

HIGH COURT OF GUJARAT (D.B.)

SARVARIYA EXPORTS LTD

Versus

O L OF URMI OIL LIMITED

Date of Decision: 11 August 2008

Citation: 2008 LawSuit(Guj) 1786

Hon'ble Judges: [D A Mehta](#), [H N Devani](#)

Eq. Citations: 2009 4 GLR 3388, 2009 147 CompCas 336

Case Type: O J Appeal; Company Application; Official Liquidators Report

Case No: 112 of 2008; 213 of 2008; 14 of 2008

Subject: Civil

Acts Referred:

[Code Of Civil Procedure, 1908 Or 47R 1](#)

Final Decision: Appeal allowed

Advocates: [S N Soparkar](#), [A B Munshi](#), [Nitin Mehta](#), [Percy Kavina](#), [Nandish Chudgar](#),
[Nanavati Associates](#)

[Cases Cited in \(+\):](#) 2

D. A. MEHTA

[1] Considering the nature of the controversy involved in the appeal, the matter was heard finally on and from 08.08.2008.

[2] The present appeal challenges order dated 03.04.2008 (Annexure-A) made by the Company Court in Company Application No.213 of 2008 in Official Liquidator's Report No.14 of 2008. The appellant herein is original respondent No.3 in the Company Application while respondent No.3 herein is the original applicant of Company Application, respondent Nos.1 and 2 herein being original respondent Nos.1 and 2. Hereinafter, for the sake of convenience, the parties shall be referred to as per their respective description in the Company Application.

[3] One M/s. Urmi Oil Industries Limited was ordered to be wound up on 06.09.1994 as per order made in Company Petition No.29 of 1994. Vide Official Liquidator's Report No.57 of 2007, directions were sought by the Official Liquidator (O.L.) for putting the properties of the Company in liquidation to sale. Vide order dated 30.03.2007 made in the said O.L.R., the Company Court rejected the offer for purchasing the property at a sum of Rs.25,00,000/- as the same was based on valuation report dated 25.02.2004 as the report was three years prior to the point of time when the property was put to sale. The Company Court further directed the O.L. to obtain fresh valuation report and thereafter initiate fresh process for putting the property of the Company to sale.

[4] On 10.08.2007 an advertisement was published in daily newspapers 'Indian Express' and 'Sandesh' inviting offers for purchasing the property in question. On 24.08.2007 a meeting of the Sale Committee was held and the minutes of the said meeting revealed that 36 intending purchasers had made their offers. The applicant was one of the intending purchasers and the name of the applicant appeared at Sr. No.20, the applicant having made an offer of Rs.46,01,000/-. Respondent No.3 was found to be the highest offerer by the Sale Committee considering the offer of Rs.51,00,000/-. The offerers were called upon by the Sale Committee to revise their offers by inter se bidding but the applicant did not take part in the said process. Respondent No.3 revised its offer at inter se bidding in presence of the Sale Committee and the offer of Rs.69,00,000/- was found to be the highest by the Sale Committee. Thereupon Official Liquidator's Report No.14 of 2008 was filed by the O.L. requesting the Company Court to accept the offer made by respondent No.3.

[5] On 12.02.2008 the Company Court passed an order accepting the final offer made by respondent No.3 after conducting inter se bidding before the Company Court wherein respondent No.3 and two other bidders, who had made bids just below the bid of respondent No.3, participated in the inter se bidding conducted by the Court. Respondent No.3 was declared to be the successful bidder having raised the bid to Rs.73,00,000/-, which was found by the Company Court to be more than the value of the assets determined by the approved valuer.

[6] On 25.03.2008 the applicant moved Company Application No.213 of 2008 seeking recall of the order dated 12.02.2008 made by the Company Court, and also with a prayer to restrain O.L. from accepting any amount pursuant to order dated 12.02.2008. On 27.03.2008 the Company Court made an order issuing notice to the parties for inter se bidding while restraining the O.L. from executing the sale deed in favour of respondent No.3, who had already by that date paid the entire amount as per order dated 12.02.2008. After considering the reply filed by respondent No.3 the Company Court allowed Company Application No.213 of 2008 by recalling earlier order

dated 12.02.2008 in Official Liquidator's Report No.14 of 2008 and confirmed fresh sale in favour of the applicant for a sum of Rs.90,00,000/-.

