

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 186 of 2023

(Arising out of judgement and order dated 17.01.2023 passed by the National Company Law Tribunal, Kolkata Bench at Kolkata in I.A. No.800 of 2022 in C.P. (IB) No.1284/2019)

In the matter of:

Deepika Bhugra Prasad

Liquidator

M/s Ess Dee Aluminium Ltd

E-10A, LGF, Kailash Colony,

Greater Kailash –I

New Delhi-110048

.....Appellant

Vs.

Lucky Holdings Pvt. Ltd.

24A Shakespeare Sarani,

Parijaat Building,

2nd Floor,

Room No.22, 5A Street,

Kolkata 700017

....Respondent

Present:

For Appellant: **Mr. Krishnendu Datta, Sr. Advocate, Mr. Rahul Gupta,
Mr. Rahul Dadhich, Mr. Yash Tandon, Advocates.**

For Respondents: **Mr. Abhijeet Sinha, Sr. Advocate, Mr. Prashant Mehta,
Mr. Raghav Marwaha, Mr. Ninad Bohidar, Advocates.**

J U D G M E N T
(1st December, 2025)

INDEVAR PANDEY, MEMBER (T)

The present appeal has arisen from the liquidation proceedings of **M/s Ess Dee Aluminium Limited (Corporate Debtor)** and the adjudication of disputes pertaining to the e-auction conducted for the sale of the Corporate Debtor as a Going Concern. **Ms. Deepika Bhugra Prasad, the Appellant, and the Liquidator** of the Corporate Debtor, is aggrieved by the order dated **17.01.2023** passed by the **Ld. National Company Law Tribunal, Kolkata Bench (Adjudicating Authority)**, in I.A. No. 800 of 2022, in C.P.(IB) No.1284/2019 whereby the Adjudicating Authority allowed the application filed by **M/s Lucky Holdings Pvt. Ltd., the Respondent**, seeking refund of Earnest Money Deposit (EMD) in the e-auction. The Appellant asserts that the Respondent failed to comply with mandatory payment timelines under the E-Auction Process Document, leading to forfeiture of EMD, and the impugned order adversely affects the liquidation process and stakeholders' interests.

Brief facts of the case

2. The brief facts of the case are as given below:
 - i. The Corporate Insolvency Resolution Process (**CIRP**) of Ess Dee Aluminium Ltd./ Corporate Debtor commenced when the Adjudicating Authority vide its order dated 14.02.2020, admitted a petition under

Section 7 of the **Insolvency and Bankruptcy Code, 2016** (hereinafter the '**Code**') and appointed the Appellant as the Interim Resolution Professional. The Appellant issued a public announcement on 19.02.2020 inviting claims from creditors. After the constitution of the Committee of Creditors (CoC), its first meeting was held on 18.03.2020, wherein the CoC, resolved to confirm the Appellant as the Resolution Professional. In the following months, the Appellant proceeded with statutory requirements, including verification of claims, preparation of the information memorandum, and appointment of valuers etc.

- ii. The Appellant published Form-G on 03.07.2020, inviting Expressions of Interest (**EOI**). In the fourth CoC meeting held on 07.08.2020, it was noted that only one EOI had been received, prompting the CoC to republish Form-G and extend the time for receipt of EOIs until 31.08.2020. The CoC continued monitoring progress in its subsequent meetings on 09.09.2020 (fifth meeting) and 31.10.2020 (sixth meeting), where developments relating to EOIs and collection of resolution plans were discussed. By 25.12.2020, the Appellant circulated a provisional list of prospective resolution applicants, informing the CoC on 28.12.2020 that two EOIs had been received.
- iii. In the ninth CoC meeting held on 19.01.2021, the Appellant reported that an additional EOI had been received from Shree Nath Rotopack. Considering this, the CoC resolved to republish Form-G again to widen market participation. The RP sought more time to complete the CIRP

process which was allowed by Adjudicating Authority by order dated 02.02.2021. Thereafter, in the tenth CoC meeting on 20.02.2021, the CoC again decided to republish Form-G, resulting in publication of a fresh Form-G on 02.03.2021, fixing 07.03.2021 as the last date for EOIs and 12.04.2021 for filing resolution plans. In the same meeting, the CoC resolved to seek yet another 60-day extension beyond the original 270-day outer limit ending on 18.03.2021.

- iv. Despite the extensions, only one resolution plan was received by the Appellant from M/s Molisati Vinimay Pvt. Ltd., which was placed before the CoC during the eleventh meeting held on 20.04.2021. Upon detailed discussion, the CoC found the plan financially inadequate and not viable unless substantially improved. Ultimately, the CoC, with a voting share of 84.78%, resolved that liquidation of the Corporate Debtor was the most suitable course given the failure of the resolution process.
- v. Based on the CoC's decision, the Appellant filed I.A. No. 699 of 2021 for initiation of liquidation. The Adjudicating Authority, through its order dated 08.10.2021, accepted the CoC's recommendations, ordered liquidation of the Corporate Debtor, and appointed the Appellant as the Liquidator, transferring all responsibilities under Chapter III of the Liquidation Regulations to her.
- vi. The Appellant issued a public announcement in Form-B on 11.10.2021 calling upon stakeholders to submit their claims in

compliance with Regulation 12 of the Liquidation Regulations. Furthermore, in accordance with Regulation 31, the **Stakeholders Consultation Committee (SCC)** was formally constituted on 07.12.2021, providing the Liquidator with a consultative body for decisions relating to selling strategies, timelines, and evaluation of offers enabling the Liquidator to proceed with liquidating the assets of the Corporate Debtor in consultation with the SCC.

- vii. In February 2022, the Liquidator received an email dated **25.02.2022** from a prospective buyer expressing interest in purchasing the Corporate Debtor as a Going Concern under Regulation 32A. In order to ensure the buyer's seriousness, the Liquidator responded by asking for a security deposit of Rs. 2 crore as a condition to consider such proposal.
- viii. Since the buyer did not deposit the security amount, by the date, when the sale notice needed to be publicised, the Liquidator published a Sale Notice dated 13.03.2022 for a piecemeal sale of assets. However, on 17.03.2022, the buyer deposited the entire security amount of Rs. 2 crores. The Liquidator acknowledged the deposit on the same day and informed the buyer that the matter would be placed before the SCC.
- ix. The fourth SCC meeting held on 22.03.2022 considered the proposal to sell the Corporate Debtor as a Going Concern and, after deliberation, decided that the reserve price for such sale should be fixed at Rs. 90 crores. This decision effectively shifted the liquidation strategy from piecemeal sale to Going Concern sale.

