

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No. 10219/2009**

4th May, 2010

D.J.ENTERPRISES LTD. & ANR.

..... Petitioners

Through: Mr. Vinay Sharma, Advocate

VERSUS

IFCI LTD. & ORS

....Respondents

Through: Mr. Suresh Dutt Dhobal, Advocate for
Respondent No.1.
Mr. Atul Pandey & Mr. Akshay
Ringe, Advocates for Respondent
No.2.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

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JUDGMENT

VALMIKI J. MEHTA, J

1. This petition under Articles 226 and 227 of the Constitution of India challenges the impugned order dated 9.2.2009 passed by Debt Recovery Appellate Tribunal (DRAT). By the impugned order, the DRAT dismissed the appeal of the auction purchaser/petitioner. The auction was conducted on 27.6.2008 with respect

to the properties of the borrower/respondent No.3 being C-4/2 & C-4/1, MIDC, situated at Gondia Industrial Area, Village Mundipur, Taluk Gondia, Maharashtra, Tehsil and District Gondia. The auction was conducted pursuant to the final judgment/decreed in the O.A.721/1996 filed by the Industrial Financial Institution (for short IFCI) respondent No.1 herein. The Recovery Officer accepted the bid of the present petitioners for the bid of amount Rs. 39,20,000/- plus Rs.23,30,000/- for both the properties totaling to Rs. 62,50,000/- and thereafter confirmed the auction sale. On an appeal by the respondent No.2 herein to the Debt Recovery Tribunal (DRT) the order of confirmation of sale by the Recovery Officer, inspite of the respondent No.2 offering a sum of Rs.68 lacs within one month of conduct of the auction before the confirmation of the auction sale was set aside by the DRT which order of DRT has been sustained by the DRAT and hence the present petition.

2 Exercising jurisdiction under Article 226, we are not sitting as a court of second appeal. This court would only interfere if there is a clear cut illegality and grave injustice caused. In fact, in the facts of the present case, we find that the two concurrent orders of both DRT and DRAT are in accordance with law and the petition is wholly misconceived.

3. Since the DRAT in a few paragraphs in the impugned order crystallizes the issue, and also the scope ; object and duty of the Recovery Officer at the time of

confirmation of sale, the failure of the Recovery Officer to adhere to establish legal principles with respect to the above, the apparent collusion of the officer of the Certificate Holder Financial Institution (CHFI) i.e., IFCI/Respondent No.1 in this case, we reproduce those few paragraphs of the impugned order which exhaustively and authoritatively analysis and pronounces upon the issue.

8. I have bestowed my anxious consideration to the respective contentions of the learned counsel for the parties and have gone through the record including the record of the recovery proceedings which has been summoned. What has been held by the Hon'ble Supreme Court in the case of LICA (P) Ltd. Vs. Official Liquidator and another, [(1996) Comp. Case 788 (SC)] may pertinently be taken note of that the purpose of an open auction is to get the most remunerative price and it is the duty of the court to keep openness of the auction so that the intending bidders would be free to participate and offer higher value if that part is cut down or closed, the possibility of fraud or to secure inadequate price of under-bidding would loom large. In the case of **M/s Divya Manufacturing Co. (P) Ltd. Vs. Union of India and others** (AIR 2000 Supreme Court 2346), it has been held that it is the duty of the court to see that the price fetched at auction is adequate price even though there is no suggestion of irregularity or fraud. **Even the confirmation of sale by a court at grossly inadequate price** whether or not it is a consequence of any irregularity or fraud in the conduct of sale could be set aside on the ground that it was not just and proper exercise of judicial discretion. The facts of Divya's case were that at the initial stage the appellant offered Rs.37 lakhs for purchasing the property in question. At the intervention of the court the price was raised to Rs.1.3 crores. Ultimately, it was found that the property could be sold for Rs.2 crores. It was on these facts that the Hon'ble Supreme Court held that even after the confirmation of sale, the same could be set aside. A Division Bench of the Hon'ble Delhi High Court in the case of **A.K.Jain Vs. Canara Bank and others** (MANU/DE/8620/2007) has held that the principle laid down in **Divya's** case is applicable to an auction by the Recovery Officer attached to DRT. It has been observed that when a properly mortgaged with the bank is sold by the Recovery Officer on the basis of the orders passed in the O.A., he (Recovery Officer) is the trustee of the property, who is selling the same for the benefit of the mortgaged bank as well as the workers. Therefore, the public purpose, which was seen by the Apex Court while laying down the principle in Divya's case, should be in the forefront in such sales conducted by the Recovery Officer as

well. The Hon'ble Supreme Court's decision in **FCS Software Solutions Ltd. Vs. LA Medical Devices** [2008(10) SCALE page 7] is also worth mentioning, wherein the principle laid down in **Divya's** case has been reiterated that even confirmed sale can be set aside in appropriate case and that it is the duty of the court to see that the suggestion of irregularity or fraud. In that case, confirmed sale in favour of the appellant was set aside which met the approval of the Supreme Court.

