(2023) 09 NCLT CK 0024

In the National Company Law Tribunal

Case No : I.A. (I.B.C.) No. 238/KB/2023 And I.A. (I.B.C.) No. 439/KB/2023 In Company Petition (IB) 1412/KB/2018

DD International Private Limited Vs Rajesh Kumar Agarwal ?

Date of Decision : 21-09-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 35(1), 60(5)(c)
Contract Act, 1872 — Section 74
Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 — Regulation 32A, 33
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2023) 09 NCLT CK 0024

Hon'ble Judges : Bidisha Banerjee, Member (J);D. Arvind, Member (T)

Bench : Division Bench

Advocate : A. K. Shrivastava, Akash Sharma, Shaunak Mitra

Final Decision : Disposed Of

Judgement

D. Arvind, Member (Technical)

1. This Court is congregated through hybrid mode.

I.A. (I.B.C.) No. 238/KB/2023

2. This interlocutory application is filed under Section 60(5)(c) read with Section 35 (1) of the Insolvency and Bankruptcy Code, 2016 (for brevity "I&B Code") and Regulation 32A and 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (in short "IBBI Liquidation Process Regulation") along with Rule 11 of the National Company Law Tribunal Rules, 2016 (for brevity "NCLT Rules") by the D.D. International Private Limited & Anr., (Applicants) seeking the following:

Interim reliefs:

a) Restrain the Liquidator (Respondent) from taking any action or further action to sell/ liquidate the Corporate Debtor as a whole or its assets in piecemeal;

b) Restrain the Liquidator from alienating/ utilising the EMD Amount of Rs. 4.255 Crore and Refundable Participation Deposit of Rs. 10 Lakh deposited by the Applicants which has been purportedly forfeited by the Liquidator on January 04, 2023;

c) Direct the Respondents to ensure the transfer of Rs. 11.58 Acres of land on which the DRI Plant is erected to the Corporate Debtor

d) Direct the Respondents to ensure the transfer of land on which the

Corporate Debtor's factory gate is located to the Corporate Debtor;

e) Direction to exclude piece and parcel of land comprising more or less around 14.96 acres of land which are purportedly forged documents to be excluded from the Liquidation assets;

f) Pass such order(s) which this Tribunal mays deem fit and proper.

Final reliefs:

a) Declare that the sale of the land holding the DRI Plant by the Corporate Debtor under its erstwhile promoters/ management is a fraudulent transaction and direct reversal of the said transaction and vesting of the said Land again with the Corporate Debtor; and

b) Direct the Liquidator to confirm the sale of the Corporate Debtor as a going concern along with the land holding the DRI Plant, Entry gate and 5.66 acres under the Sale Deeds No. 965 and 966 and fulfil the required compliance in law to transfer the Corporate Debtor's ownership to the Applicants;

Or in the alternate

c) Quash and cancel the E-Auction for sale of the Corporate Debtor as a going concern held on 29/09/2022 on account of fraud and material irregularities committed by the Liquidator; and

d) Direct the Liquidator to immediately refund the EMD amount deposited by the Applicants with their bid;

e) Pass such order(s) which this Tribunal may deem fit and proper.

3. Brief facts of the Case:

3.1. Divine Alloys & Power Company Limited, the Corporate Debtor was put under Corporate Insolvency Resolution Process (for brevity "CIRP") by Punjab National Bank, the Financial Creditor under Section 7 of the I & B Code, admitted by this Tribunal on March 7, 2019 and Mr. Rajesh Kumar Agarwal was appointed as the Resolution Professional ("RP")

3.2. As there was no resolution plan forthcoming, the CoC of the Corporate Debtor with 97.21% voting share resolved to liquidate the Corporate Debtor.

3.3. Consequent to which this Adjudicating Authority based on an application made by the Resolution Professional of the Corporate Debtor ordered liquidation of the Corporate Debtor vide Order dated May 11, 2021 in IA(IB)/136(KB)2020.

3.4. That, vide an Order dated May 11, 2021, Mr. Rajesh Kumar Agarwal is appointed as Liquidator of the Corporate Debtor to commence the liquidation process, as over two years down the lane, there was no resolution plan in sight and thus, the Committee of Creditors (COC) of the Corporate Debtor had by 97.21% votes resolved to liquidate the Corporate Debtor.

3.5. On September 05, 2022, the Liquidator issued the 13th E-Auction Sale Notice for the sale of the Corporate Debtor as Going Concern. The Notice contain details the particulars of Assets, Reserve Price and EMD Amount as:

Assets

Reserve Price

EMD Amount

Sale of Corporate Debtor as a Going Concern with all assets including Land & Building, Plant & Machinery and Securities & Financial Assets.

Rs. 42.55 Crore

Rs. 4.255 Crore

Notice of E-Auction Sale dated September 05, 2022, is annexed as Annexure "A-3" at Page 80 of the Application.

