

**THE NATIONAL COMPANY LAW TRIBUNAL  
CHANDIGARH BENCH, CHANDIGARH  
(Exercising powers of Adjudicating Authority under  
the Insolvency and Bankruptcy Code, 2016)**

**IA No. 433/2022 & IA No. 525/2021  
in  
CP (IB) No.128/Chd/Hry/2017**

**Under Section 60(5) of the IBC 2016**

**In the matter of:**

**Bank of India**

....Petitioner-Financial Creditor

Vs.

**M/s. OSIL Exports Limited**

....Respondent-Corporate Debtor

**And in the matter of IA No. 525/2021:**

**RA Enterprises,**

through its partner,  
having its registered office at  
3rd Floor, Flat No.-9,  
Ashthana Sadan Blunt Square,  
Charbagh, Lucknow,  
Uttar Pradesh-226004

...Applicant

Vs.

**Sh. Kanwal Goyal,**

Liquidator in OSIL Exports Limited  
having its office at  
E-10A, Kailash Colony,  
Greater Kailash-I  
New Delhi-110048

...Respondent/Liquidator

**And in the matter of IA No. 433/2022:**

**M/s. OSIL Exports Limited**

through Kanwal Goyal, Liquidator  
having its registered office at  
E-10 A, Kailash Colony,  
Greater Kailash-I  
New Delhi-110048

...Applicant

Vs.

**RA Enterprises,**  
through its partner,  
having its registered office at  
3rd Floor, Flat No.-9,  
Ashthana Sadan Blunt Square,  
Charbagh, Lucknow,  
Uttar Pradesh-226004

...Respondent

**Judgment delivered on: 20.01.2023**

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)  
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

**Present:**

For the Applicant in  
IA No. 525/2021 and respondent  
in IA No. 433/2022 : Mr. Viraj Gandhi, Advocate

For the Applicant in  
IA No. 433/2022 and Respondent  
in IA No. 525/2021 : Mr. Balwinder Singh Kalsi, Advocate

**PER: SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

**JUDGMENT**

**IA No. 433/2022**

This application has been filed by the liquidator of the corporate debtor to place on record the submission of losses suffered by the stakeholders of the corporate debtor due to non-performance of the contract by the successful bidder-respondent which is necessary for proper adjudication of IA No. 525/2021 filed by the successful bidder.

2. In this application, it is stated that the successful bidder-respondent was the H1 bidder in the E-Auction for the sale of assets (plant and machinery) of the corporate debtor held on 15.04.2021 and the bid of the respondent was accepted, and the letter of intent dated 16.04.2021 for the total sale consideration of Rs. 5,48,70,000/- was issued to respondent. The balance sale consideration of Rs. 5,19,70,000/- after adjustment of Rs. 29,00,000/- on account of EMD is to be paid within 90 days of issue of the letter of intent i.e. 15.07.2021.

3. Subsequently, the respondent sent an email to the applicant-liquidator on 15.07.2021, wherein the respondent requested an extension and assured that the respondent would make the payment of Rs. 01 Crore (one crore) with the applicant/liquidator on 16.07.2021 and requested that the remaining sale consideration would be paid within two weeks from the given date, ending on 29.07.2021 along with applicable interest in terms of the Regulations, 2016 and the extension to deposit Rs. 01 Crore by 16.07.2021 was given by the applicant/liquidator to the respondent.

4. It is further mentioned that in spite of the repeated extensions given at the requests of the respondent from time to time to make payment up to 16.07.2021, 19.07.2021, 29.07.2021 and 31.08.2021, the respondent has not deposited the balance amount of the sale consideration.

5. It is averred that at the time of the submission of the bid through E-Auction was fully aware of the pandemic situation in the whole country due to Covid-19 and even the decision of bid was made.

6. It is further averred that the respondent tried to sabotage the subsequent e-auction conducted on 23.09.2021 and that the respondent has duly participated in the said bid with a different name of the company with the name and style of

Native Estate (P) Ltd. and has quoted the bid amount to the tune of Rs. 5.73 Crores. The respondent, however, has not been considered a successful bidder as being ineligible for bidding as per the terms and conditions of the E-Auction. Thereafter, the assets of the corporate debtor have been sold to M/s Rohit Trading Company at a price of Rs. 4.87 Crores in a re-auction held on 07.10.2021. The full sale consideration has been received on 06.03.2022, and the sale certificate has been issued by the applicant/liquidator to the M/s. Rohit Trading Company.

7. It is stated that due to the non-performance of the contract by the respondent, the applicant and the stakeholder for loss of account of Rs. 64,40,000/- on account of loss of interest, litigation charges, security charges of the machinery etc.

