

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH: NEW DELHI**

Note to the Registry

In view of the divergent judgements, delivered by the Hon'ble Member Justice M. Venugopal, Member (Judicial), Hon'ble Mrs. Shreesha Merla, Member (Technical) of NCLAT, Chennai Bench, on 20th October, 2023, the Registrar of 'NCLAT', Principal Bench, New Delhi, is to place the record(s) in Company Appeal (AT) (CH) (Ins) No. 438 & 443 of 2022 together with the copies of the said 'judgements' before the Hon'ble Chairperson of 'NCLAT' Principal Bench, New Delhi for constituting an appropriate Bench / nominating Hon'ble 3rd Member, for rendering his opinion / decision in 'Appeals'.

**[Justice Venugopal. M]
Member (Judicial)**

20th October, 2023

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
CHENNAI BENCH
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No. 438/2022
(IA Nos. 1109/2022, 1110/2022 & 1111/2022)
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 10.08.2022 in
IA No.952/2022 in TCP/95/2017, passed by the
'Adjudicating Authority' (National Company Law
Tribunal, Chennai Bench)

With

Company Appeal (AT) (CH) (Ins) No. 443/2022
(IA Nos. 1118/2022 & 1120/2022)
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 29.06.2022 in
IA(IBC)/512(CHE)/2021 in TCP/95/2017, passed by the
'Adjudicating Authority' (National Company Law
Tribunal, Chennai Bench)

IN THE MATTER OF:

M/s Shri Karshni Alloys Private Limited
1st Floor, G Block
Connaught Circus
Connaught Place, G - 36 Delhi
New Delhi- 110 001

...Appellant

Versus

Mr. Ramakrishnan Sadasivan
Liquidator of M/s Surana Industries Limited
Old No.22, New No.28
Menod Street, Purasawalkam
Chennai - 600 007
Email id: sadasivanr@gmail.com

...Respondent

Present:

For Appellant : Mr. Virender Ganda, Senior Advocate
For Mr. Vishal Ganda, Advocate
Ms. Akanksha Mathur, Advocate
Ms. Tanya Hasija, Advocate

**For Respondent : Mr. T.K. Bhaskar, Advocate
Mr. Mayan H Jain, Advocate
Ms. Niveditha Narayanan, Advocate**

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Introduction

I have gone through the detailed judgement authored by Hon'ble Mrs. Shreesha Merla, Member (Technical) in Company Appeal (AT) (CH) (Ins.) Nos. 438 & 443 of 2022. However, with great respect, I differ with the views expressed therein. Hence, I am perforced to pen my thoughts, and render my 'Findings', independently and separately.

Background

2. The Appellant has preferred the instant Comp. App. (AT) (CH) (Ins) No. 438/2022 and Comp. App. (AT) (CH) (Ins) No. 443/2022 before this Tribunal as 'aggrieved person' in respect of the impugned order dated 10.08.2022 passed by the Adjudicating Authority/NCLT, Chennai Bench, in Application (Dy. No. 3305118016882022) in IA(IBC)/952/(CHE)/2022 in TCP/95/IB/2017 M/s IDBI Capital Markets and Securities Ltd. Vs. M/s. Surana Industries Ltd.

3. The Appellant has focussed the instant Comp App (AT) (CH) (Ins) No. 443/2022 before this Tribunal as an 'aggrieved person' in respect of the impugned order dated 29.06.2022 in IA/512/CHE/2022 in TCP/95/IB/2017 passed by the Adjudicating Authority/NCLT, Chennai.

Appellants' Submissions

4. The Learned Sr. Counsel for the Appellants contends that the impugned order dated 10.08.2022 was pronounced in open court by the Adjudicating Authority/Tribunal and that the 'CIRP', was initiated, against M/s. Surana Industries Ltd. (Corporate Debtor) through the order of the Learned Adjudicating Authority dated 02.01.2018. An application bearing MA/453/12018 was filed u/s 33(1)(a) of the Code, pursuant to the decision of the 'Committee of Creditors', to initiate 'Liquidation proceedings', against the 'Corporate Debtor'. As a matter of fact, the Adjudicating Authority / Tribunal, had passed an order on 12.10.2018, in initiating the 'Liquidation proceedings' against the Corporate Debtor and further, appointed the Resolution Professional Mr. Ramakrishnan Sadasivan (Liquidator/Respondent).

5. According to the Appellants, the Respondent was endeavouring to sell the Assets of the 'Corporate Debtor', as per Section 35(1)(f) of the Code and the provisions contained in the 'Insolvency and Bankruptcy Board of India' (Liquidation Regulations, 2016).

6. It is represented on behalf of the Appellant, that at the time of commencement of 'Liquidation proceedings', the 'Corporate Debtor' owned significant 'Assets' at its plants at Gummidipoondi (Gummidipoondi Assets) and Raichur (Raichur Assets). The process of 'sale' of these 'Assets' of the

‘Corporate Debtor’ through an ‘auction’ was conducted, from 06.02.2019 to 02.02.2021, wherein six ‘auctions’ were conducted and only, the Gummidipoondi Assets were sold, after several attempts.

7. According to the Appellants, in regard to ‘Raichur Assets’ 13 ‘auctions’ were conducted till 30.06.2021 and even on the 13th auction of the Raichur Assets, ‘no acceptable bids’ were submitted. Also that, since a substantial period of time, had elapsed and no ‘Bidders’, had approached, to take over the ‘Raichur Assets’, it was decided to sell the ‘Raichur Assets’ at the scrap value of approx. Rs. 50 crores and the same, was communicated to the ‘Creditors’, at the ‘stakeholders meeting’ held on 31.07.2021.

8. It is projected on the side of the Appellants, that despite the decision of the Respondent to sell the ‘Raichur Assets’ at scrap value of approx. Rs. 50 crores, the Appellant, on 09.09.2021 made a staggering offer to take over the Corporate Debtor as a going concern for Rs. 105.21 crores, which had this time only consisted of the Raichur Assets.

9. The Learned Counsel for the Appellants refers to the following tabular column, elaborating the desperate value of the Raichur Assets, during the course of the Liquidation proceedings and the same is as under:-

Liquidation value obtained in 1 st valuation	Liquidation value obtained in 2 nd valuation done in August 2019	Liquidation value obtained in 3 rd valuation done in August 2020	Scrap value	Bid dated September 09, 2021
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done in December 2018				submitted by the Appellant
338,01,00,000 INR	227,30,97,240 INR	117,23,31,924 INR	50,00,00,000 INR	105,21,00,00 0 INR

10. The Learned Counsel for the Appellant, points out that in the ‘stakeholders meeting’ on 15.09.2021, the ‘stakeholders’, had consented to the sale of the ‘Corporate Debtor’ as a going concern, for a sale consideration of Rs.105.21 crores. In terms of the ‘Appellants proposal’, the Appellants together with its associates were to invest Rs.40 Crores, by way of ‘equity infusion’ and the balance, of Rs.65.21 crores, was to be infused through ‘unsecured debts’. Also that, the Appellants had tide up the arrangements, to secure a ‘debt funding’ with a reasonable presumption that the plan, would be approved by the ‘Adjudicating Authority’ / ‘Tribunal’, within a short span of time.

11. The Learned Counsel for the Appellants, points that the Appellants, in terms of the sale, had deposited a sum of 10% of the total sale consideration, amounting to Rs.10.52 crores as ‘commitment advance’, to show the ‘Bonafide’, to take over the Assets, of the ‘Corporate Debtor’, as a ‘going concern’. Further, it was agreed, that the balance sum would be remitted, on receipt of ‘approval’ by the ‘Adjudicating Authority’ / ‘Tribunal’.

12. It is brought to the notice of this Tribunal, on behalf of the Appellants, that on 22.09.2021, the Respondent had filed an Application, before the ‘Adjudicating Authority’ / ‘Tribunal’, in IA No.997/CHE/2021 in

TCP/95/CHE/2017, seeking confirmation of the bid, for ‘sale of the assets’, of the ‘Corporate Debtor’ by the Appellants, as a going concern, as per Regulation 33(2)(d) of the Liquidation Regulations, 2016.

13. According, to the Appellants ‘Adjudicating Authority’ / ‘Tribunal’ on 22.03.2022 was pleased to affirm the sale of the Assets of the Corporate Debtor to the Appellants, as a going concern, for a consideration of Rs.105.21 crores and directed the Appellants to pay the ‘sale consideration’, within a period of 15 days, from the date of receipt of the order. Also that, the said order, was uploaded on 30.03.2022, and that the Appellant had time till 15.04.2021, to make the balance payment.

14. The Learned Counsel for the Appellants, proceeds to point out that majority of the payment to be made by the Appellants viz. a sum of Rs.65.21 crores, was by way of ‘debt funding’. But on account of the efflux of time (six months approximately), in the approval of the Appellants proposal, by the ‘Adjudicating Authority’ / ‘Tribunal’ and the change, in the market scenario caused by Russia-Ukraine war, the Lenders had reservations, to fund the purchase of the ‘Corporate Debtor’.

15. The Learned Counsel for the Appellant, submits that in the ‘stakeholders meeting’, that took place, on 13.04.2022, wherein the ‘stakeholder’ and the Respondents, were duly apprised of the genuine difficulty, on the part of the

Appellants and they were of the view that the ‘stakeholders’ could not have suo-moto extended the time line, in the absence of an approval by the Adjudicating Authority.

16. The Learned Counsel for the Appellants, points out that the 10th Stakeholders meeting dated 13.04.2022, after due deliberations, the following terms were agreed and they are as below:

“After deliberations, Mr. Drabesh Jha proposed a revised schedule for the payment proposal which is as follows-

Date of payment	% of payment	Amount (in Rs.)
Total amount to be paid		1,05,21,00,000
Amount already paid on 10-09-2021	10%	10,52,10,000
Balance to be paid		
On or before 18-04-2022*	15%	15,78,15,000
Before 30-04-2022	25%	26,30,25,000
Before 15-05-2022*	50%	52,60,50,000
Total		1,05,21,00,000

**Note:*

- Since 15th April, 2022 being a non-working day for the banks, Mr. Drabesh Jha stated that the payment which fell due on 15th April, 2022 would be paid on 18th April, 2022.
- Out of the amount of Rs. 15,78,15,000/- payable on 18th April, 2022, already an amount of Rs. 5,00,00,000/- was paid on 12th April, 2022.
- The last installment of 50% shall be coupled with a grace period of 15 days extended till 30th May, 2022.

For Shri Karshni A

Mr. Drabesh Jha expressed his sincere thanks to the members for the patient co-operation extended so far in the process and requested the members to place reliance on the buyer, since maximum efforts are being made to complete the Process before 30th April, 2022 Only as a measure of prudence, and factoring any unforeseen circumstances the maximum timeline is being extended till 30th May, 2022.

Interest on delayed payments:

*The prospective buyer also agreed that all payments made post 15th April, 2022 shall be coupled with payment of interest charged at the rate of @ 12% P.A.” *

17. The Learned Counsel for the Appellants, contends that on the basis of mutual consensus, which was arrived at in the 10th Stakeholder's meeting, the Appellant filed, IA(IBC)/512/CHE/2022, before the 'Adjudicating Authority' / 'Tribunal' seeking a 'Revision', in the time line, for payments, as per the decision of the stakeholders.

18. On 29.06.2022, in IA(IBC)/512/CHE/2022, 'Adjudicating Authority' / 'Tribunal' had passed the following order:

“Order
(i. *The Applicant is directed to pay on or before*
30.06.2022 the balance 50% of the sale
consideration i.e., 34.60 Crore with 12% interest
from 15.04.2022 till the date of payment.

ii. The remaining sum of Rs. 34.60 Crore shall be
paid on or before 31.07.2022 with 12% interest
from 15.04.2022 till the date of payment.

iii. The Applicant is directed to strictly comply with
the said timelines. Any deviation from the same
would amount to forfeiture of the entire amount
paid by the Applicant.”

19. According to the Appellants, the Appellant had filed a separate ‘Appeal’, in respect of the order dated 29.06.2022, passed by the ‘Adjudicating Authority’ / ‘Tribunal’, which among other things provides for features of the wholesome that was paid by the Appellants, and till the date of the said order, the Appellants had made a payment of Rs.36.8 crores, including an upfront ‘payment’, of Rs.10.52 crores.

20. On behalf of the Appellants, it was pointed out that while the Appellants were in the process of making the balance payment, as per order dated 29.06.2022, it transpires that ‘Enforcement Directorate’ was contemplating actions, against the former management of the ‘Corporate Debtor’, and its ‘Assets’.

21. It comes to be known that the Appellants, had preferred an IA No. 826/2022, on 29.07.2022 (much before the expiry of the period, that was provided to them, to make the balance payment, as per order dated 29.06.2022), seeking immunity from the possible attachment by the ‘Enforcement Directorate’, of the Assets, belonging to the ‘Corporate Debtor’. As a matter of fact, the said ‘Application’ was listed before the ‘Adjudicating Authority’ / ‘Tribunal’, on 04.08.2022, but during the period between 29.07.2022, viz. the date on which, the Appellant filed the said Application and on 04.08.2022, the date on which the Application was listed, the ‘developments’ had taken place; (i) that, a ‘provisional attachment’ order dated August 1, 2022 was passed in respect of certain Assets of the ‘Surana Group of Companies’; (ii) That, the Stakeholders Committee Meeting convened, on August 1, 2022 and decided, to forfeit the amount deposited by the Appellant, in view of the order dated June 29, 2022; (iii) That, the Appellants was informed of the decision of the stakeholders’ committee to forfeit the amount of Rs.36.8 crores deposited by them vide letter dated August 2, 2022 which was received by the Appellant as an attachment with email dated August 3, 2022.

22. The Learned Counsel for the Appellants, submits that the said Application was withdrawn on 04.08.2022, with a Liberty to file an Amended ‘Application’ incorporating the subsequent developments and also among other things,

assailing the Respondent's Letter dated 02.08.2022, whereby forfeiting part consideration of Rs.36.8 crores paid by the Appellants.

23. The Learned Counsel for the Appellants, on 04.08.2022 filed an Application, (bearing diary No.3305110801882022) in IA(IBC)/952/(CHE)/2022 in TCP/95/IB/2017, seeking to quash and set aside the letter dated 04.08.2022, granting immunity to the Corporate Debtor and its Assets from any actions, in relation to any of the offences committed before the commencement of 'Corporate Insolvency Resolution Process'.

24. According to the Appellants, the said Application was heard on 10.08.2022, under the 'Adjudicating Authority' / 'Tribunal' had erroneously passed the 'impugned order' contrary to Law and the operative portion whereof, is as under:

- "i) The Appellant / Applicant has not assailed the order dated June 29, 2022, which inter alia provides for forfeiture of the amount that has been paid by the Appellant.*
- ii) The amount of Rs.37.8 Crores stood forfeited in terms of the order dated June 29, 2022 and the Ld. Adjudicating Authority did not have power to modify the timelines for making payment or reverse the forfeiture.*
- iii) Accordingly, the prayer of the Appellant seeking quashing of the Respondent's letter dated August 2, 2022 stood rejected.*

iv) *Since the immunity to the Corporate Debtor and its assets in relation to the offences committed by the erstwhile management of the Corporate Debtor is provided in law therefore there was no need to provide any clarification. Similarly, the prayer relating to maintaining status quo and extending the time to make the balance payment were rejected.”*

25. The Learned Counsel for the Appellant, points out that pursuant to the impugned order dated 10.08.2022, the Respondent on 12.08.2022 had published and ‘e-auction sale notice’, of the Raichur Assets. Further, instead of the sale of the Corporate Debtor as a going concern, the said auction notice, provides for the ‘sale of assets’ of the ‘Corporate Debtor’, which is considered as the last resort, after exhausting other options provided in the Court, including the option to sell the ‘Corporate Debtor’ as a ‘going concern’.

26. According, to the Appellants, together with the e-auction notice, dated 12.08.2022, the Respondent had prepared a ‘Process Memorandum’ and its stipulates that the ‘payment schedule’ for the successful bidder of the auction process and further the ‘intending bidder’, shall submit the earnest money deposit and ‘Successful Bid Applicant’ shall follow the ‘Terms and Conditions’ of payment.

27. It is represented on behalf of the Appellants, that as per terms and conditions, the Successful Bidder shall deposit the balance sale consideration within 30 days, from the date of execution of 'letter of intent' issued by the Respondent and further period of 60 days would be granted, subject to the payment of interest @ 12%.

28. According to the Appellants, it was learnt that the Respondent, had received a bid, for the sale of the Assets of the 'Corporate Debtor', and is in the process of seeking confirmation of the said 'sale' from the 'Adjudicating Authority' / 'Tribunal'.

29. The Learned Counsel for the Appellants, have preferred the present Comp. App. (AT)(Ins.) 443/2022, being dissatisfied with the impugned order dated 29.06.2022 in IA (IBC) /512(CHE)/2022 in TCP/95/IB/2017, whereby the Appellants were directed to pay on or before 30.06.2022, the balance 50% of the sale consideration viz. 34.6 crore with 12% interest from 15.04.2022 till the date of payment. Also, the remaining sum of Rs. 34.60 crores were ordered to be paid on or before 31.07.2022 with 12% interest from 15.04.2022 till the date of payment. Apart from that, the Appellants / Petitioners was directed to strictly comply with the said time lines and any deviation from the same would amount to 'forfeiture' of the entire amount paid by him.

30. The Learned Counsel for the Appellants, (in both appeals) contends that the Adjudicating Authority / Tribunal, had over reached his powers, by including ‘forfeiture clause’ thereby, modifying the agreed terms of sale, between the parties. Furthermore, the Adjudicating Authority / Tribunal had included the ‘forfeiture clause’, in the absence of any ‘pleading’ or ‘prayer’ claiming such a relief.

31. The Learned Counsel for the Appellants, proceeds to point out, that it is well settled proposition of law, that no relief’ can be granted, if not pleaded or prayed for, and cites the decision of the Hon’ble Supreme Court in **Bacchaj Nahar v. Nilima Mandal & Anr., Civil Appeal No. 5798-5799 of 2008**, wherein at Paragraph 10 it is observed as under:-

“10. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is

whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.”

