

OD-1

IA NO. CA/89/2022

In

CP/233/2008

IN THE HIGH COURT AT CALCUTTA
Original Jurisdiction

IN THE MATTER OF :
M/S. DUNLOP INDIA LIMITED

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : May 4, 2022.

Appearance:

Mr. Abhrajit Mitra, Sr. Adv.

Mr. Soumabho Ghose, Adv.

Mr. Ankur Singhi, Adv.

Ms. Riti Basu, Adv.

Ms. Piyali Pan, Adv.

Mr. Tilak Bose, Sr. Adv.

Ms. Smita Das De, Adv.

Mr. Arindam Mondal, Adv.

The Court: The present application has been filed by an individual carrying on business under the name and style of Texworth International for an injunction restraining the Official Liquidator from treating the last bid submitted by the applicant for Rs. 418.11 crores as the applicant's bid against an e-auction Sale Notice for Lot-1 of the property mentioned in the Said Notice. The applicant also seeks a direction on the Official Liquidator for setting aside of the e-auction conducted on 10th and 11th March, 2022 for sale of the properties of Dunlop India Limited, the Company (in liquidation). The applicant says that it

accidentally bid for Rs. 418.11 crores instead of the intended bid of Rs. 41.81 crores.

The issue is whether appropriate terms should be imposed on the applicant for grant of the relief sought for.

The subject matter of the e-auction Sale Notice dated 21.02.2022 issued by the Official Liquidator of this Court were Lot-1 and Lot-2 of the factory units of the Company (in liquidation) situated at Sahagung, West Bengal and Ambattur, Tamil Nadu respectively. The e-auction was to be conducted by the selling agent, M/s Railtel Corporation of India Limited. The reserve price for bids was Rs. 13.21 crores and the auction was opened from 10:30 hours on 10th March, 2022 upto 18:00 hours on 11th March, 2022. The applicant paid the earnest money deposit of Rs. 2.70 crores as required under the terms and conditions of sale. The present dispute relates only to sale of Lot-1 property i.e. the Plant & Machinery in the factory unit situated at Sahagung, Hooghly, West Bengal and the applicant participating in the said e-auction as a prospective buyer.

The case sought to be made out by the applicant is that the applicant, through his representative, joined the bidding process and submitted a bid for Rs. 20.31 crores and thereafter submitted further bids to outbid the highest bidder whose offer was showing on the online portal auction. The second-last bid by the applicant was for Rs. 41.31 crores at 17:54 hours on 11th March, 2022 which was outbid by the highest bid received at Rs. 41.71 crores. At 17.54 hours, in order to outbid Rs. 41.71 crores, the applicant intended to

submit his bid for Rs. 41.81 crores but added an extra '1' through inadvertence and hence made a bid for Rs. 418.11 crores. The applicant came to know of such error on 11th March, 2022 itself and sent an email to the Official Liquidator on the following day to point out the error.

According to the learned counsel appearing for applicant, this is a case of an obvious mistake which would be evident from the auction log of 11th March, 2022. Counsel submits that the Official Liquidator cannot be allowed to take any step on such obvious mistake and must be restrained from treating the sum of Rs. 418.11 crores as the applicant's bid. Counsel offers to take the property described in the Sale Notice for Lot-1 for the intended bid of Rs. 41.81 crores. Counsel also offers to have the earnest money of Rs. 2.71 crores forfeited as compensation.

Learned counsel representing the Official Liquidator refers to the numerous efforts made by the Official Liquidator to auction the property of the Company (in liquidation) for paying off the creditors and workers of the Company in liquidation. Counsel refers to the terms and conditions of sale of the e-auction and urges that the applicant should be put on terms for the negligence on its part and for seeking to frustrate the entire sale process. Counsel also refers to the expenses which were incurred for the e-auction and that calling for a fresh auction would result in loss of valuable time and resources.

During the course of hearing, on 27th April, 2022, three other intending bidders appeared in Court with offers to buy the property for 43 crores.

Counsel representing the bidders informed the Court that they are interested to buy the property for 43 crores (price quoted by each of the bidders) in the event the Court directs a fresh auction.

The point which falls for consideration in the present application is whether the bid put in by the applicant of Rs. 418.11 crores for Lot-1 as described in the Sale Notice of the Company (in liquidation) can be treated as a *bona fide* mistake. The related point is whether the applicant should be put on terms even if the case of mistake is accepted.

The clauses relevant for the applicant as an intending bidder are as follows.

