

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1390 OF 2022

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016

Melkar TTI Biofuels Limited

...Applicant

Vs.

Mr. Dharit Kishorbhai Shah

The Liquidator

...Respondents

In the matter of

C.P.(IB) No. 3610/MB/2019

Punjab National Bank

Financial Creditor

Vs.

Dhawal Pratap Singh Mohite Patil Agro

Industries Limited

Corporate Debtor

Order delivered on: 05.12.2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)
Appearances

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

For the Applicant : Mr. B. Gopalakrishnan, Advocate a/w Mr. Ashish Dalal, Advocate

For the Respondent : Mr. Rohan Agarwal, Advocate a/w Mr. Amey Hadwale, Advocate, Ms. Geeta Lundwani, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This IA 1390/2022 is filed by M/s Melker TTI Biofuels Limited (“Applicant”) in the Liquidation Process of M/s Dhavalpratapsinh Mohitepatil Agro Industries Limited (“Corporate Debtor”) seeking directions to Mr. Dharit Kishorebhai Shah, the Liquidator of the Corporate Debtor (“Respondent”) to refund the Earnest Money deposit amounting to Rs. 1,54,21,002/- (Rupees One Crore Fifty-Four Lakhs Twenty-One Thousand and Two Only) along with interest @ 24% per annum for the unreasonable delay caused by the Liquidator in refunding the said amount to the Applicant.
2. The liquidation in this case commenced on 29.07.2021 vide Order of this Tribunal in terms of provisions of the Insolvency & Bankruptcy Code, 2016 (“Code”). The Liquidator issued a revised tender document dated 13.01.2022 inviting prospective bidders to participate in an e-auction that the Liquidator was going to conduct in terms of Regulation 32 of The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 at a later date i.e. on 25.01.2022. The Liquidator intended to either dispose off the "company as a whole" as a going concern or "Distillery Business of the Corporate Debtor" as a going concern as per the said revised tender document. The e-auction held on

25.01.2022 failed and e-auctions were again conducted by the Liquidator on 03.02.2022, 04.03.2022, 14.03.2022 and 30.04.2022. As per the terms of the revised tender document dated 13.01.2022, in case the auction failed, the EMD was to be refunded by the Liquidator after 15 days of the auction date.

3. The Applicant submitted the requisite Bid Application Form on 25.01.2022 and also made the necessary payment for "Earnest Money Deposit" ("EMD") of Rs. 1,54,21,002.00 (Rupees One Crore Fifty Four Lakhs twenty One Thousand and Two Only) as sought by the Liquidator on 25.01.2022.
4. It is the case of the Applicant that, prior to the date of the e-auction, the Respondent Liquidator had led the Applicant to believe that that even though the period of 90 days for sale of the Corporate Debtor as a going concern or sale of business of the Corporate Debtor as a going concern had elapsed, this Tribunal had allowed the extension of the time period through an order of this Tribunal even though the Order for the same was not shared with the Applicant. However, a contradictory claim was made in the revised tender document dated 13.01.2022 as issued by the Respondent.
 - 4.1. It is alleged that the Respondent failed to mention in the revised tender document and suppressed the fact that the Order for extension was already reserved by this Tribunal on 03.01.2022 even though the Applicant was informed vide an email dated 25.01.2022 that this Tribunal had dictated the order and granted an extension of 90 days. This fact is stated to have been communicated to the Applicant in private communication between the Applicant and the Respondent.
 - 4.2. Accordingly, this dual approach of the Liquidator kept the Applicant in the dark till the very last day and hence the Applicant had no other

option but to seek refund of the EMD and withdraw from participating in the e-auction dated 25.01.2022.

4.3. More than 2 months have elapsed since the date of e-auction but the Liquidator has still not refunded the EMD amount of Rs. 1,54,21,002.00 (Rupees One Crore Fifty Four Lakhs twenty One Thousand and Two Only) which was paid by the Applicant and the payment of which was duly acknowledged by the Liquidator Respondent on 25.01.2022.

