2024:PHHC:060558

IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

204 **CWP-16489-2016**
Date of Decision: 30.04.2024

M/S AKSHI MARKETING PVT. LTD.

... Petitioner

VERSUS

UTTAR HARYANA BIJLI VITRAN NIGAM LTD. AND OTHERS

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

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Present: Ms. Ateevraj Sandhu, Advocate
for the petitioner.

Mr. Piyush Bansal, Advocate
for respondents No.1 to 3.

Mr. S.P.S. Ahluwalia, Advocate
for the official liquidator-respondent No.4..

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<u>VINOD S. BHARDWAJ. (ORAL)</u>

Challenge in the present petition is to the Sales Circular No.U-03 of 06.01.2013 issued by the respondent-Distribution Licensee for effecting recovery of the dues outstanding qua the defaulting premises on the strength of Clause 21A on the ground that the same is not applicable or suffice such recovery.

Facts of the petition in brief are that respondent No.4- M/s Century Protein Ltd. was a company incorporated under The Companies Act, 1956 and that the company was ordered to be wound up on 11.01.2001 on the recommendations of the Board of Industrial and Financial Reconstruction (BIFR) by this Court. An Official Liquidator was appointed by this Court to take over the assets of the respondent No.4-company. Vide its order dated 18.09.2003 passed in CA-477 of 2003 in CP-257 of 2000, the Company Court gave permission to the Official Liquidator to sell the properties of the respondent No.4-company. An advertisement was accordingly published in the newspapers for the sale of the property of the respondent No.4-company. An auction was, thereafter, conducted by the Official Liquidator in which the petitioner participated and was declared as a successful bidder, being the highest bidder, for a sum of Rs.2,73,50,000/- for the assets of the respondent No.4-company in liquidation. The said sale consideration was duly deposited by the petitioner whereupon the sale was confirmed by the Company Court viz. the High Court, on 08.10.2004, in the abovesaid Company Application 477 of 2003. Pursuant to the confirmation of the sale, the petitioner deposited the entire amount with the Official Liquidator and possession of the assets belonging to the M/s Century Protein Ltd. was handed over to the petitioner on 17.11.2004. A sale deed was also executed by the Official Liquidator on 19.12.2015.

In order to start the regular business operations, the petitioner approached the respondent No.2-Distribution Licensee and submitted an application for grant of electricity connection. The respondent No.2-Distribution Licensee, however, sent a letter dated 09.08.2010 wherein it was conveyed that the old company had not obtained NOC from the respondent No.2-Distribution Licensee and that there was an outstanding amount of Rs.13,75,422/- against the old Company. The release of electricity supply and connection was thus withheld. The petitioner submitted another application to the SDO, Sampla for grant of the electricity connection but no response was received. Aggrieved of the same the petitioner filed CWP No.19548 of 2010 titled as M/s Akshi Marketing Pvt. Ltd. Versus Uttar Haryana Bijli Vitran Nigam Ltd. and others before this Court.

REPLY BY RESPONDENTS NO.1 & 2

A written statement was also filed by the respondents. Since the production of the petitioner was being delayed leading to cost over-seen, the petitioner made a conditional proposal to deposit the amount as demanded by the respondent No.2-Distribution Licensee to the tune of Rs.13,75,422/- for release of the electricity connection subject to the condition that in the event the petitioner succeeds, the amount shall be adjusted against future consumption. The same was allowed by this Court whereupon the said amount was deposited by the petitioner on 04.05.2011. The respondents thereafter issued a Sales Circular No.U-03 of 2013 for recovery of the outstanding dues from the defaulting premises and incorporated a new Clause 21-A in the Terms and Conditions of the Supply of Electrical Energy. The abovesaid CWP No.19548 of 2010 was thus withdrawn by the petitioner, with liberty to file fresh petition, by taking additional pleas on 23.02.2016, leading to filing of the instant writ petition.

It is submitted that all previous liabilities/dues in respect of a winding-up-company were required to be raised with the Official Liquidator and the responsibility is entirely upon the Official Liquidator to discharge all previous dues/liabilities against the company in question and that no further liability could have been fastened against the petitioner.

Reliance was placed on the judgment of ***M/s P.T.L. Tooling Systems Pvt. Ltd. bearing CWP No.12437 of 2004***, wherein such benefit was granted to the claimant, vide order dated 05.11.2004.