- x. Pursuant to discussions within the SCC, the Liquidator issued a cancellation notice dated 02.04.2022 withdrawing the earlier Sale Notice of 13.03.2022 and published a revised Sale Notice dated 05.04.2022 (published on 07.04.2022) for sale of the Corporate Debtor as a Going Concern under Regulation 32A.
- xi. In response to the fresh sale notice, several prospective bidders, including the Respondent, deposited their Earnest Money Deposits (**EMD**), thereby becoming eligible to participate in the scheduled e-auction as per the terms of the E-Auction Process Document.
- xii. During the e-auction preparations, emails dated 16.04.2022 were sent by the Appellant informing bidders of a technical error committed by another bidder, M/s GB Hospitality, who had inadvertently entered a bid of Rs. 1242 crores instead of Rs. 124.2 crores. This error compelled the Liquidator to reschedule the auction to ensure fairness and transparency.
- xiii. One of the bidders, M/s Trailblazer, objected through an email dated 17.04.2022, asserting that its bid of Rs. 124.40 crores should be treated as valid and that a fresh auction would be unwarranted. This triggered administrative and procedural review by the Liquidator before proceeding further.
- xiv. After reviewing the situation and auction records, the Liquidator issued detailed communications on 18.04.2022, clarifying that the highest valid bid of Rs. 124.40 crores had not been rejected; however,

due to the technical error by another bidder, the auction process needed to be re-started to maintain fairness and give every eligible bidder an equal opportunity.

- xv. The re-started e-auction at 3 PM on 18.04.2022 saw both M/s Trailblazer and the Respondent entering identical bids of Rs. 124.40 crores, rendering the process inconclusive, because no bidder exceeded the tie value. This necessitated a further round of competitive bidding.
- xvi. To break the tie, the Liquidator instructed all bidders to reconvene at 6 PM on 18.04.2022, and in that round, the Respondent quoted the highest amount of Rs. 124.60 crores. This amount exceeded all previous bids and was recorded in the auction report as the highest bid for the Going Concern sale.
- xvii. The SCC met for its fifth meeting on 20.04.2022 to evaluate the bidding outcome and declared the Respondent as the H1 bidder. During this meeting, the representative of the Respondent was invited for interaction with the SCC members to discuss the viability and next steps of the sale.
- xviii. Acting upon the auction results, the Liquidator issued an email dated 26.04.2022 formally requesting the Respondent to deposit 25% of the bid amount i.e. Rs.29.15 crores (after adjusting the EMD) within 15 days i.e. on or before 11.05.2022 as required under the E-Auction

Process Document, so that the Letter of Intent could be issued to the Respondent.

- xix. The Unsuccessful bidder M/s Trailblazer filed I.A. No. 397/2022 before the Adjudicating Authority and, on 09.05.2022, obtained an interim restraint order based on its undertaking. This development was immediately communicated by the Liquidator to the Respondent through an email dated 10.05.2022.
- xx. The Respondent in his reply dated 11.05.2022 to the Liquidator, stated that since the Hon'ble Tribunal had stayed further steps arising out of the auction, it could not proceed to deposit the first instalment, until the stay was vacated. The Respondent indicated that it would take necessary steps only after final orders were passed in the application filed by M/s Trailblazer.
- xxi. During the hearing of I.A. No. 397/2022 before the Adjudicating Authority on 15.06.2022, the applicant (Trailblazer) chose to withdraw his application. As a result, the interim restraint order automatically stood vacated on the same day.
- xxii. Immediately after the withdrawal of the application filed vide I.A. No. 396 of 2022, the Liquidator wrote to the Respondent on 16.06.2022, informing that the stay had been vacated and requesting the Respondent to deposit the first instalment of Rs.29.15 crores (being 25% of the bid amount after adjusting the EMD). The Liquidator also highlighted that the Respondent had only 15 days from 26.04.2022

under the E-Auction Process Document to make this payment, and therefore urged immediate compliance.

- xxiii. The Liquidator, thereafter issued repeated reminders, including emails on 17.06.2022, 23.06.2022, 28.06.2022, and 29.06.2022 making it clear that the Respondent was contractually bound to deposit the first instalment promptly once the interim restraint had ceased, and that delay would amount to breach of auction terms entitling forfeiture of EMD.
- xxiv. In response, the Respondent sent an email on 18.06.2022 stating that although the application had been withdrawn on 15.06.2022, it was awaiting the formal publication of the written order of the Adjudicating Authority before making any deposit. The Liquidator clarified that withdrawal of the application itself vacated the stay and restored full authority to proceed, but despite this clarification, the Respondent did not make the required payment.
- xxv. The certified copy of order of Adjudicating Authority dated 15th June 2022 was received by the Appellant on 23.06.2022 and the same was sent to the respondent vide an attachment to email of the same date. The liquidator once again requested the respondent to make payment of the balance amount.
- xxvi. As the Respondent failed to comply with payment terms even after repeated reminders and since the statutory timelines under the E-Auction Process Document had long expired, the Liquidator, by

letter dated 01.07.2022 and a follow-up email dated 04.07.2022, cancelled the sale in favour of the Respondent and forfeited its EMD. The Liquidator also informed the Respondent that due to its non-payment, the Going Concern sale could not be completed and therefore a fresh auction process would be undertaken.

- xxvii. On 12.07.2022, the Liquidator formally notified the Respondent that the earlier auction in which it was declared H1 now stood cancelled owing to its non-compliance, and that a fresh sale process would be initiated. Despite this explicit communication, the Respondent did not challenge the cancellation at that stage nor offer to deposit the first instalment.
- xxviii. Subsequently, the Respondent filed I.A. No. 800/2022 in August 2022, seeking refund of its forfeited EMD on the grounds that it was prevented from paying the first instalment due to the interim restraint order. The Liquidator opposed the application, submitting that the Respondent was obligated under the auction terms to make payment immediately once the stay was vacated and its failure constituted a clear breach warranting forfeiture.
- xxix. Meanwhile, the Liquidator continued the liquidation process, and in the seventh SCC meeting held on 01.08.2022, it was resolved that the Corporate Debtor's "Block A" assets would be sold as a Going Concern whereas "Block B to H" would be sold piecemeal, reflecting a restructuring of the sale strategy in the interest of maximising value for stakeholders.

- xxx. Acting on this revised SCC decision, the Liquidator issued a fresh Sale Notice on 04.08.2022, inviting bids for the restructured sale process. The deadline for deposit of EMDs was fixed as 24.08.2022, and Shakambhari Ispat & Power Ltd. deposited the EMD on the last date, successfully qualifying for the e-auction. The e- auction was held on 26.08.2022, and pursuant to the bidding process, Shakambhari Ispat & Power Ltd. was declared as the highest bidder with an offer of Rs.103.40 crores. This was confirmed in the SCC meeting held on 30.08.2022, which approved Shakambhari as the H1 bidder. Pursuant to this the Liquidator issued a Letter of Intent (LoI) on 07.09.2022 to Shakambhari Ispat & Power Ltd., requiring payment of the balance consideration. The entire sale consideration was successfully received by the Liquidator by 15.09.2022, after which symbolic possession of the assets was handed over to the auction purchaser. The Liquidator executed and issued the Sale Certificate on 28.09.2022 under Regulation 33 of the Liquidation Regulations, thereby completing the Going Concern sale of Block A and finalising distribution and liquidation steps for that asset block.
- xxxi. I.A. No. 800/2022 filed by the Respondent seeking refund of forfeited EMD came up for final adjudication, and upon hearing the parties, the Adjudicating Authority passed the impugned order dated 17.01.2023, directing the Liquidator to refund the EMD amount to the Respondent.
- xxxii. Aggrieved by the impugned order, the appellant has preferred the present appeal under Section 61 of the Code, 2016.

