

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1258 of 2022

[Arising out of Order dated 06.09.2022 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Court-2) in I.A. No. 578/2022 in C.P.(IB) 66 of 2017]

IN THE MATTER OF:

Westcoast Infraprojects Private Limited,

Through its Authorised Signatory Mr. Nilay Jasbhai
Patel, 18-392, Satyagraph Chhavni, Jodhpur Satellite,
Ahmedabad - 380015

...Appellant

Versus

Mr. Ram Chandra Dallaram Choudhary,

Liquidator of Anil Limited (In liquidation)
9-B, Vardan Complex, Near Vimal House,
Lakhudi Circle, Navrangpura, Ahmedabad
380014

...Respondent

Present:

For Appellant: Mr. Gopal Malhiraju, Ms. Bhavya Shukla,
Advocates

For Respondents: Mr. Palash S. Singhai, Mr. Atul Sharma,
Advocates

J U D G M E N T

ASHOK BHUSHAN, J.

1. This Appeal has been filed against the Order dated 06.09.2022 passed by the National Company Law Tribunal, Ahmedabad, Court -2

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(hereinafter referred to as “The Adjudicating Authority”) by which order, I.A. No. 578 of 2022 filed by the Appellant have been rejected.

2. Brief facts of the case giving rise to this Appeal are:

- (i) Liquidation Proceedings commenced against the Corporate Debtor – Anil Limited by order of the Adjudicating Authority on 25.10.2018. The Respondent was appointed as Liquidator. Liquidator issued e-Auction Sale Notice on 28.02.2022 for e-Auction to be held on 14th March, 2022 with regard to property in question as described in the e-Auction Sale Notice. In the e-Auction Sale held on 14th March, 2022, Appellant emerged as highest bidder for consideration of Rs. 3,73,00,00,000/-. The Appellant had remitted an amount of Rs. 15,00,00,000 as EMD before participating in the e-Auction.
- (ii) Liquidator vide Letter dated 28.03.2022 communicated the Appellant that he has been declared as the Successful Bidder in the e-Auction held on 14th March, 2022 for sale of properties owned by Anil Limited for total amount of Rs. 3,73,00,00,000/-. Letter noted that having deposited Rs. 15,00,00,000/- as EMD, he shall remit the balance amount of Rs. 3,58,00,00,000/- within 30 days from the confirmation of sale i.e. on or before 27.04.2022.
- (iii) The Appellant has further deposited an amount of Rs. 1,60,00,000 on 29th March, 2022. On 26th April, 2022, the Liquidator sent a communication to the Appellant to make payment of balance amount of Rs. 3,56,40,00,000/- on or before 27th April, 2022. Liquidator on 16th June, 2022 again communicated the Appellant to

make the payment of Rs. 3,56,25,00,000/- which is required to be paid within extended period of 90 days on or before 26th June, 2022.

(iv) A communication dated 17th June, 2022 was received by the Liquidator from the Appellant where the Appellant prayed that interest free period of 30 days may be extended till such time revenue entries are mutated in the name of Anil Limited. Liquidator was informed by Letter dated 22nd June, 2022 that land is still registered in the name of Anil Products Limited instead of Anil Limited. Liquidator replied on 22nd June, 2022 that request of the Appellant to extend the period of 30 days is not in the powers and duties of the Liquidator. Appellant was again requested to deposit the balance amount on or before 26th June, 2022. Appellant on 24th June, 2022 filed I.A. No. 578 of 2022 before the Adjudicating Authority praying for extension of interest free period of 30 days for payment of the balance amount of the same in respect of e-Auction held on 14th March, 2022.

(v) On 28th June, 2022, the Liquidator intimated that appellant having not paid the balance amount by 26th June, 2022 as per Liquidation Process, Regulations, 2016 as well as Clause 4.10 (b) and 4.11 of the Tender Document, sale process stands cancelled and further the EMD amount of Rs. 15,00,00,000/- and part payment of Rs. 1,75,00,000/- deposited by the Appellant stand forfeited. I.A. No. 578 of 2022 was filed by the Appellant in I.A. No. 544 of 2022

before the Adjudicating Authority where the Appellant prayed for following reliefs:

“A) This Hon’ble Tribunal may kindly be pleased to allow the present application;

B) This Hon’ble Tribunal may kindly be pleased to quash and set aside the communication dated 28.06.2022 whereby the Respondent has cancelled the intimation of sale confirmation dated 28.03.2022 issued in favour of the Applicant pursuant to e-auction dated 14.3.2022, for the Land;

C) That this Hon’ble Tribunal may kindly be pleased to pass any order as may be deemed fit in the interest of justice.”