[7] On behalf of respondent No.3, the present appellant, the aforesaid order dated 03.04.2008 was assailed principally on the ground that the applicant had not approached the Company Court with clean hands and had made various misstatements by suppressing relevant and material facts. It was submitted that in the original application and the supporting affidavit dated 25.03.2008 the fact of the applicant having been a party to the bidding process before the Sale Committee was suppressed and the subsequent affidavit dated 27.03.2008 cannot be considered to be sufficient as there was no evidence forthcoming for the so-called misunderstanding in conveying of instructions and receipt of instructions as stated in the second affidavit dated 27.03.2008. It was further contended that in fact the application dated 25.03.2008 did not contain a single ground as to why the earlier sale confirmed in favour of respondent No.3 was required to be set aside in absence of any material irregularity, inadequacy of price obtained or any other similar factor relevant for setting aside a sale made by the Company Court. Referring to various decisions of the Apex Court in the case of - (i) Divya Manufacturing Company (P) Ltd. V/s. Union Bank of India, (2000) 6 SCC 69; (ii) LICA (P) Ltd. V/s. Official Liquidator & Anr. (2000) 6 SCC 79; AND (iii) LICA (P) Ltd. V/s. Official Liquidator & Anr., (2000) 6 SCC 82 it was contended that the Company Court had erred in referring to the Supreme Court decision in case of Divya Manufacturing Company Private Limited (supra) without appreciating that the same was not laying down any absolute proposition as the Company Court had sought to read. Reliance was also placed on an unreported decision of this Court, rendered on 15-19.10.2004 in Company Application No.305 of 2004, wherein one of us was a party, to contend that the principles which would permit interference by way of disturbing a confirmed sale had been laid down and also in which circumstances the Company Court could exercise review jurisdiction to set aside a concluded sale in the said decision; that none of the principles was applicable on facts of the case.

[8] On behalf of the applicant the appeal is resisted by submitting that an inadvertent error in first affidavit dated 25.03.2008, which has already been explained in subsequent affidavit dated 27.03.2008, is being capitalized upon by respondent No.3 in these proceedings, but the Company Court had already accepted the explanation tendered by the applicant and recorded that the offer made by the applicant was required to be accepted considering the fact that the difference between the sale price of Rs.73,00,000/- and the offer of Rs.90,00,000/- was substantial. It was further submitted that despite the Company Court having called upon respondent No.3 to participate in inter se bidding with the applicant, respondent No.3 had declined to avail of the said offer and should not be now heard to make a grievance when the offer

made by the applicant was accepted by the Company Court. It was further submitted that as laid down by the Apex Court in case of Divya Manufacturing Company Private Limited (supra), once a higher price was offered even if there was no material irregularity or fraud in the conduct of sale, confirmation of sale by a Court at a grossly inadequate price could be set aside on the ground that the same was not just and proper exercise of judicial discretion. That the Court was required to ensure that there was no underbidding at the time of auction through the Court and review was permissible in such circumstances. That the concept of review as provided for in Order XLVII Rule 1 of the Code of Civil Procedure, 1908 cannot be strictly applied to the proceedings like the present one where the Company Court is required to act in the best interest of the creditors while disposing of the properties of the Company in liquidation. It was further pointed out that the Company Court had, while passing the impugned order, recorded that the applicant had not derived any undue advantage and, therefore, the objections raised by respondent No.3 were not accepted. That in fact respondent No.3 had not suffered as the amount of Rs.73,00,000/- had been ordered to be refunded with 12% interest as respondent No.3 had shown no inclination to make any further offer in the matter. Attention was invited to various decisions of the Apex Court which have already been referred to submit that in each case the prime consideration which weighed with the Court was inadequacy of the sale price for setting aside a concluded sale.

(8.1) When the Court called upon the learned counsel for the applicant to show as to why the creditors of the Company in liquidation had not suffered considering the fact that the O.L. had been directed to pay 12% interest on the amount paid by respondent No.3, the learned counsel responded, after obtaining instructions, that the applicant was ready to bear the said interest amount, if so directed by the Court. Similarly, when attention of the learned counsel was invited to the fact that even in case of Divya Manufacturing Company Private Limited (supra) the Apex Court had, after setting aside the confirmed sale, directed the Company Court to invite fresh bids and conduct an open auction once again, the learned counsel responded that if the Court so desires directions may be issued to conduct the bidding process once again by permitting the applicant to participate.