3.6. That, upon the 13th E-Auction Sale Notice dated September 05, 2022, the Applicants approached the Liquidator (Respondent) and submitted the requisite bid documents along with the Refundable Participation Deposit of Rs. 10 Lakh through RTGS on September 09, 2022, and after that, the Applicant deposited the Earnest Money Deposit (in short "EMD") to tune of Rs. 4.225 Crore through RTGS on September 27, 2022, well within the stipulated time under the Auction Notice and same was intimated to the Liquidator through Email dated September 27, 2022, annexed as Annexure "A-4" at Page 81 of the Application.

3.7. That, the Liquidator vide an Email dated September 20, 2022, verified the bid documents submitted by the Applicants and confirmed the eligibility of the Applicants for bidding in the E-Auction to be held on September 29, 2022, and for purposes of bidding, the Liquidator supplied the E-Auction Process Information Document (hereinafter referred as "Process Documents"), Teaser as well as access to the Virtual Data Room. A copy of the Email dated September 20, 2022, is annexed as Annexure "A-5" at Page 98 and a copy of the E-Auction Process Documents is annexed at Page 99-170 as Annexure "A-6".

3.8. Further, apart from the aforesaid process documents, the Applicants also received a teaser containing the details of the Corporate Debtor annexed as Annexure "A-7" at Page 171 of the Application which inter alia stated that the

Land belonging to the Corporate Debtor is around 38.325 Acres.

3.9. Based on the representation made in the information given in the Process Documents, the teaser, the virtual data and also the physical inspection of the site, the applicant participated in the Bidding Process on September 29, 2022 and became successful bidder in the process on September 30,2022

3.10. The applicant paid an earnest money of Rs. 4.255 Crore deposited in the designated account intimated by the Liquidator in the sale notice dated September 5, 2022.

3.11. The Liquidator issued a Letter of Intent (in short, "LoI") dated October 17, 2022, to the successful bidder noting down the facts that D.D.International Private Limited, the applicant herein in consortium with Bhalotia Engineering Works Private Limited has been declared as successful bidder.

3.12. The applicant thereafter continuing with the due diligence with regard to the assets and liabilities of the Corporate Debtor and in particular the Title Deeds relating to the land and building. As per the advertisement made on September 5, 2022 by the Liquidator, the total land claimed is to be around 38.325 acres but factually on verification by the applicants the area of land found to be 37.745 acres only, out of which land on which DRI plant is constructed is disputed and the same was nowhere mentioned in the Process Documents or teaser or any other preliminary documents submitted by the Liquidator and this fact has not been disputed.

3.13. The factory in dispute is a Sponge Iron and Steel Plant involving continuous process of consuming inputs/goods from one plant by another to ultimately to produce various types of steel products and therefore every plant including DRI plant is vital to the smooth functioning of the integrated steel plant of the corporate debtor and this has not been disputed

3.14. Under the above facts and circumstances, the Applicant was conducting due diligence and therefore sought for extension of time to pay the balance amount

3.15. After granting couple of extensions, the liquidator, the respondent here in closed the sale of the corporate debtor as a going concern and forfeited the EMD amount paid to tune of Rs. 4.225 Crore apart from Rs.10 Lakh which was paid as refundable deposit by the applicant through email dated January 04, 2023.

3.16. Hence, this application by the Applicant claiming relief mentioned above.

4. The Ld. Counsel for the Applicant contends that:

4.1. The Ld. Counsel, Adv. A. K. Srivastava appeared for the Applicants contends that on bona fide belief on the representations made and information given in the Process Documents, the teaser, the virtual data room and also the physical inspection of the site, the Applicants went ahead with the bidding process in the E-Auction on September 29, 2022, and became the successful bidder in the process and on September 30, 2022, the liquidator issued a "Letter of Intent" (for brevity "LOI") annexed as Annexure "A-9" at Page 173-175 and called upon the Applicants to accept the same unconditionally by signing on each page and thereafter to make payment of the first instalment of 15% of the total consideration amount followed by the remaining payments to enable the Liquidator to complete the sale process as the I&B Code.

4.2. The Ld. Counsel, Adv. Srivastava alleges that after becoming the successful bidder in the sale of the Corporate Debtor as a going concern, the Applicants herein again went for a physical inspection of the land and factory belonging to the Corporate Debtor on October 18, 2022, with an expert in land affairs and after visiting the land, the Applicant came to know that the Liquidator has deliberately suppressed and concealed the information that the DRI Plant and the Entry Gate do not belong to the Corporate Debtor and further by trying to auction the Corporate Debtor with Land under Sale Deeds No. 965 and 966 which not belonging to the Corporate Debtor. Further, the Liquidator deliberately inflated the total acreage of land to 38.325 Acres when the title deeds available with the Liquidator pertain to only 37.745 Acres of which 5.66 Acres are disputed and the same was nowhere mentioned in the Process Documents, the teaser or any other documents furnished by the Liquidator.

