OD-3 ORDER SHEET

APOT No.415 of 2023
With
CP No.233 of 2008
IA NO: ACO/1/2023
ACO/2/2023
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

IN THE MATTER OF:-
M/S. DUNLOP INDIA LIMITED (IN LIQN.)
-AND-
KANTI COMMERCIALS PRIVATE LIMITED.
-VS-
THE OFFICIAL LIQUIDATOR, HON'BLE HIGH COURT AT CALCUTTA

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE UDAY KUMAR
Date: 19th December, 2023.

Appearance:
Mr. Krishnaraj Thaker, Adv.
Mr. Chayan Gupta, Adv.
Mr. Suvranil Saha, Adv.
... for the applicant.

Mr. S.N. Mookherjee, Sr.Adv.
Mr. Ratnanko Banerji, Sr Adv.
Mr. Soumya Mazumdar, Adv.
Mr. Jishnu Chowdhury, Adv.
Mr. Shounak Mitra, Adv.
Mr. Zulfiqar Ali Ali Quaderi, Adv.
Mr. Indrajeet Banerjee, Adv.
... for Salasar Towers Pvt. Ltd.

Mr. Rupak Ghosh, Adv.
Mr. Raunak Bose, Adv.
..for Eyelid *Mercantile Pvt. Ltd.*

Ms. Tanushree Dasgupta, Adv.
..for the Official Liquidator.

The Court:- The appeal and the connected applications are taken up together and disposed of by this common order.

Dunlop India Limited, the owner of the well reputed brand "Dunlop" tyre that had dominated the Indian road market and especially the aviation sector was directed to be wound up by an order of the company Court *in APO No.65 of 2013 arising out of CP No.233 of 2008 on 2nd May 2013.* This order was affirmed by the Hon'ble Division Bench of this court on 2nd May, 2013. A Special Leave Petition at the instance of the present applicant was dismissed on 29th July, 2016 as the applicant had failed to deposit Rs.25 crores as directed by the order dated 28th March, 2016. The application for review of orders dated 25th July, 2016 and 29th July, 2016 was dismissed on January 31, 2017. The application for modification of the orders dated 28th March, 2016, 25th July, 2016 and 29th July, 2016 filed subsequently on 17th March, 2019 was disposed of by the Hon'ble Supreme Court on July 8, 2020.

The said order reads :

"Upon hearing the counsel the court made the following order:

Learned senior counsel seeks permission to withdraw this application with liberty to take appropriate proceedings in accordance with law.

Permission sought for is granted.

I.A. No. 170358/2019 application for directions is dismissed as withdrawn with the liberty as prayed for."

Thereafter, the applicant filed a review petition before the co-ordinate Bench being RVWO No.3 of 2021 praying, inter alia, for stay of operation of the order dated 2nd May, 2013 directing winding up.

The present appeal has arisen from the order dated 19th October 2023 passed by the learned single Judge in CA/205/2023 filed in connection with CP/233/2008. Kanti Commercial Private Limited is the appellant. The appellant/applicant claims to be a contributory. The appellant has challenged the auction notice issued by the Official Liquidator in respect of an immovable property known as Kings Court situated at 46B, Chowringhee Road, Kolkata – 700007.

Principal ground of challenge to the order of sale passed by the Learned Single Judge is that if the property is now allowed to be sold on the basis of valuation prepared two years back, it would not fetch proper price. The other ground is that by reason of the pendency of the review application pending before the coordinate bench no finality could be attached to the order directing winding up of the company.

The appellant has given instance of a property claimed to have been sold at an undervalue at Mumbai to justify its stand of a fresh valuation of the property in question. Appellant also espouses the cause of the workmen and states that their dues are also required to be paid. At the time of admission of the appeal, a co-ordinate Bench passed a detailed order and stayed the operation of the impugned order for a period of three weeks. The reason for granting stay appears to be that sale cannot be permitted on the basis of defective sale notice with reserve price fixed at least two years back. The co-ordinate Bench observed that in the event such sale is allowed to take place with the old valuation with other defects noticed at the time of hearing there is every possibility of the sale being challenged in future and the interest of the stake holders would likely to be in jeopardy. It is also likely to create hardship for the successful bidder if such sale is set aside for such defective sale notice based on old valuation. It appears that the said order was passed in presence of the parties present today.

Mr. Krishnaraj Thaker, learned Counsel appearing on behalf of the appellant/petitioner submits that the petitioner had filed an application for review of the order admitting the winding up petition after the special leave petition was dismissed and has drawn our attention to an observation made in the order dated 8th November 2023, which had taken note of the order passed in the review application on 23rd September 2021 to the effect:- "Any steps taken will abide by the result of this application."

Mr. Thaker has submitted that when the review application is pending it would not be proper to proceed with the sale of the property in question as in the event of allowing the review petition, the entire thing would be required to be undone and may be irreversible.

Mr. Thaker has submitted that the official liquidator has conducted the sale in violation of the provision of Rules 6, 272, 273 of the Companies Act (Companies Court Rules 1959) and also without statutory compliance of Rules 167, 168, 169 and 74 of the said Rules.

Mr. Rupak Ghosh, learned Counsel appearing on behalf of Eyelid Mercantile Pvt. Ltd. submits that Eyelid is the 50 per cent owner of the property in question which is now sought to be sold by the Official Liquidator.