Submissions of the Appellant

3. Mr. Krishnendu Datta, Ld. Sr. Counsel for the Appellant submits that the present appeal has been preferred by Ms. Deepika Bhugra Prasad, in her capacity as the Liquidator of Ess Dee Aluminium, assailing the impugned order dated 17 January 2023 passed by the Learned Adjudicating Authority (NCLT, Kolkata Bench), whereby IA No.800 of 2022 in C.P. (IB) No.1284/2019 filed by the Respondent, Lucky Holdings Private Limited was allowed.

4. The Ld. Sr. Counsel submits that the said Interlocutory Application had challenged the Liquidator's letter dated 01 July 2022, through which the Appellant, in exercise of her powers under the auction terms, cancelled the Respondent's bid and forfeited the EMD of INR 2 Crores due to the Respondent's failure to comply with the payment timelines. It is the Appellant's case that the terms of the auction expressly authorized such forfeiture, and the Adjudicating Authority erred in law and fact in setting aside the same.

5. Ld. Senior Counsel gave a brief chronology of events of the auction conducted by the Appellant. The Liquidator published a sale notice on 05 April 2022 inviting bids to sell the Corporate Debtor as a going concern in terms of Regulation 32A of the IBBI Liquidation Regulations, 2016. Clause 2 of the Sale Notice states that the auction shall be conducted as per the e-auction process document. Clause 4 states that all bidders must deposit Rs. 2Cr as an Earnest Money Deposit ("EMD"). Clause 9 states that "Default in

deposit of the balance amount by the successful bidder within the time limit as mentioned in the Email would entail forfeiture of the entire amount deposited (EMD + Any Other Amount) by the Successful Bidder”.

6. The Liquidator published the e-auction process document on 07 April 2022, which contained detailed terms governing the auction. Clause 13.5(vii) specifically states that a bidder’s EMD may be forfeited, “if the Successful Bidder fails to make the payments of the 1st Instalment Payment within 15 days from the declaration as Successful Bidder in accordance with the terms of the e-Auction Process Document”.

7. Ld. Counsel states that the Respondent executed and submitted to the Appellant a declaration in the form of an affidavit on 13 April 2022. Clause 6 of the declaration submitted by the Respondents specifically affirms that the Respondent agrees their EMD is liable to be forfeited in the event they fail to adhere to the prescribed timelines.

8. The Respondent submitted a bid for Rs.124.60 Cr. on 18th April 2022. The said bid emerged the highest, and vide letter/Email dated 26 April 2022, the Appellant declared the Respondent H-1 bidder. In line with the timelines prescribed in the e-auction process document, the Appellant also called upon the Respondent to pay the first instalment aggregating to Rs.29.15Cr within 15 days, i.e., on or before 11 May 2022.

9. The Appellant was served with an application on 02 May 2022, which was eventually numbered IA 397 of 2022, filed by one unsuccessful bidder,

Trailblazer Edusol Private Limited. The Appellant sent a copy of the application to the Respondent by way of email dated 02 May 2022.

10. Ld. Counsel submits that on 09 May 2022 i.e., two days before the 11 May deadline, the I.A 397 was listed before the Ld. Adjudicating Authority and interim orders were passed on the same day. The order dated 09 May 2022 records as follows, *“Ld. Counsel appearing for the Liquidator undertakes not to go ahead with the sale and seeks time to file reply affidavit...”*. By an email dated 10 May 2022, the Appellant informed the Respondent regarding the order dated 09 May 2022.

11. The Respondent sent a letter to the Liquidator dated 11.05.2022. By way of the said letter, the Respondent requested the Appellant to postpone the date demand of the 1st instalment till the final resolution of the dispute. Pertinently, the Respondent never stated that they would not be interested in making the first payment after the disposal of IA 397. In line with the Respondent's request, the Appellant never made any demand for the 1st instalment during the stay period.

12. Ld. Sr Counsel states that on 15 June 2022 the Applicant in IA 397 unconditionally withdrew the said application. Accordingly, the statement made by the Appellant recorded in the order dated 09 May 2022 stood withdrawn.

13. The Appellant on 16 June 2022 wrote to the Respondent informing them regarding the order dated 15 June 2022 and calling upon them to make the payment within two days. This was because the auction was

interdicted when the Respondent had two days left to make the first payment. The Respondent did not reply, forcing the Appellant to send a reminder on 17 June 2022. The Respondent replied on 18 June 2022 stating that they are evaluating the legal implications of the order dated 15 June 2022. Pertinently, the Respondent never said they would not go through with the sale at this stage.

14. 01 July 2022: After the Respondent's reply on 18 June 2022, the Appellant called upon the Respondent to make the payment on 26 June, 28 June and 29 June. Since the Respondent failed to make any payment, the Appellant was constrained to cancel the sale and forfeit the EMD submitted by the Respondent vide Letter dated 01 July 2022.

15. Thereafter, the Respondent filed the Subject IA No. 800 on 2 August 2022 challenging the Intimation Letter dt 01 July 2022. Ld. Sr. Counsel stated that vide the Impugned Order dated 17 January 2023, the AA allowed the IA No. 800 and directed the Appellant to refund the EMD. The Impugned Order incorrectly applied Section 74 of the Indian Contract Act, 1872 and held that no specific loss had been proved by the Appellant.

16. In the meantime, the Corporate Debtor was once again put to auction on 26 August 2022 and Shakambhari Ispat & Power Limited emerged as H-1 with a bid of INR 103.40 Cr (as opposed to the Respondents' bid of 124.60 Cr).

17. The Ld. Counsel submits that the Sale Notice, E-Auction Process Document, and Declaration executed by the Respondent form an integrated

and binding contractual framework. Each of these documents expressly provides that the EMD is liable to forfeiture in the event of default in payment of the sale consideration within the prescribed time.

18. Ld. Counsel emphasized that the Respondent never disputed the validity or applicability of these terms. Having participated voluntarily, the Respondent is estopped from denying their operation. The 15-day payment period, suspended by the interim restraint from 09 May 2022 to 15 June 2022, expired on 18 June 2022 upon exclusion of that period. The Liquidator even granted an extended period up to 30 June 2022, which the Respondent failed to utilize. Thus, the forfeiture was fully in accordance with the agreed auction conditions.

