NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1477 of 2023

[Arising out of order dated Order dated 09.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench, Prayagraj in IA No.226/2022 in CP (IB) No.223/ ALD/2018]

IN THE MATTER OF:

M/s. BRS Refineries
(Successful Bidder) a partnership firm,
Through one of its partner Ms. Urmila Sarda

Office at:
S.Y. No. 190/IA, 190/1 E, 190/3,
Annaram, Village Farooqnagar Mandal
Mahoobnagar, District- Telangana- 509228.

...Appellant

Versus

Mr. Supriyo Kumar Chaudhari, Liquidator,
JVL Agro Industries Ltd. (Under Liquidation),
IP Registration no. IBBI/IPA-OOI IP-P00644/2017-18/11098,

Office at:
BDO Restructuring Advisory LLP
C/O BDO India LLP
Floor 4, Duckback House 41
Shakespeare Sarani
Kolkata-700017

...Respondent

Present:

For Appellants: **Ms. Tanu Priya Gupta and Ms. Khushi Sharma, Advocates.**

For Respondent: **Ms. Swati Dalmia and Mr. Palzer Moktan, Advocates.**

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by a Successful Auction Purchaser has been filed challenging order dated 09.03.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench, Prayagraj rejecting IA No.226/2022 filed by the Appellant challenging the action of the Liquidator forfeiting EMD of Rs.96 Lakhs pursuant to e-auction of the assets of JVL Agro Industries Ltd. Further, direction was sought to refund the amount of Rs.98 Lakhs along with compensation /damages caused to the applicant due to non-issuance of Sale Certificate. Brief facts of the case necessary to be noticed for deciding this appeal are:

(i) JVL Agro Industries Ltd. was directed to be liquidated by order of the Adjudicating Authority dated 19.08.2020. The Liquidator in pursuance of order of liquidation issued public notice for sale as a going concern, which auction having failed, a public notice dated 04.03.2022 was issued by the liquidator for sale of stand-alone assets (A-1 to A-11) of the Corporate Debtor. A-11 was old expired stocks of more or less 1000 tons of packed Refined Edible Oil, not fit for human consumption, lying at JVL's plant at Deoghat, District Purba Medinpur, Haldia, West Bengal.

(ii) E-auction was fixed for 06.04.2022. Reserved price for asset A-11 being Rs.9.60 Crore, EMD of Rs.96 Lakhs was required for participation. Appellant submitted EMD of Rs.96 Lakhs and

participated in the e-auction held on 06.04.2022. Appellant submitted bid of Rs.12.60 Crores and was declared as successful bidder for Block A-11.

(iii) Letter of Intent was issued by the Liquidator on 07.04.2022 to the Appellant along with bank details for remittance of the balance consideration. Appellant wrote letter dated 08.04.2022 informing that the Appellant is ready to lift the entire material at one-time and shall make full payment, as once confirmation is given that total oil is unpacked and ready to load. On 11.04.2022, the Appellant again wrote to the Liquidator praying for loading of material confirmation. On 11.04.2022, Appellant wrote to the Liquidator that 48 hours prior intimation may be given so that payment can be made and the material can be lifted for delivery.

(iv) The Liquidator wrote to the Appellant on 12.04.2022 informing that NCLT, Allahabad Bench vide order dated 04.04.2022 has directed to proceed with the auction, however, it was directed that Liquidator shall not proceed to issue the Sale Certificate without prior approval of the Adjudicating Authority. Appellant was informed that matter was listed on 26.04.2022. The Liquidator assured that on receipt of order of the Adjudicating Authority directing in this regard, the Liquidator shall start dispatching the aforesaid oil subject to receipt of full payment successful bid amount.

(v) On 12.04.2022, the Appellant informed the Liquidator that they are ready with the full payment, however, Sale Certificate cannot be issued as per order of the NCLT. It was stated that as and when the NCLT order is received for issue of Sale Certificate, payment shall be made within 7 days of order. Letter also confirmed that they have received Letter of Intent.

(vi) Liquidator on 08.06.2022 wrote to the Appellant that payment has not been yet received of INR 11,64,00,000 plus applicable GST of INR 63,00.,000 after adjusting the amount of EMD and period of 30 days from date of Letter of Intent has expired, hence, the Appellant is required to pay interest of INR 13,01,128/-.

(vii) An application was also filed by the Appellant before the Adjudicating Authority praying for urgent listing of IA No.98/2022 in May, 2022.

(viii) The Liquidator on 22.06.2022 sent an email to the Appellant informing that the Liquidator does not have any authority to waive interest.

(ix) On 28.06.2022, the Liquidator wrote to the Appellant that Appellant has to pay the balance consideration on or before 05.07.2022 to avoid forfeiture of EMD.

