

Rastogi, J.

1. The instant appeals are directed against the judgment and order dated 5th February, 2010 passed by the Division Bench of the High Court of Punjab and Haryana at Chandigarh, setting aside the auction held pursuant to auction notice dated 24th May, 2004 by Industrial Development Bank of India (hereinafter referred to as “IDBI” – Operating Agency).

2. The facts in brief culled out from the record are that M/s Bharat Commerce & Industries Limited (hereinafter referred to as “BCI”) was declared a sick company and for disposal of assets of BCI pursuant to directions of Board for Industrial and Financial Reconstruction (BIFR) under Section 20(4) of the Sick Industrial Companies (Special Provisions) Act, 1985(hereinafter being referred to as the “Act 1985”) through IDBI - the Operating Agency, initiated the process of inviting offers in sealed cover for sale of assets of the captioned unit.

3. Pursuant to public notice dated 24th May, 2004, offers were invited for various blocks, calling upon the interested parties to deposit earnest money of Rs.6 lakhs for Block IV and submit their tenders in sealed cover within a period of 30 days from the date of

advertisement and for further information, the interested parties may contact the office of Mr. P.M. Nair, DGM, IDBI, Mumbai, the office of the Assets Sale Committee constituted by the BIFR and the agency reserved the right to accept or reject any offer without assigning any reason therefor. It is pertinent to note that the Operating Agency was under obligation to evaluate the realizable value of the property from the approved valuer and thereafter to notify the reserve price in the auction notice in terms of Section 21(c) of the Act, 1985, and that indeed was not indicated in the auction notice and the solitary bid submitted by the appellants in Civil Appeal No. 10128 of 2011 of Rs.2,84,00,000/- on 22nd June, 2004 was accepted by the authority.

4. On being examined by the ASC although nothing came forward as to why in the absence of a competitive bidding, the solitary bid of the present appellants was processed, be that as it may, the bid of the appellants in reference to Unit Block IV for the captioned assets was accepted as it reveals from the communication dated 12th August, 2004 with a rider that the same shall be confirmed as per the terms and conditions of ASC advised to all the bidders on 8th August, 2004 for which the bidder may be required to execute a tripartite Memorandum of Understanding (MOU) with IDBI.

5. The record indicates that the appellants were asked to furnish a bank guarantee for a bid value of Rs.2,84,00,000/- by 27th August, 2004 for a period of one year and required to deposit payment in instalments. The appellants from the day one were reluctant in furnishing the bank guarantee of Rs.2,84,00,000/, however, shown their alleged willingness to pay the value of the assets in terms of the bid within a period of six months. But the fact is that the appellants neither offered bank guarantee of Rs.2,84,00,000/- nor deposited a penny after acceptance of the bid on approval of the ASC by communication dated 12th August, 2004.

6. The BIFR, pursuant to its order dated 24th November, 2004 observed that since the sole bidder for Block IV (the appellants herein) is not willing to adhere to the ASC guidelines as such the Bench did not agree to the proposal to accept the bid and left the sale of the assets of the unit for Block IV be taken over and be sold by the Official Liquidator of the concerned High Court.

7. The decision of BIFR dated 24th November, 2004 was challenged by the present appellants before the Appellate Authority for Industrial & Financial Reconstruction (AAIFR). The AAIFR under its

order dated 1st April, 2005, while setting aside the order of the BIFR dated 24th November, 2004 directed the BIFR to confirm the sale of Unit Block IV in favour of the appellant and modalities for payment shall be in accordance with terms and conditions as approved by the ASC and thereafter the appellants deposited the bid value in instalments.

8. That became the subject matter of challenge by filing of a writ petition before the High Court of Punjab and Haryana at Chandigarh at the instance of BCI Staff Colony, Residential Welfare Association and its members under Article 226 of the Constitution.