The learned Counsel for the official liquidator has disputed the status of the applicant as contributory as it has lodged a claim with the official liquidator as a creditor. The appellant did not take any steps for almost nine years now to revive the company. The appellant is a fence sitter and has filed the appeal to disrupt the sale. The official liquidator, however, refuted the allegation made on behalf of the applicants regarding violation and/or non-compliance and all the relevant Company Court Rules. It is submitted that proofs and list of creditors have been prepared and filed in courts. The official liquidator was unable to proceed with the matter because of various impediments caused by the appellants in connivance with persons claimed to be in management of the company liquidation. It is submitted that the official liquidator has taken all reasonable steps for conducting sale of the assets of the company liquidation.

Mr**.** S. N. Mookherjee, learned Senior Counsel appearing on behalf of Salasar Towers Private Limited has submitted that although the order was passed by the co-ordinate Bench directing service of the notice and the petition upon all the stakeholders, the present applicant did not serve any notice or copy of the application upon Salasar Towers Private Limited. Mr. Mookherjee has referred to orders dated 2nd November, 2023 and 10th March, 2022 in order to show that real challenge to the sale is delay caused by the Official Liquidator in proceedings with the sale of the property and the attempt to sell the property based on a valuation that was made two years back. It is submitted that Salasar Towers Private Limited is not only a prospective bidder but its rights have been recognized by the learned single Judge in an order dated 3rd February, 2021 passed in connection with CA/61/2019 (Old No. CA/199/2019) to the effect that if the applicant can match the highest bidder, then the applicant's claim should be considered favourably in view of the right of pre-emption that exists in its favour.

In the aforesaid background the order under challenge has to be assessed. The present appellant has shed crocodile's tear to oppose the sale alleging statutory non-compliance on behalf of the official liquidator and the chance to revive the company would be lost forever. The present appellant has also not filed a scheme application under Section 391 of the Companies Act during the pendency of the winding up proceedings. On a specific query as to whether the applicant has taken any measure for revival of the company in liquidation and if any scheme has been prepared and filed for consideration we could not find any satisfactory reply. Rules 67 to Rule 84 of the Companies Court Rules 1959 lay down the procedure to be followed in an application for compromise or arrangement. No attempt has been made by the petitioner to file any application for revival of the company liquidation. Even on this date there is no scheme for revival. In any event, if the applicant was so much concerned for the revival of the company nothing could have prevented the applicant to approach the court with a scheme for revival of the said company in liquidation following the procedure prescribed under the Companies Act read with relevant rules. The appellant was successful in for almost 9 years to stall the sale of the property causing serious prejudice to the secured creditors and the workmen.

In so far as the claim for Eyelid is concerned there is no application for disclaimer. If the eyelid of Eyelid is opened it would show a remotest chance of establishing its right based on an unregistered agreement. It seems to us an attempt to create a shadow of right on the property and in absence of any affidavit in reply being filed in CA 183 of 2021 and thereby refuting the claim of the official liquidator as to its tall claim over the property we feel that its another ploy to defer the sale.

The ground that Court should not proceed with the sale of assets in view of the pendency of the review application may not hold ground in view of the order passed by the Bench presided over by I.P. Mukerji, J. on 10th March, 2022 in which the Hon'ble Division Bench has observed as follows :

> *"The grounds on which review is sought are summarised in paragraph 15 of the present application. It is evident from the grounds that have been made out that the applicant has tried to justify the transactions of the company, now in liquidation, which have been held to be fraudulent preference to deny or defeat the claim of the creditors, as genuine and bona fide transactions. Particular reference may be made to the transactions concerning*

Mumbai, Goa, Ambattrur and Sahaganj properties of the company.

It is quite evident on reading of the said grounds that prima facie these cannot constitute any grounds under Order XLII Rule 1 of the Code of Civil Procedure for review of the said judgment and order of the division bench dated 2nd May, 2013. Prima facie, neither is there any error apparent on the face of the division order or of the records nor can it be said that the facts which are now disclosed were not in the knowledge of the applicant or with the use of reasonable diligence could not have been in their knowledge at the time the division bench order was made.

Prima facie these are the grounds on which an appeal may have been founded but, in our opinion, they do not constitute valid grounds for review."

Considering the fact that the essential challenge to the sale notice is the valuation made in the year 2021, we direct the Official Liquidator to have a fresh valuation of the property in question by a reputed and recognized valuer who shall complete the valuation of the property in question on or before 10th January, 2024. The Official Liquidator shall thereafter publish the sale notice once in English, once in Hindi and once in Bengali on or before 17th January 2024 in newspapers having wide circulation all over India indicating that all bidders shall be required to submit their bids in the prescribed form on or before 10th February, 2024 and shall place the offers before the Hon'ble

Committee Judge for confirmation on the date to be mentioned specifically in the sale notice. In addition to the aforesaid the official liquidator shall also publish the said notice in its official website providing links where the offers can be submitted. We make it clear that the rights required to be decided in terms of the order dated 23rd September, 2021 and 3rd February, 2021 are no way disturbed by this order. However, it would be open for Eyelid and Salasar to participate in the auction sale and submit their bids/offers pursuing to the advertisement dated 17th January, 2024 if advised without prejudice to the rights and contention in the appeal.

The matter may be placed before the Company Court by the Official Liquidator after the process is complete for confirmation of sale on the date to be specified in the sale notice.

In view of the aforesaid the impugned order is set aside.

APOT No.415 of 2023 with CP No.233 of 2008, IA No.ACO/1/2023, ACO/2/2023 are disposed of.

(SOUMEN SEN, J.)

(UDAY KUMAR, J.)

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