

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

Company Appeal (AT) (Insolvency) No. 1098 of 2020

[Arising out of Impugned Order Dated 05th November, 2020 passed by Hon'ble National Company Law Tribunal, Principal Bench, New Delhi in Company Petition No. (IB)-473 (PB)/2018]

IN THE MATTER OF:

Saboo Tor Private Limited

Having Its Registered Office at
Trilokpur Roadkala Amb Sirmour,
Himachal Pradesh – 173030

....Appellant

Versus

1. Mr. Sanjay Gupta, Liquidator

Case Cold Roll Forming Ltd.
311, Bestech Chambers,
B Block, Sushant Lok Phase-1,
Sector 27,
Gurgaon – 122002
E-mail: casecold@primussolutions.in

Also at
C-4/E/135, Janak Puri,
New Delhi – 110038

....Respondent No. 1.

2. Case Cold Roll Forming Ltd.

Through Its Liquidator
Mr. Sanjay Gupta
74, Hemkunt Colony, Opp. Nehru Place,
New Delhi – 110048
casecold@primusresolutions.in

Also at:
C-4/E/135, Janak Puri,
New Delhi – 110038

....Respondent No. 2.

Present:

**For Appellant: Mr. Harshit Agarwal and Mr. Ashish Gupta,
Advocates.**

**For Respondent: Mr. Abhishek Anand and Mr. Kunal Godhwani,
Advocates for Respondent Nos. 1 and 2.**

J U D G E M E N T

Per: Shreesha Merla, Member (Technical)

1. The Appellant is the unsuccessful Applicant in I.A. No. 3413 of 2020 in Company Petition No. (IB)-473/PB/2018 filed before the Ld. Adjudicating Authority, National Company Law Tribunal, Principal Bench, New Delhi seeking refund of the earnest money deposited which was forfeited by the Respondents. The Ld. Adjudicating Authority, while dismissing the Application observed as follows:

“5. Over and above the factual background, the liquidator has stated that this applicant filed a civil suit before Civil Court Nahan, District Sirmour, Himachal Pradesh in relation to this issue and obtained exparte order, over which when the liquidator filed Order VII Rule 11 application stating that Civil Court has no jurisdiction to deal with the issue falling within IBC as per Section 63 of Insolvency and Bankruptcy Code, that civil suit was dismissed vide order dated 13.08.2020.

6. Soon after dismissal of the aforesaid suit, since the liquidator is bound by time to complete process of liquidation, the liquidator has again conducted the bidding process and sold the assets of the company including the assets involved in the earlier bidding and liquidated the company, now he is about to file dissolution application before this Bench.

7. As against the submission of the liquidator, the applicant counsel has stated that the applicant is at liberty to make payments after thirty days along with the interest @12 %, if at all bidder has failed to make payment within thirty days from the date on which 25% to be made, then only sale shall be cancelled if the payment is not received within ninety days.

8. To which, the liquidator counsel has stated that this clause is applicable only to the item 13 in the column, that is for payment of balance consideration of 75 % after the bidder has paid 25%, but not at the stage of paying 25 %. If the successful bidder failed to pay the remaining 75 % of the balance consideration payable by the bidder, then interest is leviable in between 30 days and outer limit of 90 days.

9. Here the issue is this applicant has not even paid initial 25 % as per the documents accepted by him, then

the question of invocation of the clause aforesaid will not arise.

10. At last, the applicant counsel has requested this bench to consider the aspect on equity ground and direct the liquidator to refund the money that was paid by the applicant.

11. When law is very clear and the applicant has entered into the bidding process based on the terms and conditions in the bidding documents, today the applicant cannot turn around and ask for refund after failing to comply with the terms and conditions of the agreement, therefore we have not found any merit in this application, hence this application is hereby dismissed as misconceived.”