19. The Ld. counsel submits that the Respondent's default is undisputed. Neither in its letter dated 11 May 2022 nor in its reply dated 18 June 2022 did the Respondent deny its obligation or express inability to pay. Instead, the Respondent continued to make conditional statements, suggesting its intent to "evaluate" matters, which is clearly a delaying tactics.

20. The counsel submits that the Respondent's subsequent claim of a fall in aluminium prices is untenable, as market volatility is an inherent commercial risk which cannot excuse contractual non-performance. Having bid competitively, the Respondent cannot avoid its obligations by citing post-auction price changes.

21. The Ld. Counsel submits that the Adjudicating Authority's reliance on Section 74 of the Indian Contract Act, 1872, is wholly misplaced. The

forfeiture in the present case arises not from a private contractual penalty, but from a statutory auction mechanism governed by the Liquidation Process Regulations. The relationship between the Liquidator and the bidder is not governed by a traditional contract, but by statutorily prescribed conditions, duly accepted by the bidder.

22. Ld. Counsel further stated that even otherwise, the actual loss is evident, as the re-auction fetched Rs. 21.20 Crores less than the Respondent's bid. Thus, even under Section 74, the forfeiture amount of Rs. 2 Crores is justified as reasonable compensation.

23. The Ld. Counsel submits that the Adjudicating Authority failed to appreciate the statutory scheme governing liquidation auctions. The impugned order incorrectly treats the forfeiture as penal measure, disregarding the explicit terms agreed by the Respondent and the settled jurisprudence on the issue. The finding that the Liquidator failed to prove loss is erroneous, since the monetary impact of the re-auction itself demonstrates substantial detriment to the liquidation estate.

24. The Ld. counsel further submits that the Liquidator's authority to forfeit the EMD is statutory under the IBBI (Liquidation Process) Regulations, 2016, and judicially upheld in multiple precedents. The counsel relies upon the following judgments:

- (i) In '*Westcoast Infraprojects Pvt. Ltd. v. Ram Chandra Dallaram Chaudhary, Liquidator of Anil Ltd.*', [Company Appeal (AT)(Ins.) No. 1258 of 2022], 2023 SCC OnLine NCLAT 223] which was decided on

28.04.2023, this Hon'ble Tribunal held that once the successful bidder defaults in making payment within the stipulated time, the Liquidator is fully empowered to cancel the sale and forfeit the EMD and any other amounts deposited, as per Schedule I of the Liquidation Regulations.

He further stated that the Hon'ble Supreme Court, in Civil Appeal No. 4087 of 2023, decided on 05 July 2023, dismissed the appeal, affirming the NCLAT's finding and thereby settling the law that Section 74 of the Indian Contract Act has no application to forfeiture under liquidation auctions.

(ii) In '*BRS Refineries v. Supriyo Kumar Chaudhary, Liquidator of JVL Agro Industries Ltd.*', [Company Appeal (AT)(Ins.) No. 1477 of 2023, MANU/NL/0511/2024] decided by this Appellate Tribunal on 16.07.2024, reaffirmed that the Liquidator's power to forfeit EMD flows from the auction process and not from a penal clause, and hence cannot be interfered with under Section 74.

(iii) In '*Potens Transmission & Power Pvt. Ltd. v. Apex Buildsys Ltd.*', [Company Appeal (AT)(Ins.) No. 1543 of 2023]' -this Appellate Tribunal held that the maximum payment period under Schedule I of the e-auctioned process document provided is 90 days and that non-payment within such period mandates cancellation and forfeiture. It also held that when forfeiture take place under the terms and conditions of a public auction under Liquidation Process Regulations, Section 74 of the Indian Contract Act has no application.

(iv) In '*Vikram Bajaj, Liquidator of Best Foods Ltd. v. ASJ Finsolutions Pvt. Ltd.*', [Company Appeal (AT)(Ins.) No. 1612 of 2024]' decided on 21.01.2025, it was reiterated by this Appellate Tribunal that forfeiture is a legitimate consequence of default under statutory auction conditions.

25. The counsel emphasizes that these judgments collectively affirm the Liquidator's power to forfeit deposits and reject the application of Section 74 of the Contract Act in liquidation sales.

26. The Ld. Sr. Counsel for the Appellant submitted that the Respondent committed a clear default under the auction terms, and the Liquidator's decision to cancel the sale and forfeit the EMD was fully justified, proportionate, and in compliance with statutory provisions. The Adjudicating Authority erred in applying Section 74 of the Contract Act to a statutory auction and in ignoring binding precedents of this Hon'ble Tribunal and the Hon'ble Supreme Court.

27. Accordingly, the counsel submits that the impugned order deserves to be set aside, and the Liquidator's action dated 01 July 2022 should be upheld.

Submission of Respondent

28. Sh. Abhijeet Sinha, Ld. Sr. Counsel for the Respondent submits that the said Application, being IA No. 800 of 2022, was filed by the Respondent before the Hon'ble NCLT seeking refund of the Earnest Money Deposit that

had been wrongfully forfeited by the Appellant. The EMD had been deposited by the Respondent pursuant to the Sale Notice dated 05.04.2022 issued for sale of the Corporate Debtor as a *going concern* under Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016. The forfeiture of such deposit was wholly arbitrary and unjustified.

29. Ld. Sr. Counsel submits that the e-auction of the Corporate Debtor was initially conducted on 16.04.2022, which was subsequently extended till 18.04.2022 due to a bidding error committed by another participant, *GB Hospitality (India) Pvt. Ltd.*. It is submitted that GB Hospitality inadvertently placed a bid of Rs. 1242 crores instead of Rs. 124.20 crores, an error exceeding Rs. 1100 crores. This was clarified by GB Hospitality through its email dated 16.04.2022, addressed to the Appellant-Liquidator.

30. Ld. Sr. Counsel further submits that, upon receiving this clarification, the Appellant issued an email dated 16.04.2022, acknowledging the error and declaring that the auction would recommence on 18.04.2022 at 11:00 A.M., starting from the last valid bid of Rs. 124 crores. The said email clearly demonstrates that the auction process had been restarted by the Appellant herself.

31. Ld. Sr. Counsel for the Respondent submits that the auction resumed on 18.04.2022, and upon conclusion of the extended round, both the Respondent and *Trailblazer* submitted the highest bids of Rs. 124.40 crores each. Thereafter, a fresh bidding round was commenced at 6:00 P.M. the same day, from which the Respondent emerged as the final H1 bidder with a bid of Rs. 124.60 crores.

32. Ld. Sr. Counsel further submits that after the Respondent was declared as the H1 bidder, *Trailblazer* filed an application, being IA No. 397 of 2022, before the Hon'ble NCLT seeking to be declared as the H1 bidder based on its participation in the auction held on 16.04.2022. During the hearing of the said application, the Appellant-Liquidator, of her own volition, gave a unilateral undertaking before the Hon'ble NCLT that she would not proceed with the sale. Reliance in this regard is placed on the Order dated 09.05.2022, which records the said undertaking.

