

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, Court II
KOLKATA**

IA(IBC)800(KB)2022

In

CP(IB)1284(KB)2019

*An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016
read with rule 11 of the National Company Law Tribunal Rules, 2016;*

In the matter of:

State Bank of India Financial Creditor

Versus

ESS DEE Aluminium LimitedCorporate Debtor

And

In the matter of:

Lucky Holdings Private Limited**Applicant**

Versus

Deepika Bhurga Prasad, Liquidator ...**Respondent**

Coram:

Smt. Bidisha Banerjee : **Member (Judicial)**

Shri Balraj Joshi : **Member (Technical)**

Appearances through hybrid mode:

For applicant in IA/800/2022 : Mr. Ratnanko Banerji, Sr. Adv.
Mr. Rajarshi Dutta, Adv.
Mr. Debargha Basu, Adv.
Mr. Shounak Mukherjee, Adv.

For Liquidator : Mr. Aditya Gauri, Adv.
Mr. Dhananjaya Sud, Adv.
Mr. Amar Vivek, Adv.
Ms. Shalya Agarwal, Adv.

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		Mr. Chaitanya Bansal, Adv. Ms. Damini Srestha, Adv. Mr. Abhinav Tyagi, Adv.
For IDBI Bank Ltd.	:	Ms. Urmila Chakraborty, Adv. Mr. Duttasoam Bhattacharyya, Adv.
For respondent in IA/199/2022	:	Mr. Anando Mukherjee, Adv. Mr. Shewtank Singh, Adv.

Date of Hearing: 04/01/2023

Date of Pronouncement: 17 /01/2023

O R D E R

Per: Bidisha Banerjee, Member (Judicial)

1. The hearing was conducted in a hybrid mode.
2. This application emanates from a notice dated 04/07/2022 issued by Ms. Deepika Bhurga Prasad, the Liquidator of ESS DEE Aluminium Limited whereby and whereunder the said Liquidator of ESS DEE Aluminium Limited, the R-1 herein, sought to forfeit the earnest money deposited by Lucky Holdings Pvt. Ltd., the applicant, towards a bid.
3. The brief facts leading to the application are as under:
 - (a) On 14/02/2020, by an order passed by this Adjudicating Authority, the application filed by the financial creditor under section 7 of the Insolvency and Bankruptcy Code, 2016 was admitted and Corporate Insolvency Resolution Process in respect of the corporate debtor commenced.
 - (b) By its order dated 08/10/2021, this Adjudicating Authority, ordered the liquidation of the corporate debtor. The respondent was appointed as the Liquidator.

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(c) The applicant came across a newspaper publication on 16/03/2022 of a notice for the sale of the assets and properties of the corporate debtor ESS DEE Aluminium Limited to be conducted by the respondent on 07/04/2022. Such sale notice was, however, subsequently cancelled.

(d) On 07/04/2022, the applicant came across a subsequent newspaper publication of a sale notice dated 05/04/2022 issued by the respondent for an e-auction to be conducted by the respondent, for sale of the corporate debtor as a going concern on 16/04/2022.

(e) The applicant took necessary steps, submitted necessary documents for participation in the e-auction of the corporate debtor as a going concern that was to be held on 16/04/2022 and submitted the EMD of Rs.2,00,00,000/- (Rupees Two Crores only) in the corporate debtor's bank account bearing no.502000663323182 maintained with HDFC Bank, Greater Kailash – I, New Delhi.

(f) On 16/04/2022, the Liquidator through her advocate *inter alia* informed all the bidders that one of the bidders had inadvertently placed a wrong bid and as such the said auction would restart on 18/04/2022 at 11:00 A.M., for 15 minutes from the last correct bid value to the tune of Rs.1,24,00,00,000/-.

(g) On 18/04/2022, by another email issued by the respondent at 11:38 A.M., the respondent informed the bidders that the auction that was scheduled at 11:00 A.M., was inadvertently started at Rs.1,24,00,00,000/- whereas the last bid shown in the e-auction report was Rs.1,24,40,00,000/- which had been rejected on account of inadvertence on the part of another bidder.

(h) On 18/04/2022, the applicant participated along with other bidders in the said re-auction and submitted a bid of Rs.1,24,60,00,000/- and emerged as the highest (H-1) bidder in the said e-auction.

(i) By an e-mail, the respondent *inter alia* informed the applicant on 26/04/2022 that upon discussion held between the respondent and the SCC, the

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applicant was being announced as the successful bidder in respect of the said e-auction at a bid price of Rs.124.60 Crores. By the said email the respondent also called upon the applicant to deposit the amount of Rs.29,15,00,000/- as 1st instalment within 15 days, that is, on or before 11/05/2022.