(x) Appellant on 22.06.2022 written an email to the Liquidator praying for cancellation of the e-auction and refund the EMD. Appellant

thereafter filed an application being I.A. 226/2022 before the Adjudicating Authority praying for following reliefs:

> ***"RELIEF/ PRAYER***
>
> *In view of the facts mentioned in the aforementioned paragraphs, the applicant prays for the following reliefs:*
>
> *i. Direction may be given to the Respondent/ Liquidator to withdraw his email dated 28.06.2022;*
>
> *ii. Direction may be given to the Respondent/ Liquidator to refund the EMD amount of Rs. 96,00,000/- along with interest;*
>
> *iii. Direction may be given to pay compensation towards the loss incurred by the Applicant;*
>
> *iv. Pass any other appropriate order as this Hon'ble Tribunal deem fit in the interest of justice.*
>
> *v. Interim Order, if prayed for Pending final decision of application the applicant prays for the following interim relief: That this Hon'ble Tribunal may be pleased to direct the respondent to withdraw his email dated 28.06.2022 and refund the amount of earnest money to the Applicant."*

(xi) The Liquidator filed reply to IA No.226/2022 bringing all correspondence between the parties on record. The Liquidator in the Reply stated that the Liquidator is taking steps for disposal of IA No.98/2022. It was pleaded that the Appellant was informed that

Sale Certificate cannot be issued in light of the order dated 04.04.2022 passed by the Adjudicating Authority. Under the E-auction Process Information Document, entire process of sale was subject to orders of the Tribunal, which was expressly communicated to all interested bidders. In the application it was stated that the Appellant till date has not paid the balance consideration. The prayer of the Appellant to refund the EMD and compensation are contrary to the Code, Regulations and E-auction Process Document. There has been no failure on part of the Liquidator in delivery of auctioned block and the Liquidator could not issue Sale Certificate due to order of the Adjudicating Authority.

(xii) On 01.06.2023, the Adjudicating Authority has rejected I.A. No.98/2022 paving ways for issuance of Sale Certificate to all bidders. IA No.226/2022 thereafter heard by the Adjudicating Authority and by order dated 09.08.2023 has been rejected by the Adjudicating Authority. The Adjudicating Authority held that as per the Letter of Intent, the balance sale consideration was required to be paid within period of 90 days. Applicant had clear knowledge that e-auction dated 06.04.2022 is subject to orders passed by NCLT, NCLAT and Supreme Court of India. The Applicant unconditionally accepted the Letter of Intent. Applicant is not entitled for any compensation and claim made by the Applicant for refund of EMD is not sustainable. Application was dismissed. Aggrieved by the said order this appeal has been filed.

2. We have heard learned counsel for the Appellant as well as learned counsel appearing for the Respondent.

3. Learned counsel for the Appellant challenging the order contended that on the date when e-auction was held i.e. 06.04.2022, Appellant was not informed that there is an order passed on 04.04.2022 by the Adjudicating Authority that Sale Certificate shall be issued only with the leave of the Adjudicating Authority. It is submitted that the Appellant came to know about the said order only on 12.04.2022 when the Liquidator sent information to that effect. It is submitted that the Appellant was always ready to pay the balance amount and lift the material but due to non-issuance of Sale Certificate material could not be lifted. It is submitted that after Appellant being declared as successful bidder the Appellant has already entered into transaction with third parties for onward transportation of the edible oil and Appellant having not been able to handover the material to the third parties has suffered loss which had to be compensated by the Liquidator. It is submitted that non-payment of balance amount was not on account of any failure by the Appellant but because of inability of the Liquidator to handover the material on time. It is submitted that the under the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, the Liquidator was required to execute the Certificate of Sale on payment of full amount. The Liquidator being not able to execute the Certificate of Sale and transfer of said assets, no fault can be laid on the appellant for non-payment of full amount. The Liquidator being unable to transfer the assets and issue Sale Certificate, the Appellant has written to the Liquidator on 22.06.2022 to

refund the EMD. It is submitted that the EMD of the Appellant of Rs.96 Lakhs has been forfeited without any fault of the Appellant.