[9] On behalf of the O.L. the learned advocate submitted that even if the powers of review laid down in Order XLVII Rule 1 of the Code of Civil Procedure, 1908 may not be held to be applicable in such proceedings the exercise of review could be undertaken only provided the confirmation of the sale by a Court was found to be not a just and proper exercise of judicial discretion. For this purpose reliance was placed on Calcutta High Court decision in case of Sharawankumar Agarwal Vs. Shrinenp Investment Ltd., (1990) 2 Comp LJ 231 (Cal) with special reference to Paragraph Nos.43 and 44 of the

said judgment. Referring to the decision in case of M/s. Kayjay Industries (P) Ltd. Vs. M/s. Asnew Drums (P) Ltd. & Ors., (1974) 2 SCC 213 it was submitted that the said judgment which was by a three judges Bench laid down the principles in which circumstances it was open to a Court conducting a sale to decide what could be termed a better price. That the exercise of sale through Court had to be undertaken bearing in mind the faith in the Court proceedings that people have, more particularly those intending to participate in such auction. That the said judgment also explained as to what was the meaning of the term 'material irregularity' in the conduct of a sale through the Court. It was, therefore, submitted that if the aforesaid principles are borne in mind, no case was made out for disturbing the confirmed sale in the facts of the present case. That the O.L. was not in fact averse to receive a higher price for the property in question but only if such an exercise was within the established parameters in law.

[10] The principles which have been laid down time and again by the Apex Court as to in which circumstances the Court can confirm an auction sale can be briefly stated, more particularly in relation to a subsequent higher offer - whether the same can constitute a valid ground for refusing confirmation of sale for offer already received, or disturbing a confirmed sale. In case of M/s. Navalkha and Sons Vs. Sri Ramanya Das & Ors., 1969 (3) SCC 537 after reviewing the case law it has been laid down:

"..... In Gordhan Das Chuni Lal v. T. Sriman Kanthimalhinatha Pillai it was observed that where the property is authorised to be sold by private contract or otherwise it is the duty of the Court to satisfy itself that the price fixed is the best that could be expected to be offered. That is because the Court is the custodian of the interests of the Company and its creditors and the sanction of the Court required under the Companies Act has to be exercised with judicial discretion regard being had to the interests of the Company and its creditors as well. This principle was followed in Rathnaswami Pillai v. Sadapathi Pillai and S. Soundarajan v. M/s. Roshan & Co. In A. Subbaraya Mudaliar v. K. Sundarajan it was pointed out that the condition of confirmation by the Court being a safeguard against the property being sold at an inadequate price, it will be not only proper but necessary that the Court in exercising the discretion which it undoubtedly has of accepting or refusing the highest bid at the auction held in pursuance of its orders, should see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud. It is well to bear in mind the other principle which is equally well-settled namely that once the Court comes to the conclusion that the price offered is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already received. [See the decision of the Madras High Court in Roshan & Co's case (supra)]."

[11] Therefore, merely because a subsequent higher offer has been received the same would not constitute a valid ground for refusing confirmation of sale once the Court comes to the conclusion that the price offered is adequate. In the present case the stage of confirmation of sale was already over and, therefore, the aforesaid ratio would apply with a more greater rigour, namely, mere subsequent higher offer cannot be the basis for setting aside a confirmed sale unless and until the Court comes to the conclusion that the price offered and confirmed by the Court at the earlier stage was not adequate. In the facts of the present case the Court itself has recorded in its order dated 12.02.2008 that the sale price of Rs.73,00,000/- was required to be accepted as the same was more than the report of approved valuer. This finding has to be appreciated in the context of the fact that in the earlier round of proceedings the sale had not been confirmed by the Company Court on the basis of a valuation report which was three years old on the date when the matter was placed before the Company Court for confirmation of sale.

[12] Unless the Court is satisfied about the adequacy of the price the act of confirmation of sale would not be a proper exercise of judicial discretion. But once the sale is confirmed the scope of interference with the discretion which was exercised is limited. In the first instance, unless it is shown that the discretion has been exercised by the Court unreasonably, capriciously or by adoption of unjudicial approach or on basis of the application of wrong principle, a subsequent higher price per se would be no ground to interfere.