2. Succinctly put, the facts in briefs are that the liquidator of the second Respondent Company invited EPI for sale of raw material, scrap, stores, spares, consumables and finished goods on 20.02.2020 at a Reserved Price of Rs. 1.59/- crores. The Appellant participated in the E-Auction and deposited 10% of the EMD amount, amounting to Rs. 16/- lakhs and also submitted a bid for Rs. 3,75,00,786/-. The E-Auction was held on 18.03.2020 and the Appellant was declared as a successful bidder. On 20.03.2020, the Liquidator issued the Letter of Intent ('LoI') to the Appellant which was received on 23.03.2020 and as per the terms of the 'LoI' the successful bidder was required to pay 25% of the total consideration by 25.03.2020. The Appellant had sought for extension of time for payment of the entire 25% bid amount and extension was granted by the Liquidator up to 31.03.2020. It is the case of the Appellant that despite several requests made, the Respondent had forfeited the entire money deposited.

3. Learned Counsel appearing for the Appellant vehemently contended that the 'LoI' dated 20.03.2020 was received on 23.03.2020; that no time was given for acceptance of the same as the timelines given for

unconditional acceptance of 'LoI' was the same date i.e. 23.03.2020; that the Appellant was unable to deposit the entire balance amount of 25% of the bid amount by 25.03.2020 on account of lockdown imposed in the Country which led to closure of their Unit and hence in the e-mail dated 25.03.2020 the Appellant had sought for extension of time; that the Liquidator responded vide e-mail dated 29.03.2020 and extended the time by only two days i.e. upto 31.03.2020 and that despite several e-mails exchanged between the parties explaining the difficulties experienced due to lockdown, the earnest money deposited was forfeited on 23.05.2020.

4. The Learned Counsel drew our attention to the clauses mentioned in the 'Corrigendum to Extension of Timelines for E-Auction' (hereinafter referred to as 'the Corrigendum') dated 11.03.2020. For better understanding of the case, the same is being reproduced as hereunder:

**“CORRIGENDUM TO EXTENSION OF TIMELINES
FOR E-AUCTION
FOR SALE-NOTICE FOR CASE COLD ROLL FORMING
LIMITED-IN LIQUIDATION
CIN; U67200DL2017PTC322243
(Sale of Assets under the Insolvency and Bankruptcy
Code, 2016)
Notice is hereby given that in furtherance of the E-
Auction Process Document dated 20th February, 2020,
the timelines of E-Auction has been revised and shall be
as follows;**

S. No.	Description of activity	Revised Timelines
1	Submission of Bid Forms	Monday, 16 th March, 2020
2	Site Visits and Discussion Meeting	Monday, 16 th March, 2020
3	KYC declaration, Due Diligence	Monday, 16 th March, 2020

4	<i>Request to Liquidator to permit submission of Earnest Money by the Interested Bidder through its Associate Company</i>	<i>Monday, 16th March, 2020</i>
5	<i>EMD submission</i>	<i>Tuesday, 17th March, 2020</i>
6	<i>Opening of E-voting for successful bidders and communication with them</i>	<i>Tuesday, 17th March, 2020</i>
7	<i>Proposed E-Auction Date</i>	<i>Wednesday, 18th March, 2020</i>
8	<i><u>Announcement of Successful Bidder</u></i>	<i>Wednesday, 18th March, 2020</i>
9	<i><u>Letter of Intent (LoI) to be issued to the Successful Bidder</u></i>	<i><u>Friday, 20th March, 2020</u></i>
10	<i><u>Unconditional acceptance of LoI</u></i>	<i>Monday, 23rd March, 2020</i>
11	<i><u>Payment up to 25% of total consideration by successful bidder</u></i>	<i><u>Wednesday, 25th March, 2020</u></i>
12	<i>Return of Earnest Money to unsuccessful Qualified Bidder(s)</i>	<i>Thursday, 26th March, 2020</i>
13	<i><u>Payment of balance consideration by successful bidder</u></i> <i>Payments made after 30 days shall attract interest at the rate of 12 %. The sale shall be cancelled if the payment is not received within 90 days.</i>	<i><u>Monday, 20th April, 2020</u></i>