32. Also on behalf of the Appellants, a reference is made to the decision of the Hon’ble Supreme Court in the ***State of Orissa & Anr. Vs. Mamata Mohanty, 2011 (3SCC) 436*** wherein at paragraph 55, it is observed as under:-

“55. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide : Sri Mahant Govind Rao v. Sita Ram Kesho, (1898) 25 Ind. App. 195; M/s. Trojan & Co. v. RM. N.N. Nagappa Chettiar, AIR 1953 SC 235; Ishwar Dutt v. Land Acquisition Collector & Anr., AIR

2005 SC 3165; and State of Maharashtra v. Hindustan Construction Company Ltd., (2010) 4 SCC 518.)”

33. According to the Appellant that Adjudicating Authority / Tribunal should have refrained from intervening and conducting a judicial review in respect of terms of sale being an express contract between the parties. In this regard, the Learned Counsel for the Appellant adverts to the decision of the Hon’ble Supreme Court in ***M/s. R.K. Industries (Unit-II) LLP vs. M/s. H.R. Commercials Private Limited & Ors.***, wherein at paragraph 60 it is observed as under:-

“60. The powers vested in and the duties cast upon the Liquidator have been made subject to the directions of the Adjudication Authority (NCLT) under Section 35 of the IBC. Once the Liquidator applies to the Adjudicating Authority (NCLT) for appropriate orders/directions, including the decision to sell the movable and immovable assets of the Corporate Debtor in liquidation by adopting a particular mode of sale and the Adjudicating Authority (NCLT) grants approval to such a decision, there is no provision in the IBC that empowers the Appellate Authority (NCLAT) to suo motu conduct a judicial review of the said decision. The jurisdiction bestowed upon the Adjudicating Authority [NCLT] and the Appellate Authority [NCLAT] are circumscribed by the provisions of the IBC and borrowing a leaf from Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others 43, they cannot act as a Court of equity or exercise plenary powers to

unilaterally reverse the decision of the Liquidator based on commercial wisdom and supported by the stakeholders. The Court has also observed in the captioned case that “from the legislative history, there is contra-indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority.” A similar reasoning has prevailed with Respondent in K. Sashidhar v. Indian Overseas Bank and Others⁴⁴, Committee of Creditors of Amtek Auto Limited v. Dinkar T. Venkatasubramanian and Others⁴⁵ , Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another.⁴⁶ , Ghanashyam Mishra And Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited through the Director and Others.⁴⁷ and Jaypee Kensington Boulevard Apartments Welfare Association and Others (Supra). The aforesaid view will apply with equal force to any commercial or business decision taken by the Liquidator for conducting the sale of the movable/immovable assets of the Corporate Debtor in liquidation. The Appellate Authority cannot don the mantle of a supervisory authority for overseeing the validity of the approach of the respondent No.2 – Liquidator in opting for a particular mode of sale of the assets of the Corporate Debtor.”

34. The pivotal plea projected on the side of the Appellant is that the Adjudicating Authority / Tribunal had wrongly granted ‘forfeiture’, although there is no provision in the I&B Code permitting the grant of forfeiture during liquidation. That apart, the Learned Counsel for the Appellants seeks in aid of

the decision of the Hon'ble Supreme Court of India in ***Union of India & Anr. Vs. Hansoli Devi & Ors.***, reported in (2002) 7 SCC 273, wherein at paragraph 9 it is observed as under:-

"9. Before we embark upon an inquiry as to what would be the correct interpretation of Section 28-A, we think it appropriate to bear in mind certain basic principles of interpretation of statute. The rule stated by Tindal, CJ in Sussex Peerage case, (1844) 11 Cl & F.85, still holds the field. The aforesaid rule is to the effect:

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver."

It is a cardinal principle of construction of statute that when language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In Kirkness v. John Hudson & Co. Ltd, [1955] 2 All ER 345, Lord Reid pointed out as to what is the meaning of 'ambiguous' and held that:

"A "provision is not ambiguous merely because it contains a word which in different context is capable of different meanings and it would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains

a word or phrase which in that particular context is capable of having more than one meaning."

It is no doubt true that if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. Patanjali Sastri, CJ in the case of Aswini Kumar Ghose v. Arabinda Bose, [1953] SCR 1, had held that it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In Quebec Railway, Light Heat and Power Co. v. Vandray, AIR (1920) PC 181, it had been observed that the Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. At times, the intention of the legislature is found to be clear but the unskilfulness of the draftsman in introducing certain words in the statute results in apparent ineffectiveness of the language and in such a situation, it may be permissible for the court to

reject the surplus words, so as to make the statute effective. Bearing in mind the aforesaid principle, let us now examine the provisions of the Section 28-A of the Act, to answer the questions referred to us by the Bench of the two learned Judges. It is no doubt true that the object of Section 28-A of the Act was to confer a right of making a reference, who might have not made a reference earlier under Section 18 and, therefore, ordinarily when a person makes a reference under Section 18 but that was dismissed on the ground of delay, he would not get the right of Section 28-A of the Land Acquisition Act when some other person makes a reference and the reference is answered. But the Parliament having enacted Section 28-A, as a beneficial provision, it would cause great injustice if a literal interpretation is given to the expression "had not made an application to the Collector under Section 18" in Section 28-A of the Act. The aforesaid expression would mean that if the land-owner has made an application for reference under Section 18 and that reference is entertained and answered. In other words, it may not be permissible for a land owner to make a reference and get it answered and then subsequently make another application when some other person gets the reference answered and obtains a higher amount. In fact in Pradeep Kumari's case the three learned Judges, while enumerating the conditions to be satisfied, where after an application under Section 28-A can be moved, had categorically stated - "the person moving the application did not make an application to the Collector under Section 18". The expression "did not make an application", as observed by this Court, would mean, did not make an effective application which

had been entertained by making the reference and the reference was answered. When an application under Section 18 is not entertained on the ground of limitation, the same not fructifying into any reference, then that would not tantamount to an effective application and consequently the rights of such applicant emanating from some other reference being answered to move an application under Section 28-A cannot be denied. We, accordingly answer question No. 1(a) by holding that the dismissal of an application seeking reference under Section 18 on the ground of delay would tantamount to not filing an application within the meaning of Section 28-A of the Land Acquisition Act, 1894.”

35. Not resting with the above, the Learned Counsel for the Appellants point out the decision of the Hon’ble Supreme in **Raghunath Rai Bareja & Anr. v. Punjab National Bank & Ors., (2007) 2 SCC 230**, wherein at paragraphs 40, 41, 43 wherein it is observed as under:-

“40. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB vs. Securities and

Exchange Board, India, AIR 2004 SC 4219. As held in Prakash Nath Khanna vs. C.I.T. 2004 (9) SCC 686, the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result, vide Delhi Financial Corporation vs. Rajiv Anand 2004 (11) SCC 625. Where the legislative intent is clear from the language, the Court should give effect to it, vide Government of Andhra Pradesh vs. Road Rollers Owners Welfare Association 2004(6) SCC 210, and the Court should not seek to amend the law in the grab of interpretation.

41. As stated by Justice Frankfurter of the U.S. Supreme Court (see 'Of Law & Men: Papers and Addresses of Felix Frankfurter'):

"Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in

observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction."

43. *In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each Judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn. pp 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection."*

36. The Learned Counsel for the Appellant adverts to the decision of Hon'ble Supreme Court of India in the matter of **Commissioner of Customs (Import), Mumbai v. Dilip Kumar and Company & Anr., (2018) 9 SCC 1** wherein at paragraph 24, 33 and 34 it is observed as under:-

"24. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making. Insofar as

taxation statutes are concerned, Article 265 of the Constitution **“265. Taxes not to be imposed save by authority of law-** No tax shall be levied or collected except by authority of law.” prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature.

33. Further elaborating on this aspect, the learned author stated as follows:

“Therefore, if the words used are ambiguous and reasonable open to two interpretations benefit of interpretation is given to the subject [Express Mill v. Municipal Committee, Wardha, AIR 1958 SC 341]. If the Legislature fails to express itself clearly and the taxpayer escapes by not being brought within the letter of the law, no question of unjustness as such arises [CIT v. Jalgaon Electric Supply Co., AIR 1960 SC 1182]. But equitable considerations are not relevant in construing a taxing statute, [CIT, W.B. v. Central India Industries, AIR 1972 SC 397], and similarly logic or reason cannot be of much avail in interpreting a taxing statute [Azam Jha v. Expenditure Tax Officer, Hyderabad, AIR 1972 SC 2319]. It is well settled that in the field of taxation, hardship or

equity has no role to play in determining eligibility to tax and it is for the Legislature to determine the same [Kapil Mohan v. Commr. of Income Tax, Delhi, AIR 1999 SC 573]. Similarly, hardship or equity is not relevant in interpreting provisions imposing stamp duty, which is a tax, and the court should not concern itself with the intention of the Legislature when the language expressing such intention is plain and unambiguous [State of Madhya Pradesh v. Rakesh Kohli & Anr., (2012) 6 SCC 312]. But just as reliance upon equity does not avail an assessee, so it does not avail the Revenue.”

34. The passages extracted above, were quoted with approval by this Court in at least two decisions being *Commissioner of Income Tax vs. Kasturi Sons Ltd.*, (1999) 3 SCC 346 and *State of West Bengal vs. Kesoram Industries Limited*, (2004) 10 SCC 201 [hereinafter referred as ‘Kesoram Industries Case’ for brevity]. In the later decision, a Bench of seven Judges, after citing the above passage from Justice G.P. Singh’s treatise, summed up the following principles applicable to the interpretation of a taxing statute:

“(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot

import provisions in the statute so as to supply any deficiency; (ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly".

37. The Learned Counsel for the Appellants point out that even the modified terms of sale / contract would be governed by the terms of Indian Contract Act and puts forward a plea that liquidator damages, in case of breach of contract is governed by Section 74 of the Indian Contract Act, 1872. Further, the liquidated damages shall be claimed in consonance with the real loss, incurred due to the breach. Moreover, the Corporate Debtor was sold for Rs. 145 crore, which is more than the sum offered by the Appellants.

38. The Learned Counsel for the Appellants relies on the decision of the Hon'ble Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority and Anr. (2015) 4 SCC 136***, wherein at paragraphs 43.6, 43.7 & 15 it is observed as under:-

"43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it

is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

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.

15. Having heard learned counsel for the parties, it is important at the very outset to notice that earnest money can be forfeited under sub-clause (iv) set out hereinabove, only in the case of default, breach, or non-compliance of any of the terms and conditions of the auction, or on misrepresentation by the bidder. It may be noted that the balance 75% which had to be paid within three months of the acceptance of the bid, was not insisted upon by the DDA. On the contrary, after setting up two High Powered Committees which were instructed to look into the grievances of the appellant, the DDA extended time at least twice. It is, therefore, very difficult to say that there was a breach of any terms and conditions of the auction, as the period of three months which the DDA could have insisted upon had specifically been waived. It is nobody's case that there is any misrepresentation here by the bidder. Therefore, under sub-clause (iv), without more, earnest money could not have been forfeited.

39. The Learned Counsel for the Appellants brings to the notice of this Tribunal that in the decision of Hon'ble Supreme Court in **Suresh Kumar Wadhwa v. State of Madhya Pradesh & Ors. (2017) 16 SCC 757**, wherein at paragraphs 23 & 26 it is observed as under:-

“23. Reading of Section 74 would go to show that in order to forfeit the sum deposited by the contracting party as "earnest money" or "security" for the due performance of the contract, it is necessary that the contract must contain a stipulation of forfeiture. In other words, a right to forfeit being a contractual right and penal in nature, the parties to a contract must agree to stipulate a term in the contract in that behalf. A fortiori, if there is no stipulation in the contract of forfeiture, there is no such right available to the party to forfeit the sum.

26. Equally well settled principle of law relating to contract is that a party to the contract can insist for performance of only those terms/conditions, which are part of the contract. Likewise, a party to the contract has no right to unilaterally “alter” the terms and conditions of the contract and nor they have a right to “add” any additional terms/conditions in the contract unless both the parties agree to add/alter any such terms/conditions in the contract.”

40. Continuing further, the Learned Counsel for the Appellants refers to the decision of the Hon'ble High Court of Bombay in **Sau. Sindhubai Ramraoji**

Shende & Anr., 2017 SCC online Bom 8181 wherein it is observed at paragraph 9 as under:-

“9. From the aforesaid, it is clear that the terms of the contract must be clear and explicit to justify forfeiture of the advance amount. Further, if the amount paid is towards part payment of consideration and not intended to be earnest money, then the forfeiture clause would not apply.”

41. The forceful contention of the Appellants is that they had made payment of INR 37.8 crores, being more than 30% of the sale consideration, showing its ‘bonafide’ to purchase the Corporate Debtor. Also that because of certain reasons, including delay in availability of an order dated 29.06.2022, could not make the remaining payment of balance of 50% of the sale consideration before 30.06.2022, as required by the order dated 29.06.2023.

42. It is the version of the Appellants that certain payments were made in good faith on 13.07.2022 and 25.07.2022. In fact, the said payments were duly accepted by the Respondent, without any demur about delay and without expressing their intention to forfeit the sum, in case of non-adherence of further deadlines.

43. The Learned Counsel for the Appellants emphatically comes out with a forceful plea that the forfeiture of whole sum paid by the Appellant, tantamounts to unjust enrichment of the stakeholders of the Corporate Debtor. Further, a

reliance is placed upon the decision of the Hon'ble Supreme Court in ***Katta Sujatha Reddy & Anr. v. Siddamsetty Infra Projects & Ors. (2023)1 SCC 355*** wherein at paragraph 83 it is observed as under:-

“83. We are of the firm opinion that the contract was breached due to the conduct of the plaintiff/purchaser, who were not willing to perform the contract after entering into a time sensitive agreement. In any case, it is an admitted fact that plaintiff had paid only part consideration. Though there is a forfeiture clause in the agreement, this Court with a view of rendering complete justice between the parties, deems it appropriate to direct the vendors/appellants to repay the said amount with interest @ 7.5% p.a. from the date such payment was made by the purchaser to the vendors, till the entire amount is paid back. We further direct the vendors to pay the entire amount to the credit of the suit account within six months from the date of receipt of a copy of the order.”

44. The Learned Counsel for the Appellant, refers to the decision of the Hon'ble Supreme Court in ***Alisha Khan V. Indian Bank (Allahabad bank) & Ors.*** reported in SLP(C) No. 15959-15960/2021, wherein at paragraph it is observed as under:

“Having gone through the impugned judgment and orders passed by the High Court, we are of the opinion that the High Court ought to have allowed the refund of the amount deposited being 25% of the auction sale consideration. Considering the fact that though initially the appellant deposited 25% of the

Signature Not Verified auction sale consideration, however, subsequently she could not deposit balance 75% due to COVID-19 pandemic. It is required to be noted that subsequently the fresh auction has taken place and the property has been sold. It is not the case of the respondents that in the subsequent sale, lesser amount is received. Thus, as such, there is no loss caused to the respondents.”

45. The Learned Counsel for the Appellants points out the decision of the Hon’ble Madras High Court in ***Rubina vs. Authorised Officer, Axis Bank Limited 2021 SCC OnLine Mad 2349***, wherein at paragraph 7 it is observed as under:-

“7. The right to forfeit has, ordinarily, to be balanced against the rule against unjust enrichment. Merely because there is a forfeiture clause does not imply that the entire amount deposited has to be forfeited. The forfeiture clause, like an earnest money deposit clause or a liquidated damages clause, has to be regarded as a genuine pre-estimate of the loss that may have been incurred, but when a forfeiture clause does not indicate an amount but provides that the entire amount tendered would be forfeited, it may not be permissible to forfeit, say 99% of the payment made for the default in depositing the balance 1%. Thus, the quantum that can be forfeited will depend on the extent of the loss or damage suffered by the party not in breach and this is, essentially, a question of fact that has to be adjudicated by an appropriate forum. The High Court, in exercise of the

jurisdiction under Article 226 of the Constitution, is not such forum.”

46. The Learned Counsel for the Appellants submits that the sum retained by the Respondent should be returned to the Appellants in accordance with Regulation 43 of the Insolvency and Bankruptcy Board of India (Liquidation Process) 2016 wherein it is observed as under:-

“A stakeholder shall forthwith return any monies received by him in distribution, which he was not entitled to at the time of distribution, or subsequently became not entitled to.”

47. The Learned Counsel for the Appellants refers to the decision of the Supreme Court of India in **S.J.S. Business Enterprises Pvt. Ltd. v. State of Bihar & Ors. (2004) 7 SCC 166**, wherein at paragraph 14 it is observed as under:-

“Assuming that the explanation given by the appellant that the suit had been filed by one of the Directors of the Company without the knowledge of the Director who almost simultaneously approached the High Court under Article 226 is unbelievable, the question still remains whether the filing of the suit can be said to be a fact material to the disposal of the writ petition on merits. We think not. The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a Court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226 . But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal

with the matter itself if it is in a position to do so on the basis of the affidavits filed. If however a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the Court to entertain the writ petition. The Rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another Court. But this Court has also held in C. B. Gosain Bhan V. State of Orissa 14 STC 766= 1963 (2) SCR 879 that even when an alternative remedy has been availed of by a party but not pursued that the party could prosecute proceedings under Article 226 for the same relief. This Court has also held that that when a party has already moved the High Court under Article 226 and failed to obtain relief and then moved an application under Article 32 before this Court for the same relief, normally the Court will not entertain the application under Article 32. But where in the parallel jurisdiction, the order is not a speaking one or the matter has been disposed of on some other ground, this Court has, in a suitable case, entertained the application under Article 32 . Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226. Therefore the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits.

48. The Learned Counsel for the Appellants adverts to the decision of the Hon'ble Supreme Court in Mahanth Ram Das V. Ganga Das AIR 1961 SC 882, wherein at paragraph 5, it is observed as under:

“The case is an unfortunate and unusual one. The application for extension of time was made before the time fixed by the High Court for payment of deficit court fee had actually run out. That application appears not to have been considered at all, in view of the peremptory order which had been passed earlier by the Division Bench hearing the appeal, mainly because on the date of the hearing of the petition for extension of time, the period had expired: The short question is whether the High Court, in the circumstances of the case, was powerless to enlarge the time, even though it had peremptorily fixed the period for payment. If the Court had considered the application and rejected it on merits, other considerations might have arisen; but the High Court in the order quoted, went by the letter of the original order under which time for payment had been fixed. Section 148 of the Code, in terms, allows extension of time, even if the original period fixed has expired, and s. 149 is equally liberal. A fortiori, those sections could be invoked by the applicant, when the time had not actually expired. That the application was filed in the vacation when a Division Bench was not sitting should have been considered in dealing with it even on July 13, 1954, when it was actually heard. The order, though passed after the expiry of the time fixed by the original judgment, would have operated from July 8, 1954. How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with

events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves on the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding even though a final order had been passed. We need cite only one such case, and that is *Lachmi Narain Marwari v. Balmakund Marwari* (1). No doubt, as observed by Lord Phillimore, we do not wish to place an impediment in the way of Courts in enforcing prompt obedience and avoidance of delay, any more than did the Privy Council. But we are of opinion that in this case the Court could have exercised its powers first on July 13, 1954, when the petition filed within time was before it, and again under the exercise of its inherent powers, when the two petitions under s. 151 of the Code of Civil Procedure were filed. If the High Court had felt disposed to take action on any of these occasions ss. 148 and 149 would have clothed them with ample power to do justice to a litigant for whom it entertained

considerable sympathy, but to whose aid it erroneously felt unable to come.”

