

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1559 of 2023 & I.A. No. 5604, 5605 of 2023
IN THE MATTER OF:

D.D. International Pvt. Ltd. & Anr.

...Appellant

Versus

**Rajesh Kumar Agarwal Liquidator, Divine Alloys &
Power Company Ltd. & Ors.**

...Respondents

Present:

For Appellant: Mr. Gaurav Mitra, Mansu Arya, Surabhi Gupta, Adv.

**For Respondents: Mr. Saunak Mitra, Adv. with Mr. Rajesh Kumar Agarwal,
R1
Mr. Shantanu Kumar, R2
Mr. Aditya Kumar, Illa Nath, R4
Mr. Akash Sharma, R10**

O R D E R
(Hybrid Mode)

Per: Justice Rakesh Kumar Jain: (Oral)

06.12.2024: Punjab National Bank filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against Divine Alloys & Power Company Limited (Corporate Debtor) which was admitted on 07.03.2019 and Rajesh Kumar Agarwal was appointed as the RP.

2. Since, there was no resolution plan forthcoming, therefore, the CoC of the CD with 97.21% voting share resolved to liquidate the CD. The RP filed an application before the Tribunal for liquidation which was allowed on 11.03.2021 and Rajesh Kumar Agarwal was appointed as the Liquidator as well to commence the liquidation process.

3. Shorn of unnecessary details, the property in question was put to sale in the 13th e-auction vide sale notice, for the CD as going concern, on 05.09.2022. The notice contained the particulars of assets, reserve price and EMD amount, which read as under:-

Assets	Reserve Price	EMD Amount
Sale of CD as a going concern with all assets including Land & Building, Plant & Machinery and Securities & Financial Assets	Rs. 42.55 CR.	Rs. 4.255 Cr.

4. The Appellant deposited Rs. 10 lac on 09.09.2022 as refundable participation deposit and EMD to the tune of Rs. 4.225 Cr. on 27.09.2022. E-auction was held on 29.09.2022 in which the Appellant was declared as the highest bidder.

5. LOI dated 17.10.2022 was issued by the liquidator to the Appellant being the successful bidder. The 1st instalment was to be paid by the Appellant on 10.14.2022. However, the Appellant requested for an extension of 15 days to pay the instalment and another extension was given up to 28.11.2022.

6. The Appellant raised an issue regarding land under the DRI plant which was not owned by the CD but the Respondent forfeited both EMD amount of Rs. 4.225 Cr. and Rs. 10 lac as refundable deposit for not making the balance payment on time. It led to the filing of an application i.e. I.A No. 238 of 2023 under Section 60(5)(c) r/w Section 35(1) of the Code and Regulation 32A and 33 of the IBBI (Liquidation Process) Regulation, 2016 alongwith Rule 11 of the NCLT, 2016 with the following prayers:-

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 may 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.*

7. The Tribunal noticed the contention of the Appellant in para 3.12, 4.2 & 4.3 which read as under:-

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.

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.

8. After taking into consideration the pleadings, two questions were framed which read as under:-

“(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 suppressing 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 was forfeited by the liquidator for non-compliance of timeline/regulations.”

9. The Tribunal ultimately recorded finding that there was an error on the part of the liquidator in not giving true details of the land sold to the Appellant and it also found that the Appellant had full access to the virtual data room where he could have accessed to all the relevant documents and recorded a finding in this regard which is reproduced as under:-

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 pursuing 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.

10. The Tribunal also recorded the finding that '*secondly, the Applicant, before 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 EMD and Refundable participation deposit furnished by the Applicant.

11. The Tribunal, however, ultimately recorded in para no. '7.24. Further, the e-auction held on 29.09.2022, 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 Govt. authorized report including mutation certificate of the respective land and construction. Further the liquidator shall verify all the sale deeds and documents with the authorised body to confirm the sale of the CD as a going concern. 7.26. Further, the Applicant shall have the liberty to participate in the fresh auction conducted by the Liquidator.'

12. The Tribunal passed the following orders against which the present appeal has been filed, which read as under:-

"Keeping in view of the above discussion, in the interest of justice, we direct the liquidator of Divine Alloys & Power Company Limited (CD) 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 lac, paid in terms of refundable participation deposit by the Applicant shall remain forfeited for the adjustment against the loss caused to the CD alongwith 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."