9. The Division Bench of the High Court after revisiting the records of the bidding process and the procedure adopted by the Operating Agency arrived to a conclusion that the appellants have not made payment in terms of the guidelines of the ASC and failed to furnish the bank guarantee and to deposit the purchase consideration at the relevant point of time. The Division Bench also took note of the fact that solitary bid was received by the ASC for the subject property and it was less than the circle rate fixed by the Collector of the property in question and while setting aside the order of the AAIFR dated 1st

April, 2005, restored the order of the BIFR dated 24th November, 2004 with a further direction that the money which was deposited by the appellant, be returned with interest @ 8% (simple) from the date of its deposit till the amount is refunded with liberty to sell the property, if need be, as per the provisions of law under its judgment dated 5th February, 2010.

10. That became the subject matter of challenge in the instant appeals on behalf of the appellants and this Court while issuing notice under order dated 8th July, 2010 directed the parties to maintain the status-quo.

11. The original petitioners before the High Court had also challenged the self-same judgment of the Division Bench of the High Court in Civil Appeal No.10127 of 2011.

12. Mr. Jaideep Gupta, learned senior counsel appearing for the appellants, submits that while the advertisement came to be published by the IDBI (Operating Agency), the guidelines of ASC were not appended thereto and it was not made known to the parties that they are required to furnish a bank guarantee as a security to the bid amount and calling upon the appellants at the stage of acceptance of

the bid to act upon the guidelines and to furnish a bank guarantee was not justified and this was considered by the AAIFR under its order dated 1st April, 2005 and which has not been appreciated by the High Court in the right earnest.

13. Learned counsel further submits that the appellants had paid the entire sale consideration on 3rd June, 2005 and 7th June, 2005 and pursuant thereto the tripartite Memorandum of Understanding had been executed between the concerned parties on 18th July, 2005 and this was not considered by the High Court while setting aside the bid under the impugned judgment.

14. Learned counsel further submits that the High Court has committed a manifest error and has failed to take into consideration that once the auction sale is confirmed, the objections to the said auction can only be entertained if there are material irregularities and fraud. Furthermore, the process of auction sale would forever remain incomplete because somebody may always come up after the confirmation of the sale with an offer for higher value and that conduct has always been deprecated by this Court in **Valji Khimji**

and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and Others¹.

15. Learned counsel further submits that the appellants had scrupulously adhered to the conditions of the ASC and were ready to make payment of the entire sale consideration and till September, 2004, the appellants were never made aware that the bank guarantee equivalent to the bid amount would have to be furnished and immediately on their appeal being allowed by the AAIFR, the appellants herein made over the bid amount of Rs.2,84,00,000/- on 3rd June, 2005 and 7th June, 2005 and hence there was no violation of any terms and conditions of the sale of assets.

16. To buttress further, learned counsel submits that once the auction sale stands approved, at least the employees who were residing in the property in question and who had never participated in the bidding process, have no locus to question the order passed by the AAIFR confirming the auction bid under its order dated 1st April, 2005 and the offer made by the respondent/original petitioner (BCI Staff Colony) was of no substance and if such practice is being

¹ (2008) 9 SCC 299

permitted, then such of the applicants who have not participated in the bidding process would make an offer at a later stage, no auction bid at any given point of time could be finalized and it will never fetch the value of the asset and the transaction can never attain finality. In support of his submissions, the counsel has placed reliance on the judgment of this Court in ***National Highways Authority of India v. Gwalior-Jhansi Expressway Limited Through Director***².

17. Learned senior counsel, Shri Ravi Prakash Mehrotra, appearing for the appellants in Civil Appeal No.10127 of 2011 submits that the auction bid of the appellants in Civil Appeal No.10128 of 2011 has been rightly set aside by the Division Bench of the High Court but they are aggrieved only where the Division Bench has directed that the subject property be sold, if need be, as per the provisions of law.

18. Learned counsel submits that since the appellants have made an offer of Rs.3 crores which was higher than the bid furnished by the appellants in Civil Appeal No.10128 of 2011 and they being residing for sufficiently long time over the property in question put to auction, at least they seek an indulgence of this Court that their offer

² (2018) 8 SCC 243

may be accepted and the authorities may be directed to execute the sale certificate in their favour. Learned counsel has placed reliance on the judgments of this Court in ***Navalkha and Sons v. Sri Ramanya Das and Others***³ and ***Divya Manufacturing Company (P) Ltd. Tirupati Woollen Mills Shramik Sangharsha Samity and Another v. Union Bank of India and Others Official Liquidator and Others***⁴.