Respondent’s Submissions (In both Appeals)

49. According to the Learned Counsel for the Respondent, that the instant Appeals, are filed against the orders, passed by the Adjudicating Authority / Tribunal, wherein the Corporate Debtor, viz. M/s. Surana Industries Ltd. was sold as a ‘going concern’ to a ‘third party’, through ‘private sale’, as approved by the ‘Adjudicating Authority’ / ‘Tribunal’ through an order dated 22.03.2022.

50. It is represented on behalf of the Respondents, that the sale of the Corporate Debtor was affirmed, in favour of the Successful bidder Taxcon Steels Ltd., who had paid the whole sale consideration of Rs. 145.38 crores, as on 28.11.2022 and that the sale certificate along with tax invoice, delivery challan were issued to them, on 30.11.2022. As Such, nothing survives in both the Appeals and hence, the Appeals are liable to be dismissed.

51. The Learned Counsel for the Respondents, refers to the following Dates and Events to exhibit the attitude of the Appellant(s), in respect of the ‘Liquidation’ as well as the judicial process which runs as under:

Date	Event/ Particular	Relevant Pg in Pleading
09.09.2021	Proposal submitted by Karshini Alloys (Appellant) to purchase the Corporate Debtor as a going concern.	@pg 26 of Counter in CA (AT) (CH) (Ins) 438 of 2022
15.09.2021	9th SCC meeting wherein the Appellants proposal was accepted by the Stakeholders.	@pg 43 of Counter in CA (AT) (CH) (Ins) 438 of 2022
22.09.2021	Application IA/997/CHE/2021 filed by the Respondent seeking for approval of Sale to the Appellant since there were certain concessions sought by the Appellant involved.	@pg 58 of Vol 1 of Appeal CA (AT) (CH) (Ins) 443 of 2022
22.03.2022	Order in IA/997/CHE/2021 The Sale was approved by the Ld. Adjudicating Authority, but the concessions were not allowed	@pg 52 of Counter in CA (AT) (CH) (Ins) 438 of 2022
13.04.2022	10th SCC meeting where the Appellant had sought for extension of timeline to make payment from the SCC, to which the SCC had mentioned their inability, since the sale had itself been approved by the Ld. Adjudicating Authority (see pg 64)	@pg 63 of Counter in CA (AT) (CH) (Ins) 438 of 2022
28.04.2022	Application IA/512/2022 The Appellant filed with prayer seeking extension in the timeline for payment	@pg 243 of Vol 2 of CA (AT) (CH) (Ins) 443 of 2022
16.06.2022	Memo filed by Appellant in IA 512/2022 Sought for further extension of time to make balance payment till 30.06.2022	@pg 1 Additional Documents filed on 19.08.2023
29.06.2022	Order in IA/512/2022 Impugned order in CA (AT) (CH) (Ins) 443 of 2022, wherein forfeiture was ordered in which case, the Appellant had not adhered to the preceding conditions – ie, the balance 50% of the sale consideration i.e. 34.60 Cr with 12% interest from 15.04.2022 by 30.06.2022 and the remaining sum of Rs.34.60 Cr be paid on or before 31.07.2022 with 12% interest from 15.04.2022. <i>It is clear from the above order that the forfeiture was triggered from 31.07.2022.</i>	@pg 53 of Vol 1 of CA (AT) (CH) (Ins) 443 of 2022
29.07.2022	IA 826 of 2022 This was the interim Application that was filed seeking extension of time as well (<i>prayer @pg 223</i>)	@pg 208 of Counter in CA (AT) (CH) (Ins) 438 of 2022

13.07.2022 and 25.07.2022	Appellant made part payments accepting the order dated 29.06.2022 of amounts to the tune of Rs 1.5 Crores, in compliance with the Order dated 29.06.2022	See forfeiture letter @pg 207 of Counter in CA (AT) (CH) (Ins) 438 of 2022
01.08.2022	Provisional Attachment Order Directorate of Enforcement had issued the attachment order but the same had no reference to the properties that were the subject matter of the sale.	@pg 70 relevant pg @ 174 of Counter in CA (AT) (CH) (Ins) 438 of 2022
01.08.2022	13th SCC Meeting SCC noted that the Appellant had paid an amount of Rs. 1.50 Cr pursuant to the 29.06.2022 Order, however, they expressed their inability to extend the timeline by a further period, therefore passed a resolution for the liquidator to conduct fresh auction (<i>see pg 204</i>) <i>Though Appellant's representative was present at the meeting they did not make any statement at the meeting - neither did they challenge the decision of the SCC at this meeting</i>	@pg 200 of Counter in CA (AT) (CH) (Ins) 438 of 2022
02.08.2022	Forfeiture letter issued by the Liquidator Stated that entire amount deposited by the Appellant stood forfeited as the Appellant had failed to comply with the 29.06.2022 order	@pg 206 of Counter in CA (AT) (CH) (Ins) 438 of 2022
04.08.2022	Order in IA 826 of 2022 Application disposed of since the Appellant herein withdrew	@pg 228 of Counter in CA (AT) (CH) (Ins) 443 of 2022
04.08.2022	Application bearing SR No 3305118016882022 Filed by the Appellant again seeking extension (<i>prayer at pg 313</i>)	@pg 295 Vol 2 of CA (AT) (CH) (Ins) 438 of 2022
10.08.2022	Order in SR No 3305118016882022 Order challenged in CA (AT) (CH) (Ins) 438 of 2022 - wherein bench recorded that since 29.06.2022 order had become final; they could not further extend the timeline	@pg 247 of Counter in CA (AT) (CH) (Ins) 438 of 2022
05.09.2022	WP No 24262 of 2022 Filed by the Appellant upon the order dt 29.06.2022	@Pg 8 of Sr No 240 dated 02.02.2023
29.09.2022	Ex parte Stay of distribution of amounts The Appellant got a stay on the distribution	Annexure 1 - stay order of HC
01.11.2022	Pleadings Completed in the Writ Petition Counter Affidavit filed on 20.10.2022; Rejoinder was filed by the Petitioner, still no whisper of the Appeal filed before this Hon'ble Tribunal	Counter @pg 46 of Sr No 240 Rejoinder @ 59 of Sr No 240

24.11.2022	Dismissal of WP No 24262 of 2022 by Madras HC <i>The interim stay was also vacated when the order was pronounced</i>	@pg 263 of Counter in CA (AT) (CH) (Ins) 438 of 2022
04.01.2023	Appeal bearing CA (AT) (CH) (Ins) 438 of 2022 was listed for the first time	Annexure 2 – A copy of the daily orders in CA(AT)(CH)(INS) No 443 of 2022 and CA(AT)(CH)(INS) No 438 of 2022 dated 25.01.2023 and 04.01.2023 when the matters were first listed for admission
25.01.2023	Appeal bearing CA (AT) (CH) (Ins) 443 of 2022 was listed for the first time along with CA (AT) (CH) (Ins) 438 of 2022	

52. It is the contentions of the Respondents, that it is unclear, as to how the Appellant(s), had arrived at the date on 01.07.2022, since the order itself, records, the last payment, to be made, on 1.07.2022 and further, that the ‘trigger event’, forfeiture, can only be, the ‘non-payment’ of remaining consideration, as on 31.07.2022.

53. The submissions of the Learned Counsel for the Respondents, is that the Appellants, have no ground to assail the ‘forfeiture’, when he himself had acknowledged the fact that the ‘sum’ ought to have been ‘forfeited’ for September, 2022. In this connection, the Learned Counsel for the Respondent(s) draws the attention of this Tribunal that ‘the forfeiture’, was discussed in the ‘13th SCC Meeting’, the took place on 01.08.2022, wherein the representative, of the

Appellants were present and besides this, the Letter of ‘forfeiture’ was sent by the ‘Liquidator’ to the Appellant, as on 02.08.2022.

54. According to the Respondent(s), the Appellants filed W.P. No. 24262/2022 before the Hon’ble High Court, and sought for an ‘ad-interim stay’ of the ‘distribution of proceeds’ as mentioned above, on 29.09.2022. Indeed, the ‘forfeited sum’, was distributed, as early as on 05.12.2022, once the stay was vacated, as a result of the dismissal order, in W.P. No. 24262/2022, on 24.11.2022.

55. The other contention of the Respondents is that, the Appellants are not ‘stakeholder’, having been ‘aggrieved’ by the ‘forfeiture’, has no ‘Locus standi’ to make a virtue, out of his non-payment” and speak of the ‘alleged lapse’, on the part of the Respondents’. Apart from that, the quality of ‘Approbation’ and ‘Reprobation’, seems to be second, to the nature of the Appellants.

56. According to the Respondent(s), the Appellants, even after ‘multiple reminders’, had failed to make any of the ‘stakeholders’, as a party to the instant ‘Appeals’, although, he agrees that they are necessary parties, to the present ‘Appeals’.

57. The Learned Counsel for the ‘Respondents, point out that the Appellants made payments to an extent of Rs.1.5 crores, as on 25.07.2023, pursuant to the

order dated 29.06.2022, thereby accepting the order of the ‘Adjudicating Authority/ Tribunal’. In fact, although, the Appellants claim, to have preferred an Appeal, challenging the order, before the Appellate Authority, on 13.08.2022, had not pursued the same, till 24.01.2023, (for nearly six months), before the ‘Appellate Tribunal’. However, the Appellants continued to file IA No. 826/2022 (26.07.2022) and later SR No. 3305118016882022 (04.08.2022), seeking extension of time, before the ‘Adjudicating Authority/ Tribunal’, and suppressed, the fact about filing a Writ Petition before the Hon’ble Madras High Court on 05.09.2022, on one or other grounds, just to avoid the ‘forfeiture’, instead of arranging payments, for ‘balance sale consideration’.

58. The Learned Counsel for the Respondents, takes a stand that a mere perusal of the order dated 29.06.2022, in IA/512/2022, dated 29.06.2022 indicates that an ‘extension’, granted by the ‘Adjudicating Authority/ Tribunal’, is a ‘contingent extension’ and the said order portion, runs as follows:

- “i) The Applicant is directed to pay on or before 30.06.2022 the balance 50% of the sale consideration i.e.Rs.34.60 Cr with 12% interest from 15.04.2022 till the date of payment.
- ii) The remaining sum of Rs.34.60 Cr shall be paid on or before 31.07.2022 with 12% interest from 15.04.2022 till the date of payment.
- iii) The Applicant is directed to strictly comply with the said timelines. Any deviation from the same would amount to forfeiture of the entire amount paid by the Applicant.”

59. The Learned Counsel for the Respondents, advances an argument, that once the 'Timeline', for payment, is 'altered', if 'payment' is not made, within the new timelines, the sum deposited, will be 'forfeited' in 'entirety'. Also that the 'forfeiture', was a condition, upon which the 'extension', was availed by the Appellant, if he had any grievance, with the same, the order, should have been 'impugned', upon, in total and within the permitted time, in the 'statute'.

60. It is projected on the side of Respondents the Appellants having accepted the order dated 29.06.2022, in IA/512/2022, passed by the 'Adjudicating Authority/ Tribunal', made 'two trances of payments', on 13.07.2022 and 25.07.2022, hence, accepting the portion of the 'order', which granted the 'extension', he cannot challenge, the 'portion of the order' that is contingent to the other portion, that ordered, the 'forfeiture'.

61. According to the Respondent / Liquidator, the 'order of the forfeiture', was the 'culmination' of the Appellants 'contingent default', in following the 'timelines', and it is within the 'domain' of the 'Adjudicating Authority/ Tribunal', to 'order' such a 'forfeiture'. In this connection, the Learned Counsel for the Respondent / Liquidator, (in both Appeals) adverts to the judgment, of the Hon'ble Supreme Court of India dated 09.10.2020 in **Kridhan Infrastructure Pvt. Ltd. V. Venkatesan Sankaranarayan & Ors.** (vide Civil Appeal No. 3299/2020), wherein at paragraphs 3.9 & 11, it is observed as under:

“3.9 Liquidation of the Corporate Debtor should be a matter of last resort. The IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not the mere recovery of monies due and outstanding. The appellant has indicated its bona fides, at least prima facie at the present stage, by unconditionally agreeing to subject itself to the forfeiture of an amount of Rs 20 crores, which has been deposited by it, in the event that it fails to comply with the requirement of depositing an additional amount of Rs 50 crores within a period of three months in terms of the understanding that was arrived at on 25 February 2020. In order to enable the appellant to have one final opportunity to do so, we direct that the appellant shall, in order to demonstrate its bona fides deposit an amount of Rs 50 crores upfront in terms of the understanding which was arrived at on 25 February 2020. The appellant is specifically placed on notice of the fact that should it fail to do so in whole or in part, the entire amount of Rs 20 crores which has been deposited thus far, shall stand forfeited without any further recourse to the appellant. Accordingly, the following interim directions are issued:

- (i) The operation of the impugned order of the NCLAT dated 8 September 2020, is stayed;*
- (ii) The appellant shall, in order to demonstrate its ability to implement the Resolution Plan and in compliance with the understanding arrived at on 25 February 2020 deposit an amount of Rs. 50 crores, on or before 10 January 2021; and*

(iii) The auction of the properties of the Corporate Debtor shall remain stayed in the meantime.

11. The appellant has been unable to raise the funds. The fact of the matter, as it emerges from Mr Vishwanathan's submissions, is that the appellant will be unable to raise funds from the Term Lenders who are insisting that the status of the Company should change from a company under liquidation to an active status. The order of liquidation has not been set aside. Ultimately, what the request of the appellant reduces itself to, is that it would raise funds on a mortgage of the assets of the Company and unless the Company is brought out of liquidation, it would not be in a position to raise the funds. This is unacceptable. At this stage, the order of liquidation has only been stayed, but a final view was, thus, to be taken by this Court. Sufficient opportunities were granted to the appellant earlier during the pendency of the proceedings both before the NCLT and NCLAT. The orders of the NCLT and NCLAT make it abundantly clear that despite the grant of sufficient time, the appellant has not been able to comply with the terms of the Resolution Plan. Since 9 October 2020, despite the passage of almost five months, the appellant has not been able to deposit an amount of Rs 50 crores. Time is a crucial facet of the scheme under the IBC.⁸ To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. A good faith effort to resolve a corporate insolvency is a preferred course. However a resolution applicant must be fair in its dealings as well. The appellant has failed to abide by its obligations. In that view of the matter, we see no reason or

justification to entertain the Civil Appeal any further. The consequence envisaged under the order of this Court shall accordingly ensue in terms of the forfeiture of the amount of Rs 20 crores. As a consequence of this order, the management shall revert to the liquidator for taking steps in accordance with law. The Civil Appeal is accordingly dismissed.”

62. The Learned Counsel for the Respondents, to fortify his plea that the Appellants shall not be permitted, to take benefit of that portion of the order, that provides him the ‘extension’ and ‘impugn’ that which is inconvenient to him, places reliance, upon the judgment of the Hon’ble Supreme Court of India, dated 07.10.2021, in the matter of **Union of India (UOI) & Ors. V. N. Murugesan & Ors.** (vide Civil Appeal Nos. 2491-2492 and 2493-2494/2021), wherein at paragraph 26 it is observed as under:

“26. These phrases are borrowed from the Scott’s law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be

applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the [Contract Act](#) concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.”

63. The Learned Counsel for the Respondent(s) cites the decisions of Hon’ble Supreme Court dated 14.03.2014 in ***State of Punjab & Ors. V. Dhanjit Singh Sandhu*** at paragraph 22, it is observed as under:

“22. The doctrine of “approve and reprobate” is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (vide C.I.T. vs. Mr. P. Firm Maur, AIR 1965 SC 1216). It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra State Road Transport Corporation vs. Balwant Regular Motor Service, Amravati & Ors., AIR 1969 SC 329). In R.N. Gosain vs. Yashpal Dhir, AIR 1993 SC 352, this Court has observed as under:—

“Law does not permit a person to both approve and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain

some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.”

64. The Learned Counsel for the Respondent(s), points out, that although, the provision of ‘Liquidation Regulations’ are clear, that the ‘Liquidator’ himself can sell the ‘Corporate Debtor’ through ‘private sale, the ‘Liquidator’ in the instant case, had to approach the ‘Adjudicating Authority/ Tribunal’ for selling the ‘Corporate Debtor’ through private sale because of certain reliefs and contentions sought for by the Appellant(s).

65. The clear cut stand of the Respondent(s), is that, though it was a ‘private sale’, it was a ‘sale’ approved by the ‘Court Order’, which cannot be characterised, as a contract, within the meaning of Section 73 & 74 of the Indian Contract Act, 1872.

66. The Learned Counsel for the Respondent(s), refers to the judgment of this Tribunal, dated 28.04.2023, in Westcoast Infraprojects Private Limited V. Ram Chandra Dallaram Choudhary (vide Company Appeal (AT) (Ins) No. 1258/2022), wherein at paragraph 20, it is observed as under:

20. For purpose of this case, law as laid down in Paragraph 43.7 is relevant where Hon’ble Supreme Court has clearly held that when forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. The statement of law in paragraph 43.7 is

fully applicable in the case of the present case. The present is a case where Appellant participated in the eAuction conducted by the Liquidator under the Liquidation Process Regulations, 2016. Section 74 of the Indian Contract Act has no application in the case of Auction conducted by the Liquidator under the Liquidation Process Regulations, 2016. The terms and conditions of the sale as finalized by the Liquidator under which the e-Auction was held is binding on all including the bidders. Bidders give an unqualified undertaking for participation in the e-Auction after knowing fully well of clauses of the e-Auction Process Document and undertook to abide by the clauses. The submission of the Appellant can not be accepted that Appellant's EMD can not be forfeited even though he has committed default in making the payment of balance amount and the Liquidator should file a suit for forfeiting amount deposited by the Appellant. Such preposterous argument can not be accepted in view of the fact that Liquidation Process is conducted under the statutory Liquidation Process Regulations, 2016. The terms and conditions of the Process Document has been framed as per statutory empowerment given to the Liquidator by Schedule I of the Liquidation Process Regulations, 2016 as noticed above. When the clauses of the Process Document as noted above, clearly empowers the Liquidator to forfeit the EMD and any payment made in event default is committed by the Highest Bidder, no exception can be taken to the action of the Liquidator in cancelling the sale and forfeiting the amount deposited by the Appellant."

