

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

I. A.(IB)No..... /KB/2020
in

C.P. (IB) No. 1440/KB/2018

In the matter of:

The Insolvency and Bankruptcy Code, 2016;

And

In the matter of:

An application under Section 60(5) of Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016;

And

In the matter of:

The Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016;

And

In the matter of:

Dena Bank

... Financial Creditor

Versus

M/s.Kharkia Steels Private Limited(In Corporate Insolvency Resolution Process)

... Corporate Debtor

And

In the matter of:

Equal Commosale Private Limited an existing company within the meaning of the Companies Act, 2013 and having its registered office at 11, Brabourne Road, Draupadi Manson, 5th Floor, Room No. 505, Kolkata- 700001

... Applicant

Versus

- 1. Uday Narayan Mitra, the Resolution Professional appointed by this Hon'ble Tribunal in respect of the Corporate Debtor, having his office at 72/1, Dawanagazi Road, Bally, Howrah 711201.**
- 2. Committee of Creditors of M/s. Kharkia Steels Private Limited (In Corporate Insolvency Resolution Process) through the Resolution Professional, having his office at 72/1, Dawanagazi Road, Bally, Howrah - 711201.**

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Coram: Shri Jinan K.R., Hon'ble Member (Judicial)

Counsel Present:

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| 1. Mr. Joy Saha, Sr. Advocate |] For applicant Equal Commosale |
| 2. Ms. Shreya Choudhary, Advocate |] Private Limited |
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| 1. Mr. Utsav Mukherjee, Advocate |] For Resolution Professional |
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| 1. Smt. Kanimozhi VC, Chief Manager, SBI |] For Committee of Creditors |

Date of hearing: 17 .06.2020

Order delivered on: 17 .06.2020

ORDER

Per Jinan K.R. Member (Judicial)

1. M/s. Equal Commosale Private Limited was the successful bidder in respect of two properties belonging to the Corporate Debtor (In short CD) in an auction conducted by the Recovery Officer, Kolkata Debt Recovery Tribunal-II. The CD is under order of CIRP vide order in C.P. (I.B.) No. 1440 of 2018 dated 20th September 2019 by the NCLT Kolkata Bench and appointed Mr. Uday Narayan Mitra as Interim Resolution Professional and later on vide order dated 30th October, 2019 the said Interim Resolution Professional was duly confirmed as the Resolution Professional.

2. Upon being declared as the highest bidder by the Recovery Officer, Kolkata Debt Recovery Tribunal-II, the applicant had made payment of the entire sale consideration together with poundage Fee amounting to a total sum of Rs.8,27,02,000/- by the order of the Recovery Officer dated 17th September 2019. On 4th October 2019 a Sale Certificate in respect of the said two properties was also issued in favour of the applicant. However, in view of initiating CIRP as against the CD vide order dated 14th February 2020, the Recovery Officer, Debt Recovery Tribunal-II, set aside the sale conducted on 3rd September 2019 and withdrew the sale certificate so issued. Despite repeated demand for refund of the amount with interest, the recovery officer has not refunded the amount of Rs. 8,27,02,000/- paid by the applicant against auction purchase of two properties of the Corporate Debtor conducted by the Debt Recovery Tribunal before admission of the CD into CIRP. Hence, filed this application praying for issuing direction to the resolution professional (In short RP) to refund the total consideration amount being Rs. 8,27,02,000/- along with interest at the rate of 18% per annum on and from the respective dates of payment until realisation.

3. The applicant filed this application under section 60(5) of Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules, 2016 with a prayer to here the application urgently since the lock down due to COVID-19 not lifted so far and since the regular work of the tribunal not resumed. Being satisfied with the explanation offered by the applicant the application was listed for hearing on today through video conference. (VC).

4. Heard both sides and perused the documents.

5. Ld. Sr.Counsel Mr. joy Saha submits that although the said sale was held in the presence of the Committee of Creditors including Dena Bank, the said Committee of Creditors completely suppressed the fact that CP(IB) No. 1440 of 2018 had been instituted by the Dena Bank under Section 7 of the I&B Code, 2016 against the Corporate Debtor and thereby the recovery officer proceeded with the sale despite moratorium was in force from 20th September, 2019. According to him, the recovery officer's proceedings with effect from, 20th September, 2019 onwards is to be ignored as it violates section 14 of the Code. He highlighted the list of events as shown below for stressing that the recovery officer has proceeded with the sale confirmation and set aside the sale without any power or jurisdiction.

