

Court No. - 32

Case :- SPECIAL APPEAL No. - 790 of 2023

Appellant :- M/S Flavuro Foods Pvt. Ltd.

Respondent :- Official Liquidator And Another

Counsel for Appellant :- Kunal Shah, Sr. Advocate

Counsel for Respondent :- Rajnath N. Shukla

Hon'ble Ashwani Kumar Mishra, J.

Hon'ble Syed Qamar Hasan Rizvi, J.

1. This intra court appeal is directed against an order passed by the Company Judge, dated 7.11.2023 in Company Petition No. 27 of 2007. The learned Company Judge has noticed that pursuant to auction proceedings initiated by the official liquidator the proposed sale was widely published in Amar Ujala (Hindi) (All UP Edition) and Hindustan Times (All India Edition) (English). Three bids have been submitted before the official liquidator all of which were above the reserve price fixed by the Company Judge. Learned Company Judge by the order under challenge has directed the official liquidator to re-advertise the auction by enhancing the reserve price to the amount quoted by the highest bidder i.e. the appellant. Aggrieved by the decision of Company Judge the highest bidder has filed the present appeal.

2. It transpires that in the liquidation proceedings an order came to be passed by the Company Judge on 24.5.2023 directing the official liquidator to publish e-auction notice for sale of the property in question. Auction notices were thus published on 24.7.2023 in Hindustan (Hindi) in all editions and Indian Express (English) all India editions. Pursuant to such publication of auction notice three offers were received by the official liquidator, which are as under:-

S.No.	Name of bidders	Highest bid amount
1.	Flavuro Foods Pvt. Ltd.	Rs. 11,68,41,205/-
2.	Mukti Enterprises	Rs. 11,58,75,205/-
3.	Harshika Infrastructure Pvt. Ltd.	Rs. 09,75,21,205/-

3. The reserve price for the property to be auctioned was fixed by

the Company Judge at Rs. 9,65,55,205/-. It is, therefore, apparent that all three offers received by the official liquidator were above the minimum price of the property fixed by the Company Judge. The official liquidator submitted proceedings alongwith application on 11.9.2023 for acceptance of appellant's highest bid by the Company Judge.

4. Learned Company Judge upon being informed of the proceedings conducted in the matter called upon the three bidders to participate in the negotiations. This was done vide order dated 17.10.2023 passed by the learned Company Judge. The apparent object of the order dated 17.10.2023 was to make further endeavours to fetch still higher prices than what was offered by the three bidders. Pursuant to such order passed all the bidders appeared before the Company Judge. The two lowest bidders, however, refused to increase the bid amount and the highest bidder (appellant herein) stuck to his bid. It is at this stage that the Company Judge has passed the order under challenge directing fresh auction proceedings to be conducted on the premise that only one bidder remained at the stage of negotiation. The Company Judge has accordingly enhanced the reserved price to the amount submitted as bid by the appellant.

5. Sri Amit Saxena, learned Senior Counsel assisted by Sri Kunal Shah, learned counsel for the appellant submits that the Company Judge fell in error in directing conduct of fresh auction despite the fact that the bid submitted by the appellant was much above the minimum bid amount fixed by the Company Judge. It is urged that no justifiable reason has been disclosed by the Company Judge for not accepting the appellant's highest bid and directing conduct of fresh bids. Sri Saxena places reliance upon various paragraphs of a recent judgment of the Supreme Court in *Eva Agro Feeds Private Limited Vs. Punjab National Bank and Another*, 2023 SCC OnLine

1138 to submit that the direction of the learned Company Judge is not in consonance with the law laid down by the Supreme Court. Para 67 to 69 of the judgment in *Eva Agro Feeds Pvt. Ltd.* (supra) notices relevant facts of the case, which are reproduced hereinafter:-

“67. Coming back to Schedule I, we find that as per Para 1(4-A), where an auction fails at the reserve price, the Liquidator may reduce the price by up to 25% of such value to conduct subsequent auction.