4.3. Ld. Counsel for the Applicant further claims that actual land under the ownership of the Corporate Debtor is lesser than what is claimed by the Liquidator during the auction process. It is claimed that the Sponge Iron (DRI) Plant of 200 TDP is located on 11.58 Acres of land which is not in the name of the Corporate Debtor rather different pieces and parcels of land comprising 11.58 Acres are in the name of M/s Parasar Coke Private Limited holding 3.07 Acres of land and rest are in the name of different people of the village and locality against which money has been paid earlier by the suspended board but the name was not transferred deliberately by the Suspended Board by reason of the fact that this project was essentially a vehicle for siphoning the public fund of the Banks. Further, it is alleged that the Sale Deed Numbers 965 and 966 comprising 14.96 Acres being forged deeds must be excluded from the Liquidation Assets and 11.58 Acres of land must be included in the Liquidation Assets along with the land of entry gate point making the consequential adjustment to the price of the bid enabling the Applicants to take over the Corporate Debtor as a going concern.

4.4. The Ld. Counsel for the Applicant further argues that it is the duties and obligation of the Liquidator as an Insolvency Professional registered under the provisions of the I&B Code to verify all the assets of the Corporate Debtor with the concerned authority and to provide the same in the Process Documents for a fair E-Auction.

4.5. Further, it is alleged that the instances suppressed from the Applicants were, in fact, fraudulent transactions undertaken in the Corporate Debtors' affairs by its promoters/ management prior to initiation of the CIRP which were neither reported by the Liquidator in his capacity as IRP/RP or Liquidator, nor even by the other Respondents including financial institutions entrusted with the fiduciary duty to keep a check on the Corporate Debtor and to ensure no fraud is played in its affairs.

4.6. Ld. Counsel submits that immediately upon conducting an inquiry into the recent facts unearthed, the Applicant issues a Letter dated October 25, 2022, annexed as Annexure "A-10" at Pages 176-191 of the Application, to the Liquidator inter alia raising the grave instances of wrongdoing brought to light post-auction process that they are unable to find any piece of land recorded in the same of the company in liquidation on which the DRI Plant (100TPD x 2Kilns= 200 TPD) are installed and/or any recorded land in the name of the company in liquidation which is adjacent to the DRI Plant. This is a unique/ unwarranted/unanticipated development that how the assets of the company in liquidation which is an integrated steel plant can be sold on public auction which does not have any recorded land in its own name on which the DRI Plant is installed. (Relevant page of the Application at Page 184)

4.7. In reply to the letter dated October 25, 2022, by the Applicant, the Liquidator issues a letter dated November 07, 2022, to the Applicant, annexed as Annexure "A-11" at Pages 192-197, denying all the allegations made against the Liquidator and applicant were called upon to deposit the remaining amount of sale consideration.

4.8. Further, it is submitted that a detailed reply has been given by the Applicant corroborating evidence against the misrepresentation and concealment done by the Liquidator, vide an email dated December 24, 2022, annexed as Annexure "A-14" at Page 210-371 of the Application.

4.9. Further, it is contended that an Email dated December 29, 2022, annexed as Annexure "A-16" at Pages 374-379 of the Application, sent by one M/s SG Multicast Private Limited to the Liquidator and also the Applicants claimed that the two parcels of land (05.660 Acres of land) which have been sold in E-Auction to the Applicant is belonged to them by ownership.

4.10. Further, vide an Email dated December 30, 2022, annexed as Annexure "A-17" at Pages 380-381 of the Application, the Applicants asked the Liquidator, regarding the letter sent by M/s SG Multicast Private Limited and requested to take cognizance regarding that.

4.11. Further, vide an Email dated January 02, 2023, annexed as Annexure "A-18" at Pages 382-383 of the Application, the Applicant requested the Liquidator not to forfeit their EMD amount furnished for the E-Auction and no third-party interest should be created by putting any further auction or sale notice and informed the Liquidator that they are in the process of filling application before this Adjudicating Authority for necessary directions.

4.12. Further, vide an Email dated January 04, 2023, annexed as Annexure

“A-19” at Pages 384-389 of the Application, the Liquidator forfeited the Refundable deposit of Rs. 10 Lakh and the EMD amount of Rs. 4.255 Crore furnished by the Applicants for the liquidation process as per the Process Documents.

4.13. The Ld. Counsel, Adv. A. K. Srivastava appeared for the Applicants during his argument relies upon the judicial pronouncements such as:

a) Sunrise Industries vs. Naren Seth I.A. 947/2022 in CP(IB) - 297/MB/2018:

b) Raj Singhania vs. Chinar Steel Segment Centre Pvt. Ld. Company Appeal (AT) (Insolvency) 465 of 2022

c) Union Of India vs. Raman Iron Foundry reported in 1974 2 SCC 231

5. Per contra, Reply by the Ld. Counsel for the Liquidator:

5.1. Ld. Counsel, Adv. Shaunak Mitra appeared for the Liquidator claims that by the virtue of Order dated May 11, 2021, the Liquidation process commenced in respect of the Corporate Debtor and the Liquidator was appointed to perform his duties and responsibilities in accordance with the law. The Stakeholders in the first meeting of the Stakeholder Consultation Committee (referred to as “SCC”) advised the Liquidator to proceed for the sale of Corporate Debtor as “Going Concern” and accordingly, the Liquidator moved forward with the E-Auction process.