4. Learned counsel for the Liquidator refuting the submission of learned counsel for the Appellant submits that the E-auction Process Document clearly contemplate that e-auction sale as well as Sale Certificate were subject to order of the Tribunal which fact was clearly in the notice and known to all bidders including the Appellant. In view of the order dated 04.04.2022 passed by the Adjudicating Authority that Liquidator to proceed with the sale process but shall not issue Sale Certificate without leave of the Tribunal, the Liquidator could not have issued any Sale Certificate in favour of the Appellant. It is submitted that Appellant did not deposit the balance amount within the time allowed as per the clauses of the E-auction Process Document. EMD submitted by the Appellant was required to be forfeited and has been forfeited by the Liquidator. Appellant cannot claim refund of the EMD, it having breached the contract and it having not made payment in time allowed. The Liquidator has made all efforts to get the application IA No.98/2022 decided and in fact orders were reserved in the said application by the Adjudicating Authority on 07.06.2022, however, due to reconstitution of bench the application was further heard and could be decided on 01.06.2023. The Liquidator has made all efforts including filing application for early hearing and participating in all hearing. Liquidator is not to be blamed for non-decision of application IA No.98 of 2022 which can be decided only on 01.06.2023. There were several successful bidder of different blocks that waited leave of the Court and after 01.06.2023 obtained Sale Certificates and

lifted material. The Appellant however failed to deposit the amount and lift the material. It is submitted that the Liquidator cannot owe any liability of any loss as alleged by the Appellant with regard to any further sale of the material by the Appellant. Appellant having not deposited balance amount in consideration, EMD was to be forfeited as per the clauses of the Process Document. Appellant having agreed to honour the clauses of the E-auction Process Document cannot be heard in contending that even if Appellant has not paid the balance sale consideration, EMD need to be refunded to the Appellant. Appellant cannot in midway pray to withdraw from the e-auction and pray for refund of the EMD.

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. There is no dispute between the parties that Appellant was declared as Successful Bidder with regard to Block A-11 which had reserve price of Rs.9.60 Crore. Appellant admittedly deposited EMD of Rs.96 Lakhs and submitted bid of Rs.12.60 Crores, which was accepted as highest bid for Block A-11. Liquidator sent two emails on 07.04.2022 to the Appellant informing about Appellant being declared the Successful Bidder for Block A-11 for amount of Rs.12.60 Crores. By email dated 07.04.2022 sent at 19.36 hours, Letter of Intent and Bank Details were sent, which email is as follows:

"LETTER OF INTENT

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7 April 2022 at 19:36

Liquidator JVL<liquidatorjvl@lqjvl.com>

To: brsrefinerles2@gmail.com

Cc: PRAMUKH BIO FOOD PRODUCT, Abhishek Kumar, Asit Das, Suhas Mitra, riteshjha@bdo.in, Amrita Nandy, Supriyo Chaudhuri

Dear Successful bidders

Congratulations!

We are sending two copies of LOI along with bank details fur remittance of balance consideration, through speed post on your address mentioned in the EOI submitted by you. The same must be signed by the authorised person and one copy with the send to us on the same address provided to you earlier. We are also attaching a scanned copy of the said LOI duly signed by the Liquidator confirming you as a successful bidder in the auction conducted on 06.04.2022. You are requested to print and sign this scanned copy and send to us via mail by today.

Thanks & Regards

Liquidator Team
JVL Agro Industries Limited (in Liquidation)

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2 attachments
LOI BRS.PDF
BANK DETAILS FOR PAYMENT.pdf"

7. Appellant also wrote to the Liquidator on 11.04.2022 that Appellant is ready with full payment and Liquidator was asked to confirm when Sale Certificate will be issued so that Appellant can make payment and lift the material. Email dated 11.04.2022 is as follows:

"Date: 11th April, 2022

To,

Mr. Supriyo Kumar Chaudhuri,
Liquidator of JVL Agro Industries Limited,
IP Reg. No. IBBI/IPA-P00644/2017-18/11098
BDO Restructuring Advisory LLP
C/o BDO India LLP
4th Floor, Duckback House, 41 Shakespear Sarani,
Kolkata-700017.

Subject: Loading of material confirmation for payment

Ref: E-Auction of Block No. A-11 of the Blocks of Assets of JVL Agro Industries Limited

Dear Sir,

This is to inform you that we are ready with the full payment. Kindly confirm when the sale certificate will be issued so that we can make the payment and lift the material for delivery. We await your confirmation once the oil is unpacked and is ready to load the tankers. We are also ready to lift the part material which is unpacked and make the part payment. We request you to give a 48 hours prior intimation so that payment can be made and the material can be lifted for delivery.

Further, we have received the letter of intent via mail. Once the hard copy is received, the same will be signed and sent to you.

Thanks & Regards,

For BRS Refineries"

8. Liquidator sent reply on 12.04.2022 bringing in the notice of the Appellant order dated 04.04.2022 passed by the Adjudicating Authority that Liquidator shall not proceed to issue the sale certificate without prior approval of the Adjudicating Authority. Email dated 12.04.2022 is as follows:

"Loading Of material Confirmation for Payment

12 April 2022 at 20:23

Liquidator JVL<liquidatorjvl@lqjvl.com>
To: brsrefinerles2@gmail.com

Dear Sir,

We refer to your letters dated 11th April, 2022 received via email.