9. It should also be pointed out that an auction purchaser does not have an indefeasible right for the confirmation of sale in the eventuality of non-filing of objections under Rule 60 or 61 of the Second Schedule to the Income-tax Act. The confirmation of sale is not inevitable in each and every case. In suitable situation, sale may be refused to be confirmed and even on confirmation, sale may be set aside. The auction purchaser cannot insist that the sale should invariably be confirmed after expiry of statutory period of 30 days under Rule 63(1) of the Second Schedule of the Income-tax Act. Reference may profitably be made to the decision of the Hon'ble Supreme Court in **Mohan Wahi Vs. Commissioner, Income Tax, Varanasi and others** [(2001) 4 SUPREME COURT CASES 362].

10. Paper No. 89 of the paper book of the appeal is the copy of the communication dated 2.7.2008 sent by M/s Sanvijay Rolling & Engineering Ltd. addressed to the Recovery Officer, DRT-II Delhi through Ms. Rashmi Sachdev AGM (Law), IFCI Ltd. Delhi Regional Office, 14th Floor, IFCI Tower, 61, Nehru Place, New delhi-110019. It is an offer for purchase of property of M/s Lan Esada Industries Ltd. for Rs.68 lakhs. Demand drafts for a total amount of Rs.68 lakhs were enclosed. Copies of the same are there on record. They are dated 2.7.2008, favouring Recovery Officer, DRT-II, Delhi. As per the record, the confirmation of sale in favour of the appellants was ordered by the Recovery Officer on 6.8.2008. What is recorded in the order dated 6.8.2008 in the order-sheet of the recovery proceedings throws a flood of light to expose colossal negligence, even smacking malice and foul play, on the part of IFCI which had the result of backing the appellants and hitting M/s Sanvijay Rolling & Engineering Ltd. which wanted to purchase the properties at a higher price. On that date, the counsel for CHFI and Ms. Rashmi Sachdev, officer of CHFI was present as also Mr. Ravi Data, counsel for the auction purchaser (appellants herein). The order, *inter alia*, records as under:-

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The officer for CHFI submitted that the auction was held smoothly and no irregularity in the conduct of auction had taken place. She informed that an offer has been received by CHFI from one of the

concern offering more amount than what is offered by the Auction Purchasers. She did not offer any comments/views in the matter and merely submitted that confirmation be done as per procedure.

During the proceedings one Shri Gurdeep Singh mentioned that he represents Shri Kailash Aggarwal, proprietor M/s Sun Vijay Rice Mills and prepared to pay far more than the amount offered by the Auction Purchaser. He was holding some drafts in his hand. He confirmed that he did not participate in the auction process. It was clarified that the offer made by Shri Gurdeep Singh cannot be accepted as he has no locus standi nor a person whose interest are affected.”

11. In view of the record of the proceedings before the Recovery Officer on 6.8.2008, the argument of the learned counsel for the appellants falls to the ground that the Tribunal wrongly mentioned in its impugned order that the offer of the present respondent No.2 (to purchase the properties at a higher price) was communicated to the Recovery Officer. As I pointed out, it was through the communication dated 2.7.2008 that the offer to purchase the properties at a higher price of Rs.68 lakhs had been made by M/s Sanvijay Rolling & Engineering Ltd. to the Recovery Officer through CHFI. The letter itself was addressed through Ms. Rashmi Sachdev-officer of CHFI (who was present before the Recovery Officer on 6.8.2008). Thus, the higher offer of M/s Sanvijay Rolling & Engineering Ltd. made through the communication dated 2.7.2008 came to the notice of the Recovery Officer before the confirmation of sale on 6.8.2008. The communication dated 2.7.2008 would have ordinarily reached Ms. Rashmi Sachdev, officer of CHFI within a week. The bank drafts for Rs.68 lakhs had also been got prepared on 2.7.2008 and the bona fides of M/s Sanvijay Rolling & Engineering Ltd. offering to purchase the properties at the said price could not at all be doubted. The offer itself was made within a week of the auction held on 27.6.2008. Despite all that, Ms. Rashmi Sachdev did not offer any comment before the Recovery Officer when she appeared there on 6.8.2008. She admitted that an offer had been received offering more amount than what had been offered by the auction purchasers. But she did not think it proper to promote the interest of CHFI by making a request to the Recovery Officer to accept the higher offer. Instead, she backed the confirmation of sale in favour of the auction purchasers (appellants) for a lesser amount. The way Ms. Rashmi Sachdev, officer of CHFI conducted herself cannot at all be justified. Rather, her posture was deprecatory that she did not serve the best interest of CHFI-her employer. The Recovery Officer also turned a blind eye to the blatant inequity and became a tool of favouritism to the appellants. He ought to have exercised his judicial discretion to decline the confirmation of sale in favour the appellants when he was apprised of a higher offer by M/s Sanvijay Rolling & Engineering Ltd. even before the confirmation of

