

(2012) 08 CAL CK 0109

Calcutta High Court

Case No: A.P.O. No. 204 of 2011 in C.P. No. 519 of 1989, A.P.O. No. 224 of 2012 in C.P. No. 519 of 1989

ARC Holdings Ltd.

APPELLANT

Vs

Deccan Traders (P) Ltd. and
Another
 Gourinandan Real
Estate (P) Ltd. Vs Sylvan
Commercial (P) Ltd.

RESPONDENT

Date of Decision: Aug. 14, 2012

Acts Referred:

- Companies Act, 1956 - Section 446, 446(2), 457, 529, 529A
- West Bengal Estates Acquisition Act, 1953 - Section 6(3)

Citation: (2013) 1 CHN 570 : (2012) 116 SCL 119

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Ratnanko Banerjee, Mr. D.N. Sharma, Ms. Manju Bhutoria, for ARC Holdings Ltd., Mr. S.N. Mookherjee and Mr. Sandip Mal, for Gourinandan Real Estates Pvt. Ltd. Purchaser, for the Appellant; Jaydip Kar, Advocate, Mr. Niloy Sengupta, Advocate for Deccan Traders (P) Ltd., Mr. Jishnu Saha, Advocate, Mr. Asish Kr. Mukherjee, Advocate for Sylvan Commercial (P) Ltd., Mr. M.C. Ghosh, Advocate, Ms. Mithua Sen, Advocate for Official Liquidator, Mr. P.P. Banerjee and Mr. Paritosh Sinha for the State, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

Three appeals would relate to the company in liquidation. The Appeal No. 224 of 2012 would relate to the appeal of the purchaser Gourinandan Real Estate Private Limited as against the order of the learned Single Judge declining to grant any further clarification on the order of sale while other two appeals being APO No. 204 and 205 of 2011 would relate to appeals filed by ARC against the Order of the learned Judge dated April 20, 2011 directing sale of the assets on an application

made by Sylvan Commercial Private Limited being CA No. 24 of 2009 and a similar application by Deccan Traders being C.A. No. 136 of 2009 respectively. Appeal No. 249 and 250 of 2011 would represent the grievance of ARC as against the judgment and order dated July 15, 2011 passed by His Lordship confirming the sale in favour of Gourinandan at the instance of Sylvan (APO No. 250 of 2011) and Deccan (APO No. 249 of 2011) respectively.

2. On March 11, 1985 Rishra Steel Limited (hereinafter referred to as the company in liquidation) was incorporated. Allahabad Bank was secured creditor having charge over the current assets. Due to serious labour problem the factory unit was closed down on August 16, 1987. ARC Holding Limited (hereinafter referred to as ARC) was subsequently incorporated in June 19, 1988 to purchase ninety nine per cent shareholding in Rishra Steel Limited and the ARC became holding company of the Rishra Steel in June 1989. A creditor filed a winding up petition claiming rupees one lac ninety one thousand two hundred fifty two on June 4, 1990. The learned company Judge passed an order of winding up. Thus the assets came in possession of the official liquidator by virtue of the order of winding up. The Allahabad Bank also filed a suit for recovery of the outstanding dues. ARC filed an application for stay of the winding up proceeding by framing a scheme for revival. The workers in the meantime also entered into negotiation with one G.S Sureka for revival of the company G.S Sureka subsequently brought Sylvan Commercial Private Limited (hereinafter referred to as Sylvan) as his nominee. Allahabad Bank got a decree for Rs. 3.5 crores on April 9, 1987. Subsequently ARC entered into an agreement with Allahabad Bank to pay off their dues in phases. Allahabad Bank supported the scheme framed by ARC. On May 2, 1997 Sureka got possession of the factory on a scheme of revival propounded by him despite objection being raised by Allahabad Bank. ARC as well as Allahabad Bank filed independent appeals. The Division Bench set aside the order appointing Sureka to revive the unit. Sylvan filed a SLP that was unsuccessful. Official Liquidator again took possession. The Apex Court dismissed the SLP filed by Sylvan on December 5, 1997. The Official Liquidator thereafter proceeded to sell the assets upon a valuation being made. Advertisements were published. This Court decided to sell it as a going concern. ARC again filed application for stay of winding up. The learned Judge dismissed the same on December 21, 1999. In an appeal by the Allahabad Bank, the Supreme Court ultimately permitted the sale to be conducted as a going concern. ARC again tried to revive the company by entering into an understanding with Allahabad Bank to pay off their dues by phases. ARC subsequently came to know that Allahabad Bank assigned its debts to Calcutta Securities Private Limited who in turn assigned the same to Deccan Traders Private Limited on the same day i.e., June 25, 2008. ARC immediately filed a suit as against Allahabad Bank challenging the assignment. Such suit is pending and awaiting its disposal. There had been litigations with regard to beneficial winding up. Ultimately the property was sold on "as is where is" basis at Rupees twenty six crores to M/s. Gourinandan Private Limited, who deposited Rs.