68. Paras 1(11), (11-A), (12) and (13) of Schedule I are relevant since much emphasis has been placed by the learned counsel for the parties on these provisions. As per Para 1(11), if it is required, the Liquidator may conduct multiple rounds of auction to maximise the realisation from the sale of the assets and to promote the best interest of the creditors. Para 1(11-A) says that where the Liquidator rejects the highest bid in an auction process, he shall intimate the reasons for such rejection to the highest bidder and mention it in the next progress report. While the learned Senior Counsel for the appellant has laid great emphasis on this provision on the basis of which he has assailed the unreasoned cancellation of the bid of the appellant, the learned Senior Counsel for the intervener has pointed out that Para 1(11-A) was inserted in Schedule I vide Notification dated 30-9-2021 with effect from 30-9-2021. According to him, this provision is prospective and cannot be applied to auctions conducted prior to 30-9-2021, including the auction in question. Therefore, there was no requirement for the Liquidator to give reasons for cancellation of the bid of the appellant.

69. We are afraid we cannot accept such a contention made on behalf of the intervener. While it is true that Para 1(11-A) came to be inserted in Schedule I to the Regulations with effect from 30-9-2021, it does not imply that an auction-sale or the highest bid prior to the aforesaid date could be cancelled by the Liquidator exercising unfettered discretion and without furnishing any reason. It is trite law that furnishing of reasons is an important aspect rather a check on the arbitrary exercise of power. Furnishing of reasons presupposes application of mind to the relevant factors and consideration by the authority concerned before passing an order. Absence of reasons may be a good reason to draw inference that the decision-making process was arbitrary. Therefore, what Para 1(11-A) has done is to give statutory recognition to the requirement for furnishing reasons, if the Liquidator wishes to reject the bid of the highest bidder. Furnishing of reasons, which is an integral facet of the principles of natural justice, is embedded in a provision or action, whereby the highest bid is rejected by the Liquidator. Thus, what Para 1(11-A) has done is to give statutory recognition to this well-established principle. It has made

explicit what was implicit.”

6. It is submitted that unless the auction is vitiated by fraud or there exists a justifiable reason to doubt or suspect that a fair offer has not been put-forth in the auction proceedings the Company Judge would not be justified in directing holding of fresh auction.

7. Per-contra, Sri R.N. Shukla, learned counsel appearing for the official liquidator submits that the appellant gets no indefeasible right in the auction merely because its bid is the highest bid. He further submits that the process of auction has not yet concluded and the attempt on part of the Company Judge to fetch higher revenue for the secured creditor ought not to be interfered with by this Court in appeal. Reliance is placed upon a judgment of the Supreme Court in State of Punjab and others Vs. Mehar Din, Civil Appeal No. 5861 of 2009, decided on 22.3.2022, wherein the Supreme Court upon consideration of law on the matter in issue held as under:-

“25. Undisputedly, the provisional bid, in the instant case, was not confirmed by the competent authority (Sales Commissioner) and not being accepted after recording its due satisfaction by an order dated 2-7-1993 and the decision of the authority in passing the order of cancellation of the auction bid was scrutinised/examined by the appellate/revisional authority and the discretion exercised by the competent authority in taking decision of cancellation was upheld at later stages.

26. This being a settled law that the highest bidder has no vested right to have the auction concluded in his favour and in the given circumstances under the limited scope of judicial review under Article 226 of the Constitution, the High Court was not supposed to interfere in the opinion of the executive who were dealing on the subject, unless the decision is totally arbitrary or unreasonable, and it was not open for the High Court to sit like a court of appeal over the decision of the competent authority and particularly in the matters where the authority competent of floating the tender is the best judge of its requirements, therefore, the interference otherwise has to be very minimal.”

8. Reliance has also placed upon the judgment of the Supreme Court in the Municipal Committee, Barwala, District Hisar, Haryana

Vs. Jai Narayan & Company and another, Civil Appeal No. 2222 of 2022, decided on 29.3.2022, wherein the Court negated the claim of the highest bidder.