67. The Learned Counsel for the Respondent(s), submits, that there is ‘no requirement’, under the I&B code, 2016 for the Liquidator, to seek the ‘Adjudicating Authority’ / ‘Tribunals’ permission to issue fresh auction, if a sale, that was once approved by the ‘Authority’ falls through.

68. The Learned Counsel for the Respondent(s), points out, that in the present facts of the instant case, the sale was permitted by an order of the ‘Tribunal’ and in fact, extensions in timeline, were sought for by the Appellant(s), from the ‘Adjudicating Authority’ / ‘Tribunal’ and on continuous ‘default’, the ‘Adjudicating Authority/ Tribunal’ had ordered a ‘conditional’ ‘forfeiture’, on seeing the conduct of the Appellant(s) and keeping the ‘intent’ of the ‘statute’ in mind.

69. The Learned Counsel for the Respondent(s), refers to the judgment of the Hon’ble Supreme Court of India dated 10.04.2023 in ‘Authorised Officer’, State Bank of India V. C. Natarajan (Civil Appeal No. 2545/2023), wherein at paragraph 24, it is observed as under:

“24.....In course of such determination, the tribunals/courts ought not to be swayed only by supervening events like a subsequent sale at a higher price or at the same price offered by the defaulting bidder or that the secured creditor has not in the bargain suffered any loss or by sentiments and should stay at a distance since extending sympathy, grace or compassion are outside the scope of the relevant legislation.”

70. The Learned Counsel for the Respondent(s), points out that, it was the decision of the 'SCC', on the 13th SCC Meeting, that took place on 01.09.2023, to issue a 'fresh auction', and the Appellants were present, in the 'meeting' could have opposed the same, or 'impugned' the said 'proceedings'. However, the Appellant(s) having accepted the same, he cannot bring this as a 'ground', months after the 'sale', was confirmed to the 'successful purchaser'.

71. The Learned Counsel for the Respondent (s)points out that the Appellant(s) had not paid the entire sale consideration, which was to be paid on or before 31.07.2022, and that the Appellant(s) had again failed, to 'comply' with a 'stipulation'.

72. It is represented on behalf of the Respondents that the Appellant(s) while having a 'Statutory Right of Appeal instead' of assailing the order dated 29.06.2022 passed by the Adjudicating Authority / Tribunal, the Appellant had filed WP 24262 of 2022 before the Hon'ble Madras High Court on 05.09.2022 (after the limitation period for preferring an Appeal, which got expired).

73. In fact, the Learned Counsel for the Respondents points out that the Appellant(s) had not mentioned in the 'two Appeals' herein, even a 'whisper' about the proceedings initiated by him, before the Hon'ble Madras High Court, before the Respondents bringing the same, to the notice, of this Tribunal, during the course of arguments, at the stage of 'Admission'.

74. The Learned Counsel for the Respondents refers to the submissions, made by the Learned Counsel for the Appellant(s) before the Hon'ble Madras High Court in WP 24262 of 2022 wherein on 04.11.2022 it is mentioned as under:-

“5. Mr. Omprakash, the learned Senior Counsel for the petitioner submitted that: (a) the appellate remedy available to the petitioner was not pursued because he was pursuing other legal means by filing petition for extension of time and holding discussions with the Stakeholders for extension of time. The petitioner's remedy cannot be taken away because he was pursuing his remedies in bonafide manner. The Act provides that the appeal shall be filed within 30 days from the date of the order and in any event not beyond 15 days thereafter. It is now more than 45 days since the date of order and the petitioner, therefore, cannot file an appeal before the NCLT.”

75. The Learned Counsel for the Respondents, refers to the paragraph 10 of the order, made in WP No. 24262 of 2022, on the file of the Hon'ble Madras High Court wherein at paragraph 10 it is observed as under:-

“10. In the instant case, we find that the petitioner had not exhausted the statutory remedy of preferring an appeal though he had several opportunities and enough time to do so. The excuse that they were negotiating with the Stakeholders for extension of time is not a ground to justify their action in not filing an appeal on time. That apart, even after the second application filed before the NCLT for extension of time was dismissed on 10.08.2022, the petitioner had four days to file the

appeal. On the other hand, the petitioner chose to file Writ Petition challenging the order dated 29.06.2022 only on 05.09.2022.”

76. The Learned Counsel for the Respondent(s), refers to the 2nd proviso to Clause 1(12) under Schedule 1 of the Liquidation Process Regulations, 2016 is as follows:

“1. Auction

(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety 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 ninety days.”

b. From the above Regulation, it is clear that 90 days’ period provided for making the deposit is the maximum period under which the Auction Purchaser had to make the deposit. 2nd Proviso of the item 12 of the Schedule 1 provide that sale shall be cancelled if the payment is not received within 90 days. When the Consequence of non-compliance of the provision is provided in the statute itself, the provision is necessary to be held to be mandatory. Item 12 provides that payment is to be made within 90 days and with interest after 30 days at the rate of 12 percent . Non-compliance of the Proviso, sale shall be cancelled if the payment is not received within 90 days. Therefore, the Ld.

Adjudicating Authority has rightly dismissed the Applications filed by the Appellant seeking in-definite extensions for making balance sale consideration which the code does not provide for.”

77. The Learned Counsel for the Respondents, adverts to the order dated 12.05.2022 of this Tribunal, in Potens Transmissions & Power Pvt. Ltd. Versus Gian Chand Narang (vide Comp. App. (AT)(Ins.) 532/2022, wherein at paragraph 8, it is observed as under:

“8. When we look into the above regulation, it is clear that 90 days’ period provided for making the deposit is the maximum period under which the Auction Purchaser had to make the deposit. 2nd Proviso of the Item 12 of the Schedule I provided that sale shall be cancelled if the payment is not received within 90 days. When the Consequence of non-compliance of the provision is provided in the statute itself, the provision is necessary to be held to be mandatory. Item 12 provides that payment is to be made within 90 days and with interest after 30 days at the rate of 12 percent. Non-compliance of 2nd Proviso, sale shall be cancelled if the payment is not received within 90 days. The Adjudicating Authority has rightly observed that in view of the Appellant having not made payment in 90 days, Adjudicating Authority has no option except to allow the Application filed by the Liquidator for cancellation of the sale. The action taken by the Adjudicating Authority is in accordance with the statutory provisions. We do not find any merit in the submissions of Learned Counsel for the Appellant as noticed above. Prayer ‘a’ in the Application which was filed through

I.A. No. 3153 of 2021, itself is indicative that Appellant was never interesting in making the payment and he by different prayers wanted to prolong the proceedings.”

78. The Learned Counsel for the Respondent(s), cites the judgment of this Tribunal dated 18.01.2021 (vide Comp. App. (AT) (Ins.) No. 1098/2020), in ***Saboo Tor Pvt. Ltd. V. Mr. Sanjay Gupta, Liquidator Case Cold Roll Forming Ltd.***, wherein at paragraphs 14 & 15, it is observed as under:

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

79. The Learned Counsel for the Respondents, contends, that pursuant to the order dated 29.06.2022, subsequent events, like distribution of amounts, that stood 'forfeited' etc. Moreover, the Appellant(s) had not impleaded the stakeholders, as necessary parties, to the instant Appeals, since the 'entire sum', 'deposited' by the Appellant(s), before the forfeiture, on account of his default, was, since been, 'distributed' to the stakeholders of the Corporate Debtor on 05.12.2022 and later the Asset, was sold to the successful purchaser. The failure, on the part of Appellant(s) to make the 'stakeholders', to whom the monies were distributed as parties, to the present Appeals before this Tribunal is a 'sufficient ground' for 'rejection' of the Appeals, on this ground alone.

80. The Learned Counsel for the Respondent(s), points out that M/s Texcon Steels Limited was declared that the ‘Highest Bidder’, with a ‘Bid’ of Rs. 145.38 Crores, which was higher than the ‘bid’ given by the Appellant. In fact, sale certificate dated 13.11.2022 was issued in favour of the “highest bidder”, and the ‘entire sale consideration’ was received from the ‘highest bidder’, was also distributed, among the Stakeholders of the Corporate Debtor.

81. The Learned Counsel for the Respondent(s), while winding up prays for dismissal of the Comp. App. (AT) (CH) (Ins) No. 438/2022 & 443/2022 (filed by the Appellant(s), with ‘exemplary costs’.

Evaluation

82. At the outset, this Tribunal, pertinently points out, that the Appellant, (in both Appeals) had made an ‘offer’, on 02.09.2021, by addressing the Respondent / Liquidator of M/s Surana Industries Ltd., Chennai on the ‘subject of’, *“the bid to purchase assets as a going concern of M/s SURANA INDUSTRIES LIMITED (“in liquidation”) under the provisions of Insolvency and bankruptcy Code, 2016 (“Code”) by an order of Honourable National Company Law Tribunal (“NCLT”)”* by mentioning among other things that ‘in order to ensure the smooth running of the business of the Corporate Debtor, it is imperative that certain additional reliefs / concessions / relaxations and permissions are be allowed, which would be essential and necessary to run the business of the ‘Corporate Debtor’ as a going concern etc.

83. The Appellant, in its offer dated 02.09.2021, addressed to the Respondent / Liquidator, had ultimately, at paragraph 12 of the said ‘Offer Letter’, had mentioned, that the Tribunal is empowered to grant necessary reliefs, in relation to the ‘Corporate Debtor’, sold as a ‘going concern’, under the provisions of the Liquidation Process, Regulations, under Section 60(5)(c) of the Code.

84. It transpires that the Appellant(s) had submitted its offer dated 09.09.2021, to purchase the ‘Corporate Debtor’, as a ‘going concern’, on an ‘as is where is basis’ ‘as is what is basis’, ‘whatever there is basis’ and ‘No recourse basis’, which was accepted, by the Stakeholder consultation committee, in its ‘Ninth SCC Meeting’ dated 15.09.2021.

85. In reality, a perusal of the ‘Minutes’ of the ‘Ninth Meeting’ of the Stakeholders, (Secured Financial Creditors) that took place, on 15.09.2021(vide Vol.-I, page 187-195 of the Appeal Paper Book in Comp. App. (AT) (CH) (Ins) No. 438/2022) exhibits that ‘after deliberations, was placed before all the Financial Creditors, to sell the ‘Corporate Debtor’, as a ‘going concern’, to M/s Shri Karshni Alloys Private Limited through a Private sale for Rs.105.21 Crores, subject to the ‘Approval’ of the ‘Adjudicating Authority’ / ‘Tribunal’, and the ‘Financial Creditors’ present asked the ‘Liquidator’, to take the ‘process forward’ in line with the I&B Code, 2016”.

86. Resting upon the proposal of the Appellant(s), and the Approval of the Stakeholders, Consultation Committee, the Respondents had filed IA/997/2021 before the ‘Adjudicating Authority’ / ‘Tribunal’, to ‘approve’ the sale of the ‘Corporate Debtor’ as a ‘going concern’ in favour of the Appellant, which was allowed on 22.03.2022.

87. In fact, the ‘Adjudicating Authority’ / ‘Tribunal’, through its order dated 22.03.2022 at paragraph 21, while approving the sale of the ‘Corporate Debtor’, as a ‘going concern’, had clearly held, that the Respondent (Appellant) ‘shall pay’ the ‘sale consideration’, within 15, days from the date of the receipt of the order. The said period had ended on 15.04.2022, as the certified copy of the order was received only on 31.03.2022 and the Appellant(s), had failed to comply with the ‘orders’ of the ‘Adjudicating Authority’ / ‘Tribunal’, as averred by the Respondent / Liquidator in its counter to Comp. App. (AT) (CH) (Ins) No. 438/2022, on the file of this Tribunal.

88. Because of the fact, that the Appellant(s) had failed to comply with the order dated 22.03.2022, the ‘Stakeholders’ consultation committee, meeting was held on 13.04.2022, wherein the Appellant(s), had sought an extension of time, from the ‘SCC members’, till 28.06.2022, for making payment of the ‘Balance Sale Consideration’. However, the ‘Stakeholders’ ‘Consultation Committee’ had rejected, the ‘extension of time plea’, mentioning that the ‘SCC had ‘no

jurisdiction’ to elongate, the ‘timeline’, since the same, is within, the ambit of the ‘Adjudicating Authority’ / ‘Tribunal’. Moreover, the Appellant(s), in the same meeting had prayed for an ‘extension of time’, till 30.05.2022, with interest on delayed payments at 12% per annum.

89. Pursuant to the discussions, that took place, in the ‘10th Stakeholders Consultation Committee Meeting’ an IA No. 512/2022 dated 29.04.2022 was preferred by the Appellant(s), praying for, ‘further extension of time’, till 31.05.2022, ‘for payment’ of ‘remaining sale consideration’. Because of the fact, that IA No.512/202 was not to be listed in time, a ‘memo’ dated 16.06.2022 was filed by the Appellant(s), seeking more extension of time, till 30.06.2022, for payment of ‘balance of sale consideration’.

90. The ‘Adjudicating Authority’ / ‘Tribunal’, in view of the ‘memo’ dated 16.06.2022 (filed by the Appellant), passed an order, on 29.06.2022, by directing the Appellant(s) / Petitioner(s) to pay on or before 30.06.2022, the balance 50% of the sale consideration i.e. 34.60 crore with 12% interest, from 15.04.202, till the ‘date of payment’. Also, the ‘balance sum’ of Rs.34.60 crores, was directed to be paid, on or before 31.07.2022, with 12% interest from 15.04.2022, till the date of payment. Indeed, the Appellant(s) / Petitioner was directed to strictly comply with the said ‘timeline’ and further, the ‘Adjudicating Authority’ / ‘Tribunal’, had proceeded to observe, in its order dated 29.06.2022, that ‘any

deviation', from the same, would amount to 'forfeiture', of the 'entire amount' paid by the Applicant (Appellant / Petitioner).

91. It is to be remembered that the order dated 29.06.202, in IA(IBC)/512(CHE)/2022 in TCP/95/IB/2017 (Filed by the Appellant(s) / Petitioner) passed by the 'Adjudicating Authority' / 'NCLT Special Bench-I Chennai, was not questioned by the Appellant(s) / Petitioner and that the said order dated 29.06.2022 in IA(IBC)/512(CHE)/2022 in TCP/95/IB/2017, had attained its 'finality'.

92. The Appellant(s) / Petitioner having failed to pay the 'Balance sale Consideration' on or before, the prescribed period, and also not following the 'schedule of payments', filed IA/826(CHE)/2022, in TCP/95/2017 dated 29.07.2022, which was 'withdrawn' by the Appellant(s) on 04.08.2022. However, in the interregnum, the Respondent / Liquidator, through a letter dated 02.08.2022, had intimated the Appellant(s), that in terms of the 'order' of the 'Adjudicating Authority' / 'Tribunal', the 'whole amount deposited by the Appellant(s), stood forfeited. Thereafter, the Appellant(s), assailing, the action of the Respondent / Liquidator, filed an Interlocutory Application bearing (Dy. No. 3305118016882022, which was dismissed on 10.08.2022, by the 'Adjudicating Authority' / 'Tribunal'. 'Being aggrieved' with the said order, the Appellant has filed Comp. App. (AT) (CH) (Ins) No. 438/2022.

93. A stand is taken on behalf of the Respondent / Liquidator, before this Tribunal, that the ‘point’ on which the instant ‘Appeal’ is filed before this Tribunal, has become an infructuous one, as the ‘entire amount’, deposited by the Appellant was distributed to the ‘stakeholders’ on 05.12.2022.

94. The Learned Counsel for the Respondent(s), points out that the Appellant(s) had sent a mail proposal for acquiring the ‘Corporate Debtor’ by mentioning that *“Based on the discussion and the visit conducted by our technical team, we should like to acquire the complete assets of Corporate Debtor without any liabilities as a going concern under provisions the Insolvency and bankruptcy Code, 2016”*.

95. It appears that, as per the terms of proposal for acquisition, the Appellant(s), had to remit the whole sale consideration, within 15 days, from the date of receipt of an order of the ‘Adjudicating Authority’ / ‘Tribunal’, in approving the ‘Corporate Debtor’ to be sold as a going concern and in fact, only the 15 days, ‘post the approval of sale’, by the ‘Adjudicating Authority’ / ‘Tribunal’, which requires to be taken into consideration and that 15 days period, from the date of receipt of the order of the ‘Adjudicating Authority’ / ‘Tribunal’, had lapsed, on 15.04.2022.

96. According to the Respondent / Liquidator, the proposal was dated 02.09.2021 and till the order of the ‘Adjudicating Authority’ / ‘Tribunal’, the

Appellant(s) had six months' period, for arranging the 'Source of Funds' for implementing the 'proposal'. But the Appellant(s) had reacted only upon, the 'receipt of the order' of the 'Adjudicating Authority' / 'Tribunal'.

97. It is projected on the side of the Respondent / Liquidator, that the stakeholders of the Corporate Debtor, had expressed their dissatisfaction, for an extension of timeline, till 28.06.2022. Also, it was discussed by the 'stakeholders', as three months' period, was long period of extension and only after the Appellant(s) had agreed to settle the whole payment by 30.05.2022, the 'stakeholders' had agreed, to an extension, subject to the approval from the 'Adjudicating Authority' / 'Tribunal'.

98. It comes to light, that the 'extension' was agreed to by the 'stakeholders', only with an increased consideration, in the form of 'interest', @12% per annum for the 'delayed period of payment', which was agreed to, by the Appellant(s). The fact of the matter, is that when the 'stakeholders', had considered the 'extension of payment' till 30.05.202, and that the Appellant(s) had committed 'default' once 'again'. Later, an 'Application' was filed for an 'extension of time', by the Appellant, which was listed on 29.06.2022 and even, till that date, the 'obligation' of the Appellant(s), had remained as an unsettled one. Also that, the 'continuous extension', prayed for the Appellant(s) clearly point out that the Appellant's, inability to 'infuse' funds, for implementing the 'sale proposal'.