6.5 crores as earnest money and failed to deposit the balance sum. Gourinandan asked for a clarification before the learned Judge coupled with a prayer for extension of time to pay off the balance. According to Gourinandan, the land on which the factory would situate, was covered under a proceeding initiated under the Estate Acquisition Act. The Official Liquidator and/or the State should clarify that the property belonged to the company in liquidation free from encumbrance. His Lordship directed notice to be given to the State to appear before him and ultimately dismissed the application of Gourinandan by observing that the order of sale would require no further clarification. Pertaining to note, the query of the similar nature was earlier made by few intending bidders before His Lordship when His Lordship made it clear that the property was being sold "as is where is" basis. The present appeals would include an appeal of Gourinandan against the order of dismissal. ARC's appeals would relate to sale of assets and denial of giving opportunities to revive the company.

CONTENTIONS- ARC:

Mr. Ratnanko Banerjee:

- i) Allahabad Bank could not have surreptitiously entered into negotiation and thereby assigned debt in favour of Deccan Traders and Calcutta Securities after having entered into a Memorandum of Understanding with ARC.
- ii) The learned Company Judge was not taken in confidence while direction for sale of assets was given and the sale was conducted by another learned Judge.
- iii) The sale of any asset of the company belonging to the company in liquidation could only be conducted by learned Company Judge in his administrative capacity. The learned Judge could not have sold the assets not being assigned the power of sale.
- iv) An application for direction for sale was assigned to the learned Judge. The learned Judge could not have extended the scope by directing sale to be conducted in His Lordship's Court and thereby conducting the sale to the exclusion of the regular Company Court.
- v) Once the application for sanction of the scheme was pending and awaiting its disposal the learned Judge should have waited and directed the application of ARC to be disposed of first before conducting the sale.

3. Elaborating his argument, Mr. Banerjee drew our attention to the order for sale and the order of confirmation of sale. He referred to the decision in the case of Sohan Lal Baid -Vs- State of West Bengal & Ors. reported in 1989 II CLG 433 and in case of [United Bank of India Vs. Official Liquidator and Others](#),

CONTENTIONS RAISED BY GOURINANDAN:

Mr. S.N. Mukherjee:

4. Mr. Mukherjee contended, even if the sale was conducted on "as is where is basis" the Official Liquidator was duty bound to explain the status of land in question. The proceedings u/s 6(3) of the Estate Acquisition Act and/or proceedings, if any, under the Land Reforms Act and/or Urban Land Ceiling Act would require clarification. He would definitely go for purchase of the assets for setting up an industrial unit provided the Court would get a proper clarification from the State. To sustain the order of sale, Mr. Mukherjee contended, all Learned Judges would be competent to deal with matters assigned to them. Question of allotment of work was merely procedural that would not be fatal in the case of the like nature. He relied on the decision in the case of Official Liquidator, High Court, Calcutta -VS- Ujjain Nagar Palika Nigam & Ors. reported in Volume 149 CC 446. He prayed for little time to pay off the balance sum after clarification. He also prayed for refund of the earnest money in case such clarification would not be forthcoming from the State and/or the Official Liquidator.

