

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.08.2011

Coram

The Hon'ble Mrs. Justice R.BANUMATHI

and

The Hon'ble Mr. Justice B.RAJENDRAN

O.S.A.No.129 of 2008

Sri Krishnasamy Reddiar Educational Trust

112,. Nellikuppam High Road

Cuddalore _x0016_ 607 001

rep.by its Managing Trustee

.. Appellant

Vs

1. The Official Liquidator,

High Court, Madras

(as the Liquidator of M/s.Union

Motor Services Limited)

2. The Assistant General Manager

Indian Bank, ARMB Branch-1

Circular Office Building,

No.55, Ethiraj Salai,

Willington Estate,

Chennai _x0016_ 600 008

3.Citi Co-op Maruthi Finance Ltd.,

"Sakkethi Towers"

Anna Salai, Chennai _x0016_ 2

4.State Bank of Travancore,

Industrial Finance Branch,

816/817 Poonamallee High Road

Kilpauk, Chennai _x0016_ 10

5. Indus Industries Bank Ltd.,

No.3, Village Road,

Nungambakkam, Chennai _x0016_ 34

6.Centurian Bank Limited,

"Padma Complex",

No.320, Anna Salai,

Chennai _x0016_ 35

7.The Federal Bank Limited,

No.62, Mount Road,

Chennai _x0016_ 2

8.M/s.DCL Finance Limited,

6-3-569/1, Opp.RTA Office,

Somaji Guda

Hyderabad _x0016_ 2.

9. S.Durai

.. Respondents

Respondent No.9 is impleaded
as party respondent vide order
of Court dated 13.3.2008 made
in m.P.No.2 of 2008

For Appellant : Mr.T.R.Rajagopalan,
Senior Counsel

and

Mr.D.Ravichander

For Respondents : Mr.AR.L.Sundaresan,

Senior Counsel

for

Mr.S.R.Sundar (R1)

Mr.R.Krishnakumar for R.2

Mr.Parthasarathi,Sr.Counsel

for

Mr.T.Nithyanandam for R.9

No Appearance for RR5 to 8

JUDGMENT

(Judgment of the Court was delivered by R.BANUMATHI, J.)

Being aggrieved by the Order passed by the learned single Judge in C.A.No.2729 of 2007 in C.P.No.174 of 2001 dated 25.1.2008, the appellant/ 3rd party has preferred this appeal.

2. The brief facts, which led to the filing of this appeal are as follows:-

M/s.Union Motors Services Limited was ordered to be wound up by the order of this Court dated 21.9.2004 made in C.P.No.174 of 2001. The Official Liquidator was appointed as a liquidator of the said Company with a direction to take charge of all assets and effects of the company in liquidation. Pursuant to the aforesaid directions, Official Liquidator has taken possession of the assets of the Company situated at (i) No.32 and 46 Thiru.Vi.ka Industrial Estate, Ekattuthangal, Chennai_x0016_ 32 and (ii) 3 branch offices situated at No.4, Pattulos Road, Chennai_x0016_ 2 and (iii) another Branch Office situated at 118 Manapet, Bathoore Commune Panchayat, Union Territory of Pondicherry and at No.104, bridge Station Road, Sellur, Madurai-2.

3. The Official liquidator has also valued the aforesaid assets and filed sale application. By order dated 5.12.2007 made in C.A.No.2729 of 2007, this Court has directed the Official Liquidator to sell the immovable properties situated at Madurai and Pondicherry and in this appeal, we are concerned with the property situated at Pondicherry. For the said property in Manapet, Court has fixed the upset price at Rs.115 lakhs. On 25.1.2008, Court has considered the offer made by 9th respondent - S.Dorai for a sum of Rs.1,85,00,000/- as the highest offer and confirmed the same in favour of the 9th respondent. In the said property at Manapet, the appellant Trust is running a Teacher Training institute under the name of Krishnaswamy College of Teacher Training Institute under agreement of lease and the appellant institute also participated in the auction conducted on 25.1.2008. Recording the submission made by the Official Liquidator that the appellant Trust is in occupation of the immovable property situated at Pondicherry under a lease agreement, by the order dated 25.1.2008,

Court has directed the Trust to hand over vacant possession of the property to the Official Liquidator within first week of July 2008 and directed the Official Liquidator to communicate the order to the appellant Trust. Accordingly, the Official Liquidator sent the letter dated 11.2.2008 addressed to the Managing Trustee of the Appellant with a request to make necessary arrangements to hand over the said premises to the official Liquidator.