99. The ‘Adjudicating Authority’ / ‘Tribunal’, by taking into account, the Appellant’s ‘instability’ in adhering to the ‘time schedule’, by applying its ‘mind’ and ‘wisdom’ had passed the order, on 29.06.2022, for payment of Rs.34.60 Crores, on or before 30.06.2022 and remaining sum of Rs.36.40 Crores, on or before 31.07.2022, together with the agreed 12% interest.

100. It is brought to the fore, that the Provisional Attachment Order, was issued on 01.08.2022, much after the date by which the Appellant(s), should have settled its entire ‘payment obligation’ as per the proposal and also the subsequent extension order of the ‘Adjudicating Authority’ / ‘Tribunal’, in granting ‘extension’ to the Appellant.

101. Moreover, the staggered, payment ‘instalment’ of the Appellant(s), indicates, that the Appellant, was financially, ‘incapable’ and is merely finding ‘causes’, for obtaining the time extended, for making the ‘remaining payment’ and that the Enforcement Directorate’s Attachment, is used as a ‘tool’ by the Appellant(s), which does not have any ‘overlapping effect’, in regard to the stipulated payment period.

102. In the instant matter, the ‘sale’ was confirmed in favour of M/s Texcon Steels Limited, which had paid the whole sale consideration, as on 28.11.2022. In fact, the ‘sale certificate’, along with Tax Invoice, Delivery Challan, was issued on 30.11.2022.

103. It is brought to the notice, of this Tribunal, that the ‘sale’ was completed and that the Forfeited ‘sums’ were distributed to the stakeholders, and the plea, of the Respondent / Liquidator, that the instant Comp. App. (AT) (CH) (Ins) No. 438/2022 has become an ‘infructuous one’.

104. At this stage, it is not out of place for this Tribunal, to make a pertinent mention, that the Respondent / Liquidator of M/s Surana Industries Limited, had filed IA/997/CHE/2021 in TCP/95/IB/2017, (filed under Section 60(5) of the I&B Code, 2016, read with Regulation 32(e) and 33(2)(d) of the Insolvency & Bankruptcy Board of India (Liquidation Process), Regulation, 2016 against the Appellant / Shri Kashini Alloys Private Limited before the ‘Adjudicating Authority’ / NCLT, Division Bench-I, Chennai, wherein on 22.03.2022, it was ordered that the IA/997/CHE/2021 in TCP/95/IB/2017, filed by the Respondent / Liquidator, for sale of Corporate Debtor, as a ‘going concern’ was allowed and under the Appellant / Respondent, was directed to pay the sale consideration, within 15 days, from the ‘date of receipt’ of this ‘order’.

105. The Appellant(s), was informed by the Respondent / Liquidator (insolvency Resolution Professional), on 02.08.2022, wherein it was informed, that the Appellant(s), had paid a total amount of Rs.37.80 Crores, and the ‘break up’ was mentioned as under:

S. No	Date of Payment	Amt (Rs in Crores)
1.	Commitment Advance (Paid along with the submission of proposal)	10.52
2.	On 12 th April, 2022	5.00
3.	On 15 th April, 2022	1.50
4.	On 18 th April, 2022	9.28
5.	On 20 th May, 2022	2.00
6.	On 9 th June, 2022	1.50
7.	On 14 th June, 2022	1.50
8.	On 17 th June, 2022	5.00
9.	On 13 th July, 2022	0.50
10.	On 25 th July, 2022	1.00
	Total	37.80

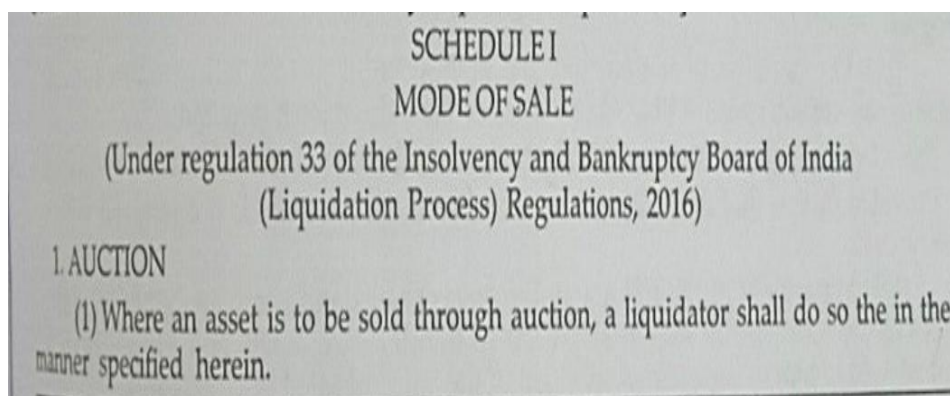
106. In the aforesaid, e-mail dated 02.08.2022 of the Respondent / Liquidator, addressed to the Appellant, it was mentioned that the 'Balance Sale Consideration' with interest was not 'completely paid' by the Appellant on or before 31.07.2022 and still, there was a 'balance outstanding' of Rs.67.41 crores along with interest @ 12% per annum, from 15.04.2022, till date of payment. Also, the Appellant was informed that it had failed to comply with the 'timelines' specified in the directions issued by the 'Adjudicating Authority' / 'Tribunal'.

107. The Appellant / Petitioner had filed IA(IBC)/952/(CHE)/2022 in TCP/95/IB/2017 before the 'Adjudicating Authority' / NCLT, Chennai, seeking to quash and set aside the letter dated 02.08.2022 of the Respondent / Liquidator in forfeiting the part consideration of Rs.36.08 crores paid by the Appellant.

Also, the Appellant had sought in granting immunity to ‘M/s Surana Industries Limited’ / ‘Corporate Debtor’ and its ‘Assets’ from any actions, in relation of any offence, committed prior to the commencement of the ‘Corporate Insolvency Resolution Process’, and such Assets being taken over as a going concern, through the Respondent in pursuance of the sale confirmed by the Hon’ble Adjudicating Authority, through an order dated 22.03.2022.

108. It is evident that IA/952/2022, filed by the Appellant / Petitioner came to be rejected on 04.08.2022. Further, on 12.09.2022, the Appellant through e-mail had requested the Respondent / Liquidator, to furnish, a copy of the order, of ‘Attachment of Assets’, of M/s Surana Industries Limited by the ‘Enforcement Directorate’ and according to the Appellant(s), ‘no reply’ was received by the Respondent/ Liquidator.

109. It is significantly, pointed out, that Schedule-I of the Insolvency & Bankruptcy Board of India (Liquidation Process), Regulation, 2016, enjoins as under:



(2) The liquidator shall prepare a marketing strategy, with the help of marketing professionals, if required, for sale of the asset. The strategy may include—

- (a) releasing advertisements;
- (b) preparing information sheets for the asset;
- (c) preparing a notice of sale; and
- (d) liaising with agents.

(3) The liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any:

¹[Provided that the liquidator shall not require payment of any non-refundable deposit or fee for participation in an auction under the liquidation process:

Provided further that the earnest money deposit shall not exceed ten percent of the reserve price.]

²(4) The reserve price shall be the value of the asset arrived at in accordance with regulation 35.

(4-A) Where an auction fails at the reserve price, the liquidator may reduce the reserve price by up to twenty-five percent of such value to conduct subsequent auction.

(4-B) Where an auction fails at reduced price under clause (4-A), the reserve price in subsequent auctions may be further reduced by not more than ten percent at a time.]

(5) The liquidator shall ³[issue a public notice] of an auction in the manner specified in regulation 12(3):

Provided that the liquidator may apply to Adjudicating Authority to dispense with the requirement of regulation 12(3)(a) keeping in view the value of the asset intended to be sold by auction.

(6) The liquidator shall provide all assistance necessary for the conduct of due diligence by interested buyers.

(7) The liquidator shall sell the assets through an electronic auction on an online portal, if any, designated by the Board, where the interested buyers can register, bid and receive confirmation of the acceptance of their bid online.

(8) If the liquidator is of the opinion that a physical auction is likely to maximize the realization from the sale of assets and is in the best interests of the creditors, he may sell assets through a physical auction after obtaining the permission of the Adjudicating Authority. The liquidator may engage the services of qualified professional auctioneers specializing in auctioning such assets for this purpose.

(9) An auction shall be transparent, and the highest bid at any given point shall be visible to the other bidders.

(10) If the liquidator is of the opinion that an auction where bid amounts are not visible is likely to maximize realizations from the sale of assets and is in the best interests of the creditors, he may apply, in writing, to the Adjudicating Authority for its permission to conduct an auction in such manner.

(11) If required, the liquidator may conduct multiple rounds of auctions to maximize the realization from the sale of the assets, and to promote the best interests of the creditors.

¹[(11-A) Where the liquidator rejects the highest bid in an auction process, he shall intimate the reasons for such rejection to the highest bidder and mention it in the next progress report.]

²(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety 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 ninety days.

(13) On payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.]

2. PRIVATE SALE

(1) Where an asset is to be sold through private sale, a liquidator shall conduct the sale in the manner specified herein.

(2) The liquidator shall prepare a strategy to approach interested buyers for assets to be sold by private sale.

(3) Private sale may be conducted through directly liaising with potential buyers or their agents, through retail shops, or through any other means that is likely to maximize the realizations from the sale of assets.

(4) The sale shall stand completed in accordance with the terms of sale.

(5) Thereafter, the assets shall be delivered to the purchaser, on receipt of full consideration for the assets, in the manner specified in the terms of sale.

110. Be it noted that, the Resolution of ‘Corporate Insolvency’, to ensure the survival of the enterprise, as a ‘going concern’, is one of the aims the I&B Code, 2016. But this, ought not to be at the ‘cost of efficiency’. No wonder, a Timely Liquidation, is preferred, over Endless Resolution Proceedings. Also that, the ‘Timelines’ prescribed under the I&B Code, 2016, were to be strictly enforced, failing which, the ‘object / aim of maximising’ the value of the Assets of the Company, will be defeated.

111. ‘Enlargement of time’, is a discretionary power, being conferred upon the ‘Tribunal’, for securing the ends of ‘justice’. No person, can claim it, as a matter of right as per decision in *Kathyee Cotton Mills Limited Vs. Padnabha Pillai* AIR 1958 Ker 88. Also that, the ‘Adjudicating Authority’ / ‘Tribunal’, by taking into account of the facts and circumstances, can ‘alter’, ‘vary’, ‘modify’ its ‘earlier order’ and ‘extend the time’. A ‘Tribunal’ is to be fully subjectively satisfied with the ground, and in its wider discretion, can grant an ‘extension of time’, of course based on the facts and circumstances of the case, before it.

112. To be noted, that while granting an extension of time, the ‘conduct of the Petitioner’, is quite relevant, which can be taken note of by the ‘Adjudicating Authority’ / ‘Tribunal’ in this regard.

113. For conducting a ‘private sale’, the Liquidator is authorised to directly ‘liaise’ with the potential ‘buyers’ to ensure the realisation, from the Sale of the

Assets, can be maximised, under the provisions of the I&B Code, 2016. A Liquidator is to take an independent, decision for the sale of the Assets of the Corporate Debtor. He can also take the ‘confidence’, of the stakeholders.

114. A Tribunal cannot act like a court of equity or exercise preliminary powers to unilaterally, reverse the decision of the Liquidator, resting upon commercial wisdom and supported by the ‘stakeholders’.

115. It is pointed out that where ‘one’ knowingly, accepts the ‘benefit’ of a ‘contract’, or ‘conveyance’, or of ‘any order’, he is ‘estopped’ in ‘Law’, from denying the validity of binding effect, of such contract, or ‘conveyance’ or order upon himself. As a matter of fact, the ‘Doctrine of Election’ is based on the ‘Rule of Estoppel’.

116. A person may be precluded, by way of his actions, or conduct, or silence, when it is his duty to speak, from asserting a right, which he would otherwise had.

117. In this connection, this Tribunal, pertinently points out, that the ‘principle of waiver’, or of ‘Approbation’, and ‘Reprobation’ lies at the ‘root of conduct’, productive change, of activation and this ‘principle’, is akin to the ‘rule of ‘Constructive’ *Res judicata*’, as per explanation IV of Section 11 of the Civil Procedure Code, 1908.

118. 'Speed' is the essence of the I&B Code, 2016. To permit such proceedings, to lapse, into an 'indefinite delay' and undoubtedly defeat the, 'aim and objective' of the code. No wonder, a 'Resolution Applicant', is to be 'fair' in its dealings.

119. It cannot be gainsaid, that the Appellant(s), is not to be allowed, to derive that part of the 'order dated 29.06.2022' in IA/512/2022 which grants it, an 'extension' and 'assail', that portion of the order, which is inconvenient to it. This principle, being a common law principle, is a 'species of estoppel', pertaining to the conduct of a party.

120. At this stage, this Tribunal worth recalls and recollect, the decision of the Hon'ble Supreme Court, in Maharashtra State Road Transport Corporation V. Balwant Regular Motor Service, Amravati and Ors. AIR 1969 SC 329, for the proposition, that once, an 'order', was passed, being complied with, accepted by the other side, and obtained 'benefit', out of it, a 'party' cannot assail it on any other ground. To put it, differently, a 'party' cannot say at one point of time, that a 'particular transaction' is valid and obtain some 'benefit', to which he will be entitled to, on the ground that it is valid and then, takes a 'Topsy Turvy Turn', and say it is 'void', for the purpose of, securing 'some other benefit'.

121. It cannot be brushed aside that in the instant case, the Respondent / Liquidator had approached the 'Adjudicating Authority' / 'Tribunal', for selling

the ‘Corporate Debtor’, through ‘private sale’, and the said sale was approved by the ‘Adjudicating Authority’ / ‘Tribunal’ order. Therefore, it can safely and securely be said, that, it is not a contract, ‘within the purview, of Section 73 and 74 of the Indian Contract Act, 1872, as opined by this Tribunal. As a logical corollary, this Tribunal, holds, that the ingredients of Section 74 of the Indian Contract Act, 1872, have no applicability, pertaining to a ‘sale’, in terms of the ‘Liquidation Regulation’.

122. This Tribunal, aptly, points out the decision of the Hon’ble Supreme Court of India in Lakshmanan v. B.R. Mangalgiri and others (1995) Suppl. (2) SCC 33, wherein at paragraphs 4 & 5, it is observed as under:

“4. It is seen, from the conduct of the appellant, that he is not willing to perform his part of the contract and he wants to wriggle out of the contract. It is also seen that time is the essence of the contract. Sale deed was required to be executed on or before February 23, 1973, the appellant is the defaulting party and he has not come to the court with clean hands.

5. The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount. In this case even otherwise, we find that the respondents had suffered

damages firstly for one year they were prevented from enjoying the property and the appellant had cut off 150 fruit bearing coconut trees and sugarcane crop was destroyed for levelling the land apart from cutting down other trees. Pending the appeal, the respondents sought for and were granted permission by the court for sale of the property, Pursuant thereto, they sold the land for which they could not secure even the amount under contract and the loss they suffered would be around Rs.70,000/-. Under those circumstances, their forfeiting the sum of Rs.50,000/- cannot be said to be unjustified. The appeal is accordingly dismissed with costs."

123. Also, in the decision of the Hon'ble Supreme Court of **India in State of Gujarat V. Dahyabhai Zaverbhai**, reported in AIR 1995 SC 1312, wherein it is observed as under:

Admittedly the respondent-contractor had entered into an agreement No.B-1/17 of 1981-82 to complete the work of protective measures for the road bridge across river Ambica. The appellant had issued the work order on June 3, 1981. It is true that there was a delay in handing over the work sheet and the specifications. But the trial Court after considering the entire evidence had noted its finding thus:

"In the present case the land on which the construction work was required to be made was a land of the Government and not of private party or private owner, so there was no hurdle in the construction work of the plaintiff but the plaintiff himself has left the construction

and hence, in the present case, only the plaintiff can be held a person who has revoked the contract. Before revoking the contract, the plaintiff was given sufficient time and reasonable opportunity to complete the work but the plaintiff has not done anything to complete the work and left the work and the sit so we have no option, the deft/Department to take the decision for revocation of the contract."

In view of the above finding, the inevitable conclusion is that the respondent had abandoned the execution of the work in spite of the opportunity having been given to him to complete the work.

Clause 3 of the Contract reads as under:

"Clause-3: In any case, in which under any clause or clauses of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit (whether paid in the sum or deduction by instalments) or in the case of abandonment of the work owing to serious illness or death of the contractor or any other cause, Executive Engineer, on behalf of the Government of Gujarat shall have power:-

(a) to rescind the contract(of which recession notice in writing to the Contractor under the hand of the Executive Engineer shall be conclusive evidence) and in that case the security deposit of the Contractor shall stand forfeited and be absolutely at the disposal of Government.

That in view of this express provision the Hon'ble High Court erred in holding that the petitioner/State is not entitled to forfeiture the deposit."

*A reading thereof would clearly indicate that in any case, under any clause or clauses of the contract, the contractor would have rendered himself liable to pay compensation amounting to the whole of his security whether paid in the sum or deducted by instalments; in the case of abandonment of the work owing to serious illness or death of the contractor or any other cause, the Executive Engineer is empowered to have the contract rescinded; in that case the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of the Government. In consequence, forfeiture of the security deposit, on account of abandonment of the work by the appellant, was perfectly valid. The High Court, therefore, was not right in directing the appellant to refund the security deposit. Learned counsel for the respondents contends that time was not the essence of the contract and therefore, the recession of the contract was not for valid reason. We are, however, not on the validity of the recession of the contract but on the question whether the respondent had abandoned the contract or not. The question in that backdrop arises: whether the recession of the contract was correct in law? In view of the above facts, the action was legal. In that perspective, the ratio in *M/s Hind Construction Contractors v. State of Maharashtra* [A.I.R. 1979 SC 720] has no relevance. Therein, the contract was not rescinded. Work was executed after the extended time and the claims were made before the Arbitrator for the work done during the extended time. Therein, the contention was raised that time was essence of the contract. Respondent and the contractor having not complete the work within the schedule time, he was not entitled to the amount under*

the award. In that contract, this Court had held that time was not essence of the contract. That question, however, does not arise in this case for the reason that the respondent had abandoned the contract.

The appeal is accordingly allowed. No costs.”