(j) Though the applicant was initially ready and willing to pay the said sum of Rs.29,15,00,000/- within the time stipulated unfortunately, on 29/04/2022 the applicant was informed by members of the respondent's team that an application had been filed by one Trailblazer Edusol Private Limited, being IA(IBC)/397(KB)2022 challenging the e-auction conducted by the respondent.

(k) The applicant was further informed by the respondent's office that Adjudicating Authority on 09/05/2022 had directed that the applicant to be impleaded in the said application. On 09/05/2022 order, the respondent made an undertaking that the sale shall not be proceeded with.

(l) Pursuant thereto the applicant wrote a letter and e-mail dated 11/05/2022 to the respondent *inter alia* requesting postponement of the date of demand of the first instalment till the completion of the final resolution of the dispute.

(m) On 15/06/2022, the application filed by Trailblazer Edusol Private Limited, being IA(IBC)/397(KB)2022 was dismissed as withdrawn.

(n) On 18/06/2022, by an e-mail the applicant *inter alia* informed the respondent that it was still awaiting order of this Adjudicating Authority dated 15/06/2022 recording the withdrawal of the said application.

(o) By an e-mail dated 23/06/2022, the respondent communicated to the applicant the said order dated 15/06/2022, with a request to make payment as per the said e-mail dated 16/06/2022 issued by the respondent.

(p) Further by an e-mail dated 26/06/2022, the respondent *inter alia* extended time till 28/06/2022 to make payment of the said sum of Rs.29,15,00,000/- .

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(q) By two further e-mails dated 28/06/2022 and 29/06/2022, the respondent sought updates from the applicant in respect of the purported demand of the respondent.

(r) By a letter and e-mail dated 01/07/2022 and 04/07/2022, the respondent sought to forfeit the EMD submitted by the applicant and cancel the bid of the applicant.

(s) Further vide e-mail dated 12/07/2022 the respondent *inter alia* informed the applicant that the said e-auction held on 16/04/2022 and 18/04/2022 had been cancelled on account of non-payment of first instalment in terms of the information document and that the respondent would be conducting another auction to sell the corporate debtor as a going concern.

4. The arguments advanced by the Learned Senior Counsel for the applicant against the forfeiture of EMD are as under: -

(i) None of the terms or provisions of the information document were meant to be binding on any of the bidders in the said e-auction, neither did any of such terms or provisions create any right, liability or obligation in respect of any of the bidders, until a Letter of Intent was issued in favour of the applicant and that no Letter of Intent ('LoI') was issued.

(ii) That the information document only laid down the procedure to be followed by the respondent for conduct of the auction, for evaluating bids submitted therein and for completing the sale of the corporate debtor. Non-compliance of the terms of the information document could only result into rejection of the bid of a bidder. The information document could not be used to determine the rights or liabilities of any of the bidders to the amount submitted by the bidders as EMD, or to retain or forfeit any part of the EMD submitted by any bidder or to unjustly enrich either the respondent or the corporate debtor thereby.

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(iii) Admittedly, no LOI was executed by and between the parties since the Liquidator had undertaken not to proceed with the sale even before expiry of time to execute LOI.

(iv) In absence of any concluded contract between the applicant and the respondent, where no LOI was executed by or between the respondent and the applicant, the applicant had a right to withdraw and/or cancel its said bid and receive refund and/or return of the EMD submitted by the applicant.

(v) The Liquidator voluntarily undertook not to proceed with the sale on 09/05/2022 and such undertaking subsisted till 15/06/2022, there was a substantial delay in the sale process frustrating the timeline set out in the process document (pages 95 to 97 of application). The value of the assets of the Corporate Debtor (specially the 300 MT of aluminium scrap) also fell drastically during the subsistence of such undertaking. Thus, the terms and commercial consideration of the sale were varied to the applicant's detriment. The Liquidator cannot be allowed to retain the EMD and enrich itself despite having frustrated the sale process by way of its own conduct. The sale had become commercially unviable on account of the conduct of the Liquidator and the applicant cannot be penalised for the same.

(vi) That no provision of the Code or the Liquidation Regulations provides for forfeiture of EMD upon withdrawal and/or cancellation of a bid by a bidder prior to a concluded contract existing between the successful bidder and the liquidator in respect of sale by e-auction.

(vii) That the process of sale of the corporate debtor by auction must mandatorily adhere to the provisions of regulation 33 of the Liquidation Regulations read with Schedule I thereof. In terms of the Liquidation Regulations the respondent was not to require payment of any non-refundable deposit or fee for participation in an auction under the liquidation process.

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(viii) The first proviso to para 1(3) of Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 specifically provides as follows:

“Provided that the liquidator shall not require payment of any non-refundable deposit or fee for participation in an auction under the liquidation process.”