4th October, 2019	The matter was once again taken up on 4th October, 2019 and the Recovery Officer was pleased to confirm the sale in favour of the applicant herein and directed that Sale Certificate be duly issued in favour of the applicant.
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14th February 2020	The Recovery Officer, in consideration of the Corporate Insolvency Resolution process against the said Company was pleased to declare that the sale conducted on 3rd September, 2019 was set aside and was pleased to withdraw the sale certificate and the order confirming the said sale.
29th May, 2020	The applicant by its letter dated 29th May, 2020 has called upon the respondents to make payment of the said sum of Rs.8,27,02,000/- together with the interest thereon @ 18% per annum.

According to Ld. Sr.Counsel, since the recovery officer has no jurisdiction and that DRT has observed in its order that in view of the admission of the CD into CIRP it has no jurisdiction and since the money was paid to the consortium bank led by SBI, the CoC is liable to refund the amount and therefore, this Adjudicating Authority (AA) has jurisdiction to deal with the issue and that the applicant has no other forum to approach for claiming refund and prays for issuing direction to RP/CoC to refund the amount to the applicant with interest as claimed.

6. The Ld.Counsel Mr. Utsav Mukerjee for RP submits that the subject asset was already under CIRP by virtue of the order of this Hon'ble Tribunal dated 20th September, 2019 prior to confirmation of sale. He would submit that the sale amount may be refunded by the Certificate Holder Banks and that the banks have not transferred the amount to the account of the CD and that there cannot be any direction on the Resolution Professional to refund monies it never had in the first place. Notwithstanding the same, it is clearly and equivocally stated that the RP has no objection to the refund of the monies given by the Applicant by the concerned Certificate Holder Banks. The resolution plan in respect of the

Corporate Debtor has already been approved by the COC and application for approval of the same has been filed. Upon the above said submission the Ld.counsel prays for issuing directions if any deem fit to the AA.

7. Smt. Kanimozhi VC, Chief Manager, SBI representing CoC though was present in the virtual room , she was unable to make submissions directly before us due to technical issue, but as directed by me the Ld.Counsel for the RP has spoken to her over phone, and briefed the observation of the AA and the submission of the Ld.Sr.Counsel for the applicant to her. In reply the Ld. Counsel for RP submits that the certificate holder bank is willing to refund the amount. However, no reason advanced as to why not till date the certificate holder Banks refunded the money and unethically kept the money in their hand.

8. In view of the above said submissions on the side of the RP and CoC it is not necessary for me to probe the matter in depth. The applicant has paid the entire sale consideration in respect of both the properties in the account of certificate holder banks on 17th September, 2019. The DRT proceedings against CD were initiated by a consortium of Banks who are the members of the CoC in the case in hand. So no doubt keeping the money in their hand after setting aside the sale is not proper and just.

9. However coming to the analysis of section 60(5) of the Code, it appears to me that an application of this nature wherein a claim is raised not against the CD or against the properties now held by the CD but is against certificate holder banks who are the members of CoC is not maintainable. It is an inter-se claim in between certificate holder banks who received the consideration and the auction purchaser as held in *M/s. Dynepro Private Limited.Vs. Mr. Nagarajan* [CA (AT) No.229 of 2018 by the Hon'ble NCLAT. At this juncture, the Id. Sr.Counsel for the auction purchaser submits that in equity, the banks cannot be permitted to legalize the wrong done by it for no fault of the auction purchaser and that I have to invoke Rul,11 of NCLT Rules. I do find some force in the said submission on the

side of the applicant/auction purchaser, especially wherein the lead bank representing the CoC showed its readiness to refund the amount.

10. In view of the positions discussed above, I am recording the submission on the side of the CoC recorded by me through the Ld.Counsel for the RP, and directing the certificate holder of the bank who are members of CoC, keeping the money paid by the applicant with accrued interest @ applicable to the Banks, till the date of refund to the applicant preferably with in two weeks from the date of receipt of this order by the bank. If such an order is not issued it would work much hardship, economical loss and injustice to the applicant who had purchased the property higher than the upset price notified by the Banks.

11. The IA is disposed of as above.

12. The Registry is directed to send e-mail copies of the order forthwith to all parties inclusive of the CoC.

(Jinan K.R.)
Member (Judicial)

Signed on this, the 17th day of June, 2020.

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