33. Ld. Sr. Counsel for the Respondent submits that this unilateral undertaking was made by the Appellant without any prior intimation or consent of the Respondent. In fact, the Respondent was not even impleaded as a party in the said proceedings at that stage. This fact is clear from paragraph 2 of the Order dated 09.05.2022, wherein the Hon'ble NCLT directed *Trailblazer* to implead the Respondent as a party. Therefore, the Appellant acted entirely on her own accord, thereby delaying and obstructing the sale process.

34. Ld. Sr. Counsel further submits that despite furnishing such undertaking before the Hon'ble NCLT, the Appellant, by email dated 10.05.2022, did not disclose the fact of the undertaking to the Respondent. Instead, the said email merely informed the Respondent that it had been impleaded as a party in IA No. 397 of 2022, thereby deliberately concealing a material fact and misleading the Respondent.

35. Ld. Sr. Counsel submits that in view of the pending proceedings initiated by *Trailblazer*, the Respondent addressed a letter dated 11.05.2022

to the Appellant requesting postponement of the first instalment payment of 25% of the sale consideration. It is significant to note that even on this date, the Respondent remained unaware of the undertaking unilaterally furnished by the Appellant before the Hon'ble NCLT.

36. Ld. Sr. Counsel for the Respondent submits that thereafter, *Trailblazer's* IA No. 397 of 2022 was withdrawn vide Order dated 15.06.2022, and consequently, the Appellant's unilateral undertaking stood vacated. However, instead of informing the Respondent of this development, the Appellant issued an email dated 16.06.2022 demanding immediate payment of the first instalment without providing a copy of the said order. The Respondent, therefore, by email dated 18.06.2022, sought a copy of the order and requested time until 30.06.2022 to respond.

37. Ld. Sr. Counsel further submits that the Appellant herself did not possess a copy of the Order dated 15.06.2022 until 23.06.2022, when the same was finally shared with the Respondent. Notwithstanding this, the Appellant proceeded to issue another email on 26.06.2022 threatening forfeiture of the EMD, even before the Respondent had expressed its intention regarding continuation of the sale. Subsequently, by email dated 01.07.2022, the Appellant illegally forfeited the Respondent's EMD of Rs. 2 crores, compelling the Respondent to approach the Hon'ble NCLT through IA No. 800 of 2022, resulting in the Impugned Order.

38. Ld. Sr. Counsel for the Respondent submits that the timelines mentioned in the Sale Notice and E-auction Process Document cannot be enforced against the Respondent since the delay in completion of the sale

process was entirely attributable to the Appellant. When the Respondent was declared as the successful H1 bidder on 26.04.2022, the first instalment was to be paid by 09.05.2022. However, the Appellant's unilateral undertaking before the Hon'ble NCLT and her failure to communicate the same to the Respondent caused a complete standstill in the process.

39. It is submitted by Ld. Sr. Counsel that the Appellant cannot now take advantage of her own wrong by alleging that the Respondent failed to meet the stipulated timelines. It was the Appellant's own act of suspending the process and concealing material facts that resulted in the breach of the timeline.

40. Ld. Sr. Counsel places reliance on the judgment of this Appellate Tribunal in Nitin Jain, Liquidator of PSL Limited v. Lucky Holdings Pvt. Ltd., Company Appeal (AT) (Ins.) No. 1390 of 2022, wherein it was categorically held that when the delay is not attributable to the successful bidder, the Liquidator cannot forfeit the EMD. The ratio of the said judgment squarely applies to the present case, as the delay arose solely due to the conduct of the Appellant.

41. Ld. Sr. Counsel argues that the reliance placed by the Appellant on the following judgments is entirely misplaced:

- *West Coast Infraprojects Pvt. Ltd. v. Ram Chandra Dallaram Choudhary, Liquidator of Anil Ltd.*

- *BRS Refineries v. Supriyo Kumar Chaudhari, Liquidator, JVL Agro Industries Ltd.*
- *Potens Transmission & Power Pvt. Ltd. v. APEX Buildsys Ltd.*
- *Vikram Bajaj, Liquidator of Best Foods Ltd. v. ASJ Finsolutions Pvt. Ltd.*

42. Ld. Sr. Counsel submits that in all these cases, the forfeiture of EMD was upheld only because the successful bidder failed to deposit the sale consideration despite repeated notices. In contrast, in the present case, the Respondent never defaulted; rather, it was prevented from performing due to the Appellant's own actions.

43. He further submitted that because of the Appellant's undertaking and delay, the market value of aluminium drastically dropped, rendering the transaction commercially unviable. The Corporate Debtor was later sold for Rs. 103.40 crores, nearly Rs. 21.20 crores less than the Respondent's offer of Rs. 124.60 crores. Hence, any loss, if at all, is entirely the consequence of the Appellant's conduct.

44. Ld. Sr. Counsel submits that the Appellant's contention regarding the inapplicability of Sections 73 and 74 of the Indian Contract Act, 1872 is misconceived. These provisions would apply to determine compensation or forfeiture in case of breach. Here, since the breach was on the part of the Appellant, forfeiture of EMD would amount to unjust enrichment, which the law does not permit.

45. Ld. Sr. Counsel for the Respondent submits that the contention of alleged loss of Rs. 21.20 crores, raised for the first time in this Appeal, was never pleaded before the Hon'ble NCLT. The Impugned Order itself records that no such plea was raised by the Appellant-Liquidator. Therefore, the Appellant cannot be permitted to raise a new ground at the appellate stage.

46. He further submitted that even assuming some loss occurred, the same was entirely due to the Appellant's unilateral act of suspending the sale and concealing her undertaking from the successful bidder. The subsequent fall in aluminium prices was the result of her own conduct and cannot now be used to justify forfeiture of the Respondent's deposit.

47. Learned Counsel for the Respondent submits that Clause 13.5 of the E-auction Information Document enumerates specific circumstances under which the Liquidator may forfeit the EMD. None of these provisions authorize forfeiture in situations where the failure to conclude the sale is due to the Liquidator's own acts or omissions. In the present case, since the Appellant's unilateral undertaking was the sole cause of failure, the forfeiture was wholly illegal and without jurisdiction.

48. Learned Counsel for the Respondent therefore respectfully submits that, in light of the above facts, chronology, and settled judicial precedents, the impugned order dated 17.01.2023 was rightly passed by the Hon'ble NCLT and calls for no interference by this Hon'ble Appellate Tribunal. The Appellant-Liquidator's forfeiture of the EMD was arbitrary, inequitable, and contrary to the process document and law. The Respondent thus prays that

the present Appeal be dismissed with costs and that the direction for refund of Rs. 2,00,00,000/- (Rupees Two Crores Only) be upheld.