5.2. That, the Applicant in pursuant to the 13th E-Sale Notice dated September 05, 2022, published by the Liquidator, submitted the EOI along with refundable deposit of Rs. 10 Lakh and on the basis of the information and documents submitted, the Applicant was found eligible by the Liquidator which was initiated to the Applicant via Mail on September 20, 2022, and the Liquidator shared the access to the Virtual Data Room.

5.3. Ld. Counsel claims that the E-Auction Process Information Documents dated 05/09/2022 were supplied by the Liquidator on September 20, 2022, to the Applicants and shared the virtual data room which was accessed by the Applicant for due diligence of the Corporate Debtor and made arrangements for the site visit.

5.4. The Ld. Counsel for the Liquidator further claims that in the virtual data room, each and every document pertaining to the intended sale and all possible information were clearly and sequentially provided and the process documents clearly envisage that the land having an area of 38.325 Acres was part of the intended sale process. The title deeds of the 38.325 Acres of land were duly uploaded in the virtual data room. Furthermore, the title deeds obviously contained full details of the land including the plot numbers, khata no., Mauza, Deed No. based on which it was easily ascertainable on basic due diligence being conducted, the location and status of the said land parcels.

5.5. Further, it is contended that on September 27, 2022, the Applicant deposited the EMD of Rs. 4.255 Crore and agreed with the terms and conditions mentioned in the E-Auction process information documents.

5.6. The E-Auction was held on September 29, 2022, from 11:00 AM to 02:00 PM where Applicant was the sole bidder participated in the Auction process and put a bid for Rs. 42.55 Crore which was the reserve price of the assets and on closure of the Auction, the Applicant was declared as Successful Bidder and on September 30, 2022 the Liquidator issued Letter of Intent (LOI) to the Applicant via mail, annexed at Page 31-33 of the Reply Affidavit by Liquidator, which was unconditionally accepted by the Applicant.

5.7. The Ld. Counsel for the Liquidator contends that in terms of the LOI and the process Documents, 1st Instalment i.e., 15% of the Final Consideration i.e., Rs. 6,38,25,000/- was required to be paid by the Applicant within 15 days of the issuance of LOI which fall due October 14, 2022. However, before the due date of the 1st instalment, the Applicant requested the Liquidator through a letter dated October 12, 2022, to extend the date of payment of the 1st instalment by 15 days.

5.8. Further, it is contended that upon request, the Liquidator after discussion with the Stakeholders allowed the extension for 15 days for the payment i.e., up to October 29, 2022, and intimated the applicant that no further extension should be entertained. The liquidator intimated the minutes of the SCC Meeting vide an email dated October 17, 2022, annexed at Page 35-36 of the Reply Affidavit.

5.9. Further, on October 25, 2022, a letter was received by the Applicant where it was alleged that part of the said land does not belong to the Corporate Debtor and is not part of the Liquidation Estate which was never alleged earlier at the time of the due diligence and did not raise any query before the submission of Bid and date of E-Auction.

5.10. Further, it is contended that the Liquidator responded on November 07, 2022, to the letter dated October 25, 2022, sent by the Applicant, where it was clearly stated that the document, details, information and deeds related to the Auction were shared in the Data Room for access of the Applicant to conduct and do their own independent due diligence. The letter dated November 07, 2022, is annexed at Page 52-57 of the Reply Affidavit.

5.11. It is further claimed that since reply was given by the liquidator to the letter dated October 25, 2022, the Applicant further requested vide a letter dated November 03, 2022, annexed at Page 58 of the Reply Affidavit for an extension of 30 days of the payment of 1st instalment and the Liquidator after discussing with the Stakeholders agreed to provide the last extension for payment of 1st Instalment by 30 days. The Liquidator vide a letter dated November 08, 2022, intimated that the further extension of 30 days as sought by the Applicant was allowed by the Stakeholder which would expire on November 28, 2022, i.e., the due date of 2nd extension of time for payment of 1st instalment. It was stated in the letter that Applicant fails to make payment within due date, the amount paid by the Applicants shall stand forfeited. The letter dated November 08, 2022, is annexed at pages 59-60 of the Reply Affidavit.

5.12. The Ld. Counsel for Liquidator further claims that it has been intimated a plethora of times, that the Balance Consideration is required to be paid within 90 days of the issuance of LOI unless, at the rate of 12% per annum interest shall be added in case of payment made after 30 days in terms of the Auction Process Documents and also in accordance with Clause 12 of Schedule I of the IBBI (Liquidation Process) Regulations, 2016.