19. Per contra, learned counsel for the intervenors, while supporting the finding of the High Court, submits that the employees of the company in liquidation have not participated in the proceedings but their dues are still outstanding and which could not have been made over in absence of the funds available with the Official Liquidator and they being the sufferers for a long time, at least while upholding the judgment of the Division Bench of the High Court, the BIFR or the Official Liquidator may be called upon to initiate a fresh bidding process to fetch the maximized value of the property which may at least bring some solace to the employees

³ (1969) 3 SCC 537

⁴ (2000) 6 SCC 69

whose dues are outstanding for a long time and they have a superior claim over the financial creditors of the company in liquidation.

20. The final arguments were concluded on 19th April, 2023 and we called upon the appellants, if they are interested, may give their revised offer of the subject property. Both the appellants have submitted their revised offer. Appellants in Civil Appeal No. 10128 of 2011 have tendered their offer of Rs.23,09,00,000/-. At the same time, the appellants in Civil Appeal No. 10127 of 2011 have given their offer of Rs.14 crores since in the absence of valuation of the subject property from the approved valuer, it may not have been possible to assess the fair value of the property.

21. We have heard learned counsel for the parties and with their assistance perused the material on record.

22. The process was initiated by the Operating Agency (IDBI) to sell the subject assets of the sick industrial company (BCI) in terms of the order passed by the BIFR in exercise of its power under Section 20(4) of the Act, 1985. Pursuant thereto, the Operating Agency was under an obligation to obtain the valuation report of the subject property and after due assessment has to arrive at the reserve price

for the sale of the property in terms of Section 21(c) of the Act, 1985 and thereafter has to proceed with a procedure known to law while adopting a method for sale of the assets by public auction or by inviting tenders or in any other manner specified and for the manner of publicity therefor in terms of Section 18(2)(k) of the Act, 1985. Sections 18(2)(k) and 21(c) are relevant for the purpose and are reproduced hereinbelow:

“18. Preparation and sanction of Schemes. -

- (1) xxx xxx xxx
(2) The scheme referred to in sub-section (1) may provide for any one or more of the following, namely:-
(a) to (j) xxx xxx xxx
(k) method of sale of the assets of the industrial undertaking of the sick industrial company such as by public auction or by inviting tenders or in any other manner as may be specified and for the manner of publicity therefor;”

“21. Operating agency to prepare complete inventory, etc. -

- Where for the proper discharge of the functions of the Board under this Act the circumstances so require, the Board may, through any operating agency, cause to be prepared-
(a) to (b) xxx xxx xxx
(c) a valuation report in respect of the shares and assets in order to arrive at the reserve price for the sale of a part or whole of the industrial undertaking of the company or for fixation of the lease rent or share exchange ratio;”

23. Indisputedly, in the instant case, it has not been placed on record if there was any valuation report assessed by the Operating Agency from the approved valuer of the subject property and, at the

same time, the reserve price of the subject property was never disclosed/indicated in the first place when the public notice came to be notified on 24th May, 2004 inviting offers from the interested parties for Block IV. Thus, the very procedure adopted by the Operating Agency appears to be defective at its very inception.

24. The object of the auction is to secure optimum realizable value of the property by giving opportunity to the potential buyers facing competitive bids either in open or closed format. The terms 'auction' or 'bid' are inter-related as both give the idea of selling the product to the public. Bidding involves the process where a person offers a price which is known as a bid. The process of bidding takes place in a situation where large number of people show their willingness to buy a particular product or a service and bidding in a sealed envelope is often used by various companies, industries and small businesses for assessing the needs of the public at large. On the other hand, auction is the process that involves buying and selling goods and services by offering them for bids, taking bids and selling the item to the highest bidder and that is possible if there is a competitive bidding between the bidders.

25. The purpose of auction (open or close format) is to get the most remunerative price and giving opportunity to the intending bidders to participate and fetch higher realizable value of the property. If that path is cut down or closed, the possibility of fraud or to secure inadequate price or underbidding would loom large. In the given circumstances, it is the duty of the Court to exercise its discretion wisely and with circumspection and keeping in view the facts and circumstances in each case.