Analysis and findings

49. We have heard both the parties in detail, gone through the voluminous records of the case and also seen the written submissions of both the parties. Based on the same, we frame the following issue for determination:

“Whether the Liquidator acted in accordance with law in cancelling the sale and forfeiting the Earnest Money Deposit; and whether the Impugned Order dated 17.01.2023, directing refund of the EMD, can be sustained in law.”

50. The Appellant/Liquidator submits that the Respondent voluntarily accepted all auction terms, including the requirement to deposit 25% of the bid amount within 15 days of being declared the highest bidder, and the express clauses permitting forfeiture of EMD in case of any failure to meet the timelines. The Respondent was declared H1 on 26.04.2022, making the first instalment payable by 11.05.2022, and had consumed 13 of the 15 days before the hearing on 09.05.2022 in IA No. 397/2022, when the Liquidator gave a limited undertaking not to proceed with the sale pending reply. It is argued that this undertaking merely paused the countdown; it did not restart or alter the payment structure. Once the said IA was unconditionally withdrawn on 15.06.2022, the Respondent was required to pay within the balance time. The Appellant states that reminders dated

16.06.2022, 17.06.2022, 23.06.2022, 26.06.2022, 28.06.2022, and 29.06.2022 elicited no firm assurance or payment, and that the Respondent's evasive responses reflected hesitation rather than readiness. It is further stated that liquidation sales cannot tolerate such uncertainty and that the subsequent auction in August 2022 fetching only Rs.103.40 crore, compared to the Respondent's Rs.124.60 crore, demonstrates the financial prejudice caused by delay. The Appellant contends that the Impugned Order erred in treating the forfeiture as a penal measure under Section 74 of the Contract Act, ignoring binding precedents such as '*Westcoast Infraprojects Private Limited v. Ram Chandra Dallaram Choudhary, Liquidator of Anil Limited*', [2023 SCC OnLine NCLAT 223], which was affirmed by the Hon'ble Supreme Court in '*Westcoast Infraprojects Private Limited v. Ram Chandra Dallaram Choudhary*', [Civil Appeal No. 4087 of 2023 (order dated 25.07.2023)]. The Appellant asserts that the Impugned Order is unsustainable as it overlooks the contractual and statutory nature of liquidation auctions.

51. The Respondent, on the other hand, contends that the Liquidator's undertaking before the Adjudicating Authority on 09.05.2022 prevented it from making the payment by the original due date of 11.05.2022 and created uncertainty regarding the status of the sale. According to the Respondent, the obligation to pay revived only when the order dated 15.06.2022 was received on 23.06.2022, leaving inadequate time to arrange funds. It claims that the Liquidator acted with unwarranted haste in insisting on immediate payment and threatening forfeiture. It also contends

that no Letter of Intent was issued, and no loss was demonstrated, both of which, according to the Respondent, indicate that forfeiture was unjustified. The Respondent thus supports the Impugned Order and claims that it was unfairly penalised.

52. We begin by noting that auctions in liquidation proceedings under the Code operate in a framework which is distinct from ordinary commercial contracts. Unlike bilateral transactions, where parties negotiate terms; a liquidation sale takes place under a statutory umbrella of the Code and Liquidation Regulations with predefined conditions; strict timelines; and automatic consequences for default. A bidder who participates in such an auction voluntarily subjects itself to those conditions, and the Liquidator is obligated to implement them strictly in accordance with Code in order to protect value of assets; ensure certainty; and maintain the timeline mandated under the Liquidation Process Regulations. It is in this context that the present dispute must be examined. The question before us is whether the Respondent complied with the obligations it had accepted, and whether the Liquidator acted within her statutory and contractual authority when she cancelled the sale and forfeited the EMD. The issue also requires us to evaluate whether the Impugned Order correctly appreciated these foundational aspects or proceeded on an erroneous application of principles borrowed from commercial contexts outside the purview of the Code.

53. At this point, it may be recorded that the relevant clauses of the Sale Notice; E-Auction Process Document; and the Declaration executed by the Respondent (including clauses mandating 25% payment within 15 days,

prohibiting withdrawal, and providing for forfeiture of EMD) need to be looked into for correct appreciation of facts.

54. The clause 9 of the terms and conditions of the e-auction deals with the matters relating to Earnest Money Deposits. The clause 9 is extracted below:

“9. The EMD of the Successful Bidder shall be retained towards part sale consideration and the EMD of unsuccessful bidders shall be refunded. The EMD shall not bear any interest. The Liquidator will issue a Letter of Intent (LOI) to the Successful Bidder after receiving 25% of the total bid value including EMDE amount within (25% successful bid amount-EMD Amount) within 15 days on issuance of H1 bidder and accordingly a LOI will be issued by the Liquidator. Default in deposit of the balance amount by the successful bidder within the time limit as mentioned in the E-mail would entail forfeiture of the entire amount deposited (EMD +Any Other Amount) by the Successful bidder.”

55. The appellant thereafter in invitation for bids of e-auction of the assets of the corporate debtor in liquidation, issued e-Auction Process Information Document and the following clauses of the said document are relevant:-

“12.1 The liquidator proposes to conduct the sale of company on a going concern basis as contemplated under Regulation 32(e) of the Liquidation Process Regulations, 2016 through E-Auction Process Document.

xxxx

It is clarified that from the date of submission of the Bid, the Qualified Bidders shall not be entitled to withdraw, cancel or renegotiate the Bid under any circumstances or for any reason

(including for any delay in getting the Final Approval Order) and by participating in this E-auction process, the Qualified Bidders specifically waive any such right to withdraw, cancel or renegotiate the Bid under all applicable law. In the event the Qualified Bidder makes any attempt to withdraw/cancel the Bid, renegotiate or4 does not complete payment of the sale consideration as per the timelines set out herein, the EMD, 1st installment and any other amounts paid by the Bidder shall be forfeited and the Bidder shall not be entitled to a refund of the same.

12.2.4 The Successful Bidder shall be required to submit the 1st Installment of 25% of successful bid amount less-EMD already submitted, within 15 days from declaration as Successful Bidder by the Liquidator.

13.5.1 It is to be noted that the EMD furnished can be forfeited at any time, upon the occurrence of any of the following events:

i) xx

ii) xx

iii) xxx

iv) xxx

v) xx

vi) xx

vii) if the Successful Bidder fails to make the payment of the 1st installment Payment within 15 days from the declaration as Successful Bidder in accordance with the terms of the E-auction Process Document; or

(Emphasis Supplied)

56. Thereafter a declaration was taken from the bidders in the form of an affidavit. This was furnished by the Respondent on 13.04.2022. The relevant para 6 of the declaration are as under:-

"6. 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 reasons whatsoever and/or fail to fulfill any/all the terms and conditions of the auction and offer letter, the EMD and other monies paid by me/us along with the online form and thereafter, are liable to be forfeited. The timeline for payment of final sale consideration may be extended by sole discretion of liquidator, to the extent permissible under the applicable laws and regulations. In case final sale consideration is not paid within timeline, the liquidator shall forfeit EMD and/or Performance BG.