5.13. It is further contended that the Liquidator after giving ample opportunities to the Applicant to make payment, vide a letter dated January 04, 2023, forfeited the Refundable Deposit and EMD

6. Key Issues:

(a) Whether details relating to ownership of land on which the DRI Plant is situated in the factory is vital and should be there in the Process Information Documents or teaser or another preliminary documents.

(b) If answer is in affirmative, whether the Highest and Successful Bidder can raise an allegation against the Liquidator for supressing and concealing the information relating to the liquidation after the e-auction and accordingly can seek the refund of its EMD amount deposited for the liquidation process which was forfeited by the Liquidator for non-compliance for timeline/regulations.

7. Analysis and Findings:

7.1. We heard the rival contention of both parties and perused the documents placed.

7.2. It is evident that the Liquidation process of the Corporate Debtor was commenced on May 11, 2021, and the Stakeholders in the first meeting of the Stakeholder Consultation Committee advised the Liquidator to proceed for sale of the Corporate Debtor as “Going Concern” on “as is where is basis, as is what is basis, whatever there is basis and no recourses basis” and accordingly, the Liquidator moved forward with E-Auction process.

7.3. It is further evident that upon the 13th E-Auction Sale Notice dated September 05, 2022, the Applicants approached the Liquidator (Respondent) and submitted the requisite bid documents along with the Refundable Participation Deposit of Rs. 10 Lakh on September 09, 2022, and after that, the Applicant deposited the Earnest Money Deposit to tune of Rs. 4.225 Crore (Total Reserve Price was fixed as Rs. 42.55 Crore) on September 27, 2022, well within the stipulated time under the Auction Notice and same was intimated to the Liquidator through Email dated September 27, 2022.

7.4. It is further evident that upon verification of the bid documents submitted by the Applicants, the Liquidator vide an Email dated September 20, 2022, confirmed the eligibility of the Applicants for bidding in the E-Auction to be held on September 29, 2022, and for purposes of bidding, the Liquidator supplied the Process Document as well as access to the virtual data room.

7.5. From the E-Auction Process Documents, we find that the lists of assets detailed under the E-Auction Process Document represented to the Applicants by the Liquidator to be the assets of the Corporate Debtor being put up for sale along with the Corporate Debtor itself as a whole as a Going Concern is as:

SN	Descriptions	Capacity
a)	Mini Blast Furnace	35M3-70 TPD
b)	Coal Washery	70 TPH
c)	Sponge Iron (DRI)	200 TPD
d)	Mini Blast Furnace	125M3-250 TPD
e)	Sinter Plant	300 TPD
f)	BOF Converter Plant	84500TPA
g)	Induction Furnace	72 MT/Heat

h)

Concast Plant

1200PTD

i)

Rolling Mill

3.50 Lakh TPA

7.6. We have perused the Process Information Documents as well as Teaser. We find that there is a separate clause detailing "Excluded Assets" (Annexure "A-6" at Page 123 of the Application). The fact that the land on which the DRI Plant is situated in dispute has not been mentioned as excluded assets. Further, we have also gone through the Teaser, annexed at Page 171 of the application and it is evident that there is no whisper about the dispute relating to DRI Plant.

7.7. Since this is a continuous process Steel Plant involving in consuming inputs/ goods from one plant by another to ultimately to produce different types of steel products. Every plant including the DRI plant is vital in running the factory/ Corporate Debtor as a Going Concern.

7.8. It is also evident that upon verifying the contention of the Process Documents and other information supplied by the Liquidator of the Corporate Debtor as well as the physical inspection made, the Applicant expressed its willingness to go ahead with this bidding process in E-Auction on September 29, 2022, and consequently, he became the only bidder and highest bidder. Further, the Liquidator issued the LOI on September 30, 2022.

7.9. Further, it is and admitted fact that after issuing the LOI by the Liquidator, the Applicant made a physical inspection of the land and factory in liquidation belonging to the Corporate Debtor on October 18, 2022 with an expert having knowledge in land affairs and after visiting the land, the Applicant came to know that the Liquidator has suppressed and concealed the information that the DRI Plant and the Entry Gate do not belong to the Corporate Debtor and the Liquidator inflated the total acreage of land to 38.325 Acres when the title deeds available with the Liquidator are pertaining to only 37.745 Acres of which 5.66 Acres are disputed and the same was nowhere mentioned in the Process Documents, or any other documents furnished by the Liquidator.

7.10. In reply, the Ld. Counsel for the Liquidator contends that in the virtual data room, all the documents pertaining to the intended sale and all possible information were clearly and sequentially provided and the process documents clearly envisage that the land having an area of 38.325 Acres was part of the intended sale process. The title deeds for the land of 38.325 Acres were duly uploaded in the virtual data room. Furthermore, the title deeds obviously contained full details of the land including the plot numbers, khata no., Mauza, Deed No. based on which it was easily ascertainable on basic due diligence being conducted, the location and status of the said land parcels.