9. We have heard Sri Amit Saxena, learned Senior Counsel assisted by Sri Kunal Shah, learned counsel for the appellant, Sri R.N. Shukla, learned counsel for the official liquidator and perused the materials on record.

10. It is not in issue that the process for auction of the property was initiated by the official liquidator pursuant to an order passed by the Company Judge on 24.5.2023. The record reveals that the Company Judge had determined the reserve price of the property at Rs. 9,65,55,205/-. This determination of the reserve price was in the same year i.e. 2023. E-auction was initiated pursuant to publication of auction notice in two widely circulated newspapers i.e. Hindustan and Indian Express. Three bids have been submitted pursuant to such auction notice. The official liquidator has submitted its report on 11.9.2023, in which the entire process undertaken has been noticed. The prayer made by the official liquidator in its report submitted before the Company Judge is as under:-

“(ii) accept the bid in favour of M/s Flavuro Foods Private Limited for the property of the company in liquidation situated at A - 52, Sector-8, NOIDA, Gautambudh Nagar as the said firm is emerged as highest bidder in the e-bidding process held on 06.09.2023 by M/s RailTel Corporation of India Ltd. in compliance of the order dated 24.05.2023 as details give in paragraph No.6 of this report subject to approval of this Hon'ble Court.”

11. It is thereafter that the Company Judge proceeded to invite three bidders for negotiation with the object of enhancing revenue to be secured for the creditors. Till such stage we find no error in the approach adopted by the Company Judge. At the stage of negotiation two out of three bidders refused to enhance their bid and withdrew from *inter-se* bidding. Facts, in this regard are noticed by

the learned Company Judge and following reasons are assigned for directing the official liquidator to re-advertise the auction:-

"Heard Ms. Sanyukta Singh, learned counsel for the highest bidder and Shri Rajnath N. Shukla, learned counsel for the Official Liquidator.

The matter was fixed for inter-se bidding. The second highest bidder namely M/s Mukti Enterprises submits that he does not want to participate in the inter-se bidding and he withdraws his right for inter-se bidding.

M/s Harshika Infrastructure Private Limited also states the aforesaid fact and wants to withdraw it.

Counsel for the highest bidder-M/S Flavuro Foods Pvt. Ltd. submits that he is not interested in enhancing the bid.

In view of the above, let the Official Liquidator may re-advertise the property in question after submitting a detailed report.

List this case on 30.11.2023 in Chamber at 2:00 PM for submitting the report with regard to advertisement.

Since the highest bid has already come of Rs.11,68,41,205/-, the same shall be fixed as reserved price."

12. What is observed from the order of the learned Company Judge is that out of three bidders, two bidders with lower bids refused to enhance their bid amount during negotiations. Second highest bidder M/s Mukti Enterprises withdrew its right of *inter-se* bidding. For same reasons other bidder M/s Harshika Infrastructure Pvt. Ltd. also withdrew its right of *inter-se* bidding. So far as the appellant is concerned, it refused to enhance the bid amount any further. It is, therefore, apparent that all three bidders stuck to the bid submitted and did not agree to any enhancement of bid amount at the stage of negotiation.

13. It was not the case that any of the bidders withdrew from the bid itself. What has been withdrawn by the second bidder is the right of *inter-se* bidding at the stage of negotiation. The Company Judge, in such a situation, directed the official liquidator to re-advertise the property in question after submitting a detailed report. The reserve price of the property has been enhanced for the purposes of fresh

bidding to Rs. 11,68,41,205/- which was the bid amount submitted by the appellant.

