



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

COMPANY APPEAL NO. 01 OF 2023
IN
COMPANY APPLICATION NO. 01 OF 2018
IN
COMPANY PETITION NO. 05 OF 2001

Official Liquidator, High Court of
Bombay, Bench at Nagpur and
Liquidator of Akola Oil Industries
Limited (in Liquidation), 2nd Floor,
East Wing, New Secretariat Building,
Civil Lines, Nagpur.

.. Appellant

Versus

Suresh Shrimohan Bajoria
age 52 years, Occ : Business,
R/o. 402-403, Jagat Plaza,
Law College Square,
Amravati Road, Nagpur

.. Respondent

Mr. Anjan De, Advocate for appellant.

Mr. R.L.Khapre, Senior Advocate, with Mr. A.S. Mehadia, Advocate
for the respondent.

CORAM : AVINASH G. GHAROTE AND
ABHAY J. MANTRI, JJ.

DATED : APRIL 23, 2025

JUDGMENT (PER : ABHAY J. MANTRI, J.)

(1) This appeal is directed against the judgment and order dated 19/10/2022, passed by learned Single Judge of this Court (Coram: Smt. M.S.Jawalkar, J.) in Company Application (L) No.01/2018

in Company Application(L) No.752/2015 in Official Liquidator's report No.30/2012 in Company Petition No.05/2001, thereby allowed the application filed by original applicant/respondent herein and directed the appellant i.e. original respondent Official Liquidator to refund the amount of Rs.89,27,645/- along with the interest @7.00%p.a. to the original applicant/respondent from the date of deposit till refund, within a period of three months from the date of impugned order and also permitted the appellant Official Liquidator to retain an amount of Rs.1 Lakh towards the expenses incurred.

(2) Succinctly, the facts of the case are as under :-

The respondent herein has filed an application for refund of the deposit amount under Rule 9 of the Companies (Court) Rules, 1959, before the learned Single Judge. It is contended that in the public auction held on 09/11/2012, the respondent had offered a bid of Rs . 5.41 Crore for the purchase of Plot No.24, area admeasuring 1952.50 square meters, near Vaidehi College, Akola (hereinafter referred to as the '**said property**'). Pursuant to the said bid being the highest, he had deposited an amount of Rs.10,73,700/- vide Pay Order No.661627 dated 07/11/2012 in favour of the Official Liquidator. Thereafter, the applicant had further deposited an amount of Rs.79,53,945/- vide Demand Draft dated 12/04/2013 in favour of the appellant Official Liquidator. Thus, he had deposited in total an amount

of Rs. 90,27,645/- with the appellant Official Liquidator as an earnest amount towards the purchase of the said property.

(3) Though the original applicant/respondent had deposited a substantial amount to purchase the said property, the sale could not be confirmed within a reasonable time due to various applications, which were pending before the Court. The respondent stated that without any fault attributed to him, he was unable to pay the balance amount of consideration to the appellant in time; thereafter, the Court vide its order dated 04/03/2016 permitted the resale of the said property and the same was sold for Rs.5.41 Crore vide auction dated 13/09/2016.

(4) In such circumstances, on the ground of equity and fair play, the respondent moved an application for refund of the amount of Rs. 90,27,645/- deposited with the appellant towards the part consideration amount of the said property. However, the appellant Official Liquidator has not refunded the amount, so he has filed an application before the learned Single Judge. Learned Single Judge, who after considering the various authorities relied upon by the Advocate of the respondent in respect of his application and considering the clauses of the contract, allowed the application as stated above. Being aggrieved by the said order, the original respondent has preferred this appeal.