7.11. It is further admitted facts that:

i. The 13th E-Auction Sale Notice was published on September 05, 2022;

ii. Refundable Participation Deposit of Rs. 10 Lakh was deposited by Applicant on September 09, 2022;

iii. Process Documents and virtual data room access were supplied to the Applicant by the Liquidator on September 20, 2022;

iv. EMD was deposited by Applicant on September 27, 2022;

v. E-Auction was held on September 29, 2022, and the Applicant became the highest and successful bidder;

vi. LOI was issued by the Liquidator on September 30, 2022;

vii. The 1st Instalment was fixed to be paid by the Applicant on October 14, 2022;

viii. Request for the extension for 15 days of 1st Instalment payment was made by Liquidator on October 12, 2022;

ix. Allegation made by the Applicant against Liquidator for deliberately suppressing and concealing the information regarding DRI Plant on October 25, 2022.

x. Request for the extension granted on October 17, 2022, for the payment of 1st Instalment to be paid within October 29, 2022;

xi. Further request of extension for payment of 1st Instalment was made on November 03, 2022, for 30 days;

xii. Liquidator on November 07, 2022, responded to the averment made by Applicant;

xiii. Further request for an extension was allowed on November 08, 2022, which would expire on November 28, 2022, and failing to make payment within the due date, the amount paid by the Applicant shall be forfeited.

xiv. Refundable Deposit and EMD amount were forfeited by the Liquidator on January 04, 2023.

7.12. Further, it is also admitted fact that the Liquidator shared access to the virtual data room with the applicant which was accessed by the applicant for due diligence of the corporate debtor and made arrangements for the site visit which was done by the applicant. The Clause 6 of the Process Documents reads as:

"(b) Upon verification of the eligibility of the Process Applicant(s) and also receipt of Refundable Participating Deposit, the eligible bidder shall be informed to proceed further with due diligence/ visit site/ physical verification as per the terms of E-Auction Process Document.’

“(c) Please not only the Eligible Bidders will gain access to documents, additional information required for due diligence. Further, if needed, the site visits for only the eligible bidder may also be coordinated by the Liquidator.”

7.13. Further, Clause 8 of the Process Documents envisages as:

“(a) The Liquidator shall endeavour to provide necessary assistance for conduct of due diligence by eligible bidders. The information and documents shall be provided by the Liquidator in good faith and in confidential mode.’

“(b) The documents shall be open for inspection at the Office of the liquidator. Inspection of documents shall be allowed on signing the Confidentiality Agreement and only for the eligible bidders who submit their documents along with the Earnest Money Deposit and are found eligible as per the criteria mentioned in this document. The Bidder(s) may note that the Liquidator does not guarantee the correctness of any information, data or documents shared and shall not be responsible or liable, whatsoever, in any circumstances, in respect of any statement or omissions contained in the shared data.’

“(c) The intending bidders, prior to submitting their bid, should make their independent inquiries regarding the title of the property, zone of the land, dues of local taxes, electricity and water charges, development charges, maintenance charges, if any…”

7.14. Further, Clause 13 of the Process Document says that:

“(h) … Default in payment of the balance sale consideration and any appliable GST, if any, on 100% of the bid sum by the Successful Bidder will result in disqualification of the Successful Bidder including forfeiture of Earnest Money Deposit and Refundable participation Deposit. The Bid option may be put to re-auction or sold to the next highest Qualified Bidder and the defaulting Successful Bidder shall have no claim/right in respect of such bid option.”

7.15. We rely upon the decision passed by the Ld. NCLT, Mumbai Bench which was also upheld by the Hon’ble NCLAT, vide Order dated 04.07.2023, in the case of Sunrise Industries vs. Naren Seth being I.A. 947/2022 in CP(IB) – 297/MB/2018 order dated March 02, 2023, reported in MANU/NC/1538/2023 at para 13 as:

“… It is settled proposition of law that the mistakes in the e-auction publication would certainly amount to material illegality and irregularity that vitiates the entire process of auction. As rightly contended by the Applicant, issuing of corrigendum after completion of the e-auction serves no purpose and the very object of issuing corrigendum is frustrated by issuing such corrigendum after completion of e-auction and such an e-auction has to be set aside on that score alone.”

(Emphasis Added)

7.16. Further, we rely upon the decision passed by this Tribunal in the Bank of India vs. Enfield Apparels Limited reported in MANU/NC/5994/2020 where the Tribunal set aside the auction holding that there is a material irregularity in conducting e-Auction of the 'Corporate Debtor' as 'a Going Concern' and directed to hold fresh Auction inviting bids afresh, strictly adhering to the procedure. The NCLT, Kolkata bench observed that:

"18. Thus, to conclude, the old e-auction is cancelled and set aside. The proposal of applicant is accepted subject to the condition that the balance amount of total bid of Rs. 15.50 Crores for the impugned asset parcel shall be deposited within six weeks from the date of receipt of this order failing which the amount of Rs. 3.875 Crores so deposited shall stand forfeited."