Further, to our email dated 11th April, 2022 informing you that you have been adjudged the successful bidder in the E-Auction held on 6th April,2022 in respect of Block A- 11, representing 'old expired stocks of more or less 1000 tons of packed Refined Edible Oil, not fit for human consumption, lying at JVL's Plant at Debhog, Dist. Purba Medinipur, Haldia, West Bengal to be unpacked and sold by E-Auction', we would like to draw your kind attention to Clause 1.15 read with Clause 5.11viii of the E-Auction Process Information Document dated 4th March, 2022 which inter alia stipulates that sale of the standalone block/(s) of assets and issuance of sale certificate or Invoice shall be subject to such orders and directions as may be passed by the Hon'ble NCLT/NCLAT and the Hon'ble Supreme Court of India, as the case may be.

While we express our sincere thanks for your participation in the E-Auction process, we would like to inform you that the Hon'ble National Company Law Tribunal (NCLT), Allahabad Bench, vide its order dated 4th April, 2022 directed to proceed with the auction, however, it is stated in the said order that the Liquidator shall not proceed to issue the sale certificate

without prior approval of the Adjudicating Authority. The matter has been listed before the Hon'ble NCLT on 26th April, 2022.

We would like to assure you that on receipt of the Hon'ble NCLT's direction in this regard, we will start dispatching the aforesaid old, expired stock of oil from JVL Haldia Plant, subject to receipt of full payment of the successful bid amount, net of the EMD received, from your end.

Meanwhile, we would request you to immediately send to us the Letter of Intent duly signed by you and arrange to make the payment as mentioned above.

Thanks and Regards

Liquidator, JVL Agro Industries Ltd. (in liquidation)"

9. There has been subsequent correspondence between the parties. On 28.06.2022, the Liquidator requested the Appellant to pay the balance consideration on or before 05.07.2022 to avoid forfeiture of EMD. Email dated 28.06.2022 is as follows:

"On Tue, 28 Jun, 2022, 14:21 Liquidator IVL, <liquidatorivi@lqjvl.com> wrote:

Dear Sir,

Further to our email dated 22-06-2022 we would like to inform you that the time period of 90 days for payment of Balance Consideration of INR 11,64,00,000 together with applicable taxes on total sale consideration including but not limited to GST and TCS is expiring on 5th of July 2022.

We request you to kindly pay the balance consideration amount on or before 5th of July 2022 to avoid forfeiture of your EMD amount.

Please note that till date you are liable to pay an interest of INR 20,28,230.

Calculation of interest till date:
Date of E-auction (H): 06th April 2022
H+30 days: 06th May 2022
Total Sale Consideration: INR 12,60,00,000.00
EMD Amount: INR 96,00,000.00
Balance Consideration: INR 11,64,00,000.00
Total no. of days for which amount has remained outstanding (from 06-05-2022 to 28-06-2022): 53 days
Interest Rate: 12% simple interest
Interest amount: 11,64,00,000 x 12% x 53/365 INR 20,28,230/-

Thanks & Regards

Liquidator Team
JVL Agro Industries Limited (in Liquidation)"

10. The Appellant wrote a letter to the Liquidator on 28.06.2022 praying for cancellation of E-auction and refund of EMD. Letter dated 28.06.2022 is as follows:

"NO.BRS/SDNR/JVL/HAL/2022-23-14

Date: 28th June 2022

To,

Mr. Supriyo Kumar Chaudhuri,
Liquidator of JVL Agro Industries Limited,
IP Reg. No. IBBI/IPA-P00644/2017-18/11098

BDO Restructuring Advisory LLP
C/o BDO India LLP
4th Floor, Duckback House, 41 ShakespearSarani,
Kolkata - 7000 17.

Subject: Forfeiture of EMD amount.

Ref: E-Auction of Block No. A-11 of the Blocks of Assets of JVL Agro Industries Limited

Dear Sir,

With regards to your e-mail dated 28.06.22, we are astonished that you expect us to pay the balance sale consideration along with interest. It is quite unjustified about how without supply of material, receipt of sale certificate and non- reply to our other queries dated 23.06.22; we are expected to pay interest and balance amount.

We had bid in the e-auction with absolute good faith. We were kept in the dark about the petition filed by Ex-Director up to the receipt of EMD. Further, we were assured that the case would wind up in a short period of time. We are already at huge loss as a result of delay in issue of sale certificate. The quality of material will further deteriorate with passage of time. In our e-mail dated 23.06.22, we had explained our perspective on the current situation of the case in detail and the various losses incurred by us as a result of non-receipt of material, to which we have not received your reply.

