

NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH,
NEW DELHI

Company App. (AT) (Ins) No. 316 of 2023

&

I.A. No. 1079 of 2023

IN THE MATTER OF:

VINOD KUMAR KOTHARI

Liquidator of the Corporate Debtor
Nicco Corporation Limited - In Liquidation
Room No. 1006-1009, Krishna Building
10th floor, 224 A.J.C Bose Road
Kolkata-700017
Through Power-of-Attorney Holder
Ms. Nitu Poddar
Nukleus, 501 & 501A, 5th Floor,
Salcon Rasvilas, District Centre, Saket,
New Delhi, Delhi 110017

...Appellant

Versus

SNEHA TECHNO EQUIPMENTS PRIVATE LIMITED

46C, Rafi Ahmad Kidwai Road,
Room No. 5D, 5th Floor, Kolkata 700016

...Respondent

Present:

For Appellant : Mr. Abhijeet Sinha, Mr. Gautham Shivshankar, Mr. S. Sinha, Advocates

For Respondents : Mr. Sumant Batra, Ms. Aishwarya, Advocates

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

The Appellant is the Liquidator of the Corporate Debtor (Nicco Corporation Limited) is aggrieved against the order dated 23.02.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata

Bench-1, Kolkata) by which I.A. (IBC) No. 930/KB/2020 filed in CP (IB) No. 3/KB/2017 has been allowed, forfeiture of EMD deposited by the Respondent (Sneha Techno Equipments Pvt. Ltd.) was held to be illegal and direction has been issued to the Appellant to refund the amount of EMD forfeited by him within 30 days from the date of the order with an interest @ 4% from forfeiture date, failing which, he has been liable to pay the forfeiture amount of EMD with an interest of 7% till the actual payment is made.

2. In short, the Liquidation proceedings were initiated against the Corporate Debtor by the Adjudicating Authority vide order dated 17.10.2017 pursuant to which the Liquidator put up one cable manufacturing unit at Shyamnagar, West Bengal (Shyamnagar Property), one of the several assets of the Corporate Debtor, for sale by way of e-auction in terms of Regulation 32 r/w Schedule 1 of the IBBI (Liquidation Process) Regulations, 2016 (in short 'Regulations')

3. The Liquidator floated Expression of Interest (EOI) for sale vide invitation dated 08.07.2020. The relevant clauses 12.17, 12.18 and 12.19 of the EOI, set up by the Liquidator are reproduced as under:-

“12.17. The H1 Bidder shall have to deposit 25% of the Sale Consideration, within 5 days of the Demand made by the Liquidator. The EMD tendered by the H1 Bidder against accepted Bid shall be adjusted towards this 25% Sale Consideration. However, where the EMD was submitted as bank guarantee, the same is not adjusted. The H1 Bidder shall pay 25% of the Sale Consideration (without considering the value of bank guarantee), and on receipt of such part consideration, the bank guarantee shall stand retired.

12.18. The balance 75% of Sale Consideration shall be paid on or before 15th day of the Demand or such time as may be permitted by the Regulations which will be communicated to the successful

bidder. Any payment made after the said period, will attract interest @ 12%p.a. If the H1 Bidder fails to tender the full Sale Consideration within 45 days of the Demand or such time as the Regulations may provide, the sale shall stand cancelled.

12.19. In the event of default of payment within the stipulated period, as mentioned above, or any default in terms of the Invitation, the EMD as all monies paid by the defaulting bidder shall be forfeited and the assets shall forthwith be sold again and such defaulting bidder shall forfeit all claims to the Sale Asset or to any part of the amount for which it may be subsequently sold.”

4. The E-auction was held on 30.07.2020 in which the Respondent was declared as the highest bidder (H1). The Appellant after confirming the applicant as H1, vide mail dated 30.07.2020, asked to remit the amount of sale consideration as follows:- (a) 25% of the sale consideration within 5 days of the demand, that is by 05.08.2020 (b) 75% of the sale consideration, plus applicable taxes within 15 days of the demand i.e. by 15.08.2020.