14. No specific reason has been disclosed by the learned Company Judge for not accepting the highest bid and directing bids to be invited again. It is worth noticing that the bid amount submitted by all three bidders was above the reserve price fixed by the Company Judge. There was no unusual gap between determination of reserve price and the holding of auction. In fact the bid amount submitted by the appellant of Rs. 11,68,41,205/- was fairly above the reserve price of Rs. 9,65,55,205/-. It is otherwise undisputed that the bid was duly advertised in two prominent newspapers in its all India editions. None had otherwise raised a grievance about denial of opportunity to take part in the bid due to lack of information. Nobody had come up with a higher offer for the purchase of property. Apparently, no reasons are recorded by the learned Company Judge to discard the highest bid. No offence could otherwise have been taken if the bidders refused to offer higher price at the stage of negotiation or withdrew their right of *inter-se* bidding.

15. The purpose and the object of inviting bids at the auction is to secure the best price for the property. For such purposes auction notices are to be widely circulated so that the best offers could be received for the property to be auctioned. Auction process has a sense of sanctity attached to it and it is only for valid reasons that the highest bids can be discarded in an auction otherwise held in accordance with law. The Supreme Court in *Eva Agro Feeds Pvt. Ltd.* (supra) has emphasised the requirement of reasons to be recorded for not accepting the highest bid. In para 75 of the judgment the Court observed as under:-

"75. A conjoint reading of the aforesaid provisions would make it clear that while the highest bidder has no indefeasible right to demand acceptance of his bid, the Liquidator if he does not want to accept the bid of the

highest bidder has to apply his mind to the relevant factors. Such application of mind must be visible or manifest in the rejection order itself. As this Court has emphasised the importance and necessity of furnishing reasons while taking a decision affecting the rights of parties, it is incomprehensible that an administrative authority can take a decision without disclosing the reasons for taking such a decision."

16. Though the above observations were made in the context of powers exercised by the official liquidator, yet, the principle would equally apply when the learned Company Judge proceeds to examine the application of the official liquidator for acceptance of highest bid. Reason being the soul of any adjudication its existence in a judicial order would all the more be required.

17. Relying upon the judgment of Supreme Court in *K. Kumara Gupta Vs. Sri Markandaya and Sri Omkareshwara Swamy Temple*, (2022) SCC 5 Pg. 710, the Supreme Court in *Eva Agro Feeds Pvt. Ltd.* (supra) observed as under in para 82 & 83:-

"82. K. Kumara Gupta v. Sri Markendaya & Sri Omkareswara Swamy Temple [K. Kumara Gupta v. Sri Markendaya & Sri Omkareswara Swamy Temple, (2022) 5 SCC 710 : (2022) 3 SCC (Civ) 178] , is a case relating to auctioning of land belonging to the Devasthanam. This Court opined that unless and until it was found that there was any material irregularity and/or illegality in holding the public auction and/or the auction-sale was vitiated by any fraud or collusion it is not open to set aside the auction or sale in favour of the highest bidder on the basis of some representations made by a third party who did not even participate in the auction proceedings and did not make any offer. If there is repeated interference in the auction process, the object and purpose of holding public auction and the sanctity of public auction would be frustrated. This Court in para 23 of the judgment held that unless there are allegations of fraud, collusion, etc. the highest offer received in the public auction should be accepted as a fair value. Otherwise, there shall not be any sanctity of a public auction.

83. It is interesting to note that insofar as the present case is concerned, even after cancelling the highest bid of the appellant, in the subsequent sale notice dated 24-12-2021, Respondent 2 i.e. the Liquidator had again fixed the reserve price of the subject property at Rs 10 crores which was the reserve price in the previous round of auction-sale and

which was also the bid value of the appellant. If this is the position, we fail to find any rationale or justification in rejecting the bid of the appellant and going for another round of auction at the same reserve price."