We have repetitively explained our plight, all the facts clearly describe that the material fact is not informed to us and as a result of delay in issue of sale certificate we are at huge loss. The quality and conditions of material is highly doubtf'ul. Hence, we claim the

following compensation from you already mentioned in our letters dated 22.06 and 23.06.22.

a) Cancellation of E auction and immediate refund of' EMD of Rupees Ninety Six Lakhs.

b) Up to date interest on the EMD amount.

c) Indemnification of the loss of Rs.1.20 Crores incurred by us.

d) Damages for loss of time, money and mental pressure as result of non-information to us of the restriction on issue of sale certificate.

We expect you to take immediate action on the above.

Thanks & Regards

For BRS Refineries"

11. Subsequent to aforesaid, IA No.226/2022 was filed by the Appellant praying for refund of the EMD and compensation, as noticed above. The application filed by the Appellant has been rejected by the impugned order, which is under challenge in this appeal. For consideration of the issues which have arisen in the appeal, we first need to notice certain clauses of the E-auction Process Information Document in which e-auction dated 06.04.2022 was held. Copy of the Process Document has been brought on the record as Annexure A-8 to the Appeal. E-auction Process Information Document dated 04.03.2022 contain 'Notes'. Note VII of the Process Document is as follows:

"VII. The entire process shall be subject to extant Regulations, the IBC and such orders as may be passed by the adjudicating Authority (Hon'ble

NCLT), Hon'ble NCLAT and the Hon'ble Supreme Court of India."

12. Clause 4.3 deals with Earnest Money Deposit (EMD) which was 10% of the reserve price. Reserve Price of all blocks was mentioned in Clause 4.1 where in respect of A-11 reserved price of Rs.9.06 Crore was mentioned. Clause 4.9 deals with forfeiture of EMD. Clause 4.9 is as follows:

> *"**4.9. Forfeiture of EMD:** Without prejudice to any other terms of this E-Auction Process Document, the Ernest Money Deposit furnished by the Prospective Bidder in terms of this E-Auction Process Information Document can be forfeited at any time, upon the occurrence of any of the following events:*
>
> - *If there is a breach of any of the conditions under this E-Auction Process Information Document by the Prospective Bidder or in case the Prospective Bidder is found to have made any false statement, any inaccurate disclosure and/or any misrepresentation; or*
> - *If the Prospective Bidder is found to be ineligible to submit the bid as per the conditions set out in Section 29 A of the IBC (as amended from time to time) or is found to have made a false or misleading declaration of eligibility as per the conditions set out in Section 29A of the IBC (as amended from time to time); or*
> - *If the Prospective Bidder is identified as the Successful Bidder and it fails to accept the Letter of Intent issued by the Liquidator; or*

- *If the Prospective Bidder is identified as the Successful Bidder and it fails to extend the validity of the Earnest Money through the Bank Guarantee till the last date of submission of total sale consideration with an additional claim period of 30 days thereafter; or*
- *If the Successful Bidder fails to make the complete payment towards total sale consideration as per the terms of the Letter of Intent issued by the Liquidator within the stipulated time not exceeding 90 days from the date of E-Auction or the date of Letter of Intent (LOI), whichever is later."*

13. Clause 5.11 deals with 'Other Terms and Conditions of the E-Auction', sub-clause (viii) of which provides as follows:

> *"viii. The issue of sale certificate or invoice, as the case may be, in respect of a particular Block of assets shall subject to such orders and directions as maybe passed by the Hon'ble NCLT/NCLAT and shall be issued in the name of Successful Bidder only. The sale shall be subject to conditions prescribed under the Insolvency & Bankruptcy Code, 2016, and the provisions and regulations made thereunder."*

14. Clause 6 deals with timelines for completion of sale through e-auction. Clause 6 of the document provides as follows:

> ***"6. TIMELINE FOR COMPLETION OF SALE THROUGH E-AUCTION***

The following timetable shall apply to the E-Auction Process as embodied in this E-Auction Process Information Document. The timetable · may be amended/ modified by the Liquidator through issuance of an addendum to the E-Auction Process Information Document and the same will be uploaded on the website of the corporate debtor.