8. The respondent i.e., RA Enterprises has filed its reply vide diary no. 00756/01 dated 02.06.2022, wherein it has been stated that due to unforeseen circumstances, the respondent could not make all the requisite payments in terms of the letter of intent dated 16.04.2021. The letter of intent on which the applicant has relied is binding on both parties, and it is as per the terms, it is nowhere mentioned that the entire money deposited by the respondent will stand forfeited. The earnest money deposited by the respondent was to the tune of Rs. 29 Lakhs and thereafter an amount of Rs. 70 Lakhs was also deposited by the respondent. Due to financial distress, the respondent was not able to make the entire payment due to the present applicant. Hence, the respondent has preferred the application bearing IA No. 525/2021 in CP(IB) No. 128/Chd/Hry/2017 before this Adjudicating Authority, seeking an extension of time for making the entire payments or refund of the amount deposited after adjusting the earnest money deposited. Further, the

respondent has denied the averments made by the applicant in the present application.

9. The applicant has filed a rejoinder vide diary No. 00756/2 dated 09.09.2022, wherein similar averments are made as in the application. Therefore, for the sake of brevity, the same is not repeated herein.

10. In view of the aforementioned facts, the prayer of the applicant is allowed, and this application is taken on record for reference purposes while adjudicating IA No. 521/2021.

11. In the result, IA No. 433/2022 is allowed and shall stand disposed of accordingly.

**IA No. 525/2021**

12. In this application, the applicant seeks direction for extending the time available to the applicant to make the balance payment pursuant to being the successful bidder on account of the unforeseen and beyond-control situations due to covid19 pandemic. Alternatively, it is prayed that an order be passed directing a refund of the amount of Rs 70 Lakhs paid to the liquidator which has been arbitrarily withheld and adjusted by the liquidator on account of the non-payment of the final bid as per the payment schedule.

13. It is submitted by the applicant that the liquidator was appointed by order of this Bench on 17.10.2019 and an e-auction was held on 15.04.2021 with regard to the company assets including plant and machinery against the reserve price of Rs. 2.93 Crore, and earnest money deposit of Rs. 29 Lakhs was made by the applicant who was the successful bidder in the aforesaid auction. And the final bid was amounting to Rs. 4.65 Crores. On 16.07.2021, the applicant paid Rs. 70 Lakhs through RTGS and on 20.07.2021 sent an email to the liquidator seeking an

extension of time to deposit the balance consideration amount along with a request not to forfeit the EMD. It is stated that in pursuance, the liquidator extended the time to deposit the amount subject to payment of interest up to the date of payment by its letter dated 10.08.2021. The liquidator vide email dated 01.09.2021 informed the applicant that it had not been able to deposit the amount as per terms of the auction, the bid was cancelled, and the earnest money stood forfeited. It was further submitted that Rs. 70 Lakhs already paid by the applicant would be adjusted towards the losses suffered by the liquidator and stakeholders on account of the non-fulfilment of the contract.

14. The respondent-liquidator has filed its reply vide diary No. 01165/01 dated 21.12.2021, wherein it has been stated that the applicant has suppressed the material facts. As per the e-auction sale, the balance consideration of Rs. 5,19,70,000/- after adjustment of Rs. 29,00,000/- on account of EMD is to be paid within 90 days of the issue of letter of intent i.e. 16.07.2021. The due has not been made within the prescribed time limit. Further, the applicant has approached the respondent for an extension of time in making the payment, the same was duly considered by the respondent, and the extension was granted as a special case vide email dated 10.08.2021 subject to the following conditions:

1. *You will give the list of visitors in advance who will visit along with you. Proper IDs will be provided at the security gate. We have so far not received the list of visitors, the same may please be expedited.*
2. *The extension up to 31.08.2021 is given subject to your deposit of the full amount along with interest @12% as provided in the auction documents.*
3. *If the amount is not deposited by 31.08.2021, the amount of Rs. 70 lakhs paid will be adjusted against losses suffered by the Liquidator and stakeholders on account of non-fulfilment of the contract as the*

*assets will have to be sold again which will cause substantial expenses and further delay in receiving payment.*

4. *This may please be noted that this is the final extension in view of the request made by you and no. further extension will be granted.*

15. The respondent has further submitted that the applicant did not raise any objection to the above-mentioned email dated 10.08.2021 and interpreted the lack of response to mean that the applicant has agreed with all the terms and conditions as contained in the above-said email. The respondent vide email dated 01.09.2021 cancelled the bid of the applicant and forfeited the EMD amount. Further, the applicant was also informed that Rs. 70 Lakhs paid by the applicant will be adjusted against losses suffered by the liquidator and stakeholder on account of non-fulfilment of contracts as the assets will have to be sold again which will cause substantial expenses and further delay in receiving payment.

16. The applicant has filed a rejoinder vide diary No. 01165/2 dated 04.02.2022, wherein the averments made by the applicant-liquidator have been denied as to be false and misleading, and the conduct of the applicant-liquidator in setting new terms and conditions is arbitrary and without any basis.

