IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT III

I.A. 2556/2023

In

C.P. No. (IB) 3747/MB/C-III/2018

Under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016

Star Blue Jewels Pvt. Ltd.)

Having its registered office at:)
4th Floor, F. P. No. 37 (Sub Plot No.)
2A+2B+F.P.No.65/B)/2, Umiya)
Chowk, A. K. Road, Surat)
Gujarat – 395008) … *Applicant*

Vs.

Sanghavi Exports International Private Limited

Having its registered office at:)
402, Mehta Mahal, Mathew Road)
Opera House, Mumbai- 400004)

Represented by its Liquidator)

Mr. Shailesh Bhalchandran Desai)

Having office at:)
708, Raheja Centre, 7th Floor,)
Nariman Point, Mumbai- 400021) … *Respondent*

IN THE MATTER OF

Bank of India … *Financial Creditor*

Vs

Sanghavi Exports International Private Limited … *Corporate Debtor*

Order pronounced on: 29.04.2024

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati (Technical)

Appearances:

For the Applicant	: Adv. Anuj Jhaveri, Adv. Aashish i/b PS2 Advocates & Solicitors
For the Respondent	: Adv. Mitali Bhatt a/w Janvi Jain i/b AKR Legal

***Per:* Ms. Lakshmi Gurung, Member (*Judicial*)**

ORDER

1. The above I.A. is filed by the **Applicant**, Star Blue Jewels Private Limited, under section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("the Code"), seeking following reliefs:

   a) *Allow the Applicant/ Successful Bidder to withdraw its bid and obtain a full and complete refund of the Earnest Money Deposit paid towards the purchase of assets in Lot-1 of the E-Auction i.e. Land & Building of Corporate Debtor, for the E-Auction held on 01.08.2022;*

   b) *Direct and impose an interim injunction on the disposal of assets which were part of the E-Auction dated 01.08.2022, till the date of realization of refund for the EMD amount, to be paid to the Applicant/ Successful Bidder by the Corporate Debtor through its Liquidator;*

   c) *Interim and ad-interim reliefs in favour of clause (b);*

   d) *To costs of the present legal proceedings in favour of the Applicant.*

Relevant Facts of the Case:

2. This Tribunal vide order dated 19.02.2019 in CP(IB)/3747/2018 initiated Corporate Insolvency Resolution Process (CIRP) in respect of Sanghavi Exports International Private Limited (**Corporate Debtor**) and Mr. Vikas Prakash Gupta was appointed as the Interim Resolution Professional (IRP) and was subsequently confirmed as Resolution Professional (RP).

3. Upon failure of the resolution process, the Committee of Creditors (CoC), in its 9th CoC Meeting dated 13.11.2019, unanimously resolved to liquidate the Corporate Debtor. Accordingly, the liquidation order was passed on 15.12.2020 thereby commencing liquidation process of the Corporate Debtor and Mr. Shailesh Bhalchandra Desai was appointed as the Liquidator.

4. The Liquidator issued the Auction Notice dated 25.04.2022 inviting participation of interested bidders in the e-auction process for sale of Lot-1(asset) of the Corporate Debtor. A subsequent auction notice dated 20.07.2022 was issued by the Liquidator whereby the land area for sale was increased and the Reserve Price was reduced to Rs.4,50,00,000/-.

5. It is submitted that the Liquidator shared the E-Auction Process Information Document with the Applicant on 29.07.2022 while the e-auction was scheduled to be held on 01.08.2022. It is further submitted that the Applicant did not get sufficient time to conduct its independent due diligence and after a bare perusal of the E-Auction Process Information Document, the Applicant submitted its Expression of Interest on the same day i.e. 29.07.2022 and also deposited the Earnest Money Deposit (EMD) of Rs. 45,00,000/-. Thereafter, the Liquidator revised the E-Auction Process Information Document and shared the same with the Applicant on 30.07.2022.

6. It is submitted that the Applicant was the only bidder to participate in the e-auction process on 01.08.2022 and was consequently declared as the successful bidder at the Reserve Price of Rs. 4,50,00,000/-.

7. On 01.08.2022, the Liquidator sent Letter of Intent to the Applicant thereby confirming the Applicant as the Successful Bidder and demanding payment of the balance amount of Rs. 4,05,00,000/- by 12.08.2022 i.e. within 11 days from the date of e-auction.