An additional reply had been filed on behalf of respondents No.1 to 3 wherein the factual aspect was not disputed and it was contended that prior to issuance of Sales Circular No.03 of 2013, Sales Circular No.U-63 of 2007 was in force and that the same provided for the terms and conditions governing sale of electricity connection and in Point 9 of paragraph No.2(i) thereof it was mandated that no new connection/reconnection is to be released to a defaulting premises whether in the name of the same consumer or to a new person till the outstanding amount is cleared by the same consumer or by the new occupant. It is further submitted that in view of the rules governing the release of electricity connection, the liability is against the premises and the occupant has to clear the dues. He submits that an amount of Rs.13,75,422/- was undisputedly due against the premises in question, hence, the petitioner is liable to clear the same. It is submitted that the petitioner ought to have carried out a due diligence and to ascertain whether there was any liability/lien/charge against the premises and that having not done so, the petitioner cannot seek exoneration of the liability.

REPLY BY RESPONDENT NO. 4

A separate reply has also been filed by the Official Liquidator on behalf of respondent No.4, wherein, while admitting the factual aspects highlighted by the petitioner, it is stated that possession of the assets of the respondent No.4-company was taken over on 20.02.2001 and that pursuant to the order dated 08.10.2004 passed by the Company Court in Company Application No.477 of 2003 in CP No.257 of 2000, the sale was confirmed in favour of the petitioner and possession had been handed over on 17.11.2004. It is further submitted that the claim notice was published in the newspaper on 03.03.2005 inviting claims from creditors/workers, and that in response thereto, only three claims were received by the Official Liquidator; firstly from the State Bank of Hyderabad; secondly from IFCI and thirdly from the Excise and Taxation Department, Rohtak. The claims of the secured creditors had been settled. The details of the claims as on the winding up order are extracted as under:

Sr. No.	Name of the Creditor	Amount claimed as on winding up order date (In Rs.)
1.	State Bank of Hyderabad 2nd Charge holder on Fixed Assets	5,65,09,374/-
2.	IFCI	21,29,68,000/-
3.	Excise And Taxation Department	20,28,51,000/-
	Total	**47,23,28,374/-**

It has been further averred by the Official Liquidator that IFCI is the first charge holder of the assets of the respondent No.4-company and their claim was to the tune of Rs.21,29,68,000/- as on the date of winding up order and that the office reimbursed a sum of Rs.2,69,58,286/- to IFCI on 21.12.2005, after retaining Rs.3,00,000/- for further liquidation expenses and the post liquidation expenses. It is submitted that even the claims of IFCI as well as State Bank of Hyderabad have not yet been satisfied under Section 529-A of The Companies Act, 1956 and that the claim of the Excise and Taxation Department is also to be considered while the balance fund position is

Rs.2,44,205/-. It is also averred that the respondent No.2-Distribution Licensee never filed its claim with the Official Liquidator. He further submits that the respondent No.4-company stands finally dissolved.

ARGUMENTS BY THE PETITIONER

Learned counsel for the petitioner has relied upon the Sale Certificate dated 19.12.2005 (Annexure P-2) executed by the Official Liquidator, wherein the sale deed has been executed in favour of the petitioner, free from all encumbrances/lien/charges/claims or demands whatsoever, as per the confirmation by the High Court of Punjab and Haryana at Chandigarh vide order dated 08.10.2004 in Company Application No.477 of 2003 in CP No.257 of 2000. She contends that once the sale has been executed free from all encumbrances/charges/lien/claims or demands, the respondent No.2-Distribution Licensee cannot claim any dues against the petitioner. She submits that the respondent No.2-Distribution Licensee was required to raise its claim with the Official Liquidator and that settlement of its claim was to be determined by the official liquidator.

She further places reliance on the judgment of ***K.C. Ninan Versus Kerala State Electricity Board***, decided by the Hon'ble Supreme Court in ***Civil Appeals No.2109-2110 of 2004*** to contend that a subsequent purchaser is bound only to discharge the obligations as were made known to him, well in advance or which were well discerned. As the property in question was put to auction, being free from all lien/charge/dues or demands of any nature whatsoever, hence, the defence of 'as is where is' basis cannot be raised by the respondents and they cannot nonetheless stake a claim for effecting recovery of outstanding against the dissolved company from the petitioner. She further submits that the respondents cannot place reliance on a circular issued in 2013, with respect to a sale that had been confirmed in favour of the petitioner and a sale certificate issued in favour of the petitioner on 19.12.2005. The said sale circular cannot thus be applied retrospectively to the petitioner. She submits that the petitioner having already deposited the entire amount as demanded by the respondent No.2-Distribution Licensee, without prejudice to the rights of the petitioner to seek adjustment of same against future consumption, is entitled to refund thereof by way of adjustment against future consumption.