OFFICIAL LIQUIDATOR

Mr. M. C. Ghosh

5. Mr. Mukti Chandra Ghosh, learned counsel appearing for the Official Liquidator opposed the appeals. Opposing the appeal of Gourinandan he contended, the property was sold on "as is where is" basis. The purchaser must have satisfied himself about the marketability of the land in question. He was also conversant with the prevalent laws of the land as to whether the provisions of the Land ceiling Act or Land Reforms Act would have any application. On the issue of notice u/s 6(3) of the Estate Acquisition Act Mr. Ghosh contended that such notice was bad in absence of appropriate leave being obtained by the State u/s 446 of the Act of 1956. Uptill date State did not proceed any further and could not have proceeded in absence of leave being obtained. Hence the plea raised by the purchaser was nothing but a ploy to avoid forfeiture. He referred to the prayer of the purchaser before the learned Judge for extension of time to make payment. He prayed for dismissal of the appeal.

SYLVAN

Mr. Jisnu Saha

6. Mr. Jishnu Saha, learned counsel appearing for Sylvan contended, he invested money for about ten months when he was running the show as per the order of the Court. He would be happy if money was refunded back by the Official Liquidator or anyone intending to run the unit. He contended, the unit was run under the supervision of a retired Judge of this Court. All bills, vouchers and supporting documents were authenticated. Hence Official Liquidator must sell the assets to pay off his dues.

DECCAN

Mr. Jaydeep Kar

7. Mr. Jaydeep Kar, learned counsel appearing for Deccan contended, he was also interested in monies being paid as per the decree that was assigned to him. He referred to his application for sale of the assets that was heard and disposed of by the learned Judge. According to him, the sale conducted by His Lordship was nothing but a follow up action. The sale was conducted as per the Apex Court order on "as is where is" basis. He also opposed the prayer of Gourinandan to back out from the sale. On the issue of assignment, Mr. Jaydip Kar, learned counsel contended, the Allahabad Bank terminated the MOU as ARC failed to act upon the same as would appear from page 56A of the paper book. ARC already filed a suit against the bank challenging the assignment. Hence, ARC was not entitled to stall the same as prayed for.

8. On the appeal of ARC, Mr. Kar contended, mere filing of scheme would not ipso facto operate as a bar to conduct sale of the assets of the company in liquidation. He contended, the learned Judge considered his prayer for sale of assets and directed sale of assets that would be governed by Section 457 of the said Act of 1956 read with Rule 272 and 273 of the company (Court) Rules 1959. According to Mr. Kar, neither the said provision nor the Rule would provide that the learned company Judge would only be entitled to sell the asset. According to him, conduct of sale by His Lordship could at best, be said to be irregular that would not make to sale void. He contended, no manifest injustice was caused to ARC that would deserve interference by the Court of appeal. He referred to the decision in the case of [P. Kasilingam Vs. P.S.G. College of Technology](#),

9. He lastly contended, the learned Judge passed the order for sale on April 20, 2011 whereas the scheme was propounded in June 2011. On the purchaser's appeal Mr. Kar referred to Section 6(3) of the West Bengal Estates Acquisition Act, 1953 to say that even if any action was taken in terms of the said provision that would not vitiate the title of the property. In this regard he referred to a decision in the case of [State of West Bengal and Others Vs. Ratnagiri Engg. Pvt. Ltd and Others](#),

STATE

Mr. Pratik Prakash Banerjee

10. Mr. Pratik Prakash Banerjee, learned Junior Standing Counsel appearing for the State contended that the proceedings under the West Bengal Land Reforms Act, could be governed by the appropriate Tribunal set up for the said purpose. The learned company Judge did not have any jurisdiction to entertain any dispute pertaining to the land. He contended, Section 6(3) of the West Bengal Estates Acquisition Act, 1953 as amended, would empower the State to call back any excess land not used for the purpose it was meant. He however, lastly contended that State was interested to see that the industry was revived. If the purchaser would revive the industry that would generate employment, the State would not create any impediment.