S. No.	*Event*	*Timeline*
1.	*Newspaper Publication of the Sale Notice for sale of the assets of the Corporate Debtor as Stand-alone Block(s) of assets in terms of this E-Auction Process Information Document*	*4th March, 2022*
2.	*Opening of Auction Portal and this E-Auction Process Information Document made available on the websites of the Corporate Debtor as per Terms and Conditions*	*8th March, 2022*
3.	*Submission of Expression of interest (EO!) together with credentials and Application Form in Annexure I along with the documents as specified therein*	*Upto 22nd March 2022*
4.	*Submission of Bid Application Form as per Annexure IV along with Affidavit and declarations as per Annexure V after, due diligence by Prospective Bidders that include reference to documents and information*	*Upto 4th April, 2022*
5.	*Site visit, if required*	*Up to 21st March, 2022, 5.00 PM*
6.	*Submission of EMD*	*On or before 4.00 PM of 4th April 2022*
7.	*Communication to Prospective Bidders who are eligible to participate in auction and providing Login and password for participating in E-Auction*	*5th April 2022*
8.	*Holding of E-Auction*	*H i.e. 6th April 2022 between*

		11 AM and 1 PM (with unlimited extension of 5 minutes each)
9.	*Announcement of Successful Bidder and Demand of Payment Consideration*	*H + 0 working day, i.e., 6th April, 2022*
10.	*Letter of Intent (Lol) to be issued to Successful Bidder*	*H + 1 working days, i.e., on or before 7th April, 2022*
11.	*Unconditional acceptance and signing of Letter of Intent (LOI)*	*H + 1 working days, immediately after receipt of LOI on or before 7th April, 2022, preferably within two hours of receipt of LOI*
12.	*Return of EM D for unsuccessful Prospective Bidders*	*H+ 15 working days*
13.	*Payment of total sale consideration/ balance consideration by Successful Bidder along with GST/ applicable Taxes (For Block A1 to A10)*	*H+90 days, Payment after 30 days will attract interest at 12% p.a.*
14.	*Payment of total sale consideration/ consideration by Successful Bidder along with GST/ applicable Taxes (For Block A 11 only)*	*balance H+7 days, on or before 13th April. 2022*
15.	*Execution of sale certificate or any other document (For Block A1 to A10)*	*Within (1 to 10 days) of (H+N+90 days)*
16.	*Handing over charge of the assets of the Corporate Debtor as Stand-alone Block(s) of assets in terms of this E-Auction Process Information Document to Successful Bidder.*	*Simultaneously with execution of Sale Certificate*

The Timeline as per the Table above may undergo change subject to any further development and/ or unforeseen circumstances which will be uploaded on the website of the corporate debtor and also intimated to the Prospective Bidders via. Email."

15. A perusal of Clause 6.16 indicates that handing over charge of the assets as Stand-alone Blocks has to be simultaneously with execution of Sale Certificate.

16. From the facts as noticed above, it is clear that however Letter of Intent was issued on 07.04.2022 declaring the Appellant as Successful Bidder of Block A-11, but the Sale Certificate could not have been issued in view of order dated 04.04.2022. Order dated 04.04.2022 was passed by the Adjudicating Authority in IA No.98/2022, which order is as follows:

> ***"IA No. 98/2022***
>
> *The Liquidator directed to file reply affidavit in the matter within TEN days from today. Copies of the same be served on the counsel on record for the applicant.*
>
> *List this matter on 26th April, 2022.*
>
> *In the meantime, auction sale to proceed as planned.* ***However, the same shall be subject to outcome of this IA. Further, the liquidator shall not proceed to issue sale certificate without prior approval of this Adjudicating Authority."***

17. When we look into the clauses of the E-auction Process Document, it is clear that there is timeline for payment of balance amount. The Liquidator has communicated 90 days' timeline for payment of balance amount ending on 05.07.2022. Liquidator after expiry of one month also informed the Appellant from 06.04.2022 that the balance amount has to be paid along with interest. Admittedly, the Appellant has not made the balance payment. Clause 4.9, as extracted above, clearly contemplate that EMD could be

forfeited if the Successful Bidder fails to make the complete payment towards total sale consideration as per the terms of the Letter of Intent issued by the Liquidator within the stipulated time not exceeding 90 days from the date of e-auction. Admittedly, the Appellant has not paid the balance amount within the period of 90 days and Clause 4.9 clearly entitle the Liquidator forfeit the EMD.