(vi) I.A. No. 544 of 2022 and I.A. No. 578 of 2022 came for consideration before the Adjudicating Authority on 29th June, 2022 where Learned Counsel for the Appellant stated that unless permission is granted from the Deputy Collector, Appellant is not in a position to make statement in respect of payment against the property which is sold to the Appellant. The Adjudicating Authority on the Application I.A. No. 578 of 2022 after hearing the parties dismissed the Application. The Adjudicating Authority noticed that Appellant failed to deposit the amount on or before 26.06.2022, there is no ground to interfere with the cancellation of the same, application was consequently rejected with Cost of Rs. 5 Lakhs.

(vii) Aggrieved by the Order impugned dated 06.09.2022, this Appeal has been filed.

3. We have heard Mr. Gopal Malhiraju, Learned Counsel for the Appellant and Mr. Palash S. Singhai, Learned Counsel for the Liquidator.

4. Learned Counsel for the Appellant challenging the Impugned Order submits that forfeiture by the Liquidator of the amount paid by the Appellant is a penalty and impermissible in law. Learned Counsel for the Appellant relying on Section 74 of the Indian Contract Act, 1872 submits that for forfeiting the amount, Liquidator ought to have filed a suit for recovery of the penalty by way of compensation and the Liquidator had no jurisdiction to forfeit the EMD and amount of Rs. 1,75,00,000/-deposited by the Appellant. Learned Counsel for the Appellant has however not raised any submission questioning the cancellation of the sale. The clauses of the Tender Document providing for forfeiture of the part consideration paid by the Appellant are stipulations in the nature of a penalty under Section 74 of the Indian Contract Act, 1872. Forfeiture of the part consideration by the Liquidator is impermissible and unlawful and at the highest the Liquidator is entitled to sue for damages/compensation before the Competent Court. Until such adjudication by the Competent Court, Liquidator has no right to receive any sum of the money from the Appellant. It is further submitted that there is no provision in the Insolvency and Bankruptcy Code, 2016 or in the Liquidation Process Regulations, 2016 under which monies paid towards the purchase of assets put to sale by the Liquidator may be

forfeited upon cancellation of the sale due to purchaser's default. Forfeiture by the Respondent has no basis in law. Learned Counsel for the Appellant further submitted that the Liquidator is guilty of suppressing crucial information from the Appellant and other bidders. It is submitted that property tax in respect of land was outstanding which ought to have been disclosed and due to outstanding dues title of the land was defective. It is submitted that land was subject to attachment due to non-payment of property tax dues and any transfer of the land would have been void under law. The liquidator was bound to disclose the defect in title and lack of the title of the land. The sale of assets "as is where is" or "as is what is" basis is only used to caveat the physical nature or quality of what is sold. It does not apply to situations where the title of the subject matter sought to be sold is defective or worse absent in the seller. The Liquidator can not wriggle out of its duty to disclose encumbrances, and particularly known encumbrances, on the basis of the "as is where is"/ "as is what is" Clause in the Tender Document.

5. Learned Counsel for the Liquidator opposing the submissions of Learned Counsel for the Appellant contends that before the Adjudicating Authority Appellant had raised only two objections; Firstly, that the name of Corporate Debtor is not on record and in the revenue record, name of Anil Products Limited is there and secondly no permission has been obtained by Deputy Collector. Both the objections have been noticed by the Adjudicating Authority while hearing the application I.A. No. 544 of 2022 and I.A. No. 578 of 2022 filed by the Appellant. Learned Counsel