[13] In the case of M/s. Kayjay Industries (P) Ltd. (supra) it was laid down :

"7. A Court sale is a forced sale and, notwithstanding the competitive element of a public auction, the best price is not often forthcoming. The judge must make a certain margin for this factor. A valuer's report, good as a basis, is not as good as an actual offer and variations within limits between such an estimate, however careful, and real bids by seasoned businessmen before the auctioneer are quite on cards. More so, when the subject-matter is a specialised industrial plant, which has been out of commission for a few years, as in this case, and buyers for cash are bound to be limited. The brooding fear of something out of the imported machinery going out of gear, the vague apprehensions of possible claims by the Dena Bank which had a huge claim and was not a party, and the litigious sequel at the judgment-debtor's instance, have 'scare' value in inhibiting intending buyers from coming forward with the best offers. Businessmen make uncanny calculations before striking a bargain and that circumstances must enter the judicial verdict before deciding whether a better price could be had by a postponement of the sale. Indeed, in the present case, the executing Court had admittedly declined to affirm the highest bids made on 16-5-1969, June 5, 1969 and August 28, 1969, its

anxiety to secure a better price being the main reason. If Court sales are too frequently adjourned with a view to obtaining a still higher price it may prove a self-defeating exercise, for industrialists will lose faith in the actual sale taking place and may not care to travel up to the place of auction being uncertain that the sale would at all go through. The judgment-debtor's plea for postponement in the expectation of a higher price in the future may strain the credibility of the Court sale itself and may yield diminishing returns as was proved in this very case.

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... The expression 'material irregularity in the conduct of the sale' must be benignantly construed to cover the climax act of the Court accepting the highest bid. Indeed, under the Civil Procedure Code, it is the Court which conducts the sale and its duty to apply its mind to the material factors bearing on the reasonableness of the price offered is part of the process of obtaining a proper price in the course of the sale. Therefore, failure to apply its mind to this aspect of the conduct of the sale may amount to material irregularity. Here, substantial injury without material irregularity is not enough even as material irregularity not linked directly to inadequacy of the price is insufficient. And where a Court mechanically conducts the sale or routinely signs assent to the sale papers, not bothering to see if the offer is too low and a better price could have been obtained, and in fact the price is substantially inadequate, there is the presence of both the elements of irregularity and injury. But it is not as if the Court should go on adjourning the sale till a good price is got, it being a notorious fact that Court sales and market prices are distant neighbours. Otherwise, decree-holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. May be, subsequent events, not within the ken of the executing Court when holding the sale, may prove that had the sale been adjourned a better price could have been had. What is expected of the Judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors, and, if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale. The Court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of Court sales will be introduced."

(emphasis supplied)

[14] Therefore, if a Court acting on the basis of a valuer's report has proceeded to confirm the sale after considering the fair value of the property, the general economic trends, large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case there should not be any act by the Court which signals that any confirmed sale can be lightly set aside. Once the order confirming the sale shows application of mind and indicates that all relevant facts have been considered before confirmation of sale, unless and until such an exercise is shown to be unreasonable or based on wrong principle, confirmed sale cannot be set at naught.

[15] The observations made in case of Divya Manufacturing Company Private Limited (supra), on which great reliance has been placed on behalf of the applicant, have to be understood in the context of the controversy before the Apex Court. In the said case initially Divya had offered to purchase the property for a sum of Rs.37,00,000/- which was enhanced to Rs.85,00,000/- and thereafter Divya withdrew its offer seeking permission of the Court to withdraw 80% of the amount of Rs.85,00,000/-. The Court permitted such an exercise subject to the condition that the 20% amount retained was liable to forfeiture if ultimately there was no buyer to make a bid at a sum of Rs.85,00,000/- or above. Thereafter, Divya revised its offer on finding that there were two other bidders of Rs.1.01 crores and Rs.1.25 crores. Divya raised the offer to a sum of Rs.1.30 crores. However, before any further steps could be taken after the acceptance of offer of Divya at a sum of Rs.1.30 crores as recorded in order dated 02.07.1998, on 10.07.1998 one of the participants to the bidding process, raised offer to Rs.1.40 crores followed by another participant by making an offer of Rs.2 crores. All this took place within a span of 10-11 days. It was in the aforesaid context that the Apex Court noted that there appeared to be gross undervaluation and hence, it was observed: "... In this set of circumstances, when correct market value of the assets was not properly known to the Court and the sale was confirmed at a grossly inadequate price, it was open to the Court to set it at naught in the interest of the Company, its secured and unsecured creditors and its employees. The appellant is also duly compensated by payment of Rs 70 thousand each by Respondents 7 and 8." Thus, in the facts and circumstances of the said case the Court had come to the conclusion that correct market value of the assets was not known to the Court and the sale was confirmed at a grossly inadequate price.

