

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1877 OF 2022

Under Section 60 (5) of Insolvency &
Bankruptcy Code, 2016

Dhanestha Steels
Through its Proprietor
Mr. Dinesh Yadav

...Applicant

V/s

Avil Menezes
Liquidator of Sunil Hitech Engineers
Limited

...Respondents

In the matter of
C.P.(IB) No. 2295/MB/2018
American Express Bank Corp.

.... Financial Creditor

Vs.

Sunil Hitech Engineers Limited

...Corporate Debtor

Order delivered on: 01/11/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Mr. Prakash Shah, Advocate

For the Respondent : Mr. Viraj Parikh, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This application IA 1877/2022 is filed on 12.07.2022 by M/s Dhanestha Steels through its Prop. Sh. Dinesh Yadav (“Applicant”) in the matter of M/s Suni Hi-tech Engineers India Limited [In Liquidation] (Corporate Debtor) under Section 60(5) of The Insolvency and Bankruptcy Code, 2016 (“Code”), for direction to the Liquidator Sh. Avil Menezes (“Respondent”) in the Corporate Insolvency Resolution Process (“CIRP”). The Applicant seeks injunction for stay in the e-auction process to be conducted on July 14, 2022 pending the revocation of cancellation of sale to the Applicant and further quash and set aside E-auction notice dated 13.06.2022 and handover the assets being the Mechanical Items and Inventory/ Scrap items in the Karanpura, Jharkhand site already sold to the Applicant as per Auction notice dated 28.11.2022 and 22.02.2022 respectively.
2. This Tribunal vide order dated June 25, 2019, passed an order of liquidation of the Corporate Debtor, and the Respondent published Auction Notice for Sale of Assets of the Corporate Debtor on November 28, 2020 and February 22, 2021, inviting bids for auctions of certain assets of the Corporate Debtor.
3. The Applicant became aware of such E-auction Notice and thereafter submitted its Bid Application Form along with all other

documents as provided in the Process Memorandum for Inventory and Mechanical Items of the Corporate Debtor in Karanpura Jharkhand Site. The Applicant was announced as the highest bidder for the abovementioned 'Mechanical Items' of the Corporate Debtor in Auction No. 217683 and Auction No. 223488. The Applicant also made the balance consideration for the sale. The Respondent failed to provide the exit gate pass due to which the Applicant was not able to collect and transport the abovementioned Mechanical Items from the North Karanpura, Jharkhand site.

3.1. It is the case of the Applicant that the Respondent vide its email sought to cancel the sale of the abovementioned items in Karanpura, Jharkhand Site without any reason and instead of revoking the cancellation of the sale and/or alternatively refunding the amount already paid, the Respondent published E- Auction Notice on June 13, 2022 for sale of the corporate debtor and invited bid for Auctions to be held on 14.07.2022.

3.2. The Applicant further states that despite facing various obstacles due to the outbreak of the Covid-19 pandemic, the Applicant took efforts to segregate the Mechanical items and also made expenses amounting to approximately Rs. 6,00,000/- for making delivery of the aforementioned Mechanical items.

3.3. It is also stated that the Respondent vide its email dated 27.5.2022 unilaterally sought to cancel the sale of the abovementioned Mechanical Items and Inventory/ Scrap items in Karanpura, Jharkhand Site without any reason provided for such cancellation, whatsoever, despite Respondents having

being paid in full and failed to provide gate pass for shifting the auctioned material to the applicant.

- 3.4. On being made aware, the Applicant is stated to have sent a letter dated 4.7.2022 requesting the revocation of the sale of abovementioned Mechanical items and inventory/ scrap items in the Karanpura site in Jharkhand, as the same having been sold to the Applicant, however, the Respondent didn't respond to it.
4. The Respondent Resolution Professional filed his reply stating that the sale in Auction No. 217683 and Auction No. 223488 could not be consummated due to non-issuance of gate pass by Bharat Heavy Electricals Limited for handover of assets, and the Applicant was duly informed that these sales are being cancelled vide email dated 27.05.2022. The details of money paid by the Applicant in terms these auctions alongwith other auctions were also provided therein, whereat the amount refundable to the applicant consequent to such cancellation was explicitly stated.
5. The Applicant filed rejoinder refuting the contentions of the Respondent in the Reply stating that this Tribunal had directed the Respondent not to proceed further in the auction vide order dated 14.07.2022. The Applicant has also sought to clarify the account of adjustment pertaining to other auctions, which are not subject matter of this Application, hence we do not consider it appropriate to deal with the same.
6. We have heard the Counsel and perused the material on record.
- 6.1. The issue for consideration in the present application is whether the sale was confirmed in terms of conditions contained under terms of auction, and such sale stands concluded. It is the case of the Applicant that Schedule I under Regulation 33(1) of the