ARGUMENTS BY DISTRIBUTION LICENSEE

Controverting to the same, counsel for the respondent No.2-Distribution Licensee places reliance on the judgment of Hon'ble Supreme Court in the matter of ***Telangana State Southern Power Distribution Co. Ltd. and another Versus M/s Srigdhaa Beverages***, reported as ***(2020) 6 SCC 404.*** He contends that the judgment of the case of ***Isha Marbles*** was distinguished by the Hon'ble Supreme Court in the abovesaid judgment and that the petitioner would be liable to pay electricity dues since liability to clear the said dues had been fastened on the consumer. He further submits that the above judgment had been followed by this Court in ***M/s Venus Real Con. LLP (Limit Liability) Versus Dakshin Haryana Bijli Vitran Nigam Ltd. and others*** reported as ***(2021) 3 RCR (Civil) 264.*** He further submits that the petitioner has chosen not to place on record the copy of auction notice, wherefrom it could be discerned as to whether the property was put to sale free from all encumbrances/charge/lien or demand whatsoever, and that the said failure has to be inferred against the petitioner. He further submits that the circular had been issued in exercise of the powers vested with the respondent-Distribution

Licensee under Section 50 of Electricity Act, 2003 and is hence binding and enforceable.

ARGUMENTS BY OFFICIAL LIQUIDATOR

Counsel for the Official Liquidator has supported the case of petitioner on the legal principles.

CONSIDERATION

I have heard the learned counsel for the respective parties and have gone through the documents and record available on case file with their able assistance.

The controversy in the present petition boils down as to whether a subsequent auction purchaser, in proceedings initiated under the Companies Act, 1956 by a Company Court, can be held liable for clearing the dues, if any, prior to the winding up or the same is required to be discharged by the Official Liquidator.

A perusal of the documents appended alongwith the present petition establish that the property in question was sold free from all encumbrances, lien, demand or charge. The contention of the respondent that in the absence of the auction notice being not placed on record, there can be no such presumption drawn is rejected by this Court at this stage since the certificate of sale issued in favour of petitioner was required to be approved by the Company Court before a sale deed is executed by the Official Liquidator. A specific recital was made in the said sale deed to the effect that the property of respondent No.4-company was being sold free from all charge, encumbrance, lien or demand of any nature whatsoever. It would not lie with the respondents to contend that the recital made in the sale deed has no potential value and is irrelevant to the rights claimed by the respondents. Further, insofar as the reliance has been placed on the judgment of ***Telangana State Southern Power Distribution Company Ltd. (supra)*** as also the judgment passed by this Court in the matter of ***M/s Venus Real Con. LLP (Limit Liability) (supra)*** is concerned, the said judgments would not be applicable to the facts of the present case for the following reasons:

(i) That the said judgment has been rendered in the context of proceeding under the SARFAESI Act, 2002. The proceedings in the present case are, however, an outcome under the Companies Act, 1956 as amended. Once a company goes in a winding up under the provisions of the Companies Act, 1956, the disbursement of its assets and settlement of its liabilities is required to be undertaken by the Official Liquidator. All liabilities viz. statutory/non-statutory or even of secured/unsecured creditors are thereafter required to be discharged by the Official Liquidator as per the Companies Act, 1956 and the Rules framed thereunder by inviting all claims. Every secured/unsecured creditor and government departments are required to submit their claims with the Official Liquidator and settlement of the claims has to be done in accordance with the scheme of settlement prepared by the Official Liquidator and approved by the Company Court. It is not in dispute that no such claim had ever been filed by the respondent-Distribution Licensee before the Official Liquidator, despite public notice having been issued by the Official Liquidator to invite any such liability/claim.

(ii) Further the judgment in the matter of ***Telangana State Southern Power Distribution Company Ltd. (supra)*** would also not be applicable since in the said case, the auction notice specifically declared that the liability of electricity was dues required to be discharged by the subsequent purchaser. It was on the said account that the claim of the petitioner therein failed to succeed and they were held liable to clear the dues of the electricity department.

(iii) There is also a marked difference with respect to the proceedings that are instituted under the Companies Act, 1956 and the proceedings that are initiated under the SARFAESI Act, 2002. While the proceedings under the SARFAESI Act, 2002 relate to taking over the assets by a secured creditor towards discharge of liability, which is not settled by the debtor/borrower, the entity of the borrower remains intact and does not come an end. Per contra, in the event of winding up proceeding having been initiated and the company having been put to liquidation, the juristic entity and existence of the company comes to an end. The liability in that eventuality would not transfer to a subsequent purchaser, who has taken the property free from all encumbrances, charge, lien or demand whatsoever.

(iv) That the reliance placed by the petitioner on the circular of 2013 is apparently misplaced since the said circular is not applicable to the petitioner having been issued in the year 2013 whereas the sale in the present case had already been confirmed in the year 2005 and the application for seeking release of electricity connection was submitted in quick succession thereto. Even the electricity connection was released to the petitioner, upon depositing the said amount, in the year 2011 without prejudice his rights. There is no retrospectivity attached to the aforesaid circular and clause 21-A cannot be held applicable. The same thus takes the claim of the petitioner to the circular of 2007.