4. Being aggrieved by the direction of the Court to hand over vacant possession, the appellant Trust has preferred this appeal.

5. Learned counsel for appellant has submitted that the appellant became tenant in the property by virtue of a lease agreement dated 22.1.2000 and subsequently renewed by another lease agreement dated 22.12.2000 on a monthly rent of Rs.5,000/- with 20 percent increase for every five years. Case of Appellant is that as a tenant, the appellant is in lawful possession of the property and that the appellant cannot be evicted except under process of law and any direction to hand over vacant possession is not legal and without jurisdiction. On behalf of the appellant it was contended that it has obtained appropriate recognition from NCTE for running the teacher training institution in the said premises and if the appellant is directed to vacate the premises it will have the effect of closing the institution itself and therefore prays for setting aside the said order dated 25.1.2008. Further contention of appellant is that the appellant, being a lawful tenant, is entitled to protect his possession and cannot be evicted under the guise of auction sale in favour of the 9th respondent or in any manner except under due process of law.

6. The learned Senior Counsel for Official Liquidator Mr.AR.L.Sundaresan would further contend that the appellant Trust is aware of the sale proceedings and the appellant Trust itself participated in the auction and being the second highest bidder and also lessee in the property of the Company in liquidation, cannot stall the sale of the assets of the Company in liquidation. Drawing our attention to terms of lease deed, learned Senior Counsel further contended that the lease rent fixed is a very low amount and the terms are heavily tilted in favour of the lessee which raises serious doubts about the deed.

7. Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the Official liquidator has submitted that the successful bidder- S.Dorai, 9th respondent remitted EMD of Rs.18,50,000/- only on various dates and the balance sale consideration of Rs.1,66,50,000/- has not been remitted by the purchaser. Pointing out that the 9th respondent _x0016_ auction purchaser has not paid the balance sale consideration, the learned Senior Counsel for Official Liquidator Mr.AR.L.Sundaresan would further contend that a fresh auction could be conducted by fixing the present market value of the property. It was further submitted that the 9th respondent, being a defaulter, in view of clause 20 of the terms and conditions of public auction, EMD of Rs.18,50,000/- paid by the 9th respondent is to be forfeited.

8. Onbehalf of the auction purchaser, learned Senior Counsel Mr.S.Parthasarathi has contended that since the matter was pending before the appellate Court and stay was also granted on 14.3.2008, the 9th respondent did not pay the balance sale consideration and the 9th respondent is ready to pay the balance sale consideration. The learned Senior Counsel would submit that in any event, if the sale is set aside, the appellant is entitled to refund of EMD.

9. The appellant is said to have entered into lease agreement with Company in liquidation on 22.1.2000 for demised building of 8400 sq.ft along with adjacent vacant land (about 5.33 acres) for a lease rent of Rs.5,000/- per month for a period of 11 months, which expired on 21.12.2000. Again, the Company in liquidation is said to have entered into a fresh lease agreement for a period of 30 years in respect of the said building of 8400 sq.ft and the adjacent vacant land at Rs.5,000/- per month with 20 percent increase in rent on every five years, commencing from 22.12.2005 and so on. Even the recitals in the lease deeds stated that the demised property is described in the Schedule. The lease agreement filed in the typed set of papers does not contain any Schedule. As per the recitals in the lease deed, the building with carpet area of 8400 sq.ft and the adjacent vacant land in new Survey No.115/3 Manapet village is said to have been leased out. As seen from the tender notice, the extent of the adjacent vacant land is 5.33 acres and 8400 sq.ft of built up area. The terms of lease deed are heavily loaded in favour of the lessee. We fail to understand as to how such large extent of property with a spacious building has been rented out for a meagre sum of Rs.5,000/- per month with marginal increase once in 5 years.

10. Even though the lease deed is stated to be for thirty years, the lease agreement was not registered. The winding up petition was filed on 29.6.2001. The lease granted under the 1st lease deed (dated 22.1.2000) expired on 21.12.2000. The next lease deed is dated 22.12.2000. As per Section 531-A of the Companies Act, any transfer of property, movable or immovable, or any delivery of goods, made by a Company, not being a transfer or delivery made in the ordinary course of its business or in favour of a purchaser or encumbrancer in good faith and for valuable consideration "if made within a period of one year" before the presentation of a petition for winding up, or the passing of a resolution for voluntary winding-up of the Company shall be void against the liquidator. The said lease deed dated 22.12.2000 is within a period of one year prior to filing of a winding up petition. Even though the Official Liquidator has not filed any petition to set aside the lease deed dated 22.12.2000, the lease deed being for long period of 30 years, it falls within the prohibition of Section 531-A.