26. The object of auction has been considered by this Court in ***Lakshmanasami Gounder v. C.I.T., Selvamani and Others***⁵ as under:-

“.....The object of the sale is to secure the maximum price and to avoid arbitrariness in the procedure adopted before sale and to prevent underhand dealings in effecting sale and purchase of the debtor’s property. Public auction is one of the modes of sale intending to get highest competitive price for the property. Public auction also ensures fairness in actions of the public authorities or the sale officers who should act fairly and objectively. Their action should be legitimate. Their dealing should be free from suspicion. Nothing should be suggestive of bias, favouritism, nepotism or beset with suspicious features of underbidding detrimental to the legitimate interest of the debtor...”

⁵ (1992) 1 SCC 91

27. Before we proceed to consider the submissions made, it will be apposite to summarize the admitted facts for better appreciation of the submissions made.

(i). M/s Bharat Commerce & Industries Limited (BCI) was established in 1964. However, it later became sick and by an order dated 22nd January, 2004 passed by the BIFR in case HP/2000, IDBI was directed to become the Operating Agency to take up sale of assets of BCI under Section 20(4) of SICA in terms of ASC guidelines.

(ii). Advertisement came to be published by IDBI (Operating Agency) for sale of land of Block IV Staff Colony of Rajpura unit of BCI admeasuring 26,750 sq. meters (approx. 5 acres) on 24th May, 2004.

(iii). The appellant (Rajiv Kumar Jindal and others) was the solitary bidder who submitted their bid for purchase of Block IV for Rs.2,84,00,000/- on 22nd June, 2004 and paid earnest money of Rs.6 lakhs.

(iv). The Operating Agency accepted the bid by letter dated 12th August, 2004, subject to the condition that the successful bidder has to comply with the terms and conditions of the ASC, as advised to all

the bidders on 8th August, 2004. The extract of the acceptance of the bid by the Appellants is reproduced hereunder:

“The above sale is on the terms and conditions of Asset Sale Committee (ASC) advised to all the bidders by the ASC on August 08, 2004 for which you may be required to execute a tripartite Memorandum of Understanding (MOU) with IDBI, Selling Agency & BCIL, the draft of which would be sent to you shortly.”

28. It will be apposite at this stage to refer to the relevant terms and conditions of the ASC which the bidder was supposed to comply and the same are referred hereunder:

“Procedure and Guidelines to be followed by Asset Sale Committee (ASC) appointed by BIFR for sale of assets of sick companies –

(a) to (g) xxx xxx xxx

(h) Where a bid has been finally accepted the purchaser shall be required to pay the balance of the purchase consideration in two installments of 50% and 48% of the total selling price, payable respectively, before the end of 45 days and 90 days from the date on which intimation regarding the final acceptance of the bid is dispatched to him by registered Post (A.D.)/Special Post at his notified address.

(i) The successful purchaser shall within 15 days of the receipt of intimation regarding the acceptance of his bid, furnish a bank guarantee, valid for one year, as many as considered satisfactory by the OA/MA, to secure full and timely payment of consideration for the assets purchased.”

(j) to (r) xxx xxx xxx.”

29. Indisputedly, the appellants (auction bidder) have neither paid the sale consideration in terms of clause (h) of the guidelines nor furnished the bank guarantee within 15 days of the acceptance of the bid in terms of clause (i) of the guidelines.

30. When the matter was placed before the BIFR, the Bench took note of the fact that the appellants, viz., M/s Rajiv Kumar Jindal and others, were the sole bidder for Block IV of Rajpura Unit and have not complied with the ASC guidelines. Taking both the factors into consideration; (i) the appellant being the sole bidder; and (ii) guidelines of ASC have not been complied with, the bid of the appellants was not confirmed but on appeal being preferred by the appellants, the AAIFR has not taken into consideration that the guidelines of the ASC have not been followed and the appellant was the sole bidder, as there was no competitive bidding which is always to be taken care of to secure the optimized value of the property.