5. The Respondent was the highest bidder who gave the bid of Rs. 24.73 Crores deposited 25% of sale consideration i.e. Rs. 6,18,25,000/- which is shown as under:-

Sl.No	Date	Cheque No.	Amount (Rs)
1	05.08.2020	297792	2,00,00,000/-
2	10.08.2020	121726	2,00,00,000/-
3	14.08.2020	121727	1,00,00,000/-
4	17.08.2020	121728	1,18,25,000/-
Total			6,18,25,000/-

6. The case set up by the Appellant is that the Respondent did not make the payment of the balance 75% of sale consideration till 15.08.2020 which was the date stipulated for full payment in the EOI. Accordingly, he sent a notice to the Respondent on 17.08.2020 asking for payment of the entire remaining amount on or before 13.09.2020 (being the 45th day from the date

of demand) in terms of clause 12.18 of the EOI dated 08.07.2020. It is alleged that since no money was paid till 09.09.2020 therefore, the Appellant sent a final pre-deadline reminder on 09.09.2020 but the Respondent made a request for an additional 90 days' time for arranging the funds. It is further alleged that since timeline was fixed as a part of EOI dated 08.07.2020 which was circulated to all and the terms were agreed to, the request made by the Respondent was rejected by the Appellant for extension of time but was allowed to make the balance payment by 16.09.2020 vide its mail dated 14.09.2020. However, since no payment was made even till 16.09.2020, the Appellant sent a pre-forfeiture notice on 18.09.2020 and gave final opportunity to Respondent to pay the balance sale consideration by 21.09.2020 and upon the failure of the payment within stipulated time, the amount paid by the Respondent (i.e. the EMD and 25% of the sale consideration) was forfeited.

7. It is further alleged that since H2 did not show interest in purchasing the auctioned property, the Appellant issued a fresh invitation on 23.09.2020, keeping the reserve price at Rs. 20.63 Crores of the same property, which was sold in a fresh e-auction at the highest bid of Rs. 23.33 Crores (as compared to the bid price of Rs. 24.73 Crores in the previous auction where the Respondent failed to honour its bid). The full payment towards the sale consideration has been made by H1 in the fresh auction within timeline prescribed, therefore, the Appellant has executed the sale certificate in favour of H1 bidder and handed over the possession of the said asset to the said H1 bidder. However, after the fresh invitation floated by the Appellant on 23.09.2020, the present application bearing I.A. (IBC)

930/KB/2020 was filed by the Respondent both for extension of timeline for making payments towards balance sale consideration and or a direction to the Appellant to refund the entire forfeited amount within two weeks from the date of the order.

8. The case set up by the Appellant before the Adjudicating Authority was that though there has been an amendment in Clause 12 of Schedule 1 of the Regulations which deals with the mode of sale and has been brought into effect from 25.07.2019 but thereafter IBBI issued a circular dated 26.08.2019 as per which the amendment in Schedule dated 25.07.2019 would apply prospectively and shall not apply to the liquidation process which has been initiated prior to that date and in the present case the Liquidation process started on 17.10.2017. However, the Adjudicating Authority did not agree with the Appellant on this issue, firstly on the ground that there is no power vested with the board to issue circular under Section 196 of the IBC and secondly the Appellant was required to issue EOI in terms of the Regulations as its stood amended on 25.07.2019 providing 90 days for payment of balance sale consideration from the date of demand.

9. Counsel for the Appellant has vehemently argued that firstly, the Adjudicating Authority has no jurisdiction to declare the circular of the board as non-est. However, it is also submitted that the circular dated 26.08.2019 even otherwise has been withdrawn, therefore, nothing much depends upon it in the present case. It is rather submitted that the timeline fixed in the EOI became an invitation to the public and once the Respondent as a bidder accepted the same, entered into the bid, it becomes a party to that contract and cannot seek selective relaxation of timeline as the time for

payment is essential part of an auction contract. It is further submitted that Section 35(1)(f) of the Code empowers and enjoins upon the liquidator to sell the assets of the Corporate Debtor and Regulation 33 r/w Schedule 1 specifies the manner in which the sale can be conducted. In this regard, he has referred to Para 1(3) of Regulation 33 which provides that “the Liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any”. The entire emphasis of the Appellant is on the point that once the Respondent being the highest bidder has accepted the terms and conditions laid down in the EOI (Clause 12.17 to 12.19 Supra) it cannot be allowed to urge that the period of 90 days should have been granted from the date of demand instead of the timeline fixed by both the parties mutually.

10. On the other hand, Counsel appearing on behalf of the Respondent has submitted that the circular dated 26.08.2019 was subject matter of the controversy in CA (AT) (Ins) No. 398 of 2021 in which this Court has made the following observations: -

“12. Having heard Counsel for Appellant and Amicus Curiae and considering the material placed by them, it does appear to us that the laudable object with which Clause 12 was substituted is defeated by issuing such Circular dated 26.08.2019. When in an auction somebody has given a higher bid, if instead of 15 days, the person gets a breathing time of 90 days to make a payment, no other person gets affected. We have seen the Discussion Paper referred to by the Learned Amicus Curiae which was alongwith the Draft Regulations dated 27.04.2019. The Discussion Paper discussed various issues that had been brought up by stakeholders relating to liquidation process under IBC. Reference was made to judgments where direction was given with regard to time during which process should be completed. Para 3.2 of the Discussion Paper referred to Regulation 32 and the option to explore sale of Corporate Debtor as a going concern along with the other available sale options and the need to provide complete

framework to enable the Liquidator to exercise the option. The Discussion Paper tries to balance need to be within timeframe for maximisation of the value and the need to have sufficient time for steps to be taken. In such backdrop, Para 5.2.2 (referred supra) was included in the Discussion Paper with regard to difficulties found by Liquidators when time is of mere 15 days.