GOURINANDAN IN REPLY

Mr. Sandip Mal

11. Mr. Sandip Mal, learned counsel for the purchaser while replying, distinguished the decision cited by Mr. Kar in the case of Ratnagiri (Supra) to say, it was no longer a good law.

12. On the submission of ARC, Mr. Mal contended that the prayer for forfeiture was contrary to the stand of the ARC and they were not entitled to "approbate and reprobate" at the same time. Mr. Mal however, prayed for four weeks" time to pay off the balance consideration. Mr. Mal contended that the provisions of Section 6(3) of the West Bengal Estates Acquisition Act, 1953 was amended with effect from November 9, 2010 wherein explanation II was added that would include the power of the State to call back any land in case of non-user for the purpose for which it was allowed to be retained.

ARC IN REPLY

Mr. Banerjee

13. Mr. Ratnanko Banerjee, learned counsel while replying for ARC contended that the decision in the case of Official Liquidator, High Court, Calcutta -VS- Ujjain Nagar Palika Nigam & Ors. (Supra) did not involve any title. It would relate to payment of the statutory outgoing hence, the said decision would be of no assistance to us. He further contended that from the tenor of the argument advanced by Mr. Saha on behalf of Sylvan and Mr. Kar on behalf of Deccan, the collusion was proved. In any event, Sylvan was not a creditor of the company in liquidation hence, Sylvan could not have prayed for sale. He lastly contended that the Order dated July 25, 2007 clearly provided that property would not be sold without any notice to ARC whereas the learned Judge declined to hear ARC on the application of Sylvan and Deccan for sale.

MANMOHAN GARORIA

14. ACO No. 119 of 2012 was filed in APO No. 249 of 2011 by Manmohan Garoria on May 15, 2012. However, the said application was kept pending and was not moved at all. Upon coming to know, we listed the matter along with the appeals. Despite matter being listed, none appeared on behalf of Manmohan Garoria. Hence, we concluded the hearing and kept our judgment reserved. Subsequently, Mr. Sandip Bhattacharyya, learned counsel appearing for Manmohan Garoria, mentioned the matter before us on August 8, 2012 and prayed for hearing on the application. He contended, Manmohan Garoria was duped by Gourinandan as Manmohan Garoria invested sums to purchase the subject property. However, the Directors of Gourinandan duped him. We asked him to file a written argument.

15. On examination of his application, we would find Manmohan Garoria filed a Title Suit in the civil court for specific performance and injunction against Gourinandan in respect of the subject immovable property. He prayed for permanent injunction restraining Gourinandan and its Directors from creating any third-party interest in the property in question. He prayed for leave to intervene in the matter for being added as a party to protect and safeguard his interest in the suit pending before the civil court.

16. Mr. Bhattacharya filed written notes of argument, giving details as to the contribution made by Gourinandan in purchasing the subject property. In the written notes, it was contended that the said auction bid was a benami transaction. However, he was interested to protect his suit that was pending before the Barasat Court.

OUR VIEW

APPEALS OF ARC

17. Let us first deal with the four appeals filed by ARC on the issue. We have considered the rival contentions. We fully agree with Mr. Banerjee when he criticised the Official Liquidator in permitting the sale to be conducted by the learned Single Judge not being the regular Company Court. We would deal with the issue little later. Let us first consider the real grievance of the ARC. ARC claimed, they were major shareholders. They all along wanted to revive the company. We would find, three attempts failed when the scheme propounded by ARC could not succeed. The company is still in liquidation, for beneficial winding up Official Liquidator must sell the assets to pay off the dues of the creditors. Hence, the Official Liquidator was duty bound to take expeditious steps for sale of the assets. Sylvan and Deccan filed applications for direction for sale. Sylvan was not a creditor as rightly submitted by Mr. Banerjee. Sylvan would be free to approach the Official Liquidator in accordance with law. We doubt how their grievance could be met in absence of any specific order from the Apex Court to the said effect. Be that as it may, Sylvan approached the learned Single Judge for a direction for sale of the assets. Even if the application was dismissed that would not change the situation.