Insolvency And Bankruptcy Board of India (Liquidation Process) Regulations, 2016 provides that “*On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within fifteen days of the date when he is invited to provide the balance sale consideration. On payment of the Full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.*”

6.2. Per contra, it is the stand of Respondent that the sale could not be consummated after the Applicant was declared successful bidder on account of non availability of gate pass from the third person i.e BHEL where the material was lying and it was the responsibility of the applicant to obtain such permission for removal of the material.

6.3. We find that the Process Memorandum for sale of Assets under Auction contemplated Sales as “*as is where is basis*”, “*as is what is basis*”, and “*whatever there is basis*”. It further stated that the proposed sale of the Assets of the Company does not entail transfer of any title except the title which the Company had over its Assets as on date of the transfer and the Bidder was under obligation to satisfy any encumbrance thereupon, if there exists any. Further, the Liquidator had not taken or assumed any responsibility for any shortfall or defect or shortcoming in the Assets of the Company.

6.4. The “*Successful Bidder*” is defined in the Process Memorandum to mean, the *Eligible Bidder whose bid is approved and who is declared successful by the Liquidator after the auction*. We also find that the Process Memorandum further states under clause 9 that “*The Liquidator will issue a letter to the Successful Bidder and the Successful*

Bidder shall have to deposit the balance consideration (after adjustment of the EMD) of the sale price within 15 days of such demand. On payment of the full amount, the sale shall stand completed and the Liquidator shall execute certificate of sale or sale deed to transfer such Assets and the Assets shall be delivered to the Successful Bidder in the manner specified in the terms of sale". Under clause 10, it provides that "Determination of the Successful Bidder(s) shall be done on the basis of highest bid (not below the reserve price) received for each Lot of assets via the E-Auction, unless the Liquidator determine, acting reasonably, that the highest bidder shall not be identified as the Successful Bidder". It further provides that "On payment of the full amount of sale consideration and applicable taxes (if any), the sale shall stand completed, and the Liquidator shall execute Certificate of sale or Sale deed or relevant sale documents related to transactions and the assets shall be deemed to be delivered to the Successful Bidder."

6.5. We find that the Applicant was declared the Successful Bidder in both the auctions, and has claimed to have made full payment towards auction money. On perusal of the reply of the Respondent, we do not find any express denial of payment not having been received in relation to these two auctions, however, the Respondent has assigned the reasons for non-consummation of sale under these two auctions to be "non-issuance of Gate pass from BHEL". There is nothing on record to suggest any specific encumbrance claimed by BHEL on such assets. On the contrary, publication of another Auction notice in relation to these assets clearly indicate that the Liquidator claims ownership of Corporate Debtor on these assets. We are not persuaded by the reasons of unwanted behaviour of Applicant as sufficient reason for the cancellation of Sale,

which in terms of the conditions of Process Memorandum gets completed on payment of balance auction money after declaration as Successful Bidder. On the contrary, in terms of the provisions of the Process Memorandum, the Liquidator was duty bound to issue Certificate of Sale and such Certificate is deemed as delivery of the assets. Accordingly, we direct the Liquidator to issue Certificate of Sale in favor of Applicant in relation to these two auctions, if the goods have not been sold as yet. In view of contentions raised in the Rejoinder disputing the adjustments made by the Respondents, we direct the Respondent to resolve those differences and appropriate the payments made by the Applicant against notified auction only, if conveyed while making payments under each of such auction. The email dated 27.05.2022 communicating cancellation of sale in respect of these two auction and E-auction notice dated 13.06.2022 are set aside.

7. With the aforesaid directions, IA 1877 of 2022 is allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)