(ix) The Liquidator has relied on the declaration furnished by the applicant prior to the e-auction to justify the forfeiture of the EMD. The said declaration was executed by the applicant on 13/04/2022 prior to the auction and prior to the aforesaid conduct of the Liquidator frustrating the timeline and commercial basis of the sale. As such, the declaration is irrelevant for the purposes of adjudication of this application.

(x) That Clause 13.5 of the information document, which provides for forfeiture EMD, is contrary and/or *de hors* the provisions of the Code and the liquidation regulations and therefore illegal and unenforceable. The said clause is inequitable, unjust, onerous and contrary to letter and spirit of the Code and liquidation regulations. Therefore, the respondent is not entitled to and cannot rely upon any clause in the E-Auction terms and conditions for forfeiture of the EMD.

(xi) In order to justify retention of the EMD, the Liquidator was required in law to show that it had suffered loss; however, the reply affidavit filed by the Liquidator is silent on this aspect and contains no allegation of loss being suffered. The Liquidator has not even alleged any difficulty in assessing any loss in the reply affidavit.

(xii) That the respondent cannot be allowed to unjustly enrich herself or the corporate debtor by retaining and/or forfeiting the said EMD of Rs. 2 crores while simultaneously selling the corporate debtor as going concern by way of a

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fresh auction, having suffered no loss due to the delay or withdrawal of the Lucky Holdings Pvt. Ltd. from the bid.

That even assuming but not admitting the information documents to be binding on the applicant, time was the essence of the information document. The respondent was bound to conduct the said e-auction and sale of the corporate debtor within the timeline specified in the information document. No addendum to the information document modifying and/or altering the said timeline was ever issued by the respondent. Despite such features and provisions of the information document, the respondent herself provided an undertaking to not take any steps in the sale of the corporate debtor before this Adjudicating Authority on 09/05/2022 in the hearing of the said application. The execution of the LoI in terms of the information document was to be completed by 16/05/2022, however, on account of the said undertaking given by the respondent on 09/05/2022, the respondent could not even seek deposit of the first instalment amount before 16th June 2022. The inordinate delay caused in the auction process and sale of the corporate debtor was on account of the respondent and not on account of the applicant.

In support, Ld. Counsel would place the following decisions: -

(a) Kailash Nath Associates vs. Delhi Development Authority & Anr.
[(2015) 4 SCC 136]

(b) MBL Infrastructure Limited –vs- Rites Limited and others

APO No. 377 & 378 of 2018 in WP No. 1645 & 1649 of 2010
of the Hon'ble High Court at Calcutta

5. Per contra, the Ld. Counsel for the respondent would in a bid to pulverise and torpedo the arguments of the applicant would submit as under: -

(i) That on 11/05/2022 even after the stay granted on 09/05/2022, Lucky Holdings Pvt. Ltd. had expressed its willingness in no uncertain terms to pay the instalment of 25% that fell due on 10/05/2022

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(ii) The auction sale could not be concluded on time due to the pendency of the IA.

(iii) Even on 18/05/2022, the Lucky Holdings Pvt. Ltd. sought for time till 30/06/2022, and never expressed their intention to withdraw themselves from the bid.

(iv) As such, in terms of the clause in the information document the respondent had every right to forfeit the earnest money.

6. Ld. Counsels were heard, materials on record perused and rival contentions were considered, and following discerned –

(i) The decisions cited by the applicant being MBL Infrastructure (Supra) rendered by the Hon'ble High Court at Calcutta was in regard to enforceability of a forfeiture clause in a notice inviting tender in case of material non-disclosure or concealment by the tenderer and is therefore not pat on the point as raised in the instant matter where earnest money deposited by a successful bidder in a liquidation process is sought to be forfeited as the auction sale could not be concluded, the successful bidder having withdrawn itself from the process.

(ii) It is discernible in the present case, i.e., that the successful bidder being the applicant herein had initially shown all its earnestness to participate in the auction sale and emerged as the highest bidder. It was even willing to pay its first instalment being 25% bid money on 10/05/2022, but for the communication of the order dated 09/05/2022 that sale shall not be proceeded with that continued till withdrawal of the application on 15/6/2022. Till such withdrawal on 15/06/2022 and its communication on 23/06/2022, the Lucky Holding was not required to pay the said instalment to the Liquidator of the Corporate Debtor.

(iii) The earnest money is stated to be paid when the parties intend to be under legal obligation on their part. It is a way of ascertaining that in the given

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circumstances the parties to the contract show that they are in earnest and so they pay for. In the present case, the earnest money was paid by the applicant to express its right earnest as successful bidder to get the sale concluded in its favour. The applicant had agreed to pay first instalment by the date it would fall due. It was only the Liquidator, who had expressly undertaken not to proceed with the sale.

