



ARTICLE...

WINDING UP ORDER-COURT'S POWER

Ironically it is said that, whenever central government introduced bill on company law in place of companies Act 1956, it met with ill fate! The companies registered under companies Act 1956 can be put to an end by passing an order of winding up by court or by striking off name from the Register of Registrar under section 560 as a defunct company.

Rescission of winding up order:

The circumstances in which company may be wound up are enumerated in section 433 and who can apply for winding up is covered up under section 439 of companies Act. In a winding up process, the official liquidator is an officer working on behalf of court in any mode of winding up as envisaged in section 425, viz by the court or voluntary. **Once order of winding up is passed by the court whether rightly or wrongly, the court has no jurisdiction to vacate winding up order.** The only option left is to get stay order under section 466 or 518 for the period as deems fit by the court. The application of such stay order may be construed as revocation of winding up order for time being but it can never be ceased to exist. The necessary direction in this regard can be given by court to liquidator under section 446(2). It is important to mention that merely filing an application is not sufficient to get stay order but should be supported by proper and credible documents in connection of revival scheme for company.

The stay order can be obtained by the liquidator, creditor or contributories. Other than any one is not competent to apply to vacate the order of winding up. The shareholder becomes contributories by operation of law. However contributory may not be member but section 430 allows him to be contributory. The court has unfettered power to take decision in the interest of company, creditors, workers, society and shareholders under Companies (court) Rules, 9.

The conduct and intention of applicant is very important, while exercising power of staying of winding up order by the court. The discretion and power of the court for stay of winding up order is well covered in the judgment of S.K.ROY CHOWDHARY in Mahabir Prasad Agarwalla v. Ashkaran Chattar Singh (1980-81) 85 CWN 557at 581.582:

1. "if the court is satisfied on the materials before it that the application is bonafide;



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2. the court would be guided by the principles and definitely come to the finding that the principles are applicable to the facts of a particular case;
3. mere consent of all creditors for stay of winding up is not enough;
4. the offer to pay in full or make satisfactory provisions for the payment of the creditors is not enough;
5. court will consider the interest of commercial morality and merely the wishes of the creditors and contributories;
6. court will refuse an order if there is evidence of misfeasance or of irregularity in demanding investigation;
7. a firm and accepted proposal for satisfying all the creditors must be before the court with material particulars ;
8. the jurisdiction for stay can be used only to allow in proper circumstances a resumption of the business of the company;
9. the court is to consider whether the proposal for revival of the company is for the benefit of the creditors but also whether stay will be conducive or detrimental to commercial morality and to the interest of the public at large;
10. before making an order court must see whether the ex directors have complies with their statutory duties as to giving information to the official liquidator by furnishing the statement of affairs;
11. And any other relevant fact which court thinks fit to be considered for granting or not granting stay having regard to the particular facts of a particular case."

Sale of property - Sanction and confirmation:

Some times interesting question comes before the court that whether the winding up order is passed, all doings of official liquidator automatically been approved by court. The relevant



Section 457 and 512 empower the official liquidator to do all such thing to complete winding up process.

Sections 457 sub section (1) deal with power of official liquidator with the SANCTION of court, while subsection (2) bestowed the power to perform the duties without sanction of court. Subsection (2A) to (2G) deal with other relevant power and autonomy to protect the property of company. Subsection (3) entitles creditors and contributories to apply to the court to protect their interest at any stage. The subsection (3) provides that the power of official liquidator with sanction or without sanctions, all are under control of court. Therefore official liquidator is always bound to report to the court for developments on regular basis.

Most debatable question comes before court in liquidation proceeding with regard to application of 457(1) (c), which is read as under:

"457(1) the liquidator in a winding up by the court shall have power, with **the sanction** of court,-

(a).....

(b).....

(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate ,or to sell the same in parcels;

(ca) to sell the whole of undertaking of the company as a going concern;

(d).....