124. In the instant ‘Appeals’, the Appellant who had addressed an ‘offer letter’ to the Appellant / SKAPL on 02.09.2021 on the subject ‘the bid to purchase assets as a ‘going concern’ of M/s Surana Industries Limited, (“in liquidation”) under the provisions of Insolvency and Bankruptcy Code, 2016 (‘Code’) by an order of Honourable National Company Law Tribunal (‘NCLT’), wherein at Sl. No. 9:

“9. In the situation where the application shall not be approved to acquire as a going concern by means of private sales basis, a commitment advance shall be refunded to the applicant immediately. The applicant is also understanding that in case if the applicant is found to be ineligible to submit the scheme under Section 29A of the IBC (as amended from time to time) or is found to have made a false or misleading declaration of eligibility under Section 29A of the IBC (as amended from time to time); or if the applicant fails to implement the scheme upon approval of the Scheme by the Hon’ble NCLT or if the applicant fails to pay the Final Sale consideration within 15 days from the date of the Scheme by the Hon’ble NCLT then the amount deposited as a commitment advance shall be forfeited.”

125. In the instant case, the Appellant(s), as per Sl. No. 9, in its ‘offer letter’ dated 02.09.2021 addressed to the ‘Respondent / Liquidator’ had mentioned that if the Applicant (Appellant), failed to pay the Final Sale Consideration, within 15 days, from the date of approval of the scheme, by the then, the ‘amount’ deposited, as a ‘commitment advance’ shall be forfeited. As such, this Tribunal, is of the considered view, that the Appellant(s) is not to be allowed to ‘Approbate’ and ‘Reprobate’ based on the aspect of ‘Election’. In fact, the Sl. No. 9 covenant, in the offer letter dated 02.09.2021 of the Appellant, addressed to the Respondent / Liquidator is not in its favour. It is not in dispute that the Appellant(s) had sufficient time period of six months, for arriving at the resources / ‘source of funds’ for implementing the proposals. However, the Appellant(s) had not made efforts for arranging the process over the fund, for ‘six months’ and only after receipt of the Adjudicating Authority ‘order’ had ‘woken up’.

126. Admittedly, the Appellant / Business entity ‘made an offer’ to purchase a unit at Rs.105.20 Crores. There is no two opinion of a candid fact that the ‘stakeholders’ were quite liberal to consider the extension of payment, till 30.05.2022, which the Appellant(s) again ‘defaulted’. Later, an Interlocutory Application, was filed by the Appellant / Petitioner seeking extension of time, and it was listed on 29.06.2022 and even on till that date, the Appellant’s obligation, remained ‘unsettled’.

127. In fact, in IA/512/2019 filed by the Appellant, the ‘Adjudicating Authority’ / ‘Tribunal’ taking into account of the Appellant’s instability, in following the ‘payment schedule’, had issued ‘directions’ on 29.06.2022, for payment of Rs.34.60 Crores, on or before 30.06.2022 and the balance of Rs.36.40 Crores, was directed to be paid on or before 31.07.2022 together with the agreed 12% rate of interest.

128. It is not out of place, it is significantly point out that the sale, which was affirmed in favour of M/s Texcon Steels Limited, who had paid the ‘whole sale consideration’ along with ‘Tax Invoice’ and the very fact, that the ‘sale’ in favour of M/s Texcon Steels Limited was at the ‘Highest Bid’, of Rs.145.38 Crores, which was (much higher, than the ‘Bid’, of the Appellant), and further, ‘no loss’ was suffered, cannot be a ‘weighing factor’, because, it is outside the ambit of the purview of I&B Code, 2016 in the considered opinion of this ‘Tribunal’.

129. In the instant case, there was a ‘consistent’, and ‘persistent’ ‘Default’, on the Appellant(s) part, in ‘not paying the amount’ and in short, the Appellant has not adhered, to the time schedule in terms of the order dated 29.06.2022 in IA/512/2022 passed by the ‘Adjudicating Authority’ / ‘Tribunal’. In fact, the extension, to the Appellant, granted by the order of the ‘Adjudicating Authority’ / ‘Tribunal’ on 29.06.2022 is a ‘conditional one’ and once the ‘time schedule’ for payment is changed, and if the ‘payment’ was not made within the time

schedule, the ‘forfeiture’ of entire amount, was to follow, which will be in tune with clause (iii) of the order dated 29.06.2022 passed by the ‘Adjudicating Authority’ / ‘Tribunal’.

130. It is to be pointed out, that for ‘every action’, he is to discharge, his ‘duty’ a ‘Liquidator’ need not obtain ‘prior permission’ from the ‘Adjudicating Authority’ / ‘Tribunal’ in spite of the fact that the ‘powers’ of a Liquidator, are subject to a direction of ‘Adjudicating Authority’ / ‘Tribunal’.

131. In the decision of the Hon’ble Calcutta High Court in ***Gurudev Industries P. Ltd. Vs. Elvoc (P.) Ltd., 1982 52 Comp Cas 308 Cal***, at page 308, wherein at paragraph 8 & 9, it is observed as under:

“8. The court cannot by its order destroy an industry which has been built up by the industry, labour, application and mobilisation of resources by the applicant-society after the lease was granted. As a special case having regard to the peculiar circumstances in this particular matter the court should exercise its discretion in favour of granting the application in a modified form to sell the assets of the company to the applicant-society by private treaty at the best reasonable price as the court thinks fit, but this cannot be treated as a precedent, as the order is to be made on the peculiar circumstances of this particular case when it has got certain exceptional features. The parties objecting seem to be purely motivated to destroy the industry, if possible.

9. *In these circumstances, in my view, the applicant-society should be granted leave to make an offer to the official liquidator for purchase of the entire assets which has been run by them under a licence granted by this court by the order referred to above and if the price is reasonable, the same to be sold by private treaty to the applicant-society, as to be determined by this court. The applicant-society is directed to make their offer to the official liquidator within a week from date in a sealed cover and the official liquidator to place the same before the court for consideration and the matter to be fixed up administratively in chamber on Friday week for final order.*

132. It is relevantly pointed out, by this ‘Tribunal’, that when the ‘advertisement’, for the sale of factory specifically mentioning as ‘Earnest Money’, and the deposit, was made in pursuance of the advertisement, the ‘individual’ cannot claim, ‘Refund of Earnest Money’ as per decision In Re R.K. Staple SPG Mills (P) Ltd. reported in 1972, 42 Comp. Cas. 415, at page 418. In fact, the Hon’ble Court had referred to the decision of the Hon’ble Supreme Court in ***Maula Bux V. Union of India***, reported in ***AIR 1970 SC 1955***, wherein it was observed that: *“Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee.”*

133. To put it precisely and succinctly, this ‘Tribunal’ points out that ‘*Earnest money*’ is paid, or given, at the time, when the ‘contract’ is entered into and, as

a 'pledge' for its due performance, by the 'Depositor' to be forfeited in case of 'non-performance', by the Depositor.

134. By following the decision of Hon'ble Supreme Court of India in ***Shree Hanuman Cotton Mills V. Tata Air Craft Ltd.***, reported in (1969) 3 SCC 522, it is held that in H.U.D.A. & Anr vs Kewal Krishan Goel (vide (1996) 4 SCC 249 at Spl. Page 254, wherein at paragraph 12, it is observed as under:

".....allotee having accepted the allotment and having made some payment on instalment basis then made the request to surrender the land, has committed default on his part and therefore the competent authority would be fully justified in forfeiting the earnest money which had been deposited and not the 10% of the amount deposited as held by the High Court."

135. In the decision in ***Natesa Aiyar & Ors. vs Appavu Padayachi*** reported in (1910) 20 MLJ 230, wherein the Hon'ble Madras High Court, had held that:

"Section 74 of the Indian Contract Act, 1872 applies, where a sum, is named as penalty to be paid in future, in case of breach, and not to cases, where a sum is already paid and by a covenant in the contract, it is liable to forfeiture."

136. In the decision of Hon'ble Supreme Court of India in ***Videocon Properties V. Bhalchandra Laboratories***, (2004) 3 SCC 711, "the Appellant-plaintiffs had entered into an agreement with the respondent-defendants on 13.05.1994 to sell the landed property owned by the respondents and a sum of Rs.38,00,000/- was paid by the Appellants as deposit or earnest money on the execution of the

agreement. In that case, this Court examined the nature and character of the earnest money deposit and took the view that the words used in the agreement alone would not be determinative of the character of the “earnest money” but really the intention of the parties and surrounding circumstances.” and “it was held, that the ‘earnest money’, serves two purposes, of being part-payment of the purchase money and security for the performance of the contract by the party concerned.”

137. It must be borne in mind, that an ‘Adjudicating Authority’ / ‘Tribunal’, has all the powers, showered by the ‘statute’. Indeed, the ‘Tribunal’s powers, are defined, of course, within the bounds, of its ‘jurisdiction’. Further, it has all the powers, ‘expressly’, or ‘impliedly’ granted. However, the ‘implied grant’, is limited by the ‘express grant’, and it can only, be of such powers, are truly ‘incidental’, and ‘ancillary’ for performing all such acts, or employing all such means, as are reasonably necessary, to ‘make the grant’, effective, as opined, by this ‘Tribunal’.

138. To be noted, the idea of selling the property by an auction, was to fetch the ‘maximum price’ and there was no question of giving any preferential treatment to the highest bidder.

139. An order, of a ‘Judicial’ Authority / Tribunal, is a ‘sacrosanct’ and ‘solemn’ one. As a matter of fact, the Tribunal should devote great care in

expressing it, as per decision in M.R.M. Periannan Chettiar V. Commissioner of Income Tax, reported in 1960 39 ITR, at page 159, at Spl. Page 173. No wonder, an 'Order' / 'Judgment' of a 'Tribunal' / 'Appellate Tribunal', shall be written with 'positive vein'.

140. When a 'person' / had not honoured, the directions issued by an 'Adjudicating Authority' / 'Tribunal', then, the 'Adjudicating Authority' / 'Tribunal' can refuse 'enlargement of time' in its sound judicial subjective discretion.

141. The purpose of a clause / covenant in providing / specifying a 'clause', for 'forfeiture' of 'earnest money', to see, only genuine bids are received from the prospective persons.

142. A 'forfeiture', can be even in respect of an 'offer' before it was accepted, if the offer itself subject to the condition that 'earnest money' will be 'forfeiture' for not entering into a 'contract', or if some other act not performed, even though, one may have a right, to withdraw his / its offer, but he / it, will have 'no right to claim' 'refund of money', as opined by this 'Tribunal'.

143. There is no simmering doubt, that the aspect of 'Forfeiture', cannot be made in an 'arbitrary, whimsical, and in a capricious manner, undoubtedly, a 'contract' is concluded, based on the acceptance offer. There can be 'forfeiture'

of ‘earnest money’ or commitment advance, if a ‘breach’, on the part of a purchaser is committed. It is not essential / necessary that ‘loss’ ought to be, on an imperative condition for the ‘forfeiture’ of ‘earnest money’.

144. In respect of ‘earnest’, it must be borne in mind that: (i) It must be given at the moment at which the contract is concluded; (ii) It represents a guarantee that the contract will be fulfilled or, in other words, “earnest” is given to bind the contract.; (iii) It is part of the purchase price when that transaction is carried out; (iv) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser; (v) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.”

Glimpse of English Decisions

145. At this juncture, this ‘Tribunal’ aptly points out, that the decision, in ***Collins v. Stimson reported in (1883) 11 Q.B.D. 142***, wherein, Baron Pollock had observed that “*according to the law of vendor and purchaser, the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.*”

146. In the matter of *ex parte Barrell, in re Parnell (1885) LR 10 Ch. 512*, wherein, in respect of “*contract for sale of real estate, it was stipulated that a*

portion of the purchase money should be paid immediately and the residue on completion of the contract, it was held on non-fulfilment of the contract by the purchaser that the vendor was entitled to retain the deposit. Sir W.M. James, L.J., in his judgment says: 'The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract and then says give me back the deposit'. There is no ground for such a claim," Sir G. Mellish, L.J., in his judgment observes: "it appears to me clear that even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract, he cannot have back the money, as the contract has gone off through his default."

147. In the decision in *Howe v. Smith* 53 L.J. Ch. 1055, wherein, “the question was considered whether a sum, which was paid on the purchase of real estate as a deposit and in part payment of the purchase money, was recoverable. The plaintiff, who sued for the recovery of the earnest money, failed to perform his contract within a reasonable time, and it was held by the Court of Appeal, affirming the decision of Kay, J., that the deposit, although to be taken as part payment, if the contract was completed, was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit.”

148. In *Bishan Chand v. Radha Kishan Das* 19 A. 489, it was observed that “the contract was for the purchase of a decree for money. Through default of the purchaser the purchase was not carried out, and it was held, that the ‘purchaser’ could not recover the deposit, which was paid by him, pursuant to the contract.”

Time is the essence

149. To be noted, the time period, specified under the I&B Code, 2016 is the salient feature of ‘Triggering process’ and ‘Insolvency Resolution Process’. It cannot be over emphasise that the primordial reason of the enactment of the I&B Code, 2016 is that ‘timeline’ is to be adhered to by the ‘Adjudicating Authority’ / ‘Tribunal’. Otherwise, the ‘Liquidation Proceedings’ will go on indefinitely / interminably, damaging / ruining the ‘stakeholders’ interests.

150. The vital fact, to be kept in mind is that an ‘Adjudicating Authority’ / ‘Tribunal’ is to follow the ‘Model Timeline’ in Regulation 40A of IBBI (Corporate Insolvency Resolution Process), Regulations, 2016, as closely as possible. It is not proper for the ‘Court’ to stand over a winding up petition, presented by a Creditor, for a very long and indefinite period of time, as per decision in *Re Beston Timber Fabrication Ltd.* reported in 1984, BCLC, 328.

151. More importantly, the ‘Corporate Insolvency Resolution Process’, is to be completed mandatorily within 330 days. No doubt, ‘CIRP’ is to be completed within 180 days’ period, as per the Code. Further period of 90 days, can be

extended, on an Application / Petition filed by the concerned person. If a 'proceeding' is pending for a long time, it will give room, an opportunity for a person / party, to 'Divert the Funds' and 'Transfer the Assets'.

152. As far as the instant 'Appeals' are concerned, one cannot remain in an 'oblivion', to the fact that on 01.08.2023, in the 13th Stakeholders Consultation Committee, a decision was taken to issue a 'fresh Auction' by the Liquidator. The Appellant(s), was present in the '13th SCC Meeting' and he, had not raised, 'any objection' and also, he had not impugned the said proceedings. As such, the Appellant, after the 'sale', was confirmed, to and in favour of the 'Successful Purchaser', is 'estopped' by his conduct, to take it as a 'plea', in his favour, as held by this 'Tribunal'.

153. It is pointed out by this 'Tribunal', that the 'Adjudicating Authority' / 'Tribunal' had earlier approved the 'sale', and in fact, when the said 'sale' 'fell through', there is no need / necessity, for the 'Liquidator', to 'seek permission', from the 'Adjudicating Authority' / 'Tribunal' for the conduct of 'Fresh Auction'.

154. Be that as it may, in the light of foregoing detailed discussions, this 'Tribunal', on a careful consideration of respective contentions, advanced on either side, keeping in mind of the facts and circumstances, in an encircling and conspectus manner, comes to a result conclusion, that the impugned order dated

10.08.2022 in Dy. No. 3305118016882022 in TCP/95/IB/2017 passed by the ‘Adjudicating Authority’, IA(IBC)/952/(CHE)/2022 in TCP/95/IB/2017 and the impugned order in IA(IBC)/512/CHE/2022 in TCP/95/IB/2017 passed by the ‘Adjudicating Authority’ / ‘Tribunal’ dated 29.06.2022 are free from any legal infirmities. Accordingly, the ‘Appeals’ fail.

Disposition

155. In fine, instant ***Comp. App. (AT)(CH) (Ins) No. 438/2022 and 443/2022 are dismissed.*** No Costs. The connected pending IA Nos.1109/2022, 1110/2022 and 1111/2022 in ***Comp. App. (AT)(CH) (Ins) No. 438/2022*** and IA Nos.1118 & 1120/2022 in ***Comp. App. (AT)(CH) (Ins) No. 443/2022*** are closed.

**[Justice M. Venugopal]
Member (Judicial)**

20th October, 2023

ss/pks

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

COMPANY APPEAL (AT) (CH) (INS.) NO. 438/2022
(Filed under Section 16 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 10/08/2022 in
C.P.(IB) No. TCP/95/2017 passed by the ‘Adjudicating Authority’, National
Company Law Tribunal, Chennai Bench)

In the matter of :

M/s. Shri Karshini Alloys Private Limited

1st Floor, G Block

Connaught Circus

Connaught Place, G -36 Delhi

New Delhi – 110 001.

...Appellant

Versus

Mr. Ramakrishnan Sadasivan

Liquidator of M/s. Surana Industries Limited

Old No. 22, New No. 28

Menod Street, Purasawalkam

Chennai – 600 007

Email id : sadasivanr@gmail.com

...Respondent

WITH

COMPANY APPEAL (AT) (CH) (INS.) NO. 443/2022
(Filed under Section 16 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the Impugned Order dated 29/06/2022 in
IA No(IBC)/512/CHE/2022 in T.C.P.(IB) No. TCP/95/2017 passed by the
‘Adjudicating Authority’, National Company Law Tribunal, Chennai
Bench)

In the matter of :

M/s. Shri Karshini Alloys Private Limited

1st Floor, G Block

Connaught Circus

Connaught Place, G -36 Delhi

New Delhi – 110 001.

...Appellant

Versus

Mr. Ramakrishnan Sadasivan

Liquidator of M/s. Surana Industries Limited

Old No. 22, New No. 28

Menod Street, Purasawalkam

Chennai – 600 007

Email id : sadasivanr@gmail.com

...Respondent

Present :

For Appellant : Mr. Virender Ganda, Senior Advocate
For Mr. Virender Ganda, Ms. Akanksha Mathur &
Ms. Tanya Hasija, Advocates

For Respondent : Mr. T.K. Bhaskar, Advocate
Mr. Mayan H Jain, Advocate
Ms. Niveditha Narayanan, Advocate

J U D G M E N T

(Virtual Mode)

[Per: Shreesha Merla, Member (Technical)]

Evaluation :

1. I humbly and respectfully dissent with the view taken by the Hon'ble Learned Presiding Judge, that the Appellant herein is not entitled to *any* refund of the amounts paid towards part Sale Consideration of the bid amount.