submits that Anil Products Limited is the earlier name of the Corporate Debtor. The property was in the name of Anil Products Limited which was the earlier name of the Corporate Debtor changed into Anil Limited. Upon such entry in the revenue record, there is no fetter in the title of the corporate debtor and the Liquidator has informed that change in the revenue record shall be done before transferring the property in favour of highest bidder. It is submitted that in so far as the approval of the Deputy Collector, the approval was also obtained which was also noticed by the Adjudicating Authority. The Adjudicating Authority in its order has noticed that Appellant has never been ready to deposit the balance amount even after 26th June, 2022. The Appellant has neither capacity nor willingness to deposit the balance amount hence the Liquidator has rightly cancelled the sale on 28th June, 2022. The forfeiture of the EMD and the part-consideration paid by the Appellant was in accordance with the Tender Document which can not be faulted. No submission on behalf of Section 74 of the Indian Contract Act, 1872 has been advanced by Learned Counsel for the Appellant before the Adjudicating Authority. Appellant having failed to deposit the balance consideration in time provided 90 days period which is provided in the Liquidation Process Regulations, sale has to be treated to be cancelled resulting in forfeiture of the EMD and part amount paid. No error has been committed by the Liquidator in cancelling the sale and forfeiting the EMD.

6. We have considered the submissions of Learned Counsel for the parties and have perused the record.

7. Learned Counsel for the Appellant submitted that even though he has not raised any submissions on the basis of Section 74 of the Indian Contract Act, 1872, the said submission being legal submissions can be considered by this Tribunal. Learned Counsel for the Appellant has relied on the Judgment of the Hon'ble Supreme Court in Civil Appeal No. 2442-2443 of 2011 in **K. Lubna & Ors. Vs. Beevi & Ors.** where the Hon'ble Supreme Court in paragraph 9 and 10 has laid following:

“9. On the legal principle, it is trite to say that a pure question of law can be examined at any stage, including before this Court. If the factual foundation for a case has been laid and the legal consequences of the same have not been examined, the examination of such legal consequences would be a pure question of law.

10. No doubt the legal foundation to raise a case by including it in the grounds of appeal is mandated. Such mandate was fulfilled by moving a separate application for permission to urge additional grounds, a course of action, which has already been examined by, and received the imprimatur of, this court in **Chittoori Subbanna v. Kudappa Subbanna.**”

8. It is true that no submission on the basis of Section 74 of the Indian Contract Act has been raised by the Appellant before the Adjudicating Authority but submission being legal and in the memo of appeal ground having been already taken by the Appellant, we have permitted the Appellant to raise submission and we proceed to consider the submission of the Appellant based on Section 74 of the Indian Contract Act, 1872 hereinafter.

9. Section 74 of the Indian Contract Act provides as follows:

“Section 74: Compensation for breach of contract where penalty stipulated for.

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) A contracts with B to pay B Rs. 1,000, if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500

on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation; not exceeding Rs. 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40,

with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.”

10. The submission of Learned Counsel for the Appellant is that forfeiture of the amount under the terms and conditions of Tender Document is in nature of penalty hence can be recovered only in accordance with Section 74 of Indian Contract Act by bringing action by the Liquidator.

11. Before we proceed further to examine the submissions based on Section 74 of the Indian Contract Act it is necessary to notice the provisions of certain clauses of Tender Document issued by the Liquidator for e-Auction for sale of land on 28th February, 2022.

12. We being concern with the forfeiture of the EMD and part consideration, we need to notice the clauses regarding the forfeiture. Clause 4.6 deals with *EMD and Intimation of eligible bidders*. Clause 4.6 sub-clause (f) is as follows:

“(f) EMD and other amounts paid by the Bidders/Eligible Bidders/Successful Bidder are liable to forfeiture in case of any default or misrepresentation on the part of the Bidder/Eligible Bidders/Successful Bidder.”

13. Clause 4.10 deals with *Deposit of the purchase price and verification of Documents*. Clause 4.10(b) and 4.11 (*Defaults in Payment*) are as follows:

“4.10(b) No interest shall be levied if the balance amount (being total bid price less EMD) is paid within 30 days from the date of issue of sale confirmation advice. However, the successful bidder can pay the balance amount (being total bid price less EMD) within the extended period of 90 days from the date of issue of sale confirmation advice along with the interest @12% p.a. after 30 days. Default in deposit of any amount as envisaged above by the successful bidder would entail forfeiture of the amount already deposited including EMD and property/(ies) shall be put to re-auction and the defaulting bidder shall have no claim/right in respect of property/amount.