18. The submission which was advanced by learned counsel for the Appellant is that the Appellant was not aware of order dated 04.04.2022 passed by the Adjudicating Authority that Sale Certificate shall be issued only after leave of the Adjudicating Authority. It is submitted by the Appellant that information of the said order was communicated by the Liquidator only on 12.04.2022. When we look into the E-Auction Process Document, there was clear stipulation that entire sale including issue of Sale Certificate is subject to orders and directions passed by NCLT/NCLAT. Clause 5.11 Sub-clause (viii) has already been extracted above which clearly provides that issue of sale certificate in respect of a particular Block of assets shall subject to such orders and directions as maybe passed by the NCLT/NCLAT. Thus, the Process Document already contemplated that issue of Sale Certificate is subject to orders passed by NCLT/NCLAT. Thus, the submission of the Appellant cannot be accepted that Appellant was not aware that the Sale Certificate shall not be issued without leave of the NCLT. When the Process Document itself contemplate issuance of Sale Certificate subject to order passed by NCLT, all bidders were clearly informed about the said contingency. Present is not a case where the Liquidator due to any deficiency on his part

could not issue Sale Certificate or hand over the material but on account of order dated 04.04.2022, the Liquidator could not issue Sale Certificate and that was cleared only after passing of order dated 01.06.2023 when IA No.98 of 2022 was rejected. Appellant even before the said date communicated that EMD be refunded and filed IA No.266 of 2022. Appellant has neither deposited the balance amount nor has complied with the terms and conditions of the Process Document.

19. The submission of the Appellant is that the material which was sold, of which the Appellant was declared successful bidder was an old expired stocks of more or less 1000 tons of packed Refined Edible Oil, not fit for human consumption delivery of which cannot be suspended for such a long period. When the bidder in any auction participate it is subject to all terms and conditions as provided in the E-auction Process Information Document and all bidders are binding to all terms and conditions of the Process Document. When Clause 4.9 provides that EMD has to be forfeited on occurrence of any event as provided in the clause and one of the event being successful bidder failing to make payment towards total sale consideration, Appellant is clearly bound by said terms and conditions.

20. The Adjudicating Authority in the impugned order has relied on the judgment of Hon'ble Supreme Court in ***"State of Haryana vs. Malik Traders, (2011) 13 SCC 200"***. In the above case, the EMD submitted by Malik Traders in a tender for appointment of agency for collection of toll was to remain valid for 90 days. Before the expiry of said period of 90 days, the Malik Traders wrote for withdrawal of EMD. The bid security given by Malik

Traders was cancelled and amount of Rs.20 Lakhs was forfeited, against which a Writ Petition was filed before the High Court, which was allowed by the Division Bench, which order was challenged by State of Haryana before the Hon'ble Supreme Court. In reference to the aforesaid fact, the Hon'ble Supreme Court laid down following in Para 12 and 13:

> *"12. The right to withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of agreement. A person may have a right to withdraw his offer, but if he has made his offer on a condition that the Bid Security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the Bid Security should not be forfeited and it should be returned to him. Forfeiture of such Bid Security amount does not, in any way, affect any statutory right under Section 5 of the Act. The Bid Security was given by the respondent and taken by the appellants to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence. Such conditions are included to ensure that only genuine parties make the bids. In the absence of such conditions, persons who do not have the capacity or have no intention of entering into the contract will make bids. The very purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in violation of the agreement.*
>
> *13. In taking the above view, we are supported by the decision of this Court in National Highways*

Authority of India v. Ganga Enterprises & Anr. [(2003) 7 SCC 410] which was rendered in a similar case. In the said case, the appellant, National Highways Authority of India, by a notice, called for tenders by 31.7.1997 for collection of toll on a portion of a particular highway. The notice provided that toll plazas would be got completed by the appellant and handed over to the selected enterprise. The notice required the bidders to furnish: (i) a bid security in a sum of 50 lakhs in the form of a bank draft or bank guarantee, and (ii) a performance security in the form of a bank guarantee of 2 crores. The bid security was liable to forfeiture in case the bidder withdrew his bid during the validity period of the bid or failed within the specified period to furnish the performance security and sign the agreement. The bid was to remain valid for a period of 120 days after the last date of bid submission. In terms of the tender document, the respondent firm gave its bid or offer and furnished a bank guarantee in a sum of 50 lakhs. It was an "on-demand bank guarantee" stating that it could be enforced on demand if the bidder withdrew his bid during the period of bid validity or failed to furnish the performance security or failed to sign the agreement. While the validity period of the bid was to end on 28.11.1997, the respondent withdrew its bid on 20.11.1997 and did not furnish the performance guarantee. Therefore, the appellant although found the respondent to be the highest bidder and accepted its offer on 21.11.1997, encashed the bank guarantee for 50 lakhs. The respondent then filed a writ petition in the High Court for refund of the amount."

21. In Para 15, the Hon'ble Supreme Court has quoted with approval earlier judgment of Hon'ble Supreme Court in ***"National Highways Authority of India v. Ganga Enterprises & Anr., (2003) 7 SCC 410"***. In Para 15 of the judgment following was held:

> *"15. Allowing the appeal, this Court held as follows:*
>
> > *"In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted."*

We respectfully agree with the above view of this Court."