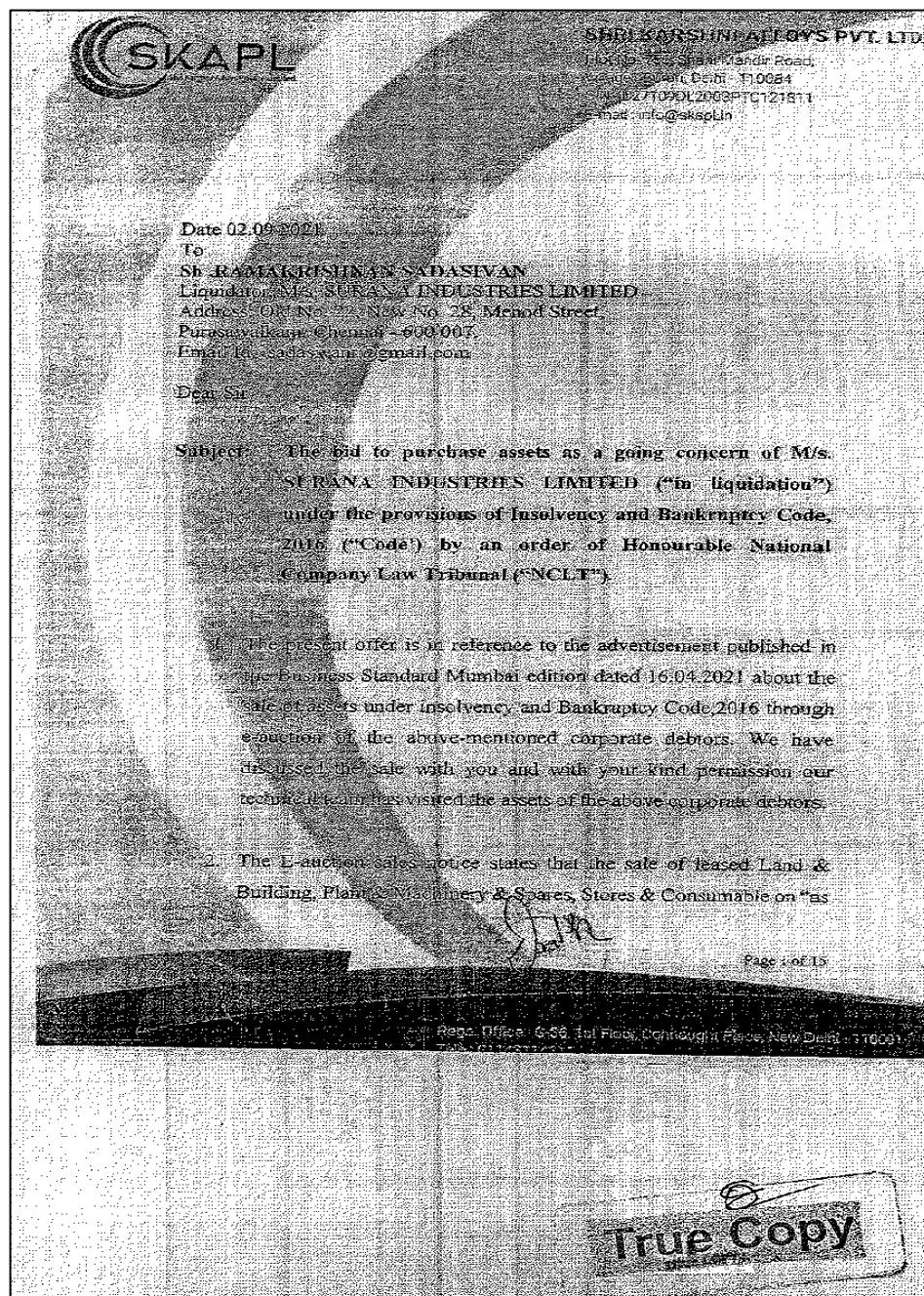
2. For the sake of brevity, the pleadings put forth by both the Appellants and the Respondents are not being repeated here and the pleadings from ‘Paragraphs 1 to 80’ of the Judgment of the Hon’ble Presiding Judge, are being adopted.

3. The brief points which fall for consideration in these Appeals are:-

- *“Whether the Adjudicating Authority was justified in directing the forfeiture of ‘the entire amount’ paid by the Appellant as part payment towards the bid amount.*
- *Whether the forfeiture of the entire amount partly paid towards the sale consideration amounts to ‘unjust enrichment’ of the Stakeholders of the Corporate Debtor, when there was no ‘loss’ incurred in the said transaction.*
- *Whether the Judgment of ‘**Westcoast Infraprojects Pvt. Ltd. Vs. Mr. Ram Chandra Dallaram Choudhary**’ in **Company Appeal (AT) (Ins) No. 1258/2022**, relied upon by the Respondent is applicable to the facts of this case. ”*

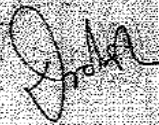
4. A brief factual matrix relevant to the adjudication of the matter on hand is that the CIRP was initiated against the Corporate Debtor / M/s. Surana Industries Limited in T.C.P./95/CB/2017 on 02/01/2018; that an Order of Liquidation, dated 12/10/2018, was passed by the ‘Adjudicating Authority’ in MA/453/2018; that six auctions were conducted to sell ‘Gummidipoondi’ and ‘Raichur’ assets between 06/02/2019 and 02/02/2021; that on 31/07/2021 the Stakeholders Consultation Committee (“SCC”) conducted a Meeting and decided to sell the assets at a scrap value of approximately Rs. 50 crores; that the Appellant had made an offer to take over the Corporate Debtor as a going concern for Rs. 105.21

Crores for 'Raichur' assets only and on 15/09/2021 the 9th SCC Meeting was held wherein consent was accorded for the sale of the Corporate Debtor as a 'going concern' for a sale consideration of Rs. 105.21 Crores. At this juncture, for better understanding of the Case, it is essential to reproduce the 'Bid Offer' made by the Appellant herein on 02/09/2021.



is where is basis", "as is what is basis", "whatever there is basis" and "no recourse basis" The Reserve Price fixed was Rs. 105 Crores. The Reserve price is exclusive of GST @18%.

3. The applicant has inquired about the status and also requested the Liquidator to furnish information about the corporate debtors. The Liquidator has supplied the relevant information i.e. treasure and list of the plant & machineries.
4. The applicant is not disqualified under any provision of the Insolvency and Bankruptcy Code, 2016. The necessary compliance and documents is being submitted along with this application. The undersigned is duly authorised by the board of the director of the applicant and fully competent to sign, deliver and produce the documents and information required. The copy of the board resolution is annexed as Annexure no 1
5. Based on the discussion and the visit conducted by our technical team, we would like to acquire the complete assets of Corporate Debtor without any liabilities as a going concern under provisions the Insolvency and Bankruptcy Code, 2016.
6. The present offer is to purchase the assets of the above corporate debtors as a going concern as per Regulation 32(e) - "the corporate debtor as a going concern" of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 by means of private sales basis. The total consideration offered is Rs. 105.21 Crores

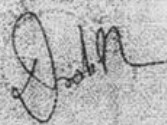


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against the reserve price fixed for the assets of the above Corporate Debtors Rs. 105 Crores. As regard GST @18% is concerned, it is not applicable on sale of assets as a going concern therefore the amount offered in net off GST. In case any liability of GST shall arise on this acquisition the same shall be recovered from the applicant as per the provision of the law.

7. Out of the total offered amount 10% i.e. Rs. 10.521 crores shall be deposited/paid along with our application as a commitment advance. The balance offer amount shall be deposited within 15 days from the date of receipt of the approval of sale by the competent Authority i.e. NCLT.
8. The date on which the honourable NCLT approves the application to acquire as a going concern by means of private sales basis shall be considered as "date of acquisition".
9. In the situation where the application shall not be approved to acquire as a going concern by means of private sales basis, a commitment advance shall be refunded to the applicant immediately. The applicant is also understanding that in case if the applicant is found to be ineligible to submit the scheme under Section 29A of the IBC (as amended from time to time) or is found to have made a false or misleading declaration of eligibility under Section 29A of the IBC (as amended from time to time); or if the applicant fails to implement



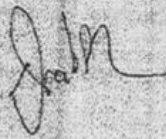
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the scheme upon approval of the Scheme by the Hon'ble NCLT or if the applicant fails to pay the Final Sale consideration within 15 days from the date of approval of the Scheme by the Hon'ble NCLT then the amount deposited as a commitment advance shall be forfeited.

10. The applicant would like to submit that the mere purchase of the Corporate Debtor as a 'going concern' as per Liquidation Process Regulations will not suffice. In order to ensure the smooth running of the business of the Corporate Debtor, it is imperative that certain additional reliefs / concessions / relaxations / and permissions are allowed which would be essential and necessary to run the business of the Corporate Debtor as a 'going concern'. Unless these reliefs / concessions / permissions are provided, the purpose of the revival of the Corporate Debtor as a 'going concern' under Liquidation Process Regulations will not be achieved. In fact, these permissions / relaxation / concessions / reliefs are crucial to kickstart the business of the Corporate Debtor and achieve value maximization of the Corporate Debtor, the honourable NCLT is empowered to grant necessary relief to the Corporate Debtor sold as a 'going concern' under the provisions of the Liquidation Process Regulations, under Section 60(5)(c) of the Code.

11. In the above background this Applicant preferred Application with the reliefs annexure as Annexure no -2:



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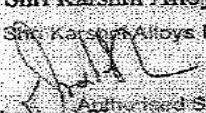
12. The Applicant further submits that Tribunal is empowered to grant necessary reliefs in relation to the Corporate Debtor, sold as a 'going concern' under the provisions of the Liquidation Process Regulations, under Section 60(5)(c) of the Code. Therefore, the Applicant submits that the instant case is a fit case to grant the reliefs in favour of the Applicant. It is clarified by the applicant that, if the NCLT does not grant any reliefs / concessions / relaxations / permissions and directs the applicant to approach the concerned authority, then in such case the applicant shall approach the concerned authority for grant of the reliefs / concessions / relaxations / permissions and that the implementation of the Scheme shall remain unaffected in all such circumstances"

We hope you will find the same in order

Thanking You

For Shri Karshni Alloys Pvt Limited

For Shri Karshni Alloys Pvt. Ltd.


Authorised Signatory

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(Emphasis Supplied)

3. In the 9th SCC Meeting, the Appellant's offer was accepted and the following was recorded in the Minutes.

“Conclusion : After deliberations, the said proposal was placed before all the financial creditors to sell the Corporate Debtor “as a going concern” to M/s. Shri. Karshini Alloys Pvt. Ltd. through a Private Sale for Rs. 105.21 Crores, subject to the approval of the Hon’ble NCLT. Financial Creditors present asked liquidator to take the process forward in line with the code.”

4. Subsequently, an Application IA No. 997/CHE/2021 was filed by the Respondent before the ‘Adjudicating Authority’, seeking confirmation of the Sale and the same was confirmed vide Order dated 22/03/2020 with a direction to the Liquidator to sell the Corporate Debtor as a ‘going concern’. Regulation 32 (2) (c) read with Schedule I of the IBBI (Liquidation Process) Regulations, 2016 governs the sale of the Corporate Debtor as a ‘going concern’.

5. It is not in dispute that the 10th SCC Meeting held on 13/04/2022 discussed the Schedule of payment proposed by the Appellant herein and approved the revised schedule, which relevant extract, is reproduced as hereunder:-

After deliberations, Mr. Drabesh Jha proposed a revised schedule for the payment proposal which is as follows:-

Date of payment	% of payment	Amount (in Rs.)
Total amount to be paid		1,05,21,00,000
Amount already paid on 10-09-2021	10%	10,52,10,000
Balance to be paid		
On or before 18-04-2022*	15%	15,78,15,000
Before 30-04-2022	25%	26,30,25,000
Before 15-05-2022*	50%	52,60,50,000
Total		1,05,21,00,000

***Note:**

- Since 15th April, 2022 being a non-working day for the banks, Mr. Drabesh Jha stated that the payment which fell due on 15th April, 2022 would be paid on 18th April, 2022.
- Out of the amount of Rs. 15,78,15,000/- payable on 18th April, 2022, already an amount of Rs. 5,00,00,000/- was paid on 12th April, 2022.
- The last instalment of 50% shall be coupled with a grace period of 15 days extended till 30th May, 2022.

Mr. Drabesh Jha expressed his sincere thanks to the members for the patient co-operation extended so far in the process and requested the members to place realiance on the buyer, since maximum efforts are being made to complete the Process before 30th April, 2022. Only as a measure of prudence, and factoring any unforeseen circumstances the maximum timeline is being extended till 30th May, 2022.

Interest on delayed payments:

The Prospective buyer also agreed that all payments made post 15th April, 2022 shall be coupled with payment of interest charged at the rate of @ 12% P.A.

Further Course of Action:

In Conclusion, Mr. Drabesh Jha stated that M/s. Shri Karshini Alloys Private Limited shall file an application with the Hon'ble NCLT, Chennai seeking approval for the revision in the extended timelines of payment.

During the pendency of the application filed with NCLT, the instalments paid by the buyer shall not be distributed by the Liquidator and the same shall be distributed only on approval from the Hon'ble NCLT, Chennai.

The same was concurred by all the Lenders present for the Meeting.

There being no other issues, the meeting concluded with a vote of thanks.

(Emphasis Supplied)

6. From the aforementioned 10th SCC Meeting, it is clear that an extension of time was sought to be given to the Appellant to make the payment by 30/05/2022 and all payments post 15/04/2022 were agreed to be made with interest @ 12 % p.a. IA/512(CHE)/2022 was preferred by the Appellant seeking approval of this extension and the same was granted by the 'Adjudicating Authority', vide Order dated 29/06/2022, however, with a rider directing forfeiture of the amount paid in case of failure to comply with the timeline.

7. It is the case of the Learned Senior Counsel for the Appellant Mr. Virender Ganda that without any prayer for forfeiture, the 'Adjudicating Authority' has overreached its power by directing the same, specifically, in the absence of any such term of forfeiture of part consideration in the 'Terms of sale' entered into between the Parties. It is the case of the Learned Senior Counsel for the Respondent Mr. T.K. Bhaskar that having paid the amount subsequent to the Order of the 'Adjudicating Authority', the Appellant cannot accept the Order in part and reject the other portion of the Order which is inextricably intertwined. For easy reference, the said portion of the Order is extracted below:

ORDER

- (i) *The Applicant is directed to pay on or before 30.06.2022 the balance 50% of the sale consideration i.e. 34.60 Crore with 12% interest from 15.04.2022 till the date of payment.*
- (ii) *The remaining sum of Rs. 34.60 Crore shall be paid on or before 31.07.2022 with 12% interest from 15.04.2022 till the date of payment*

(iii) *The Applicant is directed to strictly comply with the said timelines. Any deviation from the same would amount to forfeiture of the entire amount paid by the Applicant.”*

8. The Learned Senior Counsel for the Respondent, Mr. T.K. Bhaskar strenuously argued that extension was granted by this Order, only on the ground that once the timelines for payment is altered, if payment is not made within the timeline, the amount deposited would be forfeited in total. It is the Respondent’s case that forfeiture was the condition upon which the extension has been availed by the Appellant and had he any grievance with the same, the Order should have been immediately challenged. It was strongly contended by the Learned Senior Counsel Mr. T.K. Bhaskar, that the Appellant having paid two tranches of amounts on 13/07/2022 and 25/07/2022 cannot now assail that portion of the Order that is contingent to the other portion, that ordered the forfeiture. It is his main case that the Appellant cannot ‘Approbate’ and ‘Reprobate’ and placed reliance on the following Judgments in support of his case.

1. Union of India (UOI) vs. N. Murugesan and Ors. - Civil Appeal

Nos. 2491-2492 and 2493-2494 of 2022

2. State of Punjab and Ors.Vs. Dhanjit Singh Sandhu - Civil

Appeal Nos. 5698 - 5699 of 2009

9. It is seen from the record that IA No. 826/2022 was filed by the Appellant on 29/07/2022, subsequent to the press release by ‘Enforcement Directorate’

("ED"), stating that Promoters of the Corporate Debtor Company had been arrested in connection with a bank fraud case, and sought for the following reliefs:

10. That, in light of the aforesaid facts and circumstances the Applicant is seeking following reliefs-

a) To grant immunity to M/s Surana Industries Limited ("Corporate Debtor") and its assets from any actions in relation of any offence committed prior to the commencement of the corporate insolvency resolution process, and such assets being taken over as a going concern, through the Respondent in pursuance of the sale confirmed by the Hon'ble Adjudicating Authority, vide order dated March 22, 2022; and

b) Pending adjudication of this application, and grant the relief as enumerated in clause (a) –

1) Grant the Applicant an extension of time period for payment of the balance consideration, payable in pursuance of the bid submitted by the Applicant, dated September 9, 2021 and approved by the Hon'ble Adjudicating Authority vide its order.

2) Pending adjudication of this application, and grant the relief as enumerated in prayer (1) above-

i) Grant the Applicant an extension of time period for payment of the balance consideration, payable in pursuance of the bid submitted by the Applicant, dated September 9, 2021, and approved by the Hon'ble Adjudicating Authority vide its order dated March 22, 2022 and June

29, 2022, beyond July 31, 2022 until the immunity as per clause (a) is granted; and

ii) Waive the payment of the interest at the rate of 12% per annum as directed to be paid by the Applicant code order dated June 29, 2022, from a period of April, 15, 2022 to the date of actual payment.