(e)

The peculiar situation in many cases arise before the court that official liquidator would have taken sanction to sell of immovable/moveable property before finalizing the bidder or in some the cases bidding process is in the front of court, however bidder did not complied with the terms of order or complied with delay etc. Under these circumstances, fresh offer or offer of one of the participated bidder comes with same price or reasonable /substantial higher price for consideration. Whether court has jurisdiction to accept such offer or always go for fresh bidding process or to follow any other mode as empowered under Companies (Court) Rules, 273. It is interesting to mention that section talks about getting sanction by official liquidator before selling of immovable/movable property , while Companies (Court) Rules, 272 is as under;

*" Sale to be subject to **sanction and to confirmation by court** — Unless the court otherwise orders, no property belonging to company which is being wound-up by the court*

shall be sold by the official liquidator without the previous sanction of the court, and every sale shall be subject to confirmation by the court".

Followings is relevant portion of land mark judgment ,which cover ups explanation for section 457 (3):

[1988] 63 Comp Cas 842

Universal Dyestuff Industries Ltd.,

(at page 845):

"Section 457 of the Companies Act, 1956, deals with the powers of the liquidator. This section clearly enumerates the power of the liquidator in winding up proceedings ordered by the court. Section 457(3) provides that 'the exercise by the liquidator in a winding up by the court of the powers conferred by this section shall be subject to the control of the court; and any creditor or contributory, may apply to the court with respect to the exercise or proposed exercise of any of the powers conferred' by this section' Thus, reading both the section and the rule, it is clear that the control of the court for the purpose of deciding as to the genuineness of sale and confirming the same is paramount and it cannot be said that the court has abdicated its power by simply asking the provisional liquidator to sell the property to the highest bidder. At the stage of confirmation, as stated in the decision referred to above, the inadequacy of the price can be a relevant ground for the court to interfere in such sales and that in the interest of the company, the court can make such direction for the purpose of getting an adequate price for the properties belonging to the company in liquidation".

It is clear from the Rule 272 that no property of the company can be sold out and sale deed to be executed unless it is ordered by court. It has two limbs, one sanction and other is confirmation of sale by the court. Therefore it is important to see that in case the confirmation of sale not given by court, official liquidator can not execute sale deed and court has jurisdiction and power to consider the new application keeping in mind overall interest of creditors, contributories and workers. There are divergent judgments of Apex court based on facts of each case that even confirmed sale has also been set a side, where fraud or misstatement were found, or even without such occasion.

Analysis of few judgments:

[1996] 85 Comp Cas 792 (SC) (page 794)

LICA (P.) Ltd. (No. 2) v. Official Liquidator

"Proper control of the proceedings and meaningful intervention by the court would prevent the formation of a syndicate, underbidding and the resultant sale of property for an inadequate price. The order passed by this court yielded the

result that the property which would have been finalised at Rs. 45 lakhs, fetched Rs. 1:10 crores and in this court a further offer of Rs. 1.25 crores is made. In other words, the property under sale is capable of fetching a higher market price. Under these circumstances, though there is some force in the contention of Sri Ramaswamy that the court auction may not normally be repeatedly disturbed, since this court, on the earlier occasion, had limited the auction between the two bidders, the impediment will not stand in the way to direct sale afresh. Even today the parties are prepared to participate in the bid. Further, there is a specific condition No. 11 in terms and conditions of sale as quoted above which empowers the court to set aside the sale even though it is confirmed, for the interests of creditors contributories and all concerned and/or public interest. In this view of the matter, it cannot be said that the court became functus officio after the sale was confirmed. As stated above, neither the possession of the property nor the sale deed was executed in favour of the appellant. The offer of Rs. 1.30 crore is totally inadequate in comparison to the offer of Rs. 2 crores and in a case where such higher price is offered, it would be in the interest of the company and its creditors to set aside the sale. This may cause some inconvenience or loss to the highest bidder but that cannot be helped in view of the fact that such sales are conducted in court precincts and not by a business house well versed with the market forces and price. Confirmation of the sale by a court at a grossly inadequate-price, whether or not it is a consequence of any irregularity or fraud in the conduct of sale, could be set aside on the ground that it was not just and proper exercise of judicial discretion. In such cases, a meaningful intervention by the court may prevent, to some extent, underbidding at the time of auction through the court. In the present case, the court has reviewed its exercise of judicial discretion within the shortest time."

