Besides these rental sheds for the smooth functional requirements of the manufacturing jobs, the aforesaid company made some sheds/or godowns on their own in infusing their own capital funds in the aforesaid uncovered area both in the peripheral zones of unit-I and unit-II as shown vividly in the annexed drawing. Since the instant land belongs to Government, given on recurring monthly rental basis, so the question of valuation of the said land does not and cannot arise.

3. It is such report that reached the official liquidator and upon which the official liquidator took steps to sell the company's assets. The last sentence of the quoted portion is one of the more relevant aspects of the valuer's report that could not have been missed and, in the event an excuse is offered that it was missed, requires an explanation that cannot be met with any innocent reply.

4. The official liquidator thereafter, in discharge of the statutory duties cast on him by the Companies Act and the rules framed thereunder, proceeded to issue advertisements after preparing a sale notice. The sale notice contains all protections and indemnities that the official liquidator chose to reserve for himself so that in the event of any mistake, the official liquidator may not be touched. Such conditions require to be tested in the context of the official liquidator's conduct in this matter.

The terms and conditions of sale were prefaced by the following words:

1. The sale will be as per inventory of "as is where is and whatever there is basis" and excepting factory units I and II at Kalyani Industrial Estate, Kalyani, Nadia only, as a going concern/as is where is and whatever there is basis subject to confirmation of the hon"ble court. The official liquidator will not provide any guarantee and/or warranty as to the quality, quantity or specifications of the assets sold. The tenderers /bidders are to satisfy themselves in this regard after physical inspection of the assets of the company and the purchasers will be deemed to offer with full knowledge as to, the defects, if any, in the description, quality or quantity of the assets sold. The official liquidator shall not entertain any complaint in this regard after the sale is over. Any mistake in the notice inviting tender shall not vitiate the

sale.

5. Advertisements were issued in September, 2004, by which offers were invited for the sale of movable and immovable assets of the company (in liquidation). Under the description of immovable properties, the first property referred to is as follows:

Factory sheds S2 to S6 - covered area about 79,173 sq.ft. Uncovered area about 1,69,692 sq.ft.

6. There appeared no reservation in the advertisement, something that the ultimate purchaser now complains of, to indicate that such factory sheds bearing Nos. S2 to S6 were not being sold or that they could not be sold. The purchaser may be right when it asserts that on the strictest reading of the advertisement, it would appear that the entirety of the immovable assets of the company (in liquidation) at the Kalyani Industrial Estate including factory sheds S2 to S6, was being offered for sale.

7. How such sheds could be put up for sale despite the same having been specifically excluded in the valuer's report and despite the valuation of the assets of the company (in liquidation) not including the value of such sheds, is a question that the official liquidator will have to answer at the appropriate stage. To carry on with the chronology of events, the sale was fixed before the court on the basis of the advertisement and upon the court receiving an offer that bettered the valuation found in the valuer's report, the offer was accepted and the sale confirmed. It is the usual practice that the company court assesses, on a subjective basis, the assets which are to be sold and relies on the valuer's report to supplement such subjective assessment. Once bids are received which are in excess of the valuation found in the report, the court may seek to have enhanced offers but there is no longer any impediment in the sale being confirmed at the highest price received. It is evident that such usual practice was followed in this case.

8. Thereafter, as the official liquidator's representation to the appellate court in the order of July 11, 2006, records, the entirety of the immovable assets of the company (in liquidation) was sold to the purchaser. Such "sale" as referred to in the submission made on behalf of the official liquidator to the appellate court on 11-7-2006, may be understood to be possession being made over.