Considering the fact that the sale in question has already been confirmed in the year 2005, even the said circular of 2007 would not be applicable to a proceeding that had already culminated in favour of the petitioner in the year 2005.

It is well settled that once a company goes in winding up, all liabilities including the crown debt are required to be discharged/ set off from the amount/money collected by way of sale of assets of the company in liquidation. No liability is fastened on to the subsequent purchaser including that of a crown.

As a matter of fact the auction in the matters of ***Telangana State (supra)*** and ***M/s Venus Real (supra)*** was carried out on “as is where is” basis, which led the Court to hold that sale being under the SARFAESI Act, on "as is where is basis", all other statutory dues still remain to be cleared and the terms of statute could be enforced. In the present case, however, sale is effected by the Official Liquidator as per law and in winding up on free from encumbrances/lien/charge. The case in hand is thus factually closer to the judgment of the Hon’ble Supreme Court in the matter of ***HSEB versus Hanuman Rice Mill*** reported as ***(2010) 9 SCC 145.*** Relevant extract thereof reads thus:-

"9. The position therefore can/may be summarized thus:

(i) Electricity arrears do not constitute a charge over the property. Therefore in general law, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier.

(ii) Where the statutory rules or terms and conditions of supply which are statutory in character, authorize the supplier of electricity, to demand from the purchaser of a property claiming re-connection or fresh connection of electricity, the arrears due by the previous owner/occupier in regard to supply of electricity to such premises, the supplier can recover the arrears from a purchaser.

Position in this case

10. The appellant did not plead in its defence that any statutory rule or terms and conditions of supply, authorized it to demand the dues of previous owner, from the first respondent. Though the appellant contended in the written statement that the dues of Durga Rice Mills were transferred to the account of the first respondent, the appellant did not specify the statutory provision which enabled it to make such a claim. The decision in Paramount Polymers shows that such an enabling term was introduced in the terms and conditions of electricity supply in Haryana, only in the year 2001. The appellant did not demand the alleged arrears, when first respondent approached the appellant for electricity connection in its own name for the same premises and obtained it in the year 1991. More than three years thereafter, a demand was made by the appellant for the first time on 16.1.1995 alleging that there were electricity dues by the previous owner. In these circumstances the claim relating to the previous owner could not be enforced against the first respondent.

11. On facts, it has to be held that the decision of the High Court does not call for interference. The appeal is, therefore, dismissed."

Further, the Hon'ble Supreme Court held in the matter of ***K.C. Ninan Vs. Kerala State Electricity Board s*** decided on 19.05.2003 that while determining the liability, the terminology of clauses governing auction sale must be taken into consideration to arrive at an equitable decision. The relevant extract of the same reads thus:

> *"141. To conclude, all prospective auction purchasers are put on notice of the liability to pay the pending dues when an appropriate "as is where is" clause is incorporated in the auction sale agreement. It is for the intending auction purchaser to satisfy themselves in all respects about circumstances such as title, encumbrances and pending statutory dues in respect of the property they propose to purchase. In a public auction sale, auction purchasers have the opportunity to inspect the premises and ascertain the facilities available, including whether electricity is supplied to the premises. Information about the disconnection of power is easily discoverable with due diligence, which puts a prudent auction purchaser on a reasonable enquiry about the reasons for the disconnection. When electricity supply to a premises has been disconnected, it would be implausible for the purchaser to assert that they were oblivious of the existence of outstanding electricity dues.*
>
> *142. In terms of the legal doctrine of caveat emptor, it becomes the duty of the buyer to exercise due diligence. A seller is not under an obligation to disclose patent defects of which a buyer has actual or constructive notice in terms of Section 3 of the Transfer of Property act, 1882. However, in terms of Section 55(1)(a), in the absence of a contract to the contrary, the seller is under an obligation to disclose material defects in the property or in the seller's title thereto of which he is aware and which a buyer could not with ordinary care discover for himself.*

143. While examining the effect of an "as is where is" clause, the facts and circumstances of each case individually, along with the terminology of the clauses governing the auction sales must be taken into consideration, to arrive at an equitable decision."

The sale in the present case is free of any lien, charge or encumbrance. Hence, the subsequent auction purchaser cannot be saddled with additional liability.

Hence, considering from any angle, the claim of the respondent-Distribution Licensee does not find favour in law or finds any support from the judgments relied upon by the counsel for the respondent-Distribution Licensee.

The present petition thus deserves to be allowed. Resultantly, the amount of Rs.13,75,422/- already deposited by the petitioner without prejudice to its right, is ordered to be adjusted by the respondent-Distribution Licensee in the subsequent consumption charges that would be recoverable from the petitioner. Let the needful be done within a period of two months from the date of receipt of certified copy of this order.

Petition stands allowed accordingly.

(VINOD S. BHARDWAJ)
JUDGE

APRIL 30, 2024
rajender

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No