[16] In the present case while passing the impugned order dated 03.04.2008 the Court has placed reliance on the aforesaid decision in case of Divya Manufacturing Company Private Limited (supra) but without recording as to whether the sale price of Rs.73,00,000/- realized, which was confirmed vide order dated 12.02.2008, was

inadequate or without recording whether the Court was not aware about the correct valuation of the property. There is no finding to the effect that the judicial discretion vested in the Court had been exercised unreasonably or an unjudicial approach based on wrong principle had been adopted while confirming the sale vide earlier order dated 12.02.2008.

[17] In the unreported order dated 15-19.10.2004 in Company Application No.305 of 2004 the position of law, by which the Court can interfere with a concluded contract by way of auction sale for the purposes of setting aside the same, has been summarized in the following words:

"16. Apart from the applicability of principles regarding review jurisdiction being equally applicable to order dated 05/03/2004 it is also necessary to bear in mind the settled position of law by which the Court can interfere with concluded contract by way of auction sale for the purpose of setting aside the same. The applicant has to show that there was some material irregularity and fraud. However, an allegation in this regard is not enough. There must be adequate material to substantiate such allegation. Further, the objector must show that such material irregularity resulted in substantial injury to the Objector. In absence of such pleading and evidence in support thereof it is not open to set aside an auction sale. (Ref: Shri Ram Maurya v. Kailash Nath and others, AIR 2000 SC 3402 - Shri Ram Maurya Vs. Kailash Nath and others).

16.1 Other factors which would come into consideration are where the sale is conducted with undue haste without any reserve or upset price being fixed; the valuation itself is suspect and there is inadequate publicity resulting into situation where best possible price was not procured. These factors cumulatively would affect an auction sale and would permit the Court to set aside the same considering the Companies (Court) Rules, 1959. (Ref : AIR 1999 SC 1715 - Allahabad Bank etc.etc. Vs. Bengal Paper Mills CO.Ltd. & Others).

16.2 As already stated mere proof of material irregularity and inadequacy of price realised by itself are not sufficient. What the objector has to establish is that not only there was inadequacy of price realised but that, that inadequacy was caused by reasons of material irregularities or fraud. (Ref: AIR 1971 Supreme Court 2337 Radhey Shyam Vs. Shyam Behari Singh)."

[18] One more important factor which is required to be borne in mind is : an auction sale made and confirmed by the Court should not be lightly set aside / cancelled as the same would go to affect the credibility of the Court in the eyes of public at large. The Apex Court has also in this context stated in case of M/s. Kayjay Industries (P) Ltd.

(supra) that merely because one or the other party requests for waiting for a higher price the Court is not expected to keep on postponing confirmation of sale and the requirement is only that the Court should satisfy itself that having regard to the fair value of the property adequate price is available, otherwise it would strain the credibility of the Court sale itself.

[19] Therefore, in the present set of facts and circumstances of the case, on application of the aforesaid principles it is not possible to state that the earlier order dated 12.02.2008 made in Official Liquidator's Report No.14 of 2008 was suffering from any of the legal infirmities so as to warrant recalling of the said order, cancelling the confirmed sale and passing a fresh order only on the basis of the applicant making a higher offer at a subsequent point of time without participating in the auction which the Court conducted and, even prior thereto before the Sale Committee.