13. It is pertinent to mention that against the findings recorded by the Tribunal, no appeal has been filed by the Liquidator though the observations are against his act and conduct of the liquidator that he did not clearly mention all the facts and information in the e-auction process information memorandum on the basis of which the bid was given by the Appellant and was adjudged the highest bidder.

14. Be that as it may, Counsel for the Appellant has submitted that firstly, the Tribunal has recorded a concrete finding against the Respondent holding in para 7.24 that the e-auction held on 29.09.2022 shall have no effect. Meaning thereby, e-auction held on 29.09.2022, in which the Appellant participated by depositing Rs. 10 lac and EMD to the tune of Rs. 4.225 Cr. has been completely erased. As result thereof, it is submitted that whatsoever amount was deposited by the Appellant to participate in the e-auction, which was deposited as refundable participation deposit as well as EMD has to be fully returned back to him. It is further submitted that the Tribunal has further committed an error in forfeiting the amount of 50 % EMD, 'in the interest of justice' and secondly for the purpose of compensating the CD for the alleged loss which has not been quantified. He has, therefore, submitted that directions issued in para 7.22 of the impugned order deserves to be set aside and the amount of Rs. 10 Lac and entire amount of EMD has to be returned to the Appellant.

15. In reply, Counsel for Respondent has vehemently argued that the Tribunal has not only held that the liquidator was at fault in not making full disclosure in the e-auction process document but the Appellant was also equally at fault because it has been observed that the Appellant had all the opportunity to inspect the record because access was given to the virtual data room which contained all the details relating to the information of the

CD including details relating to the land in question whether the same is owned by the CD or not. In respect of forfeiture, it is submitted that there was forfeiture clause in e-auction process document, therefore, the Tribunal has rightly passed the order of forfeiture of 50% of the amount. In respect of question as to why 50% amount has been forfeited, it is submitted that since the Appellant was equally at fault, therefore, 50% amount has been forfeited.

16. We have heard Counsel for the parties and perused the record with their able assistance.

17. There is no doubt that there was no resolution in this case, therefore, the property was put up for e-auction by 97.21% voting share of the SCC. There is no dispute about the fact also that in the past 12 attempts were made but the property in question could not be sold, ultimately it was the 13th attempt and the Respondent was duty bound, being the custodian of the record of the CD, to give the exact details of the property which was put to sale by e-auction but in the e-auction process document the fact that the property under DRI plant was not belonging to the CD was not disclosed. The Tribunal has though blamed the Appellant as well that it had the access to VDR and could have also found out by due diligence that whether the said land belongs to the CD or not but in our considered opinion the first duty is cast upon the liquidator to provide exact information to the bidder about the property which is put to sale and it cannot take the shelter of alleged fault of the Appellant for justifying the order passed in which the amount of Rs. 10 lac and EMD deposited to the extent 50% amount has been ordered to be forfeited despite the fact that the Tribunal has specifically passed an order that the e-auction held on 29.09.2022 shall have no effect further and put the property again to auction though giving a chance to the Appellant to

participate in the same. Moreover, the Tribunal has erred in forfeiting 50% of the EMD as it has been mentioned in paragraph 7.22 that it has been done in the interest of justice. It is really strange as to what interest of justice is to be served by forfeiting 50% which comes to Rs. 2.1 Cr. and thirdly, in the Code, there is no procedure for imposing damages. Even if, for the sake of argument, it is presumed that the Tribunal has the jurisdiction to impose damages as well, it is incumbent upon the Tribunal to first quantify as to how much damages has been caused to the CD and how the said damages have to be compensated. The Tribunal has acted totally arbitrary in awarding the damages of 50% of the EMD which in law cannot be sustained.

18. Thus, in view of the aforesaid discussion, we are totally satisfied that the impugned order is patently illegal and arbitrary and therefore, while allowing the appeal, the impugned order is hereby set aside and direction is issued to the liquidator to return the amount of Rs. 10 lac deposited as refundable participation deposit and the entire amount of EMD within a period of 30 days from the date of passing of this order.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

Sc/RR