4.11 Defaults in Payment

Default of payment of the bid amounts within the stipulated time shall result in an automatic cancellation of the sale without any notice and all amounts paid until then by the Successful Bidder (inclusive of the EMD), shall be liable for forfeiture.”

14. It is also relevant to notice that Liquidator is statutorily entitled to fix the terms and conditions of sale. Schedule 1 (Mode of Sale) of the Liquidation Process Regulations under the Heading (1)- Auction, Clause (3) provides as follows:

“(3) The liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any.”

15. The Tender Document issued by the Liquidator is thus referable to above statutory empowerment under the Liquidation Process Regulations,

2016. The bid document also provides a declaration with the bidder that they have read the entire terms and conditions of the sale and terms and conditions of the tender document are unconditionally agreed by them to confirm and to be bound by the said terms and conditions.

16. In support of his submission on Section 74 of the Indian Contract Act, Learned Counsel for the Appellant has relied on Judgment of the Hon'ble Supreme Court in **Fateh Chand Vs. Balkishan Dass, AIR 1963 SC 1405**. The above case arose out of a suit filed by the plaintiff claiming a decree of possession of the land and decree for Rs. 6,500 as compensation on the ground that defendant has breached the sale agreement. In the suit, Appellant has also claimed to forfeit the amount received from the defendant. The suit was partly decreed. Defendant had filed an appeal before the Hon'ble Supreme Court against the said Judgment which decree was modified by the Hon'ble Supreme Court. In the above context, Hon'ble Supreme Court had occasion to consider the provisions of Section 74 of the Indian Contract Act where it was held that expression "the contract contains any other stipulation by way of penalty" also include forfeiture of right to money or other property already delivered. In paragraph 10 and 11, following has been held:

"Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and `ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of

deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether Section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not

the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view."

17. Learned Counsel for the Appellant submits that above judgement of the Hon'ble Supreme Court was relied on by the Hon'ble Supreme Court in subsequent Judgments. He has relied on Judgment of the Hon'ble Supreme Court in **Kailash Nath Associates v. Delhi Development Authority, (2015) 4 SCC 136**. In the case of Kailash Nath Associates,

public auction was conducted by DDA whereby the Appellant was the highest bidder. Appellant had deposited 25% of the bid amount. Provision of the condition of auction contained the clause that in case of default/breach or non-compliance of the terms and conditions of the auction or misrepresentation by the bidder or intending purchaser, EMD shall be forfeited. DDA acknowledged the receipt of the amount of Rs. 78 Lakhs and directed the Appellant to deposit remaining amount. There was extension granted for depositing the balance amount, consent of the Appellant was also sought by the DDA for making payment of balance amount along with 18% interest which consent was given by the Appellant. Subsequently, the DDA cancelled the allotment and EMD by letter dated 06.10.1993. The Appellant had filed a suit for specific performance and in the alternative recovery of damages and recovery of earnest money. Learned Single Judge had allowed the order for refund of the EMD with 9% interest which judgement was set aside by the Division Bench of the Delhi High Court against which the Appeal was filed by the Appellant. Hon'ble Supreme Court in the above case came to the conclusion that there was no breach on the part of the Appellant hence the forfeiture of the amount could not have been done. In paragraph 15 and 29, following has been held:

15. Having heard learned counsel for the parties, it is important at the very outset to notice that earnest money can be forfeited under sub-clause (iv) set out hereinabove, only in the case of default, breach, or non-compliance of any of the terms and conditions of the

auction, or on misrepresentation by the bidder. It may be noted that the balance 75% which had to be paid within three months of the acceptance of the bid, was not insisted upon by the DDA. On the contrary, after setting up two High Powered Committees which were instructed to look into the grievances of the appellant, the DDA extended time at least twice. It is, therefore, very difficult to say that there was a breach of any terms and conditions of the auction, as the period of three months which the DDA could have insisted upon had specifically been waived. It is nobody's case that there is any misrepresentation here by the bidder. Therefore, under sub-clause (iv), without more, earnest money could not have been forfeited.