5. The Respondent has filed the reply stating that the Application is not maintainable in law and the Applicant under the garb of present Application is seeking and attempting to travel beyond the terms of e-auction. It is further stated that, in the third Stakeholder's Consultative Committee held on 6.12.21, it was decided to sell the Corporate Debtor as Going Concern. Pursuant to this, the Liquidator sought permission of this Tribunal vide application no. 2949/2022, and the said was allowed vide order dated 3.1.2022, also extending the time for further ninety days to sell the Corporate Debtor as going concern.

5.1. The Respondent had sent documents along with the annexures which were to be signed by the applicant, and the applicant submitted the Bid Application Form, affidavit & undertaking, declaration along with EMD confirming the terms of the tender document sent by the Respondent. Pursuant to this, the Respondent conducted the auction on 25.1.2022 wherein the applicant failed to participate in the e-auction despite of depositing the EMD and therefore the auction could not be concluded.

5.2. Since, the applicant failed to participate in the auction and therefore in view of clause 22 "Forfeiture of Earnest Money Deposit From the E-Auction Applicant" of revised tender document, the Respondent has forfeited the EMD deposited by the Applicant.

5.3. It is further claimed that the Respondent through an email dated 25.1.2022 had clarified the query of the applicant and informed the Applicant that this Tribunal has approved the extension of 90 days from 3.1.2022 to sell the Corporate Debtor as going concern, however, the order dated 3.1.2022 is not uploaded on the Tribunal's website. Accordingly, the Respondent has denied that he had created any confusion or have made any contradictory statements.

6. We have heard the learned Counsel and perused the material available on record.

6.1. Clause 22 "Forfeiture of Earnest Money Deposit From the E-Auction Applicant" of revised tender document reads as under –

"22. It is to be noted that the Earnest Money furnished can be forfeited at anytime, 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 29A of the OBC (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 accept the Letter of Intent / intimation of confirmation of sale to the successful bidder issued by the Liquidator; or*
- 4. If the successful bidder fails to make the complete payment as per the terms of the Letter of Intent issued by the Liquidator, or*
- 5. Bidder who have submitted documents and paid EMD and if he is either not availing Login credential or after availing Login Credential is not participating in E-Auction."*

- 6.2. The Applicant had also furnished a declaration agreeing to forfeiture of EMD in case of failure to fulfil any/all of the terms and conditions of the auction and offer letter.
- 6.3. We find that the Applicant has based its case merely on the proposition that Order extending period of 90 days for conclusion of sale of Corporate Debtor as going concern was not communicated to him as the same was not found uploaded on this Tribunal's website. It is not disputed that the contents of this Order, as communicated to the parties present on 3.1.2022 were duly communicated to the Applicant by the Respondent. Nonetheless, the events of inviting the E-Auction Bids, and submission of Bid documents took place after 3.1.2022 and the fact that the Liquidator, being an officer appointed by this Tribunal to conduct the liquidation process, in itself confirms that what was communicated by the Liquidator in relation to extension of 90 days was true because in the absence of such oral pronouncement of Order by this Tribunal, the Respondent could not have proceeded with the publication of bid documents. Clause 22 of the Tender Documents vests the right to forfeit EMD in case where either the log is not obtained or having obtained, the bidder does not participate.
- 6.4. In the case of *National Highways Authority of India vs. Ganga Enterprises, (2003) 7 SCC 410*, the Hon'ble Apex Court has explained this proposition in the following words –

“The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. The 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”.

- 6.5. It is undisputed proposition that the EMD condition is generally stipulated to ensure that the prospective bidders do not back out from the process in between thereby wasting time and delaying the process further. The Liquidator had unequivocally communicated to the Applicant that the Sale as a Going Concern was in accordance with the process of Tender documents and the Code, hence the Applicant can not be allowed to step back on the ill-founded ground of absence of Order of this Tribunal extending the period of 90 days to conclude the sale. Hence, the Applicant has to suffer the consequences for such withdrawal as provided in the Revised Tender Documents.
- 6.6. In view of the foregoing discussion, we have no hesitation to hold that the Respondent had a right to forfeit the EMD on failure specified in clause 22(5) and has rightly invoked his right to forfeit the EMD deposited by the Applicant.
7. In view of the above, IA 1390/2022 is disposed of as dismissed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)