11. By perusal of the records, it is seen that the appellant has entered into a lease agreement (22.12.2000) with the company in liquidation _x0016_ M/Union Motor Services Limited. The Official Liquidator was appointed and the Official Liquidator has taken possession of the assets in 2004. Now the Official Liquidator is the custodian of the property. The purpose of winding up is to facilitate the protection and optimum realisation of the assets with a view to ensure equitable distribution among the creditors. Now the appellant is said to be paying the lease rent to the official liquidator. Learned counsel for the appellant contended that since the appellant is paying the rent to the official liquidator, the appellant must be deemed to be in possession as a lawful tenant.

12. On behalf of the Official Liquidator, learned Senior Counsel Mr.AR.L.Sundaresan has contended that the appellant has entered into a lease agreement with the Company on 22.12.2000, which is well within a period of one year prior to the filing of winding up petition and hit under the provision of Section 531-A of the Companies Act. The learned Senior Counsel would further contend that it is unbelievable that a spacious building of 8400 sq.ft with the surrounding land of 5.30 acres was leased for a meagre sum of Rs.5,000/- per month with a 20 percent increase in rent for every five years. The learned Senior Counsel would contend that the lease deed has been brought into existence only to deprive the claims of the secured creditors and the employees. Placing reliance upon judgment of single Judge of the Calcutta High Court in Company Petition No.217 of 2011 - In Re: Prudential Capital Markets Limited (In liquidation) reported in (2008) 1 CompLJ314(Cal), the learned Senior Counsel would contend that the appellant had unjustly stayed in the Company property and therefore

the appellant has to be directed to pay a reasonable amount as damages for use and occupation beyond July 2008.

13. Even though the Official Liquidator is collecting rent from the appellant, it would not amount to attornment of tenancy nor the acceptance of the leasehold right of the appellant. Any amount collected by the Official Liquidator from the appellant could only be towards damages for use and occupation of the property. Mere fact that the appellant is paying the amount to the Official Liquidator would not in any manner confer any right upon the appellant Trust. The lease agreement between the appellant and the erstwhile company in liquidation would not have any bearing upon the liquidation proceedings, more so in view of Section 531-A.

14. It is pertinent to bear in mind that the lease deeds (22.1.2000 and 22.12.2000) have been executed for a meagre lease rent of Rs.5,000/- per month. The second lease deed dated 22.12.2010 is for a long period of 30 years and large extent of property i.e., 8400 sq.ft of building along with land of about 5.33 acres in between Cuddalore and Pondicherry was leased out at a meagre rent of Rs.5,000/- per month with increase at 20 percent for every five years. The lease is not free from doubt. We need to consider the bonafides of the transaction in the light of the following:-

(i) The lease was within a period of one year prior to filing of winding up petition;

(ii) Lease deed (dated 22.12.2000), even though stated to be for thirty years, was not registered; and

(iii) The lease was for a meagre sum of Rs.5,000/- per month with increase at 20% after a long period of 5 years.

15. Considering the terms of lease in favour of appellant, we are of the view that the intention of the Company appears to be to deny the assets to the secured creditors/creditors by bringing in a tenant. Taking note of facts and circumstances of the case, by the impugned order, the learned single Judge rightly directed the appellant to hand over the property during the first week of July 2008 to the official Liquidator i.e., not later than 7.7.2008.

16. Considering a case of identical facts and the scope of Section 531-A of the Companies Act, the learned single Judge of the Calcutta High Court in Company Petition No.217 of 2011 - In Re: Prudential Capital Markets Limited (In liquidation) reported in (2008) 1 CompLJ 314(Cal), has held as under:

"38. In Biswabani case MANU/SC/0486/1979: (1980) 1 SCR 650, the creation of tenancy or the original lease was free from doubt, which is not the case here when the first agreement was entered into in derogation of the express undertaking given by the company to the Reserve Bank. Again in the Biswabani case, the transferee was entitled to protection as a tenant under the rent laws as on the date of the relevant agreement being found void for want of registration. Under Section 446(2) of the Act, the Company Court has the jurisdiction to go into the question as to the

transactions raised by the official liquidator. The scandalous transactions that the respondent seeks to defend are indefensible on facts and in law.

39. ...