13. Perusing the Liquidation Regulations and Clause 12 of Schedule I as was subsequently introduced on 25.07.2019, the substituted Regulation which has been brought by way of amendment does not show that the Regulation is to be applied only prospectively. It is open ended provision relating to procedural law which in no way states that it will not apply to pending liquidation processes on the date of substitution. In our view, the Circular dated 26.08.2019 could not interpret the Regulations in the manner it is done. Power of Board under Section 196(1) (p) or (t) to issue guidelines cannot be expanded to interpreting provisions made. That is job of Courts to interpret and apply law. Reading the Regulation as amended we find it must be held to be applicable to liquidation process which are pending, and the provision can be applied considering stage of the process, irrespective of the date whether the liquidation process started before 25.07.2019 or on or after 25.07.2019 when Clause 12 Schedule I of the Regulations was substituted. This is not to say that sales already cancelled before 25.07.2019 for default of payment under earlier existing clause 12 can be reopened. Liquidators can rely on the amendment at the time of issue of Auction Notice being issued, irrespective of date of liquidation order of Adjudicating Authority. The Circular dated 26.08.2019, we hold is not legally enforceable to interpret applicability. Such Circular cannot be in the nature of substituting existing Regulation in the name of guidelines. The guidelines which are inconsistent with the subordinate legislation would not be enforceable. If provision is clear, external aid, that too inconsistent, cannot be applied. The provision has to be enforced by Tribunal as it is.”

11. It is further submitted that the Regulation 33 of the Regulations deals with the mode of sale. He has referred to Regulation 33(1) which says that “the liquidator shall ordinarily sell the assets of the Corporate Debtor through an auction in the manner specified in Schedule 1”. Then he drew our attention to Schendel 1 which deals with the mode of sale. Clause 12 of

Schedule 1 which was substituted on 25.07.2019 says that “on the close of auction, the highest bidder shall be invited to provide balance sale consideration within nineteen days of the date of such demand: provided that payments made after thirty days shall attract interest at the rate of 12%: Provided further that the sale shall be cancelled if the payment is not received within 90 days.”

12. He has argued that it is incumbent upon the Appellant (Liquidator) to have followed Clause 12 of Schedule 1 and could not have laid down its own terms and conditions because the invitation (EOI) was given on 08.07.2020 after the amendment dated 25.07.2019. In the EOI, the period was given 15 days whereas the Respondent had been asking for 90 days from the date of demand in terms of amendment dated 25.07.2019.

13. We have heard Counsel for the parties and perused the record.

14. In this case, the issue involved is as to whether the parties are bound by the terms and conditions fixed by the Appellant in the EOI dated 08.07.2020 or the Appellant was required to follow the terms and conditions of Clause 12 of Schedule 1 of the Regulations which was amended on 25.07.2019?

15. The very fact that the circular dated 26.08.2019 has already been withdrawn and that the amendment dated 25.07.2019 was in vogue as on 08.07.2020, it was incumbent upon the Appellant to have followed the provisions of Regulation 33 much less Schedule 1 (Clause 12) of the Regulations which has not been followed and the terms and conditions have been provided by the Appellant on its own in the EOI overlooking the terms and conditions as envisage in Schedule 1.

16. In such circumstances, the action of the Appellant is totally unsustainable, therefore, we do not find any error in the order under challenge in which all the factors of this case have been thoroughly appreciated.

17. In the end, Counsel for the Appellant requested that the component of interest which has ordered to be paid with EMD which has been forfeited would cause extra burden on the Appellant but at the same time, it is also submitted that the amount of EMD is lying deposited in Bank on which the interest is accruing. In such circumstances, we do not find any merit in this argument as well.

18. Thus, looking from any angle, we do not find any merit in the appeal and the same is hereby dismissed. No costs.

**[Justice Rakesh Kumar Jain]
Member (Judicial)**

**[Mr. Naresh Salecha]
Member (Technical)**

New Delhi

27th September, 2023

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