9. The West Bengal Small Industries Development Corporation Ltd., a Government of West Bengal undertaking and claiming to be the owner of the Kalyani Industrial Estate, applied u/s 535 of the Companies Act for a direction on the official liquidator to disclaim that part of the erstwhile factory of the company (in liquidation) that covered shed Nos. S2 to S6. The Corporation's application was rejected. In appeal, the Corporation was ultimately not successful in obtaining a direction on the official liquidator as sought but the Corporation's right to obtain its land was recognised in the following words contained in the order of 30-8-2006, disposing of that appeal:

We, therefore, are not satisfied that a case for disclaimer was really made out by the appellant (Corporation). However, we do not, at the same time, think that the appellant is precluded from taking such steps, as it may be advised, to recover the possession of the land in question. The observation made in the impugned judgment that because of pendency of the BIFR proceedings, the lease could not have been cancelled or the tenancy could not have been terminated is in our view premature. Moreover, u/s 22 of the SICA what is prohibited is a coercive measure and not the exercise of a contractual right of the lessor. The impugned judgment and order is, therefore, set aside. The appeal, to that extent, is allowed and is disposed of with the observation that it will be open to the appellant to take such step for recovery of the land in question as they may be advised in accordance with law.

10. The official liquidator, thus, was not required to do anything in the matter. He had, as he had represented before the appellate court, sold the assets of the company (in liquidation) (read, made over possession) to the purchaser and it was for the purchaser to understand the effect of the liberty or the right reserved in favour of the Corporation in the appellate court order of 30-8-2006. But the official liquidator took upon the moral responsibility of ensuring that the purchaser obtained what the court sold to it. The official liquidator applied, seeking the following orders:

(a) Leave be granted to make this application;

(b) Delay, if any, in making this application be condoned;

(c) An order be passed directing respondent No. 1 to hand over and to disclose the documents in respect of its claim in regard to the landed property as also the structures being S2 to S6 having an area of 79,173 sq.ft. (covered), 1,65,692 sq.ft. (uncovered) and 2,355 sq.ft. (office space) within such time as this hon"ble court may deem fit and proper;

(d) An order be passed directing respondent No. 1 to demarcate, identify as prominently as possible with regard to the landed property as also structures being S2 to S6 having an area of 79,173 sq.ft. (covered), 1,69,692 sq.ft. (uncovered) and 2,355 sq.ft. (office space) in the presence of the valuer appointed by the hon"ble court;

(e) An order be passed directing the purchaser to protect and to take care of structures being Nos. S2 to S6 and to see that the aforesaid area of 79,173 sq.ft. (covered), 1,69,692 sq.ft. (uncovered) and 2,355 sq.ft. (office space) are not being encroached by any trespasser or anybody else;

(g) An order of injunction be granted restraining respondent No. 2 purchaser from removing any shed or structure from any place of Kalyani Industrial Estate until it is demarcated by respondent No. 1 in the presence of the valuer appointed by the

hon"ble court;

(g) Ad interim orders in terms of all the prayers above;

(h) Costs of this application be paid by the respondents;

(i) Such further order and/or orders be passed and direction and/or directions be given as this hon"ble court may deem fit and proper.

11. In the affidavit in support of the summons, the official liquidator claimed that the valuer appointed by this court valued the assets and properties of the company (in liquidation) and, according to the official liquidator, "it appears from the valuation report made by the valuer in respect of the assets situated and lying at the Industrial Estate, Kalyani, that shed Nos. S2 to S6 and also the land on which the aforesaid shed is constructed and some other portions of the land at the Kalyani Industrial Estate (unit-I and unit-II) have not been valued by the valuer". The official liquidator has not indicated as to what prompted him to take time off from his heavy duties to revisit a matter that had been closed and to discover upon revisiting the matter that the valuation report did not value some assets that he had included in the sale notice and had made over to the purchaser. But, he did understand, however belatedly, that the valuer had not valued a part of the property that had been made over to a purchaser or who had been allowed to retain it without offering any consideration therefor.

13. The application further proceeds to aver as follows:

6. I say that the possession of the assets of the company (in liquidation) situated and lying at Industrial Estate, Kalyani as sold aforesaid were handed over to the purchaser aforesaid on or about 24-2-2005, I crave leave to refer to the minutes of the handing over possession of the assets of the company (in liquidation) to the purchasers at the time of hearing.