40. Section 531 A of the Act provides that any transfer of property or goods made by a company within one year before the presentation of a winding up petition against it will be void unless such transaction was in the ordinary course of business. In principle, the same tests as to intent as in Section 531 apply to a transaction challenged under Section 531A of the Act and the onus is on the official liquidator seeking to avoid the transaction to establish that the transfer was not made in the ordinary course of the company's business or that it was not made in good faith or for valuable consideration. As to whether the transaction is made in good faith or for valuable consideration is woefully inadequate, there may arise a presumption of want of good faith. Again, even if there is adequate consideration, the official liquidator may attempt to establish that a valuable asset of the company was sought to be shielded against the claims of the company's creditors. The official liquidator's challenge would not pass muster if he cannot establish lack of bona fides on the part of the transferee.

41. In either case, whether under Section 531 or under Section 531 A of the Act, for the rigours thereunder to apply and the transfer to be declared void, it must be evident that the company or the controlling mind thereof was aware of the imminent winding up of the company, took out a valuable asset of the company from the general pool to be ultimately available to creditors and dealt with such asset by the impugned transaction. The test that has to be applied in either case has to be one that would hold good for the earliest date of the period covered by either section."

We agree with the views taken by the learned single Judge of the Calcutta High Court.

17. In the case on hand, the facts are writ large that after filing of the winding up petition, the second lease deed was executed for thirty years period on a meagre rent of Rs.5,000/- per month with minimal increase of 20 percent for every five years. But for the stay order granted by the Bench (14.3.2008), the appellant could not have remained in possession after July 2008. But for the stay order granted by the Division Bench, the Official Liquidator would have taken possession of the property and put the assets of the Company for the maximum advantage of the secured creditors of the Company in liquidation. The large extent of built up area of 8400 sq.ft and the land surrounding was leased out to the appellant. We find much force in the contention of the learned Senior Counsel for Official Liquidator. Keeping in view the interest of the Company in liquidation, secured creditors and the claims of the employees, it would be appropriate to direct the appellant to pay damages for use and occupation of the building and the surrounding land.

18. Having regard to the fact that the appellant had been in possession of a large extent of property, we felt that the appellant could be directed to pay rent of Rs.75,000/- - Rs.1,00,000/- per month after July 2008. At this juncture, it is necessary to refer to the happenings in this Court on various dates of hearing.

19. On 5.8.2011, the appellant was represented by Mr.D.Ravichander, learned counsel. After hearing the contentions, we expressed the view that it is appropriate for the appellant to pay atleast Rs.75,000/- per month as damages for use and occupation from July 2008. Thereafter, we have posted the matter "for pronouncing orders" on 8.8.2011. On 8.8.2011, we have heard Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the Official Liquidator. The Official Liquidator has submitted that the property in occupation of the appellant would fetch atleast Rs.50,000/- per month and the same can be fixed as the reasonable amount towards damages for use and occupation of the property. Per contra, learned Counsel for the appellant has submitted that the appellant is a Trust and running a Teachers Training Institute, where there is poor intake of students. However, he stated that Senior Counsel Mr.T.R.Rajagopalan is leading the appellant in this matter and requested time for further submissions.

20. Again, we listed the matter on 9.8.2011 "for pronouncing orders". The learned counsel for appellant Mr.D.Ravichander submitted that the property in occupation of the appellant might fetch between Rs.25,000/- - Rs.50,000/- and that he would persuade the appellant to pay reasonable rent and learned counsel has only submitted that since the appellant is running an educational institution, the appellant wants reasonable time to vacate and hand over vacant possession. Learned counsel for the appellant then submitted that he would file an affidavit of undertaking of the appellant to deliver vacant possession of the property and also undertaking to pay reasonable amount for use and occupation. Having regard to the submission, we have again posted the matter on 11.8.2011 under the caption "for pronouncing orders".

21. On 11.8.2011, when the matter was listed, appellant was represented by Senior Counsel Mr.T.R.Rajagopalan along with Mr.D.Ravichander. On 11.8.2011, the affidavit of the appellant was filed stating that the appellant may be permitted to withdraw the appeal. In the said affidavit, the appellant has stated as under:

"... 4. I state that the trust is running a teacher training institute in the property, and there is a poor intake of students and the trust feel very hard to run the institute and the further running of the institute will not be in the interest of the trust. Hence, the trust had decided to vacate the property which is the subject matter of appeal within a period of two months, and I undertake to maintain the property in a good manner.