Clause 7 of the Terms and Conditions of Sale, which was circulated to the intending bidders, requires the bidders to personally see the status of bids through the 'Completed Auction' immediately after closing of e-auction. Clause 7.6 reads as:

"The Bidders shall be solely responsible for all consequences arising out of the bid submitted by him (including any arongful bidding by him) and no complaint/representation will be entertained by SELLER/eNivida in this regard. Bidders must be careful to check the Bid Amount/No. Of '0'/ No. Of Digits, etc., and if required, rectify their bid before submitting the Bid into the live e-Auction floor by clicking the 'Submit Bid' Button."

Clause 8.1 states that acceptance of the highest bid is subject to confirmation by the High Court of Calcutta and no bidder can demand the automatic confirmation of sale in his/her favour.

Clause 9 - Forfeiture of EMD - provides for forfeiture of any amount lying with the Seller from the successful Bidder who defaults in making due payments against the e-auction.

The 'mistake'

The fact of the applicant making an obvious error in keying in an extra '1' to the intended bid is not as simple as it is made out to be. There are several factors which cast a shadow of doubt over the alleged error committed by the applicant in bidding Rs. 418.11 crores as opposed to the intended Rs. 41.81 crores.

The terms indicate that the bidders were put on notice and sufficiently warned of any 'mistake' made during the e-auction. It is inconceivable that an intending purchaser who is participating in an e-auction where the entire process is being conducted online, would be careless enough to put in an extra digit and increase the allegedly intending bid by 10 times. It is equally unbelievable that after having discovered the so-called error on 11th March, 2022 itself, the applicant chose to wait till the next morning to point out the fact of the error to the Official Liquidator. The Bid Summary, annexed to the application, shows that the last bid submitted by one Bohra Exports Private Limited was Rs. 41.71 crores. The applicant submitted its bid of 418.11 crores immediately thereafter. This naturally became the last bid and the e-auction closed thereafter. There were six minutes left for the closing time of the e-auction after the applicant put in a bid of 418.11 crores.

The effect of the 'mistake'

Dunlop India Limited went into liquidation in 2013. There have since been umpteen litigations over sale of its assets. Even after 9 years, every announcement of sale of the assets of the Company (in liquidation) results in sprouting of applications by entities with a nebulous connection to the Company (in liquidation). While some amount of progress has been made in paying off a few of the creditors and workers, a huge number of other creditors and stakeholders remain unpaid. The e-auction held on 10th and 11th March, 2022 was in aid of the process of sale of the properties of the Company (in liquidation) so that a few of the remaining claims may be satisfied.

In the present context, when the applicant put in the bid for Rs. 418.11 crores at 17:54 hours on 11.03.2022 with 6 minutes left for the closing of the e-auction, the bidding immediately stopped. This was only to be expected since the last bid given by Bohra Exports at 17:54 hours was for Rs. 41.71 crores. The applicant's so-called 'mistake' hence stalled the bidding before reaching the closing time and more important, capped the price at 41.71 crores (assuming that the last bid of the applicant of Rs. 418.11 crores was through inadvertence). Second, the error frustrated the entire bidding process. According to the data available with the Court, about 100 bidders had participated in the e-auction held on 10th -11th March, 2022. The result of the bid was disclosed to the Court on 25.03.2022 and the three highest offers were submitted in a sealed cover by the Official Liquidator. On an application made

thereafter, the earnest money was returned to the unsuccessful bidders. Hence as of this date, the offers of the three highest bidders are before the Court and the other bidders have gone. There is no certainty that the other 97 bidders who had participated in the e-auction would respond and participate in a fresh e-auction in the near future. The action of the applicant has resulted in the entire process for sale of assets of the Company (in liquidation) being put back in square one after a span of two months from the last e-auction.

Should the applicant be put on terms?

A mistake is a misguided or a wrong decision. It signifies an absence of conscious and deliberate thought behind the commission or omission of the act and presumes that the person did not intend to do what he did. A mistake, whether of law or of fact, does not constitute a ground of exemption from liability in tort. In cases of tortious liability, the test is whether a reasonable person would have done what the defendant did. Sections 20, 21 and 22 of The Indian Contract Act, 1872, contemplate situations where both the parties to an agreement have proceeded on a mistaken belief of a fact essential to the agreement and contemplate that a contract is not voidable because it was caused by a mistake as to any law in force. Although, the present case is not one of contract, the principle which emerges from the statute and case-law is that a person cannot turn back on his obligations on the pretext of an act mistakenly committed. This is particularly true where the mistake has resulted

in certain irreversible consequences or consequences which may be reversed but at substantial cost to the other party to the act.