17. We have heard the learned counsel for the applicant and respondent. For the proper adjudication of the present application, the terms of reference of the letter of intent dated 16.04.2021 are perused. The relevant clause is extracted hereinbelow for reference purposes:

*“3. As per terms and conditions as set out in the E-Auction Process Information Document for the acquisition of assets of the OSIL Exports Limited (In Liquidation), if you default in making the aforesaid payment within the stipulated time, the EMD shall be forfeited, and the assets shall forthwith be sold again, and you shall*

*forfeit all claims to the assets or to any part of the amount for which it may be subsequently sold”.*

18. In this context, we are conscious of the decision of the Hon’ble Delhi High Court in the matter of **Union of India & Anr. vs M/s. Jindal Rail Infrastructure** dated 23.05.2022, wherein it is held that:

*“In cases where it is found that the terms of the contract do not clearly express the intentions of the parties, it is open to seeking recourse to various tools of interpretation. This would include interpreting a contract in a manner that would make commercial sense as it is assumed that men of commerce would have intended it so. However, it is not open to re-work a bargain that was struck between the parties on the ground that it is commercially difficult for one party to perform the same.*

*The decision of the Arbitral Tribunal to award the difference between the price quoted by the tenderers and the price quoted by JRIL is unsustainable. It amounts to re-writing the contract between the parties. The impugned award is in conflict with the fundamental policy of Indian law and is vitiated by patent illegality”.*

19. Further, the Hon’ble Supreme Court in the matter of **Shree Ambica Medical Stores & Ors vs. The Surat People’s Co-operative Bank Limited & Ors**; Civil Appeal No. 562 of 2020 dated 28.01.2020 held that:

*This Court, while interpreting the contract of insurance must interpret the words of the contract by giving effect to the meaning and intent which emerges from the terms of the agreement. In a Constitution Bench decision of this Court in **General Assurance Society Ltd V Chandumull Jain**, it was observed thus:*

*"11. ...In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in*

*which the contract is expressed by the parties because it is not for the court to make a new contract, however reasonable if the parties have not made it themselves..."*

*The court through its interpretative process cannot rewrite or create a new contract between the parties. The court has to simply apply the terms and conditions of the agreement as agreed between the parties.*

*(Emphasis Supplied)*

20. We also refer to the decision of the Hon'ble NCLAT in the case of **Saboo Tor Private Limited Vs. Mr Sanjay Gupta**; Company Appeal (AT) (Insolvency) No. 1098 of 2020 dated 18.01.2021, wherein reliance is placed on the following two decisions of the Hon'ble Supreme court while upholding the confirmation of forfeiture of EMD by the Liquidator.

"We find it a fit case to place reliance on the Judgement of the Hon'ble Supreme Court in National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410 in which the Hon'ble Apex Court has observed as follows:

*"The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But the withdrawal of an offer before it is accepted is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into a contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security in no way affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given an advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only*

*a genuine party makes a bid. If such a term was not there even a person who does not have the capacity of a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.”*

21. Further, the Hon'ble Supreme Court in **State of Haryana V/s. Malik Traders**, (2011) 13 SCC 200, has held as under:

*“The right to withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of the agreement. A person may have a right to withdraw his offer, but if he has made his offer on a condition that the bid security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the bid security should not be forfeited and it should be returned to him. Forfeiture of such bid security amount does not, in any way, affect any statutory right under Section 5 of the [Contract] Act. The bid security was given by the respondent and taken by the appellants to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence. Such conditions are included to ensure that only genuine parties make the bids. In the absence of such conditions, persons who do not have the capacity or have no intention of entering into the contract will make bids. The very purpose of such a condition in the offer/bid will be defeated if forfeiture is not permitted when the offer is withdrawn in violation of the agreement.”*

22. Keeping in view of the above decisions and the terms of the letter of intent dated 16.04.2021, it is observed that if there is a default in making the payment within the stipulated time, the EMD shall be forfeited as per the LOI. In IA No. 433/2022 discussed above, the applicant has made out a claim of losses of Rs. 64,40,000/- on account of loss of interest, litigation charges, security charges of

machinery etc. due to the non-payment by the respondent We have also come across, the respondent-liquidator's letter dated 10.08.2021, whereby, the time period was extended subject to the condition that If the amount is not deposited by 31.08.2021, the amount of Rs. 70 lakhs paid will be adjusted against losses suffered by the Liquidator and stakeholders on account of non-fulfilment of contract as the assets will have to be sold again which will cause substantial expenses and further delay in receiving payment. The respondent-liquidator has further claimed that the applicant's non-objection to the email dated 10.08.2021 means the applicant has agreed to all the terms and conditions. In this context, we are of the view that the liquidator cannot change the terms of the letter of intent unilaterally by adding a subsequent condition. Under the LOI, except EMD, no other amount can be forfeited by the liquidator. It is also noted that the corporate debtor sold to one M/s. Rohit Trading Company in re-auction and entire sale consideration has been received amounting to Rs. 4.87 Crores on 06.03.2022. In view of these facts, the forfeiture of the amount beyond EMD would amount to unjust enrichment and is against the terms of the letter of intent agreed between the parties.

23. Keeping in view of the above discussions, the liquidator is directed to refund the amount of Rs. 70 Lakhs to the applicant while the forfeiture of EMD amounting to Rs.29 lakhs is upheld. Therefore, IA bearing 525/2021 is allowed and shall stands disposed of accordingly.

Sd/-  
**(Subrata Kumar Dash)**  
**Member (Technical)**

Sd/-  
**(Harnam Singh Thakur)**  
**Member (Judicial)**

January 20, 2023  
PB/ASH