(Emphasis Added)

Under the above facts and circumstances, we now take up the key issues mentioned above, for appropriate decision.

In our view, the non-disclosure of dispute relating to the land on which the DRI plant is constructed, in the process information document, or in the teaser or any other preliminary documents, is vital and gross irregularity committed by the Liquidator.

Therefore, we are of the view that the applicant is entitled to get refund of the EMD amount paid as a successful bidder along with refundable deposit of 10 Lakh.

Having said so, we need to also take into consideration that the full access was given to the virtual data room which contained all the details relating to the information of the corporate debtor including details relating to the land on which DRI plant is constructed.

Though, the Applicant was aware of the issue relating to said land while seeking extension couple of time, the applicant raised only as a concern but never took this as reason to cancel the sale but only was seeking extension to pay the balance amount. Therefore, even after knowing fully, the dispute relating to DRI Plant after complete due diligence, the Applicant was still pursing to complete the sale.

This has resulted in significant loss of time and efforts on the part of liquidator and the loss incurred has to be compensated.

7.17. In view of above discussions and findings we are of the view that the wrong was done by both parties. Firstly, the Liquidator has not disclosed all information relating to the land and DRI Plant in the E-Auction Process Information Document or in teaser, though he has provided the relevant deeds of land in the virtual data room, which was accessible to the Applicant. Secondly, the Applicant, before the commencement of the E-Auction, availed opportunities to verify the documents furnished by the Liquidator and it is admitted fact that the Applicant has inspected the site also before the payment of EMD. Further, in terms of forfeiture of the Earnest Money Deposit and Refundable Participation Deposit furnished by the Applicant, the Last para of Clause 13(h) of the Process Documents clearly mentions that:"Default in payment of the balance sale consideration … the Successful Bidder will result in disqualification of the Successful Bidder including forfeiture of the Earnest Money Deposit and Refundable Participation Deposit."

7.18. The Hon'ble Supreme Court of India, in the case of Fateh Chand vs. Balkishan Das reported in AIR1963SC1405: MANU/SC/0258/1963 laid down that:

"…in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that s. 74 (the Indian Contract Act, 1872) applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by s. 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

(Emphasis Added)

7.19. Further, in Anand Singh vs. Anurag Bareja reported in (2012) ILR I Delhi 728: MANU/DE/6860/2011 where the decision of Fateh Chand (Supra) was reiterated, the Hon'ble Delhi High Court has observed that:

"…the Constitution Bench judgment of the Supreme Court reported as Fateh Chand vs Balkishan Dass, MANU/SC/0258/1963 : (1964) 1 SCR 515: AIR 1963 SC 1405, wherein the Supreme Court has said that even if the buyer is guilty of breach of performance of an agreement to sell, however, seller cannot forfeit the earnest money received under the agreement to sell, as the forfeiture is hit by Section 74 of the Indian Contract Act, 1872 being in the nature of the penalty and forfeiture cannot take place unless loss is pleaded and proved by the seller…."

(Emphasis Added)

7.20. Moreover, in the case of Nafe Singh vs. Sanjay Gupta reported in MANU/DE/5431/2018, the Hon'ble Delhi High Court held that:

"6. Accordingly, I do not find any fault with the impugned judgment by which the appellant/defendant has been directed to refund the amount of earnest money received by the appellant/defendant under the subject agreement to sell. This is because in law, a mere breach of contract does not entitle a person to damages and the entitlement to damages is only if loss is pleaded and proved to have been caused on account of the breach of contract to the aggrieved party/seller."

(Emphasis Added)

7.21. Further, in MBL Infrastructure Limited vs. Rites Limited reported in AIR 2020 Cal 155: MANU/WB/0306/2020 the Hon'ble High Court at Calcutta held that:

"31. A balance has to be stuck in every case, when the assessment of the quantum becomes a difficult or an impossible task; to allow the forfeiture in principle, but to limit the quantum so as not to make it punitive or extortionist. Indeed, there is always an element of approximation and guesswork involved in assessing the quantum of damages even after receipt of the best evidence possible. After all, the court is trying to put a person in the position as if the breach had not happened, though the breach has, in fact, happened.'

"32. Considering the nature of the contract in this case and the value of the work, the offer made by the appellant for Rs. 2 lakh to be forfeited in either case appears to be reasonable and appropriate. Indeed, the quantum of loss that may have been suffered by the respondents in either case may not be Rs. 2 lakh; but since the appellant has fairly offered that such should be the amount that the forfeiture should be restricted to, this court perceives a sum of Rs. 2 lakh in either case to be appropriate compensation for the respondents having received the applications, processed the same and proceeded therewith for some time before discovering the non-disclosure and concealment of material facts.'