(5) Mr.Anjan De, learned counsel for the appellant, vehemently contended that the learned Single Judge failed to consider the terms and conditions of the sale in paras 10 and 28 and erred in allowing the application contrary to the said conditions. In fact, as per the said terms and conditions, the appellant is entitled to forfeit the said earnest money. He further canvasses that the appellant-Official Liquidator has deposited the said amount in the bank in a fixed deposit and bank is awarding the interest @5.3% only and also deducting TDS, however, learned Single Judge directed the appellant-Official Liquidator to refund the said amount @7.00%p.a. and thereby, burden is cast upon the appellant to pay higher rate of interest than receiving it from the bank and therefore, the passing of the order about the refund of amount with interest is unjust. In fact, the respondent is not entitled to the interest as he has breached the terms and conditions of the sale. Therefore, he urged for allowing the application. Learned Counsel has also pointed out the conditions in paras 10 and 28 of the sale agreement.

(6) Mr.Khapre, learned Senior Counsel for respondent strenuously argued that considering the mandate laid down in the cited judgments, learned Single Judge held that appellant failed to demonstrate that it has suffered the damage or loss for non-compliance of the conditions of the sale, therefore, rightly held that respondent is entitled to refund of the amount with interest @7.00%

p.a. The findings recorded by the learned Single Judge are just and proper, and no interference is required. He further propounded that during the pendency of the application, second auction was held, however, same was not completed, but during the pendency of the appeal, third auction was conducted vide order dated No.12/01/2024 of this Court passed in Company Application (L) No.21/2018 **(Shyamsunder s/o Shivnarayan Sarda and others vs. Official Liquidator, High Court of Bombay Nagpur Bench)** (page 214). In view of the said order, the auction was conducted. The said property was auctioned for Rs.7.01 Crore and therefore, the question of causing loss or damage to the appellant Official Liquidator does not arise; hence, passing of the impugned order is just and proper, as such, he urged for dismissal of the appeal.

(7) We have heard learned counsel for the appellant, learned Senior Counsel for the respondent, and gone through the impugned order as well as the record.

(8) Having considered the rival submissions, the following points arise for our consideration, which are as under :-

- 1. Is respondent entitled to the refund of Rs.89,27,645/- awarded by the learned Single Judge ?*
- 2. Is respondent entitled to interest @7.00% p.a. on the refund amount awarded by the learned Single Judge ?*

(9) Before dealing with the above points, we would like to reproduce the undisputed facts of the matter, which are as under :-

In public auction held on 09/11/2012, the applicant/respondent herein had offered a bid price of Rs.5.41 Crore for purchase of the said property and being the highest bidder, he had deposited an amount of Rs.10,73,700/- vide Pay Order No.661627 dated 07/11/2012 in favour of the Official Liquidator, thereafter the applicant/respondent had further deposited an amount of Rs.79,53,945/- vide Demand Draft dated 12/04/2013 in favour of the appellant Official Liquidator, thus, he has deposited total amount of Rs.90,27,645/- with the appellant Official Liquidator as an earnest amount towards the purchase of the said property, however, the applicant/respondent failed to deposit the balance amount of the bid within stipulated time, i.e. two years, thereafter, the Court vide its order dated 04/03/2016 had permitted to resell the said property. Pursuant to the said order, the auction was held on 13/09/2016, and the property was sold for Rs.5.41 Crore. The second bidder also did not pay the remaining amount within the stipulated time; therefore, the Court vide order dated 12/01/2024 auctioned the property a third time for Rs.7.1 Crore.

(10) While dealing with the controversy, it would be proper to reproduce the terms and conditions of paras 10 and 28 of the sale as under :-

"10. If the purchaser does not pay the balance of the purchase money in the manner and within the time as specified by the Hon'ble High Court or in other respect fails to perform these conditions or then the earnest money shall stand forfeited and the Official Liquidator, High Court, Nagpur shall resale the said property as described in the schedule by public auction and subject to such condition and in such manner in all respect as the Official Liquidator, shall think fit and proper and deficiency in price, if any, occasioned by such resale and the cost thereof shall be made good by the defaulting purchaser with interest on the amount of deficiency at the rate of 18% p.a. from the expiration of till payment and in case of non payment of the whole or the balance of such sum the same shall be recoverable by the Official Liquidator from the defaulting purchaser as and by way of liquidated damages while any profit on such resale shall not belong to such defaulting purchaser.