sale. M/s. Sanvijay Rolling & Engineering Ltd. offer of a higher price could not be hit on the technical premise that it had not participated in the auction. No vested right had come to be created in favour of the auction purchasers and it was a fit case where the Recovery Officer should have refused to confirm the sale when there was a higher offer from M/s Sanvijay Rolling & Engineering Ltd.” (emphasis supplied)

4. The aforesaid paragraphs show that the following unexceptionable conclusions are arrived at by the DRAT:-

(i) The object of auction proceedings is to get the best possible price from sale of the properties and there is no inherent right in an auction purchaser for confirmation of the sale if there is availability of higher offer before the confirmation of the auction sale. The Recovery Officer owes a fiduciary duty of a trustee to get the best price.

(ii) Once a higher offer is available then the same is to the benefit of the Financial Institution which must in fact support such higher bid, however, in the facts of the present case, on the contrary, there was a collusion between the auction purchaser and the officer of the respondent No.1 that a substantial amount of Rs.5 ½ lacs was not taken into consideration before confirmation of the auction sale. To this we may only add that who benefits from this difference of Rs.5 ½ lacs less to the Financial Institution, is not understood to say the least.

(iii). In fact, the bid of Rs. 68 lacs given by the respondent No.2 herein was enhanced by it to Rs.75 lacs in the appeal before DRT against the order of the Recovery Officer and which amount of Rs.75 lacs was deposited by the respondent

No.2 before the DRT. We may further add that no attempt at any stage was made by the present petitioners to match the increased offer of the respondent No.2 herein.

5. Before us, the learned counsel for the petitioners sought to contend that once the petitioners were found to be the highest bidders in the auction, they were entitled to confirmation of the auction sale. We do not agree with this contention. We agree with the findings and observations of the DRAT in the paragraph 8 of the impugned order wherein the DRAT has quoted different judgments of the Supreme Court as also of this court. The fiduciary duty of the Recovery Officer mandates that even a confirmed sale can be set aside. The much higher offer of Respondent No.2 was in close proximity of time to the offer of the petitioner and actually before confirmation of sale.

6. Another argument which was sought to be advanced by learned counsel for the petitioners is that the petitioners have spent a huge amount of money which is about a crore of rupees on construction on the plots and therefore they have equity in their favour. This was rightly countered in our opinion by the learned counsel for respondent No.2, as also the respondent No.1, by bringing a shocking and startling fact to our notice that the petitioners did not receive possession of the auction properties either from the Financial Institution /Respondent No.1 or the borrower, but they simply “walked in” in the property and started construction. On

being queried by this court the counsel for the petitioners contended that the petitioners were entitled to do so as the property was lying vacant. We are clearly shocked at the gall of the petitioners. Clearly, therefore, the petitioners are trespassers on the auctioned properties and they cannot claim any equity in their favour. Whatever they constructed, was at their own risk and cost and with open eyes because to their knowledge the auction proceedings were yet not final and they were not in legal possession of the auctioned properties.

7. In view of the above, we do not find any reason to interfere with the impugned order in exercise of our jurisdiction under Article 226 of the Constitution of India.

8. The petition is therefore dismissed.

CM No. 8735/2009(Stay)

Dismissed.

Interim orders dated 20.7.2009 stand vacated.

VALMIKI J. MEHTA, J

SANJAY KISHAN KAUL, J

May 04, 2010

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