5. Hence, I humbly pray that this Hon'ble Court may be pleased to permit the appellant to withdraw the appeal as otherwise the appellant will be put to serious loss and untold hardships."

22. In our considered view, the appellant is not justified in filing the memo seeking permission to withdraw the appeal. As we pointed out earlier, but for the stay granted by the Division Bench (14.3.2008), the Official Liquidator would have taken possession of the property and would have put the assets for the maximum advantage of the secured creditors and the employees. It is fairly well settled that in case if any interim order has been passed and the party takes advantage thereof and ultimately if the petition/appeal is found to be without any merit, interest of justice requires that any unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised.

23. Observing that the party, who succeeds ultimately, is to be placed in the same position in which it would have been if the Court would not have passed the interim order, in AMARJEET SINGH AND OTHERS VS. DEVI RATAN AND OTHERS, ((2010) 1 SCC 417) the Supreme Court has held as under:

"17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court. (Vide Shiv Shankar v. U.P. SRTC, (1995 Supp(2) SCC 726), GTC Industries Ltd. v. Union of India (1998) 3 SCC 376) and Jaipur Municipal Corpn. v. C.L. Mishra (2005) 8 SCC 423).

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20. In South Eastern Coalfields Ltd. v. State of M.P. (2003) 8 SCC 648, this Court examined this issue in detail and held that no one shall suffer by an act of the court. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences.

21. The Court further held: (South Eastern Coalfields case (2003) 8 SCC 648, SCC pp. 664-65, para 28)

28. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated.

In Amarjeet Singh's case ((2010) 1 SCC 417), For the same proposition, the Supreme Court also referred to the decisions of KARNATAKA RARE EARTH V. DEPTT. OF MINES & GEOLOGY, ((2004) 2 SCC

783); MAHADEO SAVLARAM SHELKE V. PUNE MUNICIPAL CORPN., ((1995) 3 SCC 33) and GRINDLAYS BANK LTD. V. ITO, ((1980) 2 SCC 191).

24. Applying the ratio of the above decisions, we are of the view that the appellant having taken shelter under the order of stay from July 2008 and continued to be in occupation of the property for more than three years, and having taken advantage of the stay order granted by the Court, now cannot seek to withdraw the appeal. The Company in liquidation and the secured creditors, who ultimately succeed, are to be placed in the same position. We are constrained to disapprove the conduct of the appellant. Having taken number of adjournments for filing necessary affidavit of undertaking, the appellant is not justified in filing the affidavit seeking permission to withdraw the appeal. Notwithstanding the affidavit seeking for permission to withdraw the appeal, in the interest of the secured creditors and the claims of the employees of the Company in liquidation, we direct the appellant to pay Rs.25,000/- per month from July 2008 to September 2011. The appellant is granted time for vacating and handing over vacant possession of the building and vacant land till 30.9.2011 as per the affidavit of undertaking filed by the appellant.

25. Coming to the sale of the assets for auction of the properties consisting of land to an extent of 5.33 acres in R.S.No.115/3 along with building thereon by fixing the price on 25.1.2008, the 9th respondent - S.Dorai was the highest bidder for a sum of Rs.1,85,00,000/- and the same was confirmed in his favour. The 9th respondent has remitted only EMD of Rs.18,50,000/-. As per the terms and conditions of the tender-cum-auction, 50 percent of the sale consideration has to be paid within 45 days of date of auction i.e., on or before 11.3.2008 and the balance 50 percent will have to be paid within 45 days thereafter. Admittedly, the 9th respondent has deposited only EMD and thereafter the sale consideration has not been deposited. Admittedly, the 9th respondent has not remitted the balance sale consideration within the stipulated time. In the event of non-payment of balance sale consideration, as per clause (20) of the terms and conditions, the EMD is liable to be forfeited.

26. The learned Senior Counsel for 9th respondent has submitted that because of the stay granted by this Court, the 9th respondent was under the bonafide impression that the time is extended for deposit of balance sale consideration. The learned Senior Counsel would further submit that the 9th respondent is now ready to deposit the sale consideration and if so directed with necessary interest.

27. The above contention does not merit acceptance. Remittance of 1st instalment of sale consideration was on or before 11.3.2008 and stay was granted by this Court only on 14.3.2008 and therefore the 9th respondent cannot take shelter under the order of stay granted by this Court. On 14.12.2009, the Division Bench has clarified that the interim stay is restricted only to dispossession alone. Even after the said clarification (14.12.2009), the 9th respondent has not come forward to deposit the sale consideration. Since the 9th respondent has committed default in payment of the sale consideration, in our considered view, the Official Liquidator should have already taken necessary steps to bring the properties for fresh auction.