18. Coming to the question of Deccan, we find, Deccan got the decree assigned in their favour from the Allahabad Bank. Whether such assignment was right or wrong, is a question to be decided in the pending suit filed by ARC. Deccan also activated the Official Liquidator by asking for sale.

19. Sylvan and Deccan both prayed for distribution of the sale proceeds that, in our view, would not be possible at this stage. Deccan's right to claim money out of the sale proceeds is a subject matter of suit. Sylvan would have to protect it in accordance with law. We would only observe, such stage has not come. Even if we allow these two appeals arising out of order dated April 20, 2011 the situation, in our view, would not change. We cannot overlook the fact, the Apex Court passed

orders including the one dated September 26, 2000 appearing at page 41-51 of the compilation where the Apex Court directed the Official Liquidator to sell the assets at the best possible price keeping interest of all creditors. The said order was passed at the instance of Allahabad Bank. The next order was passed on October 18, 2010 when the Apex Court adjourned the SLP filed by ARC which was ultimately dismissed by the Apex Court vide order dated February 14, 2011 appearing at page 92 of the compilation. As of date, the attempt of ARC to revive the company failed at all stages. We were told, after the order dated April 20, 2011 ARC filed another scheme in June, 2011, that was, awaiting disposal before the learned Company Judge.

20. From the orders referred to above and appearing in the compilation and from the sequence of events, we find that initially the Court directed the property to be sold as a going concern. Subsequently, it was directed to be sold "as is where is" basis. Accordingly, assets were sold. We do not find any scope to interfere. Mr. Banerjee strenuously contended that he was entitled to a notice as per the earlier order dated July 25, 2007. We find, ARC was represented before His Lordship when Deccan and Sylvan were heard on their applications. We feel, the learned Judge should have given a hearing to ARC. In any event, such defect is cured by us by giving a full-fledged hearing to ARC on merits. If we summarise his contention, we would find that his main grievance was against the Allahabad Bank who surreptitiously assigned the debt in favour of Deccan. He tried to show connivance between Deccan, Sylvan and Bank. Even if he was correct that would not change the situation. They would only be entitled to as a shareholder to protect the interest of the company in liquidation and its shareholders by overseeing disbursement of the sale proceeds. That stage has not come as yet.

21. In those two appeals being APO 204 and APO 205; both against the order dated April 20, 2011 and his subsequent appeals being APO No. 249 and APO 250; both against the order of confirmation of the sale dated July 15, 2011 would deserve only order that the sale would not preclude the learned Judge to hear his scheme application whatever its worth may be as on date. As a shareholder he would be having his right to participate in beneficial winding up. That would take care of the four appeals.

THE APPEAL OF GOURINANDAN

22. Gourinandan participated in the sale keeping its eyes wide open. Moment they participated in sale, they were deemed to have been satisfied about the nature, character and status of the land and assets in question on as is where is basis. If we look to the terms and conditions of the sale, we would find Official Liquidator making it clear that he would not be responsible for any defect in the title. We fail to appreciate how Gourinandan could make any complain subsequently.