8. The Applicant vide letter dated 08.08.2022, requested the Liquidator to grant period of three months in accordance with Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (**Liquidation Regulations**) for the payment of the balance consideration. However, ignoring the mandatory timeline of 90 days provided under Schedule I of the Liquidation Regulations, the Liquidator vide letter dated 12.08.2022 refused to grant the said extension of time.

9. Consequently, the Applicant filed IA No. 2263/2022 before this Tribunal and sought extension of time for making the payment.

10. On 28.09.2022 and 11.10.2022, the Liquidator sent emails to the Applicant informing that the EMD of the Applicant has been forfeited and further also cancelled the bid of the Applicant. Thereafter, the IA No. 2263/2022 which was filed by the Applicant seeking extension of time was disposed of as infructuous vide order dated 03.11.2022 on the ground that the Liquidator had cancelled the sale confirmed in favour of the Applicant on account of failure in making the balance sale payment within the stipulated time. However, liberty was granted to the Applicant to move application for appropriate reliefs in accordance with law.

11. Thereafter, the Liquidator proceeded with further fresh auction rounds to dispose of the assets of the Corporate Debtor.

12. It was submitted that adequate information was not provided to the Applicant to enable it to come to a reasoned conclusion. Further, since the Liquidator had shared the E-Auction Process Information Document for the first time only on 29.07.2022 and subsequent revision of the document on 30.07.2022 when the e-auction was to take

place on 01.08.2023, the Applicant was unable to conduct the due diligence.

13. It is the main contention of the Applicant that the Liquidator had cancelled the bid on the ground that the Applicant failed to make the payment by 12.08.2022 i.e. within 11 days from the date of e-auction. This is in gross violation of Clause 12 of Schedule I of the IBBI (Liquidation Process) Regulations, 2016 that provides for a time limit of 90 days.

14. It is submitted that the Applicant relied on the representations of the Liquidator and invested its time, effort and money for the payment of the balance sale consideration. It is only now when the Applicant got aware of the fact that the assets in question are disputed that the Applicant is willing to withdraw the bid and is seeking a complete refund of EMD paid towards the purchase of the assets.

Submissions of the Liquidator

15. The Liquidator submits that the present Application is not maintainable in law as the Applicant ought to have approached this Tribunal within 15 days from the date of intimation received from the Liquidator as stated in section 42 of the I&B Code.

16. As regards the contention that the E-Auction Process Information Document was shared only on 29.07.2022, the Liquidator submits that as per the provisions of the Code, E-Auction Process Information Document is to be shared to interested parties after they deposited EMD.

17. The Liquidator further submits that the Applicant has himself admitted that he has gone through the E-Auction Process Information Document before submitting its Expression of Interest. Page nos. 16, 18, and 23

of the E-Auction Process Information Document clearly state that the entire successful bid amount is to be paid till 12.08.2022. If a Successful Bidder fails to pay the balance consideration within the said time, the Successful Bidder will be considered a defaulter and the Liquidator has a right to forfeit the EMD and any other payments made thereunder. The same is also stated in page 19 of the document.

18. As regards the averment regarding the dispute in the assets of the Corporate Debtor, the Liquidator submits that the asset is never disputed with regards to its title and the dispute is limited to claim of transfer fees which is the subject matter in IA No. 2459/2022 and has no bearing on the title of the asset. The said fact is already mentioned in the E-Auction Process Information Document at Page 3, Para 11.

19. Further, it is pertinent to refer to the "Declaration by Bidders" i.e. Annexure III which is annexed at page 81 of the Application which has been duly signed and provided by the Applicant at the time of the auction which categorically provides at point 4 as under:

> "4. I/We also agree that after my/our offer given in my/our bid for purchase of property (ies) is accepted by the Seller and if, I/We, fail to accept or act upon the terms and conditions of the sale or am/are not able to complete the transaction within the time limit specified for any reason whatsoever and/or fail to fulfil any/all the terms and conditions of the auction and offer letter, the EMD and other monies paid by me/us alongwith the online form and thereafter, are liable to be forfeited."