(Emphasis Supplied)

57. We note from the Clause 9 of sale notice, clauses 12.1, 12.2.4 and 13.5.1 (vii) of e-auction process document and clause 6 of the affidavit submitted by the respondent that non-payment of balance amount within 15 days from the date of declaration as H1 bidder would lead to forfeiture of EMD. The respondent has given an unequivocal undertaking regarding the same in his affidavit dated 13.04.2022.

58. We therefore note that these three aforementioned documents together form a binding code of conduct governing the sale, and the Respondent agreed unconditionally to be bound by them.

59. Turning to the factual record, we find it necessary to assess the Respondent's conduct in a manner consistent with the structure of liquidation auctions. The Respondent was declared H1 on 26.04.2022.

Under the auction terms, the first instalment became due on 11.05.2022. The record shows that the Respondent did not raise any concern regarding the timeline at any point prior to 09.05.2022, nor did it indicate any inability or difficulty in arranging funds. On 09.05.2022, when IA No. 397/2022 was taken up, the Liquidator's undertaking was limited and procedural, it was not a statement that the sale itself was under challenge or would not proceed. The Respondent, in fact, wrote on 11.05.2022 requesting postponement of the deposit until the "issue is resolved," indicating clearly that it intended to go ahead with the purchase, but sought a short deferment while the application was pending. This correspondence confirms that the Respondent was not prevented from preparing to comply and that it expected to make the payment after the dispute was resolved.

60. When IA No. 397/2022 was unconditionally withdrawn on 15.06.2022, the temporary impediment stood completely removed. The Liquidator immediately resumed the timeline and called upon the Respondent to pay within the remaining period. Between 26th April 2022 to 9th May 2022, a total of 13 days had already elapsed from the date of declaration of H1 bidder and as on 10th May 2022, when the information about orders of AA dated 9th May 2022 was communicated to the respondent, only two days were left for making the balance payment. The Respondent did not, at this stage or thereafter, dispute that only two days remained.

61. On 15.06.2022, the applicant objecting to auction sale withdrew his application opposing the same, accordingly, AA allowed the withdrawal and

specifically noted that interim orders, if any, stand vacated. The order is extracted below:

“ORDER SHEET ON 15th June 2022

ORDER

- 1. Ld. Counsel for the parties present.*
- 2. IA(IBC)/397(KB)2022 - Ld. Counsel appearing for the application seeks permission to withdraw the application. Permission is granted. IA stands disposed of. Interim order, if any -stands vacated.*
- 3. List rest of the IAs on 19/07/2022.”*

62. Immediately thereafter, the appellant liquidator wrote to the respondent on 16.06.2022 informing him about the decision of the Ld. AA and requested him to comply with the terms and conditions of the E-Auction document and comply with the mail which was sent by the liquidator on 26.04. 2022, in particular, clause 12.2 of the e-auction process document. The relevant mail of the liquidator is extracted below:

“On Thu, Jun 16, 2022 at 11:59 AM Ess Dee Aluminum/AAA Insolvency cessdee@aaainsolvency.com> wrote:

Respected Sir/Mam,

This mail is with-reference to the Liquidation Process of ESS DEE Aluminium Limited In Liquidation.

It is pertinent to mention that as per trail mail and as per our previous communications wherein we imparted your good office that an application was filed by one of the bidders before Hon'ble NCLT Kolkata bench bearing IA No. 397/KB/2022. As per trail mail, the said (A was listed on 09.05.2022 wherein the counsel of the Liquidator undertakes that no further action will be taken by the liquidator with reference to the sale.

However, we would like to bring to your notice that the said A was listed yesterday i.e. on 15-06-2022 at Item no. 202 wherein the counsel from the side of Liquidator appeared before the court. During the course of the hearing, the counsel from the side of Trailblazer (Applicant) specifically mentioned that they want to withdraw their application, and based upon their submission the court dismissed the application.

In lieu of the same, the undertaking given by the liquidator stands vacated and the process of sale continues as per the terms and conditions of Sale and E-Auction Documents. Hence we request you to comply with the terms and conditions of the E-Auction document and comply with the mail which was sent by the liquidator on 26.04. 2022.

Hence, you are requested to comply with the provision of the E-Auction Document by submitting the Ist Instalment as mentioned in the terms and conditions so that appropriate further cause of action can be taken. The relevant para of the auction document is as follows:

"12.2 Auction Process

12.2.4., The Successful Bidder shall be required to submit the 1st Instalment of 25% of successful bid amount Less-EMD already submitted, within 15 days from the declaration as Successful Bidder by the Liquidator

12.2.5. Based upon submission of Ist Installment, the Successful bidder will be required to depute their own security guard of the site along with the security guard of the liquidator for securing the assets of the Corporate Debtor until and unless a final order approving/rejecting the Going Concern is decided by appropriate adjudicating authority"

According the 1st installment is calculated as follows:-

Description	Amount
Highest Bid amount bid by Lucky Holding Pvt. Ltd.	1,24,60,00,000
25% of the bid amount as per E-Auction Document	31,15,00,000
Total amount of EMD Already Received	2,00,00,000
Remaining amount to be paid as 1st Instalment	29,15,00,000

Hence, it is requested from your office to kindly deposit the amount to the tune of Rs. 29,15,00,000/-within 2 days as per the terms and conditions of the E-Auction Process Document

(Excluding time already granted for making payment). Hence the said amount must be paid on or before 18/06/2022.”

63. In response to the aforesaid email of liquidator, the Respondent vide his email dated 18.06.2022 wrote back saying that they are awaiting the final orders of the Hon'ble NCLT and sought time to examine the same. They further sought time till 30th June 2022 for their further response. The email is extracted below:

“On Sat, Jun 18, 2022, 4:36 PM Lucky Holdings Pvt Limited <luckyholdings01@gmail.com> wrote:

Dear Madam,

We are in receipt of your mail dated 16.06.2022 in the matter Ess Dee Aluminium Ltd, for payment of 01 Installment within 18.06.2022. We are awaiting the NCLT order pertaining to the application IA No. 397/KB/2022, which was listed for hearing at NCLT Kolkata on 15.06.2022. Once we receive the Order, we shall evaluate the implications of the same with our legal team.

Accordingly, we would request you to kindly hold the demand notice and allow us time till 30th June 2022, to get back to you.

Regards.

Devendra.”