23. Lot was said on the notice issued u/s 6(3) of the Estates Acquisition Act. Mr. Ghosh appearing for the Official Liquidator rightly contended, such attempt on the

part of the State was of no consequence in absence of appropriate leave being obtained u/s 446(2) of the Companies Act, 1956 that would have an overriding effect if there was any conflict. We fully appreciate the agony of the State so advanced by the learned Junior Standing Counsel to the effect that land might be misused by user in a manner not contemplated. We have enough confidence on the State that it would never create any impediment to any industry being revived and the land being used strictly for industrial purpose through eco-friendly mechanism. If Gourinandan feels that they would utilize these lands for setting up of malls or residential complex or multiplex, the State would be definitely within their power to question such attempt. In any event, these questions are totally irrelevant for the Company Court or the Official Liquidator. Gourinandan participated in the sale and became the successful bidder. They are supposed to pay the purchase price. On such payment being made Official Liquidator would transfer the right, title and interest. It would then be open for Gourinandan to set up industry with the concurrence of the State by resolution of dispute, if any, they would be having with the State pertaining to the land in question. Official liquidator would not be in any way responsible for the same. Mr. Ratnanko Banerjee rightly contended, the decision in the case of Ratnagiri (supra) would be of no assistance to Gourinandan that would decide the question of payment of statutory outgoings which the company in liquidation was supposed to pay. Such question would not be germane, at least in the present proceeding before us. The learned Junior Standing Counsel rightly contended, the land revenue issue would be strictly within the domain of Land Tribunal or any other appropriate forum dealing with such situation. Neither the Company Court nor the Court of Appeal in extension of the company jurisdiction, would be competent to deal with the same. The learned Judge rightly declined to interfere. So do we.

RESULT

24. These appeals fail and are all dismissed without any order as to costs.

BEFORE WE PART WITH

25. Before we part with all humanity and with deepest regard we have for His Lordship, may we add few words pertaining to the conduct of sale. His Lordship was never assigned the company jurisdiction. Few matters were specially assigned to His Lordship that included two applications by Deccan and Sylvan, inter alia, praying for sale of assets of the company in liquidation and a direction upon the Official Liquidator to pay off their dues. His Lordship rightly disposed of both the applications vide order dated April 20, 2011. His Lordship should have stopped there asking the Official Liquidator to take routine directions for sale from the regular Company Court that would create the position healthy and sound.

26. Sale is conducted by the learned Company Judge in open Court in administrative capacity. Mr. Kar rightly contended, no such statutory obligation was imposed by

the Companies Act, 1956 or the rules framed thereunder. It had a history. If we look back, we would find that in 1970s there had been allegations with regard to the functioning of the office of the Official Liquidator. Under the rules, Official Liquidator was obliged to sell the assets of the company in liquidation and disburse the proceeds amongst the creditors, shareholders, workers and all concerned in terms of Section 529, 529A and 530 of the said Act of 1956. The sale would be subject to the confirmation of the learned Company Judge. To avoid unnecessary allegations and to maintain a transparency, the then learned Company Judge started holding auctions in open Court. It was rather, Court took it upon itself the onerous duty the Official Liquidator had, to sell the assets. Since then, the sale of assets of company in liquidation are held subject to the direct superintendence of the learned Judge taking company matters. This is the prevalent practice we have for decades.

27. The application for direction for sale was specially assigned to His Lordship. His Lordship should have disposed of the same either by dismissing it if His Lordship so feels it proper or allow it directing Official Liquidator to take expeditious steps for sale. Further directions for advertisement and conduct of sale would remain with the learned Company Judge. It would have been better His Lordship would not have taken it upon himself and that too, by directing sale to be held before His Lordship. The subsequent order confirming the sale was really in that way an extension of the assignment that His Lordship was perhaps not competent to.

28. Since the process was irregular but not illegal in that sense we do not wish to upset the same. We only feel, His Lordship could have avoided this controversy. Now that the sale was conducted and confirmed, if we set it aside and direct fresh sale to be conducted by the regular Company Court, it would unnecessary complicate the issue and delay the beneficial winding up. We, thus, refrain from doing so. We hope and trust His Lordship would pardon us for the unpleasant words we are compelled to spell out.

29. Urgent Xerox certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir Sinha, J.

I agree.