20. Furthermore, even during the previous round of litigation vide I.A. 2263/2022 filed by the Applicant seeking extension of 90 days, at no point in time did the Applicant challenge any contents or any lapse in the auction process. Moreover, when the said IA was disposed of on 03.11.2022, the Applicant had already consumed 82 days out of the available 90 days that was sought in the said IA. Also, the Applicant has not challenged the said order dated 03.11.2022 before the Hon'ble NCLAT and hence the order has attained finality.

21. It is also relevant to note that there is no such provision to withdraw from an auction after being declared as successful bidder as is also mentioned in E-Auction Process Information Document at para 9, page 35 and also at page 19 that *"in the event, the Successful Bidder withdraws his E-Auction Application and/or fails to make the entire payment in specified time, the Beneficiary/Liquidator shall have the right to forfeit the EMD and any payments made thereunder, by the Successful Bidder."*

22. The legal maxim "caveat emptor" squarely applies and the Applicant, based on its sole will, had participated and paid the EMD, without any pressure or duress influence from any party. Further, there is no provision under the Code for seeking any refund of a forfeited EMD amount.

23. The Liquidation Regulations uses the term "within 90 days" and it is not mandatory that 90 days ought to be allowed. There is no bar in law or in Code to provide for a reduced timeframe. Even if otherwise, it is relevant to note that in view of the previous application, the Applicant was seeking 90 days, however, the Applicant failed to even pay within the said upper limit of 90 days and hence, there is no occasion for the Applicant to seek refund.

FINDINGS/OBSERVATIONS

24. Heard the Counsel and perused the records.

25. Upon perusal of the documents placed on record, it is seen that no bids were received against the Lot-1 in the e-auction process and therefore, by invoking Clause I of the E-Auction Process Information Document, the Applicant was declared as the Successful Bidder at the reserve price of Rs. 4,50,00,000. The Liquidator, in the confirmation e-mail dated 01.08.2022 called upon the Applicant to pay the balance sale

consideration by 12.08.2022 clearly stating that in case of failure to adhere to the time limit, the sale shall stand cancelled and EMD shall be forfeited.

26. The Applicant, on 08.08.2022, sent an e-mail requesting for an extension of 3 months period for the said payment which request was rejected by the Liquidator vide email dated 12.08.2022. Thereafter, the Applicant approached this Tribunal by filing IA 2263/2022 seeking extension of time limit. Further, the Applicant also submitted that a due diligence was carried out on the Corporate Debtor's assets and it was revealed that there exists some dispute and therefore, the Applicant decided to withdraw the bid.

27. Accordingly, the Applicant filed the instant application and has sought this Tribunal's direction to allow the Applicant to withdraw its bid and to direct the Liquidator to remit the Earnest Money Deposit (EMD) of Rs. 45,00,000 paid by the Successful Bidder as a pre-requisite for the E-Auction for sale of the assets of the Corporate Debtor.

28. It is noted that the bid of the Applicant has already been cancelled by the Liquidator vide emails dated 28.09.2022 and 11.10.2022 which fact is also duly recorded by this Tribunal in Order dated 03.11.2022 passed in IA/2263/2022. Relevant portion of the order is reproduced below:

> *"**IA/2263/2022***
> *The above Application is filed by M/s. Star Blue Jewels Pvt Ltd who is the successful bidder in respect of e-auction conducted by the liquidator of the assets in Lot No.1.*
> *The Petitioner filed the above Application for extension of 90 days time w.e.f. 12.08.2022 to 11.11.2022 to deposit the balance sale consideration of an amount of Rs. 4,05,00,000/-.* ***During the pendency of the above Application the Ld. Liquidator has cancelled the sale confirmed in favour of the Applicant due to their failure in paying the balance sale consideration within time.*** *Therefore, in view of the above the question of extension does not arise and accordingly*

> *the above I.A. has become infructuous and disposed of accordingly. However,* ***the Petitioner is at liberty to adopt the recourse in filing application claiming appropriate further reliefs as per law.***
> *With the above observations and directions, the above I.A. is disposed of."*
>
> ***(Emphasis Provided)***

29. In view thereof, the prayer seeking withdrawal of bid has become infructuous. However, it is also noted that the Tribunal, vide the aforesaid order dated 03.11.2022, also granted liberty to the Applicant to file application claiming appropriate further reliefs as per law. In view of the same, the present Application has been filed.