28. If the purchaser shall fail and/neglect for any reason or any account to pay in full the amount and/or the balance of the purchase price as provided hereinabove and/or to complete the in terms of these conditions then and in that event the Official Liquidator will be at liberty without tendering or assigning any reason or assurance to the purchaser or his Advocate/ Advocates, if any, to treat the contract for sale as at an end and to forfeit the moneys paid to him by the purchaser and shall be entitled to proceed to hold another sale (by public auction or otherwise) at such time and subject to such terms and conditions and in such manner for all purposes and in all respect as the Official Liquidator may in his discretion think fit and proper. In the event of any deficiency in the price arising on such deficiency and shall also pay all costs, charges and expenses of Official Liquidator arising out of such resale the defaulting purchaser shall make good such deficiency and shall also pay all costs, charges and expenses of this official Liquidator arising out of such resale and incidental thereof by reason of the default. In the event of nonpayment thereof or any part thereof, the Official Liquidator will be at liberty to claim and recover the whole or the balance as the case may be from the purchaser as and when by way of liquidated damages with interest thereon at 18% per annum from the date fixed for completion of the purchase. In the event of any surplus arising on such sale, the defaulting purchaser shall not be entitled to the same, and the same shall be credited to the present company in liquidation. This condition shall not affect or supersede the other rights and remedies which the Official Liquidator shall otherwise have in law and under these conditions against the purchaser."

(11) A bare perusal of above conditions indicate that if the purchaser/bidder failed to pay the balance of the purchase money, or failed to perform these conditions within the stipulated time, then the earnest money shall stand forfeited and the Official Liquidator, i.e., the appellant, is entitled to resell the said property.

(12) To resolve the issues, it would also be appropriate to reproduce the proposition of law which the learned Single Judge summarised in the order impugned, which reads thus as under:-

(8) On perusal of the judgments, the common proposition of law which emerges can be summarised as under:-

“(i) In order to forfeit the sum deposited by the contracting party as “earnest money” or “security” for the due performance of the Contract, it is necessary that the Contract must contain a stipulation of “forfeiture”.

(ii) The amount can be forfeited only on showing loss or damage to the aggrieved party.

(iii) Where a sum is named in a Contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In every case, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded, not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of a penalty, only reasonable compensation can be awarded, not exceeding the penalty so stated.

(iv) Since Section 74 of the Contract Act awards reasonable compensation for damage or loss caused by a breach of Contract, damage or loss caused is a sine qua non for the applicability of the Section. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded. The basic principle is that compensation can only be given for the damage or loss suffered. If damage or loss is not sufficient, the law does not provide for a windfall.”

(13) The Hon’ble Apex Court, after considering Section 74 of the Contract Act, 1872, has held that the earnest amount can be forfeited only on showing the loss or damage caused to the aggrieved party. We would like to reproduce Sections 73 and 74 of the Contract Act as under :-

“73.Compensation for loss or damage caused by breach of contract

– When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—*When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*

Explanation.—*In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.*

74. Compensation for breach of contract where penalty stipulated for –*[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*

Explanation –*A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]*

Exception –*When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.*

Explanation –*A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.”*

(14) As to point No.1 :-

Perused the impugned order, it seems that learned Single Judge after considering the facts, as well as law laid down by the Hon'ble Apex Court and Sections 73 and 74 of the Contract Act, in para 12 of the impugned order has observed that "though, there is a clause for forfeiture, the Official Liquidator failed to establish any loss or damage to him specifically in view of the resale of the property and held that the Official Liquidator i.e. appellant is entitled to the expenses incurred by him and quantified the same as Rs.1 Lakh and also directed him to refund an amount of Rs.89,27,645/- to the respondent. We would like to reproduce the said para as under :-