Sanjay Gupta

Liquidator –Case Cold Roll Forming Limited

IBBI Regn. No. IBBI/ IPA-003/ IP-N00047/2017-18/ 10354

Registered Address with Board: C-4/E/ 135, Janak Puri, New Delhi – 110058

Communication Address: 311, Bestech Chambers, B Block, SushantLok Phase-1, Sector 27,

Gurugram – 122002, Haryana

E-mail: casecold@primussolutions.in; Sanjay@sgaindia.in

Date: 11.03.2020

Contact No.: 0124-4285388/ +9810041074

*Place: New Delhi”
(Emphasis Supplied)*

5. It is the case of the Appellant that in compliance of Clause 13 of this Corrigendum, the Appellant was ready to deposit the amount with 12% interest but the Respondent was not willing to consider their request. Learned Counsel for the Appellant further submitted that the Ld. Adjudicating Authority did not interpret the Clause in its truest sense and has erroneously observed that the Clause is applicable only for payment of balance consideration of 75 % after the bidder has paid 25% of the EMD amount. The Counsel placed reliance on paras 41, 42 and 43.7 of the Judgement rendered by the Hon'ble Supreme Court in ***Kailash Nath Associates V/s. Delhi Development Authority and Another reported in (2015) 4 SCC 136.*** The relevant paragraphs are reproduced as hereunder:

“41. It must, however, be pointed out that in cases where a public auction is held, forfeiture of earnest money may take place even before an agreement is reached, as DDA is to accept the bid only after the earnest money is paid. In the present case, under the terms and conditions of auction, the highest bid (alongwith which earnest money has to be paid) may well have been rejected. In such cases, Section 74 may not be attracted on its plain language because it applies only “when a contract has been broken”.

42. In the present case, forfeiture of earnest money took place long after an agreement had been reached. It is obvious that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown. In fact, it has been shown that far from suffering any loss, DDA has received a much higher amount on re-auction of the same plot of land.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.

The Appellant Counsel strenuously argued that in public auctions, Section 74 of the Indian Contract Act, 1872 cannot be invoked at a pre-contractual stage and further that the amount sought to be forfeited on the facts of the present case is sought to be forfeited without any loss being shown.

6. Learned Counsel appearing for the Respondent contended that the submission by the Appellant that only two days extension was granted is factually incorrect as the 'Corrigendum' shows that the proposed E-Auction date was 18.03.2020; announcement of the successful bidder was on 18.03.2020; 'LoI' to be issued on 20.03.2020; unconditional acceptance of 'LoI' on 23.03.2020; payment of upto 25% of total consideration is to be done by 25.03.2020 and payment of balance consideration by 20.04.2020. He further submitted that there was absolutely no violation of any timelines on behalf of the Liquidator and that the 'LoI' was issued on 18.03.2020 and there was unconditional acceptance of 'LoI' by the Appellant on 23.03.2020, by which time the Covid-19 situation in the country was well-known. Having given an unconditional acceptance on 23.03.2020 with respect to payment of the balance amounts, the Appellant cannot now take a stand that the forfeiture was unjustified on the ground that there was lockdown in the country.

7. Heard both sides at length. The main issue which arises for consideration is whether the Liquidator was justified in forfeiting a part of the earnest money deposited by the Appellant.

8. Clause 'J' of the Auction terms & conditions refers to 'Earnest Money Deposit' (EMD) and the terms of forfeiture of 'EMD' from the E-Auction of the Applicant/Bidder, which is detailed as hereunder:

“Forfeiture of Earnest Money Deposit from the E-Auction Applicant/Bidder

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

1. *if there is a breach of any of the conditions under this E-Auction Process Information Document by the Bidder or in case Bidder is found to have made any misrepresentation; or*
2. *if Bidder is found to be ineligible to submit the bid as per the conditions set out in Section 29 A of the IBC (as amended from time to time) or is found to have made a false or misleading declaration of eligibility as per the conditions set out in Section 29A of the IBC (as amended from time to time); or*
3. *if the Bidder is identified as the Successful bidder and it fails to pay 25 % of the Money within the stipulated time as per the clauses of this E-auction documents after being intimated as successful bidder by the Liquidator.*
4. *if the Successful Bidder fails to make the complete payment as per the terms of the Letter of Intent issued by the Liquidator.*
5. *in any of the above event, all the amounts deposited till that date shall be forfeited and the property will be offered to the next highest bidder”*

(Emphasis Supplied)

9. The interpretation of Clause 5 by the Learned Counsel appearing for the Appellant that as the property was re-auctioned and the entire amount realized, the EMD was consequently to be refunded resulting in the non-applicability of the aforementioned clauses, is untenable, as the Clause of forfeiture does not anywhere specify that it is subject to the happening of any event viz. realization from any 'Sale'. Undisputedly as per the timelines under the auction, the Appellant was required to make the payment of upto

25% of the total sale consideration by 25.03.2020 and the 'LoI' issued, was unconditionally accepted, by the Appellant on 23.03.2020. The Covid-19 situation in the country at that point of time was already an ongoing pandemic and there was declaration of Nationwide Lockdown by the Central Government vide a notification dated 24.03.2020 and hence it can be safely construed that the Appellant was well aware of the circumstances prevalent in the country.

10. The e-mail dated 18.05.2020 addressed by the liquidator to the Appellant herein is significant to the facts of this case and is reproduced as hereunder:

"Dear Mr. Saini,

This is in furtherance to emails dated 01.04.2020, 02.04.2020, 23.04.2020 & 15.05.2020 and the last telephone call the undersigned had regarding the payment to be made by you and the assurances given in this regard.

For clarity, it is once again reiterated that the undersigned conducted E-auction for sale of specified inventory of Case Cold Roll Forming Limited in which you participated as a qualified bidder. The auction was conducted on 18.03.2020 and you were declared as a Successful Bidder. The E-auction timelines were also communicated to all the qualified bidders including you along with E-Auction Process Document dated 20.02.2020. The revised timelines were issued on 11.03.2020.

As per agreed timelines and the LoI that which you had accepted unconditionally on 23.03.2020, an amount of Rs. 93,75,197/- plus GST against 25% of the total consideration was to be paid by i.e. 25.03.2020 and balance consideration plus GST by Monday, 20.04.2020.

However, you defaulted in payment of 25% of the total consideration by 25.03.2020 and sent a request for extension of time for depositing the 25% of the total consideration.

The auction was conducted on 18th March, 2020 and at the time of E-Auction, issuance of LoI and acceptance of LoI unconditionally you were aware of the situation caused by the spread of corona virus and which was very well persisting on the day of E-auction where you were declared as successful bidder.

On declaration of you as successful bidder, the only thing remained was the transfer of funds. It may be noted that during all time of lock down, all digital services of banks were open and banks have been working too. Therefore, your obligation under the auction was not affected through COVID-19.

Though you were always informed right time of payment of consideration of sale of inventory, the undersigned extended the time of deposit of 25% of sale consideration from 25.03.2020 to 31.03.2020 vide its mail dated 29.03.2020 without relaxing the timeline to submit the balanced amount.

It is most unfortunate that despite our repeated mails dated 01.04.2020, 02.04.2020, 23.04.2020 & 15.05.2020 we neither received any response nor any consideration. The undersigned also tried to reach you over the call. The undersigned contacted Mr. Manish Saini (on Mobile No. 9816500028) on 09.05.2020 who assured to pay within 2 days. However, you failed to deposit the same.

In view of the aforesaid facts and circumstances and in terms of the provisions of the Code, the undersigned, being a custodian of the assets of the Corporate Debtor, hereby by virtue of the present notice call upon you to forthwith upon receipt of the present notice, deposit the whole consideration for sale of Inventory i.e. INR. 3,75,00,786;- (Rupees Three Crore Seventy Five Lakh Seven Hundred and Eighty Six only) plus GST within 48 hours failing which the undersigned will be at liberty to forfeit the EMD of an amount of INR 16,00,000 (Rupees Sixteen Lakh only) which has been retained by the undersigned in terms of process document and LoI as unconditionally accepted by you.