64. The certified copy of order dated 15th June 2022 was sent to the respondent on 23.06.2022 vide an attachment to email of the same date. The liquidator once again requested the respondent to make payment of the balance amount as per the trail mail which gave the details that in view of vacation of all ad-interim stays. The said email is extracted below:

“On Thu, Jun 23, 2022, 7:42 PM Ess Dee Aluminum /AAA Insolvency sessdee@aaainsolvency.com> wrote:

Respected Sir/Mam,

Kindly find the attached order dated 15.06.2022

Based upon said order all interim stay stands vacated. Hence we request you make the payment as per trail mail.”

65. The Liquidator, thereafter issued reminders, including emails on 28.06.2022, and 29.06.2022 making it clear that the Respondent was contractually bound to deposit the first instalment promptly once the interim restraint had ceased, and that delay would amount to breach of auction terms entitling forfeiture of EMD. Despite repeated reminders through mails, no response was forthcoming from the respondent. Faced with no other option, the Liquidator, by letter dated 01.07.2022 and a follow-up email dated 04.07.2022, cancelled the sale in favour of the Respondent and forfeited its EMD.

66. We note that even if we take 23.06.2022 as the date on which the orders of AA were communicated to the respondent, still he could have made payment within next two days as 13 days period was already over till 09.05.2022. It is important to note that the Respondent still did not make any payment, partial or otherwise, nor did it give any firm date. Between 23.06.2022 and 01.07.2022, the Respondent did nothing except ask for more time to “evaluate”. At no stage did the respondent show any inclination towards making payment nor did it seek further time from the liquidator. This clearly reflects that due to extraneous considerations like fall in the price of aluminum in international market, the respondent did not want to

go ahead with the purchase. Such an action of respondent was in clear violation of the terms and conditions of the auction process which was conducted by the liquidator in accordance with the liquidation regulations.

67. We now turn to the reasoning adopted by the Adjudicating Authority. The Impugned Order proceeds on the assumption that the Respondent was handicapped and deprived of an opportunity to comply. The order emphasises the non-communication of the 15.06.2022 withdrawal order until 23.06.2022, the absence of an LOI, and the lack of pleading regarding loss.

68. We now analyse these issues one by one. Firstly, the Respondent still had eight clear days after receiving the order and still he did not make any payment, nor did he give any concrete commitment for payment. Not going even that far, it did not seek time extension for payment, which was provided for by the clause 6 of the undertaking which the bidders had submitted. Nothing prevented it from depositing a portion of the amount, indicating his willingness to make full payment. So, this finding of the AA is contrary to the facts of the case.

69. Secondly, regarding non-issuance of LOI by the liquidator to the respondent, we need to have a look at the relevant provisions of the E-Auction process document. The relevant clauses 14 and 15 of the e-auction process document deal with this matter. The same are extracted below:

“14. LETTER OF INTENT

The Successful Bidder shall be required to execute a LOI provided by the Liquidator within a period of 7 (seven) days

from the E-Auction date and after submission of 1st Installment as described under this auction document, and record unconditional acceptance of the LOI by providing the Liquidator with one copy of LOI with an endorsement stating that LOI is accepted unconditionally under the signature of the representative of the Successful Bidder, which shall be binding on the Successful Bidder. The LOI may be cancelled only by the Liquidator in her discretion as per the terms of this E-Auction Process Document.

15. PAYMENT OF 1ST INSTALLMENT

15.1 The successful bidder shall be required to submit the first installment towards the sale consideration for an amount of 25% of successful bid amount including EMD (plus applicable Taxes if any), as "1st Installment" of Payment, within 15 days from declaration as Successful Bidder by the Liquidator.

15.2 Mode of Payment of 1st Installment

15.2.1 The 1st Installment, which would not be bearing any interest, has to be paid by the Bidder within 15 days from declaration as successful bidder by the Liquidator."

(Emphasis supplied)

70. As we can see from the above, that under para 14 of the document, the successful bidder was required to execute the LOI only after submission of first instalment as described in the auction document. The amount and process of payment of first instalment is detailed in para 15 of the document as seen above. The first instalment which amounts to 25% of the successful bid amount including EMD had to be paid by the respondent within 15 days from declaration as successful bidder by the liquidator. Only after the payment of first instalment, the LOI could be executed. The submission of respondent is factually incorrect and Ld. AA, without going into the relevant document, has accepted this contention of respondent.

71. The third issue based on which Ld. AA allowed the appeal related to applicability of Section 74 of the Contract Act to the aforesaid auction proceeding. In this regard, it is to be noted that IBC, 2016 is a complete law in itself for corporate insolvency resolution process. Detailed procedure and process of liquidation has been laid down in the law; and rules and regulations framed thereunder. Any contractual obligation under the Code has to be dealt with in accordance with procedure laid down. We note that in this case, the liquidator has strictly followed the procedure laid down by the Code. The forfeiture of EMD in such auctions arises out of statutory terms, and not negotiated penalty clauses. Accordingly, in accordance with clauses of the E-Auction notice, E-auction process document and affidavit filed by the respondent, the liquidator has correctly forfeited the EMD.

72. This legal position has been conclusively settled by the judgment of this Appellate Tribunal in *Westcoast Infraprojects Private Limited (supra)*, which was affirmed by the Hon'ble Supreme Court in **Civil Appeal No. 4087 of 2023 (order dated 25.07.2023)** in the same matter. In these decisions, it has been held that forfeiture of EMD in liquidation auctions is a legitimate, contractual and statutory remedy for default, and Section 74 is wholly inapplicable. Relevant paragraphs para 4 and 20 of the judgment of this Appellate Tribunal have been extracted below:

“(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 cannot 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.

(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 eAuction 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."

73. Further support for the Liquidator's position is found in judgment of this Appellate Tribunal in '*BRS Refineries Private Limited v. Supriyo Kumar Chaudhuri*' (*supra*), where a bidder's failure to demonstrate readiness and repeated requests for time were held incompatible with the time-bound nature of liquidation, and forfeiture was upheld. The same reasoning was followed in judgment of this Appellate Tribunal in '*Potens Transmission & Power Private Limited*' (*supra*), which reaffirmed that even minor deviations from timelines permit forfeiture when the terms are strict. Most recently, this Appellate Tribunal in '*Vikram Bajaj, Liquidator of Best Foods Limited*' (*supra*) held that conditional expressions of willingness do not save a bidder from default; only clear, unconditional readiness suffices.

74. In light of the foregoing, we are of the view that the Respondent did commit default under the binding auction terms, that the Liquidator's action of cancelling the sale and forfeiting the EMD was fully justified and in accordance with the provisions of the Code. We have already seen that the impugned order suffers from incorrect appreciation of facts and law like application of Indian Contract Act whereas the issue should have been examined through the lens of this Code only.

75. In view of the findings above, the appeal is allowed. Pending IAs, if any, are closed. There would be no order as to costs.

[Justice Yogesh Khanna]
Member (Judicial)

[Mr. Indevar Pandey]
Member (Technical)

SA/Pragya (LRA)