

PETITIONER:
ALLAHABAD BANK

Vs.

RESPONDENT:
ARC HOLDING LIMITED & ORS.

DATE OF JUDGMENT: 26/09/2000

BENCH:
A.P. Misra & Doraiswamy Raju

JUDGMENT:

Misra, J.

Leave granted.

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The appellant-Allahabad bank the decree-holder has raised a question, whether after an order passed in execution proceedings for the sale of plant, machinery and moveable lying at the factory, can the same court later pass an order for sale of the factory of the company as a 'going concern'. The submission is, by introducing into the sale of the factory as a 'going concern' has in fact, nullified the execution itself. In order to appreciate the controversy we are hereunder giving short essential facts.

The appellant-Allahabad bank the decree-holder is a secured creditor of Rishra Steels Limited respondent no.4 the judgment-debtor. On 19th December, 1990 the appellant-bank filed a suit against the said company represented by the Official Liquidator in the High Court for a decree for Rs.4,06,90,548/- together with interest. On 15th July, 1996 a decree was passed by the Calcutta High Court for Rs.3,47,94,232.85 together with interest. The decree provided; payment of decretal amount in 60 equal monthly installments on and from 12th September, 1996; in default the petitioner was entitled to sale the suit properties by public auction or private contract. No appeal was preferred from this order nor any installment was paid by the judgment-debtor. On the 26th August, 1997 the appellant-bank applied for execution of decree for the aforesaid amount along with interest. It is relevant to refer that the aforesaid judgment-debtor-company went into liquidation under the order of the winding up dated 4th June, 1990.

On 12th December, 1997 the High Court appointed the Official Liquidator in the said execution case, to take possession of the assets of the company and directed it to take steps for the sale of the assets of this company. The relevant portion of this order is quoted hereunder:

"The Official Liquidator is appointed Receiver for the purpose of making an inventory of the assets of the Company liquidation (in liquidation) and have the same valued by a qualified Valuer for the purpose of sale of the said assets. The conditions for such sale shall be settled by him subject

to confirmation by this Court."

On 19th December, 1997 this order was modified by directing that order for sale must be limited to the security of Allahabad bank, which has been plant, machinery and other moveable assets as mentioned in the schedule to the decree. The relevant portion of this order is also quoted hereunder:

"In the order for the sale on the application of the secured creditor Allahabad Bank, the same must be limited to its security and the order dated 12.12.97 is modified to the above extent.....At the time of settling the above sale, the question as to whether the suit of the company can be sold as a going concern shall be considered."

Thereafter the High Court through its order dated 23rd February, 1998 directed the Official Liquidator to publish an advertisement inviting offers for sale of the assets of the company in liquidation as a 'going concern'. The relevant portion of this order is also quoted hereunder:

"The Official Liquidator is directed to appoint a Valuer in terms of the order dated 12th December, 1997 passed by this Court. Such valuation is to be made within 16th March, 1998. Upon such valuation being made, the Official Liquidator shall, thereafter, publish advertisements within 13th April, 1998, inviting offers for sale of the factory and assets of the Company in liquidation as a going concern.....The Official Liquidator shall mention in his sale notice that the intending bidders should be prepared to re-employ the workmen stated to be 468 in number. In their offers and bidders shall indicate as to whether they are prepared to pay all the arrear dues of the workmen and if so the manner in which they proposed to pay off the said dues. It should be mentioned in the said notice that the sale shall be subject to confirmation by this Court."

Another order dated 10th July, 1998 was passed by the High Court directing the Official Liquidator to sale all the assets of the company in liquidation as a 'going concern'. On these facts, the submission, on behalf of the appellant-bank is that respondent no.4 Rishra Steels Limited the judgment-debtor was not functional even before the date of winding up i.e. it is not a running concern since last more than ten years. The argument is, by order dated 19th December, 1997 the court directed for the sale of plant, machinery and moveable which are security of the bank. There could be no difficulty in execution in terms of this order. This is natural also to first get satisfaction from the securities which stood for the loan. But subsequent order directs sale of the entire assets of the company as a 'going concern'. This means revive the company first to make it operational, re-employ its employees, which would involve huge investment by the prospective buyer, an Herculean task, making execution practically infructuous.

On these facts the appellant-bank has filed these appeals against two orders dated 23rd February, 1998 and 10th July, 1998. Learned counsel submits, the Division Bench of the High Court fell in error in not directing plant, machinery and securities to be sold separately, by this, vast land and building of the factory would still be left, which would fetch much higher price, which may cover

the total balance liabilities of the company in liquidation. On the other hand, selling of the factory as a 'going concern' with a rider to absorb all the employees would not only bring low sale price but would negate the execution of the decree.

On the other hand the submission on behalf the judgment-debtor and on behalf of the workmen is such an order is just and proper as it brings back workers to earn their livelihood and simultaneously it would satisfy the decree.