28. The Official Liquidator has to safeguard the properties of the Company in liquidation and the Court has got inherent powers to safeguard the interest of the properties vested with the Official Liquidator. The Court is the custodian of the properties vested with the Official Liquidator. Even though this is an appeal preferred by the lessee, in the interest of the Company in liquidation and to safeguard the interest of the secured creditors and employees, it is necessary to set aside the sale and order fresh sale by fixing the present market value.

29. In an identical case reported in (Nuziveedu Seeds Limited vs. Official Liquidator, High Court as the Liquidator of Standard Motor Products of India Limited (in Liquidation) and others) (2006) 134 Company Cases 396 (Madras), a Division Bench of this Court has set aside the very sale confirmed in favour of the highest bidder at the instance of a third party, who preferred the appeal. In that case, though no appeal was filed by either of the contesting parties, when it was brought to the notice of this Court by a third party regarding the procedural irregularities in conducting sale, this Court set aside the auction sale. The Division Bench set aside the sale on two grounds namely (i) opportunity was not given to third parties and (ii) the successful bidder in the auction, in whose name the sale was confirmed, has not paid even the first instalment due as per the directions of the Company Court. It is an identical situation as the case in hand, in that case, the successful bidder was directed to deposit 10% of the balance amount namely Rs.13.37 crores on or before 08.12.2004, but he has not paid the same. The successful bidder took a stand that the Original Side Appeal filed by the third party was pending and stay was also granted and therefore he could not proceed further. Subsequently, a clarification petition was also filed and the Division Bench, by order dated 28.04.2005, though granted extension of time to pay Rs.60 crores within 30 days, the successful bidder has not remitted the same and inspite of the argument of the counsel that the said amount was not paid only due to the order of interim stay granted by this Court, the Division Bench held that the subsequent order has not been complied with and consequently, the very sale itself was set aside.

30. In the present case on hand, interim order was granted staying all further proceedings. Subsequently, even in the year 2009, a clarification was sought and this Court clarified that the stay was only in respect of dispossession alone therefore the auction purchaser ought to have deposited the amount but it was not done. The fact remains that when the amount has not been paid by the successful bidder before this Court, this Court, as custodian of the company in liquidation, has every right to cancel the sale even in an appeal filed by a third party.

31. In the case on hand, the earlier auction was in the year 2008. Since three years have passed and keeping in view the steep increase in land prices, in order to ensure the assets secure best price and in the interest of the Company and also secured creditors, sale held on 25.1.2008, in which the 9th respondent was declared the highest bidder, is set aside. The Earnest Money Deposit paid by the 9th Respondent shall not be refunded till the completion of fresh auction. On completion of the fresh auction proceedings, the auction purchaser - 9th respondent is at liberty to file petition before single judge seeking return of the EMD. The learned single Judge shall consider the same and pass appropriate orders after defraying the expenses incurred towards advertisement and other charges.

32. For the fore-going reasons, rejecting the request for withdrawal of the appeal, this appeal is disposed of with the following directions:-

(a) the appellant shall pay the amount of Rs.25,000/- per month as damages for use and occupation from July 2008 till the appellant delivers vacant possession of the property i.e., 30.9.2011. Since the appellant is stated to be running a Teachers Training Institute, the appellant is granted time till 30.9.2011 to vacate and hand over vacant possession of the property, as the appellant Trust itself has filed an affidavit of undertaking to vacate the property on or before 30.09.2011 recording the undertaking. As the time is granted as per the undertaking of the appellant, if the appellant fails to deliver vacant possession of the property on or before 30.09.2011, it is open to the Official Liquidator to take immediate possession of the property in accordance with law. That apart, the Official Liquidator is also at liberty to initiate appropriate proceedings for non-delivery of the possession of the property.

(b) The auction dated 25.1.2008 is set aside and the fresh auction is ordered to be conducted within a period of three months. Upset price shall be fixed at the present market value. After fixing the market value, learned Judge shall issue necessary directions for conduct of fresh auction. Keeping in view the interest of secured creditors, we request the learned single judge to complete the exercise within a period of three months from the date of receipt of copy of this order.

However, there is no order as to costs. Consequently, the connected miscellaneous petition is closed.

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The Sub-Asst.Registrar

Original Side

High Court

Madras