30. The limited question for consideration in the present case is *whether the Liquidator was justified in cancelling the bid of the Applicant, ignoring the timeline of 90 days provided in Schedule I of the IBBI (Liquidation Process) Regulations, 2016?*

31. The E-Auction Process Information Document dated 30.08.2022 states that the entire sale consideration amount has to be paid till 12.08.2022 and in case of non-compliance, the EMD paid by the Successful Bidder shall be forfeited.

32. At this juncture, it is relevant to refer to Clause 12 of Schedule I (1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (referred to as '**Liquidation Regulations'**). The said clause reads as follows:

> ***"SCHEDULE I: MODE OF SALE***
> ***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****.*"
> ***(Emphasis Provided)***

33. It can be seen from the plain reading of the above clause that a period of 90 days is to be granted to a Successful Bidder for payment of balance sale consideration. Therefore, in accordance with Clause 12 of the Liquidation Regulations, the 90 days limit would come to an end on 29.10.2022.

34. However, the Bid was cancelled by the Liquidator on 28.09.2022 itself before the expiry of the said 90 days. The Liquidator placed heavy reliance on the terms and conditions of the E-Auction Process Information Document and argued that the Applicant was well aware of the said terms and even unconditionally agreed to be bound by the same.

35. It is pertinent here to mention here that Clause A(2) of the E-Auction Process Information Document itself states that *the information provided in this E-Auction Process Information Document should be read together with the provisions of the Code and Liquidation Regulations. In the event of a conflict between this e-Auction Process Information Document and the Code or the Liquidation Regulations, the provisions of the Code or Liquidation Regulations, as the case may be, shall always prevail.*

36. Further, Clause C(3) of the said e-auction document states that *the E-Auction would be conducted in the manner specified in the Schedule I, as provided under Regulation 33 of the Liquidation Regulations, any other rules, regulations, orders, circulars, directions or notifications or the like, issued pursuant to or under the provisions of the Code or the Liquidation Regulations."*

37. Thus, even the E-Auction Process Information Document clearly mentions that the clauses of Schedule I of the Liquidation Regulations shall prevail. In other words, the Liquidator should have granted the 90 days period to the Successful Bidder for payment.

38. Further, compliance of the said Schedule is mandatorily to be followed and the same is not at the discretion of the Liquidator. We shall refer to Hon'ble NCLAT's observations in **Potens Transmissions & Power Pvt. Ltd. vs. Gian Chand Narang [Company Appeal (AT) (Ins) No. 532 of 2022]** decided on 12.05.2022**:**

> *"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."***
>
> ***(Emphasis Provided)***

39. Further, in **Vinod Kumar Kothari vs. Sneha Techno Equipments Private Limited [Company Appeal (AT) (Ins) No. 316/2023],** the Hon'ble NCLAT upheld the decision of NCLT, Kolkata Bench in IA/930/KB/2020 wherein the Liquidator was directed to refund the EMD for cancelling the bid before the expiry of 90 days as mandated under the Liquidation Regulations. The observations by the Hon'ble NCLAT are reproduced below:

> *"**14.** In this case, the issue involved is as to whether the parties are bound by the terms and conditions fixed by the Appellant in the EOI dated 08.07.2020 or the Appellant was required to follow the terms and conditions of Clause 12 of Schedule 1 of the Regulations which was amended on 25.07.2019?*
>
> ***15.** … it was incumbent upon the Appellant to have followed the provisions of Regulation 33 much less Schedule 1 (Clause 12) of the*

Regulations which has not been followed and the terms and conditions have been provided by the Appellant on its own in the EOI overlooking the terms and conditions as envisage in Schedule 1.

16. In such circumstances, the action of the Appellant is totally unsustainable, therefore, we do not find any error in the order under challenge in which all the factors of this case have been thoroughly appreciated."

40. Since, the Liquidator had acted contrary to law by cancelling the bid before the expiry of 90 days as provided in Clause 12 of Schedule I of the Liquidation Regulations, the forfeiture of EMD is unsustainable in law.

41. In view of the above discussion, we direct the Liquidator to refund the EMD amount of Rs. 45,00,000/- to the Applicant within 4 weeks.

42. Accordingly, the present IA No. 2556/2023 is **disposed of** in above terms.

Sd/-
Charanjeet Singh Gulati
Member (Technical)

Sd/-
Lakshmi Gurung
Member (Judicial)

Uma, LRA