31. The appellants have shown their willingness to deposit the bid amount in two instalments on 20th September, 2004 and 10th November, 2004 but the fact is that even before the order came to be passed by the BIFR, neither the bank guarantee was furnished nor a

single instalment was deposited by the appellants and here, in our view, the AAIFR has went wrong in setting aside the Order of BIFR.

32. The Division Bench of the High Court had revisited the entire proceedings and taking into consideration the fact that there was no competitive bidding which is a *sine qua non* for public auction and guidelines of the ASC have not been complied with, accordingly set aside the order of the AAIFR with a further direction to initiate the process afresh in accordance with law and we do not find any error in the view expressed by the High Court which may call for our interference.

33. The submission of Mr. Gupta, learned senior counsel, that the appellants in Civil Appeal No.10127 of 2011 have not participated in the bidding process and made an offer at the later stage, have no locus standi to challenge the order of the AAIFR confirming the bid of the appellants. In the facts and circumstances of the case, it may not be of any assistance for the reason that the appellants in Civil Appeal No.10127 of 2011 (BCI Staff Colony, Residential Welfare Association and Others) indeed were not the bidders and have not tendered any sealed bid, but at the same time, they have made an

offer at a later stage and directly interested in the subject property in question as they are residing there for sufficiently long time, and not the strangers to the proceedings, being the person aggrieved their right to question invoking the jurisdiction of High Court under Article 226 of the Constitution cannot be ruled out.

34. That apart, the question of locus was never raised by the appellants before the High Court and once the subject issue has been looked into by the High Court on merits and we too are persuaded that order of the AAIFR confirming the bid pursuant to its order impugned dated 1st April, 2005 is not legally sustainable, we do not find any justification at this stage to non-suit the claim of the appellants prayed for in Civil Appeal No.10127 of 2011.

35. Further submissions made by the learned counsel that the conditions of the ASC were scrupulously adhered to and the entire bid amount was deposited after the order came to be passed by the AAIFR confirming the bid on 3rd June, 2005 and 7th June, 2005 and Tripartite MOU was executed is of no substance for the reason that the very procedure in the first instance initiated by the Operating Agency was defective at its very inception and before initiation of the

auction proceedings, neither the value of the property was assessed through the approved valuer nor the reserve price was notified in the auction notice dated 24th May, 2004 and the solitary bid of the appellant for Rs.2,84,00,000/- was accepted and confirmed by the AAIFR without taking note of the fact that the appellant has failed to comply with the guidelines laid down by the ASC indicating that successful purchaser has to furnish a bank guarantee valid for a period of one year within 15 days of intimation regarding acceptance of the bid and the balance of the purchase consideration has to be paid in two instalments of 50% and 48% of the total selling price payable respectively before the end of 45 days and 90 days from the date of intimation of final acceptance of the bid is dispatched at his notified address which is the requirement in terms of clause (h) and (i) of the procedure and guidelines laid down by the ASC and that being a part of the auction notice, the appellant was under obligation to comply with and despite opportunity the appellant has failed to comply with both the twin conditions and, thus in the facts and circumstance, the Division Bench of the High Court has rightly set aside the order of AAIFR dated 1st April, 2005.

36. So far as the submission made by learned counsel for the appellants in Civil Appeal No. 10127 of 2011 that the offer made by the appellants was higher than the sealed bid is concerned, it has no substance for the reason that the appellants have not participated in the bidding process and it is not the case of the appellants that the auction notice published on 24th May, 2004 was not in their knowledge. In our considered view, later offer in the facts and circumstances of the case tendered by the appellants was of no legal significance and rightly not acknowledged by the authority.

37. Before we conclude, we would like to observe that the money deposited by the appellants in Civil Appeal No. 10128 of 2011 shall be refunded in terms of the order of the High Court impugned dated 5th February, 2010. At the same time, the official liquidator may take all reasonable steps to fetch the optimum value of the property in order to achieve the object of public auction.

38. Consequently, both the appeals are without substance and accordingly dismissed. No costs.

39. Pending applications, if any, shall stand disposed of.

.....**J.**
(AJAY RASTOGI)

.....**J.**
(BELA M. TRIVEDI)

NEW DELHI;
APRIL 27, 2023.