.....

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. It is clear, therefore, that [Article 14](#) would apply in the field of contract in this case and the finding of the Division Bench on this aspect is hereby reversed.”

18. Thus, the Judgement of the Hon’ble Supreme Court in **Kailash Nath Associates** case was a case where it was held that there was no default by the Appellant hence forfeiture was set aside. Hon’ble Supreme

Court in the above case has also occasion to consider Section 74 of the Indian Contract Act and has also referred to and relied on Judgement of the Hon'ble Supreme Court in **Fateh Chand v. Balkishan Dass** (supra). As a general proposition of law, following the judgement of the Hon'ble Supreme Court in **Fateh Chand**, Hon'ble Supreme Court held that EMD is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74. In Paragraph 40 of the Judgment, following has been laid down:

“40. From the above, it is clear that this Court held that Maula Bux's case was not, on facts, a case that related to earnest money. Consequently, the observation in Maula Bux that forfeiture of earnest money under a contract if reasonable does not fall within [Section 74](#), and would fall within [Section 74](#) only if earnest money is considered a penalty is not on a matter that directly arose for decision in that case. The law laid down by a Bench of 5 Judges in Fateh Chand's case is that all stipulations naming amounts to be paid in case of breach would be covered by [Section 74](#). This is because [Section 74](#) cuts across the rules of the English Common Law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated above, forfeiture of earnest money on the facts in Fateh Chand's case was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by [Section 74](#).”

19. After considering all authorities, the law on compensation for breach of contract was stated in paragraph 43 of the Judgement.

Paragraph 43, 43.1, 43.2, 43.3, 43.4, 43.5, 43.6, 43.7 are as follows:

“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.

43.4. The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

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 dispensed with. 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.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

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 can not be accepted that Appellant's EMD can not 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 can not 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.

21. Learned Counsel for the Liquidator has relied on a Judgement of this Tribunal in C.A. (AT) Insolvency No. 532 of 2022, **Potens Transmissions & Power Private Limited v. Gian Chand Narag** considering the Liquidation Process Regulations it has been held that 90

days period is provided for making the deposit which is the maximum period and when the deposit is not made, sale shall be cancelled. In paragraph 7 and 8, following has been held:

“7. 2nd proviso to Clause 1(12) under Schedule I of the Liquidation Process Regulations, 2016 is as follows: “1 Auction. (12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days of the date of such demand: Provided that payments made after thirty days shall attract interest at the rate of 12%: Provided further that the sale shall be cancelled if the payment is not received within ninety days.”

8. When we look into the above regulation, it is clear that 90 days’ period provided for making the deposit is the maximum period under which the Auction Purchaser had to make the deposit. 2nd Proviso of the Item 12 of the Schedule I provided that sale shall be cancelled if the payment is not received within 90 days. When the Consequence of non-compliance of the provision is provided in the statute itself, the provision is necessary to be held to be mandatory. Item 12 provides that payment is to be made within 90 days and with interest after 30 days at the rate of 12 percent. Non-compliance of 2nd Proviso, sale shall be cancelled if the payment is not received within 90 days. The Adjudicating Authority has rightly observed that in view of the Appellant having not made payment in 90 days, Adjudicating Authority has no option except to allow the Application filed by the Liquidator for cancellation of the sale. The action taken by the Adjudicating Authority is in accordance with the

statutory provisions. We do not find any merit in the submissions of Learned Counsel for the Appellant as noticed above. Prayer 'a' in the Application which was filed through I.A. No. 3153 of 2021, itself is indicative that Appellant was never interesting in making the payment and he by different prayers wanted to prolong the proceedings."

22. We thus do not find any substance in the submission of Learned Counsel for the Appellant that Liquidator was not empowered to forfeit the EMD.

23. Now, we come to the next submissions of Learned Counsel for the Appellant that there was defect in title of the Corporate Debtor and Liquidator has suppressed crucial information from the Appellant and other bidders.