[2000] 102 Comp Cas 66 (SC)

Divya Manufacturing Co. (P.) Ltd. v. Union Bank of India

"The aforementioned survey of case law clearly lays down that this court is clothed with the powers to set aside even a confirmed sale provided it comes to the conclusion that the price offered by the auction purchaser in fact was inadequate. Such powers is not dependent on any finding that there was material irregularity or commission of fraud in the process of sale, adopted by the official liquidator. It is also significant to notice that Dr. Singhvi appearing for the auction purchaser has also conceded such a power of the court. The question which arises is whether in the facts and circumstances of the case, the sale confirmed in favour of the auction purchaser should be set aside or the plea raised by the interveners should be rejected."

[2006] 70 SCL 252 (SC)

Punjab Wireless Systems Employees Union v. WINSOME Yarns Ltd.

"There was no objection in the proposal by the other parties, obviously having regard to the fact that everyone was benefited by the said arrangement. In view of the above, it was a fit case to exercise power under article 142 of the Constitution. The settlement proposed in the larger interest of parties and to benefit the workmen, was to be accepted. The sale, which had already been confirmed in favour of respondent No. 1, was to be set aside, not on merits, but in pursuance of the negotiated settlement arrived at among respondent No. 11, the appellant and respondent No. 2. Accordingly, the appeals were to be allowed." [Para 14]

[2008] 145 COMP. CAS. 1 (SC)

IFCI Ltd. v. Vishnu Kant Gupta

Held that "higher offer by other parties could not invalidate highest offer of first respondent, but at the same time, one could not also be oblivious and unmindful of the fact that out of Rs. 5 crores six years back, the first respondent had parted with a negligible amount of Rs. 10 lakhs only at that time. The Division Bench was wrong and not at all justified in ordering payment of interest only from date of dismissal of appeal. The ends of justice would be served if sale in favour of first respondent be confirmed with condition that the first respondent would pay an additional amount of rupees three crores."

[2008] 145 Comp Cas 36

Valji Khimji and Co. v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd.;

paragraphs 28 to 30 of which are quoted below (page, 43 of 145, Comp Cas) :

"If it is held that every confirmed sale can be set aside the result would be that no auction sale will ever be complete because always somebody can come after the auction or its confirmation offering a higher amount. It could have been a different matter if the auction had been held without adequate publicity in well-known newspapers having wide circulation, but where the auction sale was done after wide publicity, then setting aside the sale after its confirmation will create huge problems. When an auction sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same and they will be themselves be to blame if they do not come forward to bid at the time of the auction. They cannot ordinarily later on be allowed after the bidding (or confirmation) is over to offer a

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higher price. Of course, the situation may be different if an auction sale is finalised say for Rs. 1 crore, and subsequently somebody turns up offering Rs. 10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers 10 crores, then an inference can be drawn that an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done. In the present case we are satisfied that there is no fraud in the auction sale. It may be mentioned that auctions are of two types (1) where the auction is not subject to subsequent confirmation and (2) where the auction is subject to subsequent confirmation by some authority after the auction is held. In the first case mentioned above, i.e., where the auction is not subject to confirmation by any authority, the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction purchaser. However, where the auction is subject to subsequent confirmation by some authority (under a statute

or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction purchaser, and these rights cannot be extinguished except in exceptional cases such as fraud."

One should not pick and choose the judgment of his liking from head notes, since case has its own facts. Say in para 5 of *Valji Khimji and Co. v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd.* very clearly states that all terms and conditions of offer acceptance had been fulfilled by the auction purchaser and therefore setting aside confirmation of sale based on ground of adequacy of price etc should not be allowed. Therefore one needs to look into the facts of case in totality before applying the ratio of judgment. However it is correct that there is divergent view expressed by Apex court hence views of various High courts are also different. In short, the court is empowered adequately to protect the interest of all concerned parties of company, during its existence and in winding up proceeding too.

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