[20] Apart from the aforesaid position in law there is one more aspect of the matter which would disentitle the applicant : and that is the conduct of the applicant. It is not in dispute that the applicant was one of the offerers having made a bid at a sum of Rs.46,01,000/- before the Sale Committee but did not choose to participate in the inter se bidding by revising the offer when called upon to do so by the Sale Committee. This exercise took place on 24.08.2007. Thereafter, the applicant absented himself all throughout and approached the Court on 25.03.2008 only after the sale was confirmed in favour of respondent No.3 by the Court on 12.02.2008. The supporting affidavit dated 25.03.2008 states that the applicant was not aware of the process of invitation of offer and for this purposes the following averments made in the said affidavit are material:

"3. I submit that the applicant was not aware of the process of invitation of offer as the applicant did not come across the advertisements issued by the Official Liquidator.

5. I submit that the applicant was not aware of the process of invitation to offer as also the inter se bidding held before this Hon'ble Court at any stage, though the applicant was interested to submit its bid. The applicant submits that the applicant is desirous to purchase the entire assets forming part of Lot No.A as described hereinabove of the Company in liquidation for a consideration of Rs.81.50 lacs subject to the orders of this Hon'ble Court for inter se bidding. I submit that the applicant is also willing to deposit the EMD and other charges as may be directed by this Hon'ble Court."

[21] Thereafter, the second affidavit dated 27.03.2008 has been filed wherein the aforesaid averments are sought to be explained by stating as under :

"1. I have filed an affidavit dated 25.3.2008 in support of the Judges Summons, wherein in para 5, the following statement is made:

"I submit that the applicant was not aware of the process of invitation to offer as also the inter se bidding held before this Hon'ble Court at any stage, though the applicant was interested to submit its bid."

2. I state that through misunderstanding on account of miscommunication with my Advocate, who had drafted the said Affidavit, the said statement has been made. In fact, the applicant had submitted its tender/bid with the Official Liquidator pursuant to the public advertisement published during first/second week of August 2007 in the local newspapers. The auction before the Sale Committee had taken place on 24.8.2007. I state that thereafter, the Official Liquidator had filed its Report being OLR No.14 of 2008 for confirmation of sale in favour of the highest bidder. Upon the said Report, being filed, this Hon'ble Court was pleased to issue notice on 18.1.2008 on the highest bidder, M/s. Sarvaiya Exports Ltd. and also on the second and third highest bidders in the auction held before the Sale Committee. It appears that thereafter, an inter se bidding had taken place in this Hon'ble Court in the proceedings of OLR No.14 of 2008 amongst the said first three highest bidders. The applicant is not aware as to when the said bidding had taken place in this Hon'ble Court. However, the applicant came to know about such inter se bidding and the sale being confirmed in favour of M/s. Sarvaiya Exports Ltd. at a much later point of time, when upon instructions, the Advocate of the applicant obtained a simple typed copy of the said order dated 12.2.2008 from this Hon'ble Court.

3. For the purpose of preparing the Affidavit dated 25.3.2008 in support of the present Judges Summons, the Advocate for the applicant was conveyed that the applicant was not aware of the bidding that had taken place before this Hon'ble Court in the proceedings of OLR No.14 of 2008. However, on account of some misunderstanding, by mistake of my Advocate a statement has been made in the Affidavit dated 25.3.2008 giving an impression that the applicant was not aware of the process of invitation to offer at any stage.

4. I hereby beg to clarify the same and state that the applicant had come across the public advertisement published in local newspaper inviting tender / bid, issued on behalf of the Official Liquidator and had also submitted its tender / bid before the Official Liquidator / Sale Committee. Further, the applicant was not aware of and had not participated in the inter se bidding that had taken place in this Hon'ble Court in the proceedings of OLR No.14 of 2008."

[22] Thus, it is apparent that on reading the two affidavits together the Court ought to have, in the first instance, put the applicant to strict proof and called for further explanation as to what was the applicant doing in the interregnum, i.e. between 24.08.2007 when the applicant opted out of bidding before Sale Committee, and 25.03.2008 when the application was filed before the Company Court. It appears that the applicant was waiting till the other bidders were out of the race and thereafter, without participating in the auction, the applicant intended to steal a march over the other bidders, including the successful bidder. The learned counsel for the applicant in this context fairly stated that the applicant was trying to arrange for finance and it was only when financial arrangement could be made the applicant approached the Court. The Court appreciates the frankness of the learned counsel, but the same only goes to prove the fact that the applicant was all along aware of the stage of the proceedings and waited for an opportune time to approach the Court. Even otherwise, this cannot be a valid ground for upsetting a confirmed sale.