18. The argument advanced by Sri R.N. Shukla relying upon the judgment of Supreme Court in State of Punjab and others Vs. Mehar Din (supra) that the highest bidder gets no indefeasible right to the property is well too settled to be doubted. What is, however, to be seen is the rationale/reason for not accepting the highest bid. What is further to be seen is as to whether decision to discard highest bid is on a valid ground. Similarly the judgment of the Supreme Court in the Municipal Committee (supra) is a decision distinguishable on the facts of the case. Reliance in this case has been placed by the Supreme Court upon an earlier judgment in Haryana Urban Development Authority & others Vs. Orchid Infrastructure Developers Private Limited, (2017) 4 SCC 243, wherein the Court considered an issue where rejection of bid by the administrator although was found illegal, yet the relief of allotment was denied on account of long lapse of time and the possibility that the prices may have gone up substantially. In Municipal Committee (supra) also the auction was conducted on 23.3.1999 but was not given effect to. A suit had to be filed in which a contest was made by the local body on the ground that appropriate approval was not obtained and no right had crystallized merely on the strength of highest bid. It was also held that approval of State Government was mandatory and had not been obtained. The Court in such factual background allowed the appeal of the Municipal Committee and set aside the judgment and decree of courts below. This case thus is clearly distinguishable. It was a case decided on entirely different factual scenario which has no applicability in the facts of the present case. The decisions relied upon by Sri Shukla, therefore, are clearly distinguishable.

19. In the present case, it is not in dispute that auction notice was widely published. None has otherwise come forward before the

Company Judge raising a grievance that the auction was not widely circulated or anyone was prevented from submitting his bid. No higher bid was otherwise placed before the Company Judge. No infirmity is otherwise shown in the publication of auction notice or the conduct of auction. It is in this backdrop that we are not inclined to concur with the view taken by learned Company Judge in ignoring the highest bid submitted by the appellant and direct holding of a fresh bid in the matter.

20. We have already noticed that no reasons are otherwise discernible in the order of the learned Company Judge for not accepting the highest bid and directing holding of fresh auction. The only reason that can be inferred is the possibility of receiving higher offers in a fresh bid. This reason has also been disapproved by the Supreme Court in *Eva Agro Feeds Pvt. Ltd.* (supra). The observations of the Court contained in para 84 are relevant and reproduced:-

"84. Thus, mere expectation of the Liquidator that a still higher price may be obtained can be no good ground to cancel an otherwise valid auction and go for another round of auction. Such a cause of action would not only lead to incurring of avoidable expenses but also erode credibility of the auction process itself. That apart, post auction it is not open to the Liquidator to act on third-party communication and cancel an auction, unless it is found that fraud or collusion had vitiated the auction. The necessary corollary that follows therefrom is that there can be no absolute or unfettered discretion on the part of the Liquidator to cancel an auction which is otherwise valid. As it is in an administrative framework governed by the rule of law there can be no absolute or unfettered discretion of the Liquidator. Further, upon a thorough analysis of all the provisions concerning the Liquidator it is evident that the Liquidator is vested with a host of duties, functions and powers to oversee the liquidation process in which he is not to act in any adversarial manner while ensuring that the auction process is carried out in accordance with law and to the benefit of all the stakeholders. Merely because the Liquidator has the discretion of carrying out multiple auction it does not necessarily imply that he would abandon or cancel a valid auction fetching a reasonable price and opt for another round of auction process with the expectation of a better price. Tribunal had rightly held that there were no objective materials before the Liquidator to cancel the auction process

and to opt for another round of auction.”

21. In light of the deliberations made above in the context of the facts available on record, we cannot approve of the view taken by the learned Company Judge in not accepting the highest bid of the appellant and directing holding of fresh auction. The decision to direct fresh holding of auction is not based on any legally justifiable ground. The official liquidator had otherwise submitted a report for acceptance of highest bid of the appellant. In such view of the matter, the direction issued by the learned Company Judge cannot be maintained. This appeal consequently succeeds and is allowed. The order dated 7.11.2023, passed by learned Company Judge, is set aside. The matter is remitted to the learned Company Judge with the request to reconsider the matter in light of the observations made above, keeping in view the law laid down by the Supreme Court in the case of *Eva Agro Feeds Private Limited (supra)*.

Order Date :- 5.1.2024
Ranjeet Sahu