Even if the case made out by the applicant is to be accepted, namely that it was an error simpliciter, the applicant would still be liable for negligence. Negligence, in its general and non-tortious sense, is an absence of exercise of due care which results in consequential damage to the party who expected a reasonable standard of care to be taken by the negligent person. The terms and conditions, referred to above, clearly cautioned the applicant to carefully check the bid amount and warned the bidders of the consequences of any wrongful bidding. The applicant was hence under an obligation to exercise due care while keying-in a number for the bid, all the more so since the entire process was being conducted online and the applicant was well aware that it would not have the opportunity to immediately rectify its bid or take corrective measures as in a court sale. The case pleaded by the applicant of the possibilities of computer hacking and cyber crime is curious to say the least. Pushing a button on the key-board was a manual act undertaken solely by the applicant and/or his representative and there was no scope of any third party intervention or alteration of the numbers on the Internet.

Moreover, the fact that three other bidders appeared in Court on the last day when this matter was heard to make their offers of buying the property at Rs. 43 crores, is significant. These bidders chose to appear, out of the woodwork as it were, only at a time when the option of calling for a fresh bid was suggested to the Court. There was no sign of these bidders when the e-

auction was concluded and the three highest bids were received in sealed covers or even when the applicant first moved the present application for cancellation of the e-auction. The uniform offer of 43 crores by all bidders who have now appeared in the proceedings raises the spectre of a price-cartel which is inimical to receiving the best-price for sale of the property in question.

The circumstances put together amount to a reasonable apprehension that the 'mistake' was not a *bona fide* mistake on the part of the applicant. The applicant is also guilty of negligence in failing to exercise due diligence during the bidding process. This Court is hence of the view that the applicant must be made to compensate for the act.

The authorities cited on behalf of the applicant on 'mistake' are factually distinguishable from the present case. In *Guinness Peat Properties Ltd. Vs. Fitzroy Robinson Partnership; (1987) 2 All ER 716*, the England and Wales Court of Appeal (Civil Division) found that the plaintiffs' experts and solicitors had knowingly taken advantage of an obvious error on the part of the defendants' solicitors in including a letter in the list of documents offered by the defendants for inspection. In *Chandigarh Administration Vs. Naurang Singh; (1997) 4 SCC 177*, the Supreme Court was of the view that a mistake committed by the administration in terms of the revision of pay-scale of storekeepers cannot furnish a legitimate ground for the court to direct the administration to go on repeating the mistake. In both these cases, the court accepted the fact of a genuine mistake having been committed by one of the parties before it. In *MBL Infrastructure Limited Vs. Rites Limited; AIR 2020 Cal 155* a Division Bench of

this Court held that the earnest deposit in a tender document cannot be forfeited since the party forfeiting should not be entitled to a windfall without there being any loss or damage suffered by that party. The case before the Division Bench involved a breach of contract pertaining to construction of a road in Jharkhand and subsequent defects discovered after expiry of the defect liability period. In the present case, the Official Liquidator has not demanded forfeiture of the earnest money deposit. Hence, the cases cited do not assist the applicant.

Since the facts point to a frustration of the e-auction by an artificial price-ceiling at Rs. 41.71 crores (being the last bid before the applicant's 418.11 crores) this Court is of the considered view that a fresh e-auction should be conducted for sale of Lot-1 property of the factory unit of the Company (in liquidation) at Sahagunj, West Bengal. In order to show its *bona fides*, the applicant is directed to compensate for cancellation of the last e-auction by way of the following measures.

1. The applicant shall bear all expenses for conducting the e-auction including advertising for the same by way of public notices in 1 English, 1 Bengali and 1 Hindi newspaper having wide coverage all over India.
2. The applicant shall also bear the necessary operational expenses for conducting the fresh bid and pay the same to Railtel Corporation and the Official Liquidator of this Court.

3. The applicant shall also protect the sale price which was last reached in the e-auction by putting in Rs. 41.81 crores (being the amount which the applicant intended to bid) in the form of a bank guarantee with the Official Liquidator within 7 days for being treated as the base-price of the fresh e-auction. The Official Liquidator shall use the bank guarantee as the starting price/reserve price from which the bids shall be invited. The bank guarantee shall remain valid for 3 months or until further orders of this Court, whichever is later.

4. The Official Liquidator / Railtel Corporation shall prepare the sale notices accordingly. The Official Liquidator and Railtel Corporation shall try their best to hold the e-auction within 3 weeks from today.

5. As suggested by the parties, the Official Liquidator shall indicate the operational/incidental expenses for the e-auction to the advocate-on-record of the petitioner by 12 noon tomorrow, i.e., 5th May, 2022.

6. The Official Liquidator will consider whether the earnest money deposited by the petitioner can be adjusted in the future e-auction.

These measures are required for ensuring sufficient safeguards in the form of price-protection for sale of the assets of the Company (in liquidation).

C.A 89 of 2022 is disposed of in accordance with the above. The parties shall be at liberty of applying before this Court for appropriate relief after conclusion of the fresh e-auction.

Urgent Photostat certified copies of this order, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)

sg.