"33. Accordingly, the appeals are allowed by setting aside the judgment and order impugned dated December 14, 2017. APO 377 of 2018 and APO 378 of 2018 succeed. The relevant writ petitions, WP 1645 of 2010 and WP 1649 of 2010, are allowed by setting aside the forfeiture attempted to be effected by the respondents herein in excess of Rs. 2 lakh in either case. The balance amount should be refunded to the writ petitioner-appellants within eight weeks of this order, failing which such amount will carry interest at the rate of six per cent per annum from November 1, 2009 till the payment."

(Emphasis Added)

7.22. Keeping in view of the above discussions, in the interest of justice, we direct the Liquidator of Divine Alloys & Power Company Limited (Corporate Debtor) to refund 50% of the forfeited EMD amount to the Applicant within 30 days from the pronouncement of this Order, while the forfeiture of rest 50% of EMD amount shall stand upheld. Further, the amount of Rs. 10 Lakh, paid in terms of Refundable Participation Deposit by the Applicant shall remain forfeited for the adjustment against the loss caused to the Corporate Debtor along with the stakeholders having interest in this Auction and for prejudicing the Liquidation Process due to the failure of the Applicant to comply with its obligations, as claimed in Para 42 of the Reply Affidavit filed by the Liquidator.

7.23. Failing to refund the amount by the Liquidator to the Applicant, shall carry interest at a rate of 10% per annum from the date of pronouncement to the date of payment and payment of such interest shall not be incurred as liquidation cost.

7.24. Further, the E-Auction held on September 29, 2022, where the Applicant became the highest and successful bidder, shall have no effect further and the Liquidator is free to conduct a fresh E-Auction with the publication of a fresh E-Auction Process Information Memorandum by clearly mentioning all the facts and information which may affect the interest of an interested bidder in case of hiding such.

7.25. Further, in new E-Auction Process Information Memorandum, the Liquidator has to ensure the location, acreage and other relevant information relating to the DRI Plant and in that respect, the Liquidator shall furnish the Government authorized report including mutation certificate of the respective land and construction. Further, the Liquidator shall verify all the Sale Deeds and documents with the Authorized Body to confirm the sale of the Corporate Debtor as a going concern.

7.26. Further, the Applicant shall have the liberty to participate in the fresh Auction conducted by the Liquidator.

7.27. In terms of the order above, this I.A. (I.B.C.) No. 238/KB/2023 is disposed of accordingly.

8. I.A. (I.B.C.) No. 439/KB/2023:

This interlocutory application is filed by the D.D. International Private Limited & Anr., (Applicants) contended that the Liquidator has committed serious fraud by conducting the E-Auction, where the Liquidator has deliberately suppressed, concealed and misrepresented the assets of the Corporate Debtor and the liquidator again in the new E-Auction Sale Notice dated 09/02/2023 have repeated the same irregularities to defraud the prospective bidders which further proves the malicious intention of the liquidator hitherto and thus, the Applicant seeks the following relief that:

a) Stay the E-Auction Sale Notice dated 09/02/2023 till disposal of I.A. 238/KB/2023 filed by the Applicants.

b) Pass such other/further order(s) which the Tribunal may deem fit and proper.

9. In terms of the aforesaid order, the E-Auction Sale Notice dated 09/02/2023 shall have no effect further, and the Liquidator is directed to conduct a fresh E-Auction with the publication of a fresh E-Auction Process Information Memorandum by clearly mentioning all the facts and information which may affect the interest of an interested bidder in case of hiding such.

10. Accordingly, this I.A. (I.B.C.) No. 439/KB/2023 is also disposed of in terms of order above.

11. Further, it has come to fore that I.A. (IBC) 435/KB/2023- filed by M/S SG Multicast Pvt. Ltd. seeking relief that to declare sale of lands described under purported title deeds no. 965 and 966 as null and void and to exclude the said title deeds from the list of assets of the Corporate Debtor. It is evident that an interim order passed by this Bench dated March 07, 2023 that:

“2. … When this matter was taken up for consideration, it is stated on behalf of applicant that applicant is a registered owner of a land, which is a part of the subject matter of sale under liquidation, details of which are mentioned in paragraph 5.9 and 5.10. This comprises of 4.05 Acres and 1.61 Acres. Whereas, Ld. Counsel for the Liquidator has stated that he is having a registered sale deed of this land in the name of Corporate Debtor. Ld. Counsel appearing for the liquidator has also stated that a charge has been created in favour of bankers over this land.’

“3. In view the above position, we deem it appropriate to issue notice to the Liquidator, who will file reply within two weeks. He has stated that he has no objection for keeping 4.05 Acres of land and 1.61 Acres of land out of sale notice issued by him for the time being.’

“4. Keeping in view of the above position, till the next of hearing and on the basis of statement made by liquidator status quo with regard to piece of land measuring 4.05 acres in para 5.9 and 1.61 acres mentioned in para 5.10 shall be maintained.”

12. In view of the said order, we are not passing any interim relief with regard to I.A. (IBC) 435/KB/2023. List the matter on 27/ 09/ 2023 for final hearing and disposal.

13. Certified copy of this order may be issued by the Registry, if applied for, upon compliance of all requisite formalities.