24. The process document under which e-Auction has been held and the e-Auction Notice has described the price of the land which was sought to be auctioned. Clause 4 deals with Terms and Conditions of the e-Auction. Clause 4.2, Cautions to the Bidders provide as follows:

"4.2 Cautions to the Bidders

(a) The Land are being sold strictly on an "as is where is, what is there is, whatever there is and non-recourse" basis.

(b) Bidders are advised to go through all the terms and conditions of sale given in this Tender Document and also in the Notice of Sale before participating in the online bidding/auction.

(c) The e-auction shall entitle the Successful Bidder to all the rights of the incumbent holder in respect of the Land.

Details of the land as stated in the Notice of Sale and under this Tender Document are as per the details available with the seller and neither the Seller nor the Agency shall, in any way, be responsible for any variation in the extent of the land due to any reason.”

25. Clause 4.3 deals with inspection of the Land/Buyers beware. In paragraph 4.3, following has been stated:

“(a) Bidders are required to inspect the Land including the area of the land and satisfy themselves regarding the area, physical nature, condition, extent, etc., of the land prior to submission of their online bids. All costs incurred in connection with such inspection shall be borne by the Bidders. Further, the area of the land in the title deeds provided shall prevail over what has been presented in the Notice of Sale or this Tender Document and the same must be inspected and verified by the Bidders before participating in the e-auction.

(b) Bidders are advised/cautioned to verify with the sub-registrar’s office as well as obtain and analyze the revenue records with respect to the Land to satisfy themselves regarding the existence, title, nature, description, condition, existing encumbrances, liens, charges, statutory dues, etc. over the Land before submitting their bids.

(c) The Agency/the Seller shall not be responsible for rendering any assistance to the Bidder in connection with its independent inspection of the Land.

(d) Bidders are bound by the principle of caveat emptor (buyer beware).

(e) *Bidders are requested to submit their bids only after conducting their own independent due diligence exercise with respect to the title to the Land.”*

26. We may notice that when the Liquidator on 16th June, 2022 sent an email to the Appellant to deposit the amount of Rs. 3,56,25,00,000/- by 26.06.2022. The response was sent by the Appellant vide email dated 17.06.2022 where it was stated that in the revenue records name of the Land still registered in the name of Anil Products Limited whereas the owner of the Land should be Anil Limited. The mail further noticed that process of change in the revenue records is underway. The email dated 17.06.2022 states following in paragraph 5, 6 and 7:

“5. *That, in the revenue records as evident from 7/12 extract dated 25.05.2022 (enclosed), the Land still stands registered in the name of Anil Products Limited as the owner of the Land instead of Anil Limited. We understand the process of mutation to change the revenue records in favour of Anil Limited is underway. However, the sale deed for the said Land cannot be executed in may favour till the time the land records are mutated in favour of Anil Ltd.*

6. *Therefore, you are humbly requested that the interest free period of 30 days be extended till such time as the revenue entries are mutated in favour of Anil Limited which would enable you to execute a sale deed in may favour.*

7. *We request you to please inform us as soon as the mutation is completed so that we can initiate*

registration process. And kindly prepare the site clear of any structures and vehicles to be handed over to us.”

27. Liquidator in reply filed in this Appeal has pleaded in paragraph 9.2 of the Reply and submitted that the name of the corporate debtor came to be changed to “Anil Products Limited” and thereafter to “Anil Limited” by notification dated 24.06.1985 and 23.09.2010. In paragraph 9.2 and 9.3, following has been pleaded:

“9.2. It is submitted that thereafter, pursuant to the resolution passed by the board of directors of the corporate debtor and with the approval of the Central Government, the name of the corporate debtor came to be changed to “Anil Products Limited” and thereafter to “Anil Limited” by the Government of India, Department of Company Affairs, New Delhi, Notification No. G.S.R. 507(E) dated 24.06.1985 vide SRN No. A94403573 dated 23.09.2010. It is submitted that pursuant to the aforesaid notification, the Registrar of Companies, Gujarat, Dadra and Nagar Haveli issued a Fresh Certificate of Incorporation Consequent upon change of name dated 23.09.2010. Thus, upon perusal of the Fresh Certificate of Incorporation it is crystal clear that the name of the corporate debtor is changed from “Anil Products Limited” to “Anil Limited”. The copy of Fresh Certificate of Incorporation Consequent upon Change of Name dated 23.09.2020 is attached herewith and marked as “Annexure –R18” to the present Reply.