It is not in dispute that the appellant-bank is the only secured creditor as against the said judgment-debtor company in liquidation. The total decree along with interest till 31st August, 1999 recorded is Rs.8,29,48,725.72p. It is true, the court must find that method of sale of the assets or of the company, which brings maximum price to satisfy its creditors. This may, in a given case, include recovery through instalments out of the production of the company. This would depend on the potentiality, viability and health of a company. Sometimes when company is taken over under Section 29 of the Financial Corporation Act, corporation may run or get the factory run to recover the loan. In another set of cases, where company has become non-functional, sick, due to its heavy debt, lack of production, mismanagement etc. then possibility of its revival is examined through expert statutory body the BIFR. It is only after scrutiny a decision is made to help in revival. It may order if no revival is possible. If company agrees with conditions imposed under any scheme framed by BIFR, if revival is possible such company may be brought back as running concern, with hope of its revival. But, if a company has reached a skeleton stage, where its revival is not possible, its assets are sold, to pay back the creditors. In the present case, undisputedly an order of winding up was passed as far back as on 4th June, 1990. There is nothing on the record to show even any attempt was made by the judgment-debtor respondent-company for its revival nor there is any thing on the record, to show that there exist possibility of its revival. Submission for the appellant-bank in support of sale being as 'going concern' is made under the garb and in the name of 'workers' to resist the present execution.

Learned counsel for the appellant-bank strongly relies on Union Bank of India vs. Official Liquidator H.C. of Calcutta and Ors. 2000 (5) SCC 274. This was a case where a company was closed for about 17 years. The relevant portion is quoted hereunder:

"It also appears that the Division Bench was persuaded by the so-called sympathy for the workers, without verification of the fact that the Company was closed before 17 years of sale. The Court has noted in the beginning while narrating the submission of the learned counsel who appeared for the benefit of the employees that more than 100 employees were starving to death and in the later para stated that the Court was informed by the learned advocate appearing for the employees' union that more than 100 employees have already died. Without there being any application on record and without there being proper verification of the facts from the parties concerned, it is not just and proper to make such observations. It is not impossible that because of the lapse of 17 years, out of

1200 workers who might have worked in the said factory 100 employees might have died a natural death. But in any circumstances it was unjustified to make a case over it and to accept oral submissions and to dispose of the valuable properties of a Company by stating that the sale of the Company as a going concern was for the benefit of the so-called employees who were not in employment."

Submission is, applying this decision and in the absence of any credible material the direction to sale the company as a 'going concern' is not sustainable.

Learned counsel for the company in liquidation and for the employees union, representing workers submits, for a compassionate consideration, in the interest of workers; as a last resort, attempt be made, if possible, to get a buyer who may take over the company as a 'going concern' and be ready to pay the price to satisfy the decree and pay the rest of the liability in a phased manner after the production starts.

When indisputably the order of winding up made on 4.6.1990 had become final and company has become non-functional for long, even BIFR could not come to its rescue and the attempt of the workers union to resuscitate the company by getting a committee constituted for management was repelled by a Division Bench of the High Court and this Court when the SLP filed by the workers Union came to be dismissed on 5.12.1997, it would no doubt be ironical and unjust to get order for the sale of the assets of the company - as a going concern. But, at the same time to give a last try to the fond hopes expressed on behalf of the erstwhile workers, we consider giving one more chance to have it so done within a strict frame of time limit.

After considering submission of the learned counsel for the parties, we are granting this indulgence, by permitting the sale of the company as a 'going concern' with certain conditions only.

The Official Liquidator for this purpose shall advertise the sale of the company in liquidation-judgment debtor as a 'going concern' as ordered by the High Court. Such publication shall indicate that the reserve price, shall be the amount equal to the total decree including interest which has accrued upto 31st December, 1999 in favour of the appellant-bank, and shall also has to pay the balance interest which accrues, till full payment is made. The publication shall also indicate that purchaser has also to pay the liabilities of other claimants in the proceeding for the liquidation of the company.

Since all the parties are represented before us, including the Official Liquidator, we grant total period of ten weeks from today, for concluding sale, with the aforesaid condition, including the period of advertisement, receiving offers etc. In case, it is not concluded within this period, the order of the High Court directing the sale of the company as a 'going concern' shall stand set aside. The Official Liquidator will then proceed to sell the assets of the company first by selling the plant, machinery and other moveable assets and then the other assets in such a manner to fetch the maximum price, keeping the interest of all other creditors. Out of the aforesaid proceed, first

the decree in favour of the appellant-bank should be satisfied and then to proceed to distribute the balance to other creditors in accordance with law. Accordingly the aforesaid two orders of the High Court dated 23rd February, 1998 and 10th July, 1998 stand modified to the extent we have passed this order. In these terms these appeals stand disposed of. Costs on the parties.

JUDIS