"(12) As such, there is a substance in the contention of the applicant that there is no fault attributable on the part of the applicant. Moreover, as the Official Liquidator put the property on auction, resold and fetched the same value, he cannot be said to be suffered any loss or damage. In view of the principle laid down in the citations relied upon by the learned Senior Counsel for the applicant, it is well-settled that there cannot be any damage unless there is a loss to the person aggrieved. Sections 73 and 74 of the Contract Act are clear on this aspect. Though there is a clause for forfeiture, the Official Liquidator failed to establish any loss or damage to him specifically in view of the resale of the property. The Official Liquidator, however, is entitled for the expenses incurred by him which can be quantified as Rs.1,00,000/-. Hence, interests of justice would be served by allowing the Application thereby directing the Official Liquidator to refund an amount of Rs.89,27,645/-."

(15) It seems that the learned Single Judge based on the facts, as well as law laid down by the Hon'ble Apex Court, has recorded the above findings, as against, the respondent has not challenged the

same, which indicates that they have no grievance about the impugned order, as against which the appellant/Official Liquidator failed to demonstrate that due to non-compliance of the terms and conditions of the same, it has suffered damage or loss, and therefore, the original applicant/respondent is not entitled to the refund of the earnest amount. However, the facts on record indicate that due to the pendency of the various applications before the Court in liquidation proceedings, the original applicant/respondent could not complete the said sale within the stipulated time. Apart from that, it has come on record that by order dated 12/01/2024, the property in question was auctioned for a bid of Rs. 7.1 Crore. In such an eventuality, it cannot be said that due to non-compliance with the sale within the stipulated time, the appellant/Official Liquidator has sustained loss or damage. Therefore, we do not find any illegality or perversity in the impugned order to the extent of the refund of Rs. 89,27,645/-. Hence, we answer point No.1 in the affirmative as awarded.

(16) As to point No.2 :-

While considering this point, we would like to reproduce the prayer of the original applicant/respondent in the application, which thus reads as under :-

“1. Direct the Respondent to make the payment / refund the amount of part sale consideration, i.e. Rs. 90,27,645/- (Rs. Ninety lacs twenty seven thousand six hundred and forty five) paid by the Applicant to the respondent.

2. *Pass any other order as may be deemed fit and proper in the facts and circumstances of the instant case."*

(17) A bare perusal of the prayer does not indicate that the original applicant/respondent has claimed interest on the said refund amount. Therefore, the question of granting interest on the said amount does not arise at all while allowing the application.

(18) The record further indicates that the original applicant/respondent failed to comply with the sale within the stipulated time, which itself denotes that the respondent had committed a breach of contract. Therefore, in our view, the person who committed a breach of contract is not entitled to claim any interest on refunding the amount due to their own fault.

(19) Besides, the appellant/Official Liquidator has demonstrated that it has kept the said earnest amount in the bank. However, the bank has given interest @5.30%p.a. on the said amount. But the learned Single Judge has awarded interest @7.00% p.a., which is a higher interest rate than the interest received from the bank. In those circumstances, granting interest as awarded would also not be proper.

(20) Thus, considering the above discussion and facts, it is evident that the learned Single Judge neither considered the prayer clause of the application, nor considered the fact that the respondent

was at fault for non-compliance with the contract and therefore, is not entitled to the interest. Thus, the findings arrived at by the learned Single Judge to the extent of awarding interest on the refund of the amount are not sustainable in the eyes of the law and liable to be set aside; therefore, the original applicant/respondent is not entitled to get interest on the refund amount. Hence, we answer point No.2 ***in the negative.***

(21) In the wake of above discussion, in our view, the impugned order is liable to be modified to the extent of awarding interest on the refund amount. Hence, we partly allow the appeal and modify the impugned order dated 19/12/2022, directing the appellant / Official Liquidator to refund an amount of Rs.89,27,645/- to the original applicant / respondent without any interest, within three months from the receipt of the copy of this order.

(22) The rest of the order is intact.

(23) Rule is made partly absolute in the above terms. No costs.

[ABHAY J. MANTRI, J.]

[AVINASH G. GHAROTE, J.]

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