7. I say that respondent No. 1 West Bengal Small Industries Development Corporation Ltd., had made an application u/s 535 of the Companies Act, 1956, for disclaimer of shed Nos. S2 to S6 of Administrative Building, Kalyani on or about July, 2003, by taking out a judges summons supported by an affidavit of one Kamal Kanti Roy affirmed on 8-5-2003.

13. The Corporation, the purchaser and a bank [possibly the only secured creditor of the company (in liquidation)] were arrayed as the respondents in this application. The Corporation responded by setting out the circumstances in which, according to the Corporation, this misconceived application was made by the official liquidator. According to the Corporation, upon it taking action pursuant to the right recognised by the appellate court order of 30-8-2006, and proceeding not against the official liquidator but against the purchaser, the official liquidator jumped into support the purchaser. The pendency of the present application was used effectively to shield the purchaser from the Corporation's assertion of its rights in respect of the said

land. The Corporation has relied on documents from which it appears that it resorted to the provisions of the West Bengal Government Premises (Tenancy Regulations) Act, 1976. Whether or not the Corporation was empowered to resort to such provisions or whether or not the Corporation was entitled to directly obtain its land from the purchaser are questions that are not necessary to be gone into in the present application.

14. Upon such facts coming to light when this application was taken up for final hearing, a receiver was appointed to make an inventory of the entirety of the immovable property of which the purchaser had possession. The purchaser was restrained by an order of injunction from creating any third party right in respect of any part of the immovable property of which possession had been made over to it.

15. The receiver has filed a report. Such report describes the immovable property the relevant sheds and also contains the representation made before him by the Corporation:

3. There are 5 (five) sheds, besides some open spaces in unit I, i.e., on the eastern side. None of the sheds bears, any identification mark whatsoever. According to the representatives of WBSIDC, these 5 sheds are referred to as S-2, S-3, S-4, S-5 and S-6 and were built by and belonged to WBSIDC, and the same could not have been put up for sale/sold. Nothing, however, was shown to the receiver in support of the aforesaid claim of WBSIDC, save and except a copy of the order dated December 5, 1994, issued by the Joint Secretary, Government of West Bengal Cottage and Small Scale Industries Department, which relates to WBSIDC being entrusted with the control of Kalyani Industrial Estate and four other industrial estates in West Bengal.

16. The purchaser has been heard. On a query from the court, the purchaser has indicated that it has not obtained title deeds of the land of which it is in possession. The purchaser submits that it bona fide made an offer upon the advertisement issued by the official liquidator and it had bargained for the entirety of the land described in the advertisement. The purchaser claims that if the purchaser was aware that a part of the land, or the relevant sheds, would not be allotted to it upon the sale, it may not have bid the sum that it did or it may not have shown any interest in the sale. Again, these are matters which can scarcely be taken up in course of this application which, it must be remembered, has not been made by the purchaser but by the official liquidator.

17. Since the official liquidator is not in possession of the land as the receiver's report indicates the same, there was no occasion for the official liquidator to make this application. If the Corporation is entitled to obtain its land in terms of the appellate court order, the Corporation has to work out its remedies and if the purchaser is in possession of a part of such land, the purchaser has also to work out its defence. The official liquidator ought not to have shown any interest in the matter and ought not to have applied in the manner that has been done.

The application is dismissed. There will be no order for costs. The receiver is discharged.

18. There is of course, the one matter which requires to be dealt with. It is necessary to understand and ascertain from the official liquidator as to how in the description of the immovable property and the advertisement issued by him, the relevant sheds found mention. It is also to be enquired as to how such sheds could be sold despite the valuation report clearly mentioning that such sheds had not been valued. It is also necessary to ascertain as to how possession of such sheds could be made over and as to why the notice of the court was not specifically drawn in that regard by the official liquidator. The official liquidator will answer such questions and submit a report to the court within six weeks from date.