22. The Hon'ble Supreme Court ultimately set aside the order of the High Court and upheld the forfeiture of bid security of Rs.20 Lakhs. Hon'ble Supreme Court held that the bid security was liable to forfeiture in case the bidder withdrew his bid during the validity period of the bid or failed within the specified period to furnish the performance security and sign the agreement. In the present case, the Appellant did not deposit the balance amount so as to enable the Sale Certificate to be issued in favour of the Appellant and before the event of Sale Certificate could happen has requested for withdrawal of the EMD. The judgment of the Hon'ble Supreme Court relied by the Adjudicating Authority do support the submission advanced by the Liquidator.

23. Another judgment which has been referred to and relied by the Adjudicating Authority is judgment this Tribunal in ***"Westcoast Infraprojects Pvt. Ltd. vs. Mr. Ram Chandra Dallaram Chaudhary, Liquidator of Anil Ltd., Company Appeal (AT) (Ins.) No.1258 of 2022"***, in which case e-auction was held where Appellant has emerged as highest bidder, EMD of Rs.15 Crore was submitted by the Appellant, Appellant was informed to remit the balance amount, Appellant wrote to the Liquidator for extension of time on the pretext that in the revenue entries the name of Corporate Debtor is not registered. The Liquidator intimated the Appellant, the he having not paid the balance amount within the period, the sale process stand cancelled and part payment is forfeited. An IA was filed by the Appellant

before the Adjudicating Authority seeking various prayers. The Adjudicating Authority noticed that Appellant having failed to deposit the amount, it need not interfere with the cancellation of the sale. An appeal was filed by the Appellant challenging the order of the Adjudicating Authority, which appeal came to be dismissed by order dated 28.04.2023 of this Tribunal. In Para 20 of the judgment this Tribunal laid down following:

> *"20. For purpose of this case, law as laid down in Paragraph 43.7 is relevant where Hon'ble Supreme Court has clearly held that when forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. The statement of law in paragraph 43.7 is fully applicable in the case of the present case. The present is a case where Appellant participated in the e-Auction conducted by the Liquidator under the Liquidation Process Regulations, 2016. Section 74 of the Indian Contract Act has no application in the case of Auction conducted by the Liquidator under the Liquidation Process Regulations, 2016. The terms and conditions of the sale as finalized by the Liquidator under which the e-Auction was held is binding on all including the bidders. Bidders give an unqualified undertaking for participation in the e-Auction after knowing fully well of clauses of the e-Auction Process Document and undertook to abide by the clauses. The submission of the Appellant cannot be accepted that Appellant's EMD cannot be forfeited even though he has committed default in making the payment of balance amount and the Liquidator should file a suit for forfeiting amount deposited by the Appellant. Such*

> *preposterous argument cannot be accepted in view of the fact that Liquidation Process is conducted under the statutory Liquidation Process Regulations, 2016. The terms and conditions of the Process Document has been framed as per statutory empowerment given to the Liquidator by Schedule I of the Liquidation Process Regulations, 2016 as noticed above. When the clauses of the Process Document as noted above, clearly empowers the Liquidator to forfeit the EMD and any payment made in event default is committed by the Highest Bidder, no exception can be taken to the action of the Liquidator in cancelling the sale and forfeiting the amount deposited by the Appellant."*

24. The above judgment clearly lays down that no exception can be taken to the action of the Liquidator in cancelling the sale and forfeiting the amount deposited by the Appellant, the Successful Auction Bidder having failed to deposit the balance amount. It was further held that Bidders have given an unqualified undertaking for participation in the e-Auction after knowing fully well of clauses of the E-auction Process Document and undertook to abide by the clauses. Learned counsel for the Respondent relies on judgment of this Tribunal in ***"VDB Projects Private Limited vs. Anil Mehta, Liquidator of Pratibha Industries Limited, 2023 SCC OnLine NCLAT 173"***, which judgment also supported the submission of the Respondent.

25. In view of the foregoing discussion, we are of the view that the Appellant having breached the clauses of the E-auction Process Information Document and having failed to deposit the balance amount within the time allowed, the Liquidator did not commit any error in forfeiting the EMD. Appellant was not

entitled for refund of EMD and the application filed by the Appellant has rightly been rejected by the Adjudicating Authority. The claim of compensation made by the Appellant has also been rightly negatevated by the Adjudicating Authority. Judgment of this Tribunal in ***"Westcoast Infraprojects Pvt. Ltd. vs. Mr. Ram Chandra Dallaram Chaudhary, Liquidator of Anil Ltd."*** has been referred and relied by the Adjudicating Authority, in which reliance we do not find any infirmity. In result of foregoing discussion, we upheld the order of the Adjudicating Authority and dismiss the Appeal.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

16th July, 2024

Archana