(iv) The delay in completion of the sale could not be attributed to the applicant. The auction sale could not be concluded on time admittedly due to pendency of the IA filed by the Trailblazer Edusol Private Limited.

(v) It is also discernible that no expressed LoI was issued by the respondent, which would give it right to forfeit the earnest money.

(vi) It is visibly evident that it was the respondent who had kept the applicant waiting until 23/06/2022 to communicate the order dated 15/06/2022 issued in the IA, and by a further e-mail on 26/06/2022 even extended time till 28/06/2022 to make payment of the first instalment and by e-mail dated 01/07/2022 cancelled the bid of the applicant, even before the applicant had expressed its intention to withdraw itself from the bid.

(vii) Further the respondent has not pleaded that it has suffered any loss due to non-conclusion of the sale. In fact, it had conducted a further e-auction on 26/08/2022, to sell the Corporate Debtor as a going concern which is the subject matter of an IA(IBC)/1295(KB)2022 filed by the subsequent successful auction purchaser with a bid of Rs.103.40 Crore as against the maximum bid of reserve price of Rs.100 Crore, while the reserve price of previous auction of 16/04/2022 and 18/04/2022 was Rs.90 crore, when Lucky Holdings emerged as H-1 bidder. IA(IBC)/1305(KB)2022 has been filed by the Liquidator seeking extension of time to conclude the Liquidation process as LoI, Sale Certificate and Letter of Possession to successful buyer has been already sent to the subsequent highest bidder.

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7. The Constitution Bench of the Hon'ble Apex Court in the case of "**Fateh Chand vs. Bal Kishan Das**" AIR 1963 Supreme Court 1405 referred to in MBL Infrastructure (supra) *has held that seller cannot forfeit the earnest money received under the agreement to sell even if the buyer is guilty of breach of performance of agreement to sell as forfeiture being in the nature of penalty is hit by Section 74 of The Indian Contract Act, 1872 which cannot take place unless loss is pleaded and proved by the seller.* [emphasis added]

The Hon'ble Apex Court in "**Satish Batra vs. Sudhir Rawal**", (2013) 1 SCC 345 took a view contrary to the one in the Constitution Bench judgment in the case of **Fateh Chand** (supra). However, in its subsequent judgment of "**Kailash Nath Associates vs. Delhi Development Authority**" (2015) 4 SCC 136, where the ratio of **Fateh Chand** (supra) was reiterated, Hon'ble Apex Court held:

"damage or loss is sine qua non for payment of compensation for breach of contract even under S.74" and

"Though in public auctions, prior to conclusion of contracts, earnest money can be forfeited for breach of terms and conditions of auction, S.74 cannot be invoked at pre-contractual stage";

Relevant extracts from the decision would run thus -

"29.Based on the facts of this case, it would be arbitrary for the DDA to forfeit the earnest money on two fundamental grounds. First, there is no breach of contract on the part of the appellant as has been held above. And second, DDA not having been put to any loss, even if DDA could insist on a contractual stipulation in its favour, it would be arbitrary to allow DDA as a public authority to appropriate Rs.78,00,000/- (Rupees Seventy Eight Lakhs) without any loss being caused..."

"42.It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land...."

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows: -

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found *inter alia* in Section 73 of the Contract Act.

43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.”

“43.6 The Expression ‘whether or not actual damage or loss is proved to have been caused thereby’ means that where it is possible to prove actual damage or loss, such proof is not dispensable. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded”. [emphasis added]

8. Following the said two decisions, the Hon’ble Delhi High Court in “**Nafe Singh vs. Sanjay Gupta**” RFA No. 1036/2018 rendered on 21/12/2018, upheld the decision of the Trial Court where it directed refund of earnest money received by the appellant/defendant on the ground that “*in law, a mere breach of contract does not entitle a person to damages and the entitlement to damages is*

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only if loss is pleaded and proved to have been caused on account of the breach of contract to the aggrieved party/seller.”

9. In the given circumstances of the present case where no loss is pleaded by the Liquidator, we are of the considered opinion that the Hon’ble Delhi High Court’s decision in “*Nafe Singh*” (supra) would squarely apply. In the aforesaid backdrop, the respondent is directed to refund the earnest money as paid by the applicant. The refund be made within a period of **four weeks**.
10. The present application stands disposed of with the directions as aforesaid.
11. The Registry is directed to send e-mail copies of the order forthwith to all the parties for information.
12. Certified copy of the order may be issued to all the concerned parties, if applied for, subject to compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Signed on this, the 17th day of January, 2023.

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