9.3. It is respectfully submitted that the change of name has no bearing on the title and all rights and interest in the property auctioned continue to vest in the corporate debtor irrespective of the fact that the relevant

records do not reflect the change of name. The Appellant herein has no means and intention to pay the balance consideration and therefore, has come under the false pretext that the relevant records has not corrected and thus, under this guise had wrongly withhold the payments.”

28. It is further pleaded that ultimately the revenue record was also corrected in the name of Anil Limited. We are of the view that issue raised by the email dated 17th June, 2022 by the Appellant that name of the land is not in the name of the corporate debtor is only a ruse not to make payment within time allowed by law. Admittedly, the land was in the name of Anil Products Limited which was the earlier name of the Corporate Debtor changed in to Anil Limited. The title of the land shall be of the corporate debtor Anil Limited by change of the name the title to the land will continue with the corporate debtor and the earlier name of the corporate debtor in the revenue record has no bearing in the title. We thus are satisfied that there was neither defect in the title nor the fact that process of change of the name in the revenue record was underway was any reason for Appellant not to make the payment of balance consideration within time.

29. Learned Counsel for the Appellant sought to raise also the submission that property tax dues in respect of land was outstanding. Liquidator has submitted that all dues were paid and No Dues Certificate was issued. Liquidator further submitted that in any view of the matter, these issues were required to be done by the Liquidator before

transferring the property in question in favour of the Appellant but that itself could not have been any ground available to the Appellant to refuse to deposit the balance consideration within time allowed by the law. Similarly, the argument that properties were attached towards non-payment of property tax dues also can not raise any fetter in the title, right of the corporate debtor and further when No Dues Certificate were obtained by the Liquidator subsequently it can not be said that title of the corporate debtor was defective due to above reason. There was no title defect in the Corporate Debtor.

30. We may further notice that Adjudicating Authority after filing of the Application by the Appellant has passed various orders. The Adjudicating Authority vide Order dated 04th August, 2022 in fact has directed the Appellant and Liquidator to visit sub-registrar office to confirm the modalities of registration in the name of the auction purchaser. The Adjudicating Authority further directed that entire payment of the sale proceeds has to be made on or before 10:30 am on 10.08.2022. Order dated 04.08.2022 is as follows:

“IA 544 of 2022 & IA 578 of 2022

Heard both the sides.

Learned Sr. Counsel Mr. Soparkar for the applicant states that the copy of affidavit of the liquidator, assuring for the process to be completed about the registration of the property in the name of the applicant, is received just now during the hearing, and requests that let the liquidator company and the applicant visit the Sub-Registrar office today itself, and confirm the

*modalities of registration in the name of the auction purchaser. Let both sides co-ordinate.
The entire payment of the sale proceeds has to be made on or before 10:30 a.m. on 10.08.2022.”*

31. Both the parties also visited the Sub-Registrar Office and Liquidator has pleaded that sub-registrar has clearly intimated that there is no impediment in execution of the document in favour of the Auction Purchaser. The issue of permission by the Deputy Collector was also raised by the Appellant before the Adjudicating Authority which was noticed in the Order dated 29th August, 2022. Liquidator in his Additional Affidavit filed by the Liquidator in compliance of the Order dated 29th August, 2022 has mentioned that Deputy Collector vide Letter dated 20th August, 2022 has granted permission for transfer of the property in question.

32. We thus are satisfied that issues regarding entry in the revenue record, permission of the Deputy Collector for sale were issues which had no effect on the title of the corporate debtor and the issues were raised by the Appellant to avoid payment of balance amount and to buy time in which Appellant failed. We do not find any substance in the submissions that there was defect in title.

33. Learned Counsel for the Appellant has also cited several judgements relating to the defect in title of the seller which need no detail consideration since present is not a case where there is any defect in title of the Corporate Debtor.

34. In view of the foregoing discussions, we come to the conclusion that the Adjudicating Authority did not commit any error in rejecting I.A. No. 578 of 2022. There is no merit in the Appeal, Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI
28th April, 2023

Basant B.