(Emphasis Supplied)

The aforementioned e-mail establishes that despite repeated requests made by the Liquidator, there was no response from the Appellant herein

which substantiates the case of the Respondent that the Appellant did not adhere to the timelines given in the Corrigendum. The liquidator addressed an email on 18.05.2020 asking the Appellant to deposit the total consideration amount of Rs. 3,75,00,786 by 20.05.2020, failing which, the EMD would be forfeited. As admittedly, the amount demanded was not paid by the Appellant, the amount was forfeited vide an e-mail dated 23.05.2020, in which communication, once again all the earlier e-mails were referred to, but the Appellant chose to reply only on 16.06.2020 which is almost a month thereafter.

11. The facts in the Judgement of ***Kailash Nath Associates (Supra)*** relied upon by the Appellant are different from the facts of the instant case. In the aforementioned Judgement, the successful bidder had paid the entire 25% of the EMD and requested for extension of time to pay the balance amount of the total sale consideration which was also extended on recommendation of two High Power Committees. Secondly, the letter of cancellation and consequent forfeiture of earnest money was made without putting the successful bidder to 'Notice'. Finally, the other noticeable feature of the aforementioned case is that DDA specifically requested the bidder to give their *consent* to make the balance payment. The facts in the attendant case are distinguishable in the sense that the successful bidder herein has paid only 10% of the EMD amount and not 25%, there was no *consent* taken to make the balance payment alongwith interest charges and lastly, the bidder in the instant case was admittedly put to 'Notice' by way of repeated e-mails. Additionally, the facts specific to this case evidence that the 'forfeiture' has

no nexus with any consequential benefit gained/or loss suffered by the Respondent.

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

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

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

“The right to withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of agreement. A person may have a right to withdraw his

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

14. In the present case, the material on record evidences that reminder e-mails dated 01.04.2020, 02.04.2020, 23.04.2020, 15.05.2020 and 18.05.2020 were issued by the Liquidator to the Appellant herein requesting for payment of the balance amount of the 25% of the consideration but the Appellant neither replied to the e-mails nor made any payment adhering to the terms and conditions. It can be safely construed that the Appellant, by his own conduct, precluded the coming into existence of the concluded ‘Sale’ and cannot now be given an advantage or benefit of his own wrong doing by not allowing forfeiture.

15. Lastly, the contention of the Learned Counsel for the Appellant that Clause 13 of the Corrigendum is applicable to this case and that the same has not been considered by the Ld. Adjudicating Authority, is unsustainable on the ground that Clause 13 of the Corrigendum is with respect to payments regarding the balance 75% of the sale consideration. The timelines with respect to the *initial payment* of the 25% is clearly given as

25.03.2020 and the payment of *balance consideration* by the successful bidder was given as 24.04.2020. Viewed from any angle, it cannot be construed that Clause 13 is applicable to the initial 25% payment of the EMD amount. Be that as it may, the documentary evidence, the e-mails dated 02.04.2020, 03.04.2020, 15.05.2020 and 18.05.2020 clearly establish that sufficient opportunity was given to the Appellant to make the balance payments, which the Appellant had failed to respond or comply with the requests made and therefore we are of the considered view that Clause 3 of the “*Forfeiture of Earnest Money Deposit*” from the E-Auction terms and conditions, squarely applies to the facts of this case. Hence, we are of the opinion that the Ld. Adjudicating Authority has rightly dismissed the Application seeking direction for refund of the EMD.

For all the afore-noted reasons, this Appeal fails and is accordingly dismissed. No order as to costs.

**[Justice Bansi Lal Bhat]
The Acting Chairperson**

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

**New Delhi
(18th January, 2021)**

ha/basant.