[23] There is nothing on record either in the first affidavit dated 25.03.2008 or the second affidavit dated 27.03.2008 as to when and how the applicant derived knowledge about confirmation of sale having been made on 12.02.2008. In fact the applicant waited for the successful bidder, respondent No.3, to tender the entire sale price and approached the Court only at that late stage to contend that it was open to the Court to intervene before the O.L. executed the sale deed as, till that point of time, the sale could not be stated to have been concluded.

[24] This conduct of the applicant has to be appreciated from a slightly different angle because merely comparing the confirmed sale price of Rs.73,00,000/- with the figure of Rs.90,00,000/- may yield a distorted picture. The applicant had originally made an offer of Rs.46,01,000/- and refused to revise the said offer on 24.08.2007 when called upon to do so by the Sale Committee. As against that on 24.08.2007 itself respondent No.3 raised initial offer of Rs.51,00,000/- to Rs.69,00,000/- before the Sale Committee denoting an upward revision to the tune of Rs.18,00,000/- on 24.08.2007. When the matter came up before the Company Court for confirmation of sale on 12.02.2008 the said figure of upward revision of Rs.18,00,000/- got further enhanced by another Rs.4,00,000/- and thus there was an upward revision to the tune of Rs.22,00,000/- by the successful bidder between the point of time of opening of bids on 24.08.2007 and confirmation of sale on 12.02.2008. During this very period the applicant remained silent without revising the offer made. Not only this, even after the order made on 12.02.2008 the applicant consumed nearly a month and a half before approaching the Court. None of these factors can be said to be irrelevant when one considers the same in context of adequacy of price. The concept of adequacy of price has always to be judged in light of the fact situation obtaining on any given day and cannot be

considered in hindsight after passage of time as laid down by the Apex Court in case of M/s. Kayjay Industries (P) Ltd. (supra). The only caveat being, if any of the relevant factors for confirmation of sale are absent when the same is confirmed, or any of the relevant factors are present to subsequently indicate that while making an order the judicial discretion exercised stands vitiated. In the facts of the present case none of the positive or the negative factors are present.

[25] Any confirmed sale cannot be set aside merely because it is permissible to do so in exercise of judicial discretion before execution of the sale deed on the plea that subsequently higher price has been offered. Taken to its logical end, this exercise would be an unending exercise because hypothetically there can always be subsequent higher offer, and in no case can a confirmed sale attain finality. All the factors which have to be taken into consideration while confirming a sale would come into play every time a confirmed sale is set aside, and more particularly on formation of a syndicate offering a higher price as, in the present instance, the applicant waited for arranging finance and thereafter approached the Court for having the confirmed the sale set side.

[26] In the circumstances, it is apparent that neither in law nor on facts was the applicant entitled to have the confirmed sale set aside and a fresh sale confirmed in its favour. Accordingly, the impugned order dated 03.04.2008 is quashed and set aside restoring the order dated 12.02.2008 made by the Company Court.

[27] It is an admitted fact that respondent No.3 has already made the payment of the entire sum of Rs.73,00,000/-, and vide communication dated 27.03.2008 had called upon the O.L. to execute the sale deed in favour of respondent No.3 but the O.L. could not do so only because of the interim directions issued by the Company Court on 27.03.2008. In the circumstances, the O.L. is directed to comply with condition No.2(B) of order dated 12.02.2008 within 07 (seven) days as stipulated therein, and execute the sale deed subject to all other conditions being fulfilled.

[28] In the view that the Court has adopted in light of the facts and circumstances of the case the Court has not found it necessary to accept the request of the applicant to set aside the second confirmation of sale and start the process de novo considering the fact that the company was ordered to be wound up as far back as on 06.09.1994.

[29] At this stage the learned advocate for the applicant requests that the operation of this judgment and order be stayed for a period of 06 (six) weeks. Considering the conduct of the applicant and the facts which have come on record, the request does not merit acceptance and is accordingly rejected.

[30] The appeal is accordingly allowed in the aforesaid terms. There shall be no order as to costs. Direct service permitted.