8. Grant any other prayers as the Hon'ble Adjudicating Authority may deem fit."

(Emphasis Supplied)

10. From the aforementioned reliefs sought for in IA No. 826/2022, it is clear that the Appellant had sought for extension of time and has also sought to bring to the notice of the 'Adjudicating Authority' regarding the press release. It is the case of the Appellant that the information that the 'Raichur' asset was not included in the list of assets attached by the ED was never given to them by the Liquidator at that point of time. It is not disputed by the Respondents that the Appellant had indeed made a mention for urgent listing of the Application on 01/08/2022, 02/08/2022 and 03/08/2022. The Application was listed on 04/08/2022. In the meantime, on 02/08/2022, the Appellant was informed that the 13th SCC Meeting had decided to forfeit Rs. 37.8 Crores deposited by the Appellant. Keeping in view the subsequent development, IA No. 826/2022, dated 29/07/2022 was withdrawn with a liberty to file an amended Application. Subsequently, IA No. 952/2022 was filed by the Appellant seeking quashing of the Liquidator's letter dated 02/08/2022 and also immunity from ED and further extension of time to

make the balance payment. It is the case of the Appellant that it was during the course of Hearing that the Appellant was informed that the Corporate Debtor's assets were not attached by the ED. Be that as it may, the 'Adjudicating Authority' has rejected the extension of time vide Order dated 10/08/2022. Subsequently, on 12/08/2022 the Respondent published an e-auction Sale Notice of the 'Raichur' assets. From the aforementioned chronology of events, it is clear that IA No. 826/2022 was filed by the Appellant prior to the last date of the extended timeline, seeking further extension. Even if we take into consideration, the submission of the Respondent Counsel that the forfeiture was triggered from 31/07/2022, the fact of the matter is that there was a *bona fide* attempt by the Appellant who had paid amounts even on 13/07/2022 and 25/07/2022 to seek further extension of the time but the IA was never listed for Hearing till 04/08/2022, by which time on 02/08/2022 the amount stood forfeited by the SCC. It is also seen from the record that by 31/07/2022, the Appellant had already paid an amount of Rs. 36.8 Crores and it is pertinent to mention that the letter dated 02/08/2022 forfeiting the amount of Rs. 36.8 Crores was challenged by the Appellant, but disallowed by the 'Adjudicating Authority'. Application bearing S.R. No. 3305118016882022 seeking extension of time, filed on 04/08/2022 was rejected by the 'Adjudicating Authority', on 10/08/2022, pursuant to which the Appellant had preferred an Appeal on 13/08/2022, but it is submitted that it was not listed for some time. Subsequently, the Appellant had filed W.P. No. 24262/2022 challenging the Order dated 29/06/2022. On

29/09/2022, the Hon'ble High Court stayed the Order dated 29/06/2022 for a period of three weeks. The Hon'ble High Court, vide Order dated 24/11/2022 has observed as follows:

“13. Above all a Division Bench of this Court had after considering all the Judgments of Hon'ble Apex Court had held that a Writ Petition is not maintainable against an order passed by the NCLT when an appellate remedy is provided under the Act in L & T Infra Investments partners vs. Ebenezar Inbaraj and others in C.R.P.(PD) No.525 of 2022 and C.M.P.No.2785 of 2022 which is extracted hereunder for easy reference:

“On a perusal of the recent Judgments of the Apex court, it is clear that when an appeal remedy is provided under the Act, the aggrieved party should exhaust the said remedy by filing an appeal before the Appellate Forum and the Writ Petition/Civil Revision Petition filed them under Articles 226/227 of the constitution is not maintainable. When the petitioner can raise all the grounds available to them under law before the Appellate Forum, the filing of the Civil Revision Petition under Article 227 cannot be entertained.”

14. We also note that the petitioner has preferred an appeal against the subsequent order passed by the NCLT relating to the same issue and this is also another factor which deters us from entertaining this Writ Petition, leaving it open for the petitioner to raise all the contentions available to them in law in the said appeal.”

(Emphasis Supplied)

11. From the aforementioned observations made by the Hon'ble High Court it is seen that the Appellant was given liberty to **raise all contentions available to**

them in law in the said Appeal. Therefore, in the light of this chequered history, and observations of the Hon'ble High Court, the issue of 'Approbation' or 'Reprobation' and the contention of the Learned Counsel for the Respondent that the 'issue of forfeiture' cannot now be questioned, cannot be sustained.

12. It is the case of the Respondent that it is not required for the Liquidator to seek the permission of the 'Adjudicating Authority' to issue any fresh auction, if the 'Sale' that was once approved by the 'Adjudicating Authority' falls through; that the 'Sale' in this case is a 'private sale' approved by the Court and therefore, cannot be termed as a 'Contract' within the meaning of Sections 73 and 74 of the Contract Act, 1872 and that the Order of forfeiture is a consequential Order based on the conduct of the Appellant who sought for frequent extensions of time for payment of the sale consideration.

13. It is not in dispute that the Appellant had failed to make the payment as directed by the 'Adjudicating Authority', vide Order dated 29/06/2022. It is also seen from the record that in the initial bid made by the Appellant herein on 02/09/2021, offering to purchase the Corporate Debtor as a going concern for Rs. 105.21 Crores, Clause 9 specifically states that *'if the Applicant fails to implement the scheme upon approval of the scheme by the NCLT or the Applicant fails to pay the final sale consideration within fifteen days from the date of approval of the scheme by the Hon'ble NCLT, then the amount deposited as a 'commitment advance' shall be forfeited. The commitment advance in this case is stipulated in Clause 7 as 'out of the total offered amount 10 % i.e. Rs. 10.21*

Crores has been deposited / paid along with our Application as a commitment advance’. In the instant case, this is the only term which deals with forfeiture. The Hon’ble Supreme Court in the matter of **‘Union of India and Anr. Vs. Hansoli devi and Ors.’** reported in [(2002) 7 SCC 273] has observed that if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in a natural and ordinary sense. In the instant case, the only amount that could have been forfeited, for the latches on behalf of the bidder in paying the amount, is the commitment advance which is 10 % of the total amount.

14. Now, I address to the applicability of Section 74 of the Contract Act, 1872, which the Learned Counsel for the Appellant strongly relied on referring to the Judgment of the Hon’ble Apex Court in the matter of **‘Kailash Nath Associates Vs. Delhi Development Authority and Anr.’** reported in [(2015) 4 SCC 136] in paras 41 to 44, wherein it is noted as follows:

“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 (along with 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. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused

thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

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.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages—namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.”

15. The Principal Bench of NCLAT in the matter of ***‘Westcoast Infraprojects Pvt. Ltd. Vs. Mr. Ram Chandra Dallaram Choudhary’*** in ***Company Appeal (AT) (Ins) No. 1258/2022*** dealt with this specific issue and referred to Section 74 of the Indian Contract Act, 1872 and ***‘Kailash Nath Associates’*** (Supra) and has held as follows:

*16. In support of his submission on Section 74 of the Indian Contract Act, Learned Counsel for the Appellant has relied on Judgment of the Hon’ble Supreme Court in **Fateh Chand Vs. Balkishan Dass, AIR 1963 SC 1405**. The above case arose out of a suit filed by the plaintiff claiming a decree of possession of the land and decree for Rs. 6,500 as compensation on the ground that defendant has breached the sale agreement. In the suit, Appellant*

has also claimed to forfeit the amount received from the defendant. The suit was partly decreed. Defendant had filed an appeal before the Hon'ble Supreme Court against the said Judgment which decree was modified by the Hon'ble Supreme Court. In the above context, Hon'ble Supreme Court had occasion to consider the provisions of Section 74 of the Indian Contract Act where it was held that expression "the contract contains any other stipulation by way of penalty" also include forfeiture of right to money or other property already delivered. In paragraph 10 and 11, following has been held:

"Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and `ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of tile case. jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according, to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses

with proof of “actual loss or damages”; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether Section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has

jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view.”

17. Learned Counsel for the Appellant submits that above judgement of the Hon'ble Supreme Court was relied on by the Hon'ble Supreme Court in subsequent Judgments. He has relied on Judgment of the Hon'ble Supreme Court in Kailash Nath Associates v. Delhi Development Authority, (2015) 4 SCC 136. In the case of Kailash Nath Associates, public auction was conducted by DDA whereby the Appellant was the highest bidder. Appellant had deposited 25% of the bid amount. Provision of the condition of auction contained the clause that in case of default/breach or non-compliance of the terms and conditions of the auction or misrepresentation by the bidder or intending purchaser, EMD shall be forfeited. DDA acknowledged the receipt of the amount of Rs. 78 Lakhs and directed the Appellant to deposit remaining amount. There was extension granted for depositing the balance amount, consent of the Appellant was also sought by the DDA for making payment of balance amount along with 18% interest which consent was given by the Appellant. Subsequently, the DDA cancelled the allotment and EMD by letter dated 06.10.1993. The Appellant had filed a suit for specific performance and in the alternative recovery of damages and recovery of earnest money. Learned Single Judge had allowed the order for refund of the EMD with 9% interest which judgement was set aside by the Division Bench of the Delhi High Court against which the Appeal was filed by the Appellant. Hon'ble Supreme Court in the above case came to the conclusion that there was no breach on the part of the Appellant hence the forfeiture of the amount

could not have been done. In paragraph 15 and 29, following has been held:

15. Having heard learned counsel for the parties, it is important at the very outset to notice that earnest money can be forfeited under sub-clause (iv) set out hereinabove, only in the case of default, breach, or noncompliance of any of the terms and conditions of the auction, or on misrepresentation by the bidder. It may be noted that the balance 75% which had to be paid within three months of the acceptance of the bid, was not insisted upon by the DDA. On the contrary, after setting up two High Powered Committees which were instructed to look into the grievances of the appellant, the DDA extended time at least twice. It is, therefore, very difficult to say that there was a breach of any terms and conditions of the auction, as the period of three months which the DDA could have insisted upon had specifically been waived. It is nobody's case that there is any misrepresentation here by the bidder. Therefore, under sub-clause (iv), without more, earnest money could not have been forfeited.

.....

29. Based on the facts of this case, it would be arbitrary for the DDA to forfeit the earnest money on two fundamental grounds. First, there is no breach of contract on the part of the appellant as has been held above. And second, DDA not having been put to any loss, even if DDA could insist on a contractual stipulation in its favour, it would be arbitrary to allow DDA as a public authority to appropriate Rs.78,00,000/- (Rupees Seventy Eight Lakhs) without any loss being caused. It is clear, therefore, that Article 14 would apply in the field of contract in this case and the

finding of the Division Bench on this aspect is hereby reversed.”

18. Thus, the Judgement of the Hon’ble Supreme Court in Kailash Nath Associates case was a case where it was held that there was no default by the Appellant hence forfeiture was set aside. Hon’ble Supreme Court in the above case has also occasion to consider Section 74 of the Indian Contract Act and has also referred to and relied on Judgement of the Hon’ble Supreme Court in Fateh Chand v. Balkishan Dass (supra). As a general preposition of law, following the judgement of the Hon’ble Supreme Court in Fateh Chand, Hon’ble Supreme Court held that EMD is an amount to be paid in case of breach of contract and named in the contract as such, it would necessarily be covered by Section 74. In Paragraph 40 of the Judgment, following has been laid down:

“40. From the above, it is clear that this Court held that Maula Bux's case was not, on facts, a case that related to earnest money. Consequently, the observation in Maula Bux that forfeiture of earnest money under a contract if reasonable does not fall within Section 74, and would fall within Section 74 only if earnest money is considered a penalty is not on a matter that directly arose for decision in that case. The law laid down by a Bench of 5 Judges in Fateh Chand's case is that all stipulations naming amounts to be paid in case of breach would be covered by Section 74. This is because Section 74 cuts across the rules of the English Common Law by enacting a uniform principle that would apply to all amounts to be paid in case of breach, whether they are in the nature of penalty or otherwise. It must not be forgotten that as has been stated above, forfeiture of earnest money on the facts in Fateh Chand's case was conceded. In the circumstances, it would therefore be correct to say that as earnest money is an amount to be paid in case

of breach of contract and named in the contract as such, it would necessarily be covered by Section 74.”

19. After considering all authorities, the law on compensation for breach of contract was stated in paragraph 43 of the Judgement. Paragraph 43, 43.1, 43.2, 43.3, 43.4, 43.5, 43.6, 43.7 are as follows:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the

party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

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."

20. For purpose of this case, law as laid down in Paragraph 43.7 is relevant where Hon'ble Supreme Court has clearly held that when forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. The statement of law in paragraph 43.7 is fully applicable in the case of the present case. The present is a case where Appellant participated in the eAuction conducted by the Liquidator under the Liquidation Process Regulations, 2016. Section 74 of the Indian Contract Act has no application in the case of Auction conducted by the Liquidator under the Liquidation Process Regulations, 2016. The terms and conditions of the sale as finalized by the Liquidator under which the e-Auction was held is binding on all including the bidders. Bidders give an unqualified undertaking for participation in the e-Auction after knowing fully well of clauses of the e-Auction Process Document and undertook to abide by the clauses. The submission of the Appellant cannot be accepted that Appellant's

EMD cannot be forfeited even though he has committed default in making the payment of balance amount and the Liquidator should file a suit for forfeiting amount deposited by the Appellant. Such preposterous argument cannot be accepted in view of the fact that Liquidation Process is conducted under the statutory Liquidation Process Regulations, 2016. The terms and conditions of the Process Document has been framed as per statutory empowerment given to the Liquidator by Schedule I of the Liquidation Process Regulations, 2016 as noticed above. When the clauses of the Process Document as noted above, clearly empowers the Liquidator to forfeit the EMD and any payment made in event default is committed by the Highest Bidder, no exception can be taken to the action of the Liquidator in cancelling the sale and forfeiting the amount deposited by the Appellant.”

(Emphasis Supplied)

16. The Principal Bench, NCLAT in the aforementioned Judgment has held that Section 74 of the Contract Act is not applicable to the IBC, 2016 and in this case, the Appellant’s EMD together with all the amounts that were paid was forfeited as he had committed default in making the balance payment which led to the *entire Sale itself being terminated* thereby leading to loss of time and financial loss. It is held in this case that only the terms and conditions of the ‘Process Document’ are to be considered for deciding the issue of forfeiture. The terms and conditions of the said clauses are detailed in Para 12 of the ‘Westcoast Infrastructure’, based on which terms, the NCLAT, Principal Bench has decided the ‘quantum of forfeiture’.

“ 12. We being concerned with the forfeiture of the EMD and part consideration, we need to notice the Clauses regarding the forfeiture. Clause 4.6 deals with EMD and intimation of eligible bidders. Clause 4.6 sub-clause (f) is as follows:

(f) EMD and other amounts paid by the Bidders/Eligible Bidders/Successful Bidders are liable to forfeiture in case of any default or misrepresentation on the part of the Bidder / Eligible Bidders/ Successful Bidder.”

(Emphasis Supplied)

17. Following the same ratio, in the instant case, the only document which can be relied upon is the ‘Bid Offer Document’ and the terms and conditions thereunder. Hence, the fact remains that Clause 9 of the bid offer, has to be adhered to and therefore, the ‘Adjudicating Authority’ ought to have directed for forfeiture of the amount as per this Clause only, specifically having regard to the fact that an auction was immediately conducted and there was no ‘financial loss’.

18. Now, the next issue which requires to be examined is whether the forfeiture of the entire amount as directed by the ‘Adjudicating Authority’ in the facts of this case, amounts to ‘unjust enrichment’ of the Stakeholders of the Corporate Debtor. The Learned Senior Counsel for the Respondent placed reliance on the Judgment of the Hon’ble Supreme Court in the matter of **‘Kridhan Infrastructure private Limited Vs. Venkatesan Sankaranarayanan and Ors.’** in **Civil Appeal No. 3299/2020** in support of his submission that time is a crucial facet of this scheme under IBC and to allow such proceeding to lapse into a delay will plainly

defeat the object of the statute. The Learned Senior Counsel drew our attention to paras 3.9 and para 11 which read as hereunder:

“ 3. XXX

9. Liquidation of the corporate debtor should be a matter of last resort. IBC recognises a wider public interest in resolving corporate insolvencies and its object is not the mere recovery of monies due and outstanding. The appellant has indicated its bona fides, at least prima facie at the present stage, by unconditionally agreeing to subject itself to the forfeiture of an amount of Rs 20 crores, which has been deposited by it, in the event that it fails to comply with the requirement of depositing an additional amount of Rs 50 crores within a period of three months in terms of the understanding that was arrived at on 25-2-2020. In order to enable the appellant to have one final opportunity to do so, we direct that the appellant shall, in order to demonstrate its bona fides deposit an amount of Rs 50 crores upfront in terms of the understanding which was arrived at on 25-2-2020. The appellant is specifically placed on notice of the fact that should it fail to do so in whole or in part, the entire amount of Rs 20 crores which has been deposited thus far, shall stand forfeited without any further recourse to the appellant. Accordingly, the following interim directions are issued:

(i) the operation of the impugned order of NCLAT dated 8-9-2020 [Kridhan Infrastructure (P) Ltd. v. Venkatesan Sankaranarayan, 2020 SCC OnLine NCLAT 639] , is stayed;

(ii) the appellant shall, in order to demonstrate its ability to implement the resolution plan and in compliance with the understanding arrived at on 25-2-2020 deposit an amount of Rs 50 crores, on or before 10-1-2021; and

(iii) the auction of the properties of the corporate debtor shall remain stayed in the meantime.

.....

11. The appellant has been unable to raise the funds. The fact of the matter, as it emerges from Mr Viswanathan's submissions, is that the appellant will be unable to raise funds from the term lenders who are insisting that the status of the Company should change from a company under liquidation to an active status. The order of liquidation has not been set aside. Ultimately, what the request of the appellant reduces itself to, is that it would raise funds on a mortgage of the assets of the Company and unless the Company is brought out of liquidation, it would not be in a position to raise the funds. This is unacceptable. At this stage, the order of liquidation has only been stayed, but a final view was, thus, to be taken by this Court. Sufficient opportunities were granted to the appellant earlier during the pendency of the proceedings both before the NCLT and Nclat. The orders of the NCLT and Nclat make it abundantly clear that despite the grant of sufficient time, the appellant has not been able to comply with the terms of the resolution plan. Since 9-10-2020, despite the passage of almost five months, the appellant has not been able to deposit an amount of Rs 50 crores. Time is a crucial facet of the scheme under IBC [Innoventive Industries Ltd. v. Icici Bank, (2018) 1 SCC 407, paras 12-16 : (2018) 1 SCC (Civ) 356] . To allow such proceedings to lapse into an indefinite delay will plainly defeat the object of the statute. A good faith effort to resolve a corporate insolvency is a preferred course. However, a resolution applicant must be fair in its dealings as well. The appellant has failed to abide by its obligations. In that view of the matter, we see no reason or justification to entertain the civil appeal any further. The consequence envisaged under the order of this Court shall accordingly

ensue in terms of the forfeiture of the amount of Rs 20 crores. As a consequence of this order, the management shall revert to the liquidator for taking steps in accordance with law. The civil appeal is accordingly dismissed.”

(Emphasis Supplied)

17. In the aforementioned Judgment, the Appellant had submitted a Resolution Plan which was approved and the Appellant had deposited a certain amount in the Escrow account of the Corporate Debtor. However, the Appellant did not fulfil its further obligations, despite numerous opportunities given. The ‘Adjudicating Authority’ allowed the liquidation of the Corporate Debtor, which was upheld by the NCLAT and in an Appeal before the Hon’ble Apex Court, the Appeals were dismissed, observing that the Appellant was unable to raise the fund in compliance of the terms and conditions of the Resolution Plan and as the Appellant had indicated its *bona fides* atleast *prima facie* at the present stage, by unconditionally agreeing to subject itself to the forfeiture of an amount of Rs. 20 Crores, which has been deposited by it, in the event that it fails to comply with the requirement of depositing an additional amount of Rs. 50 Crores, within a period of three months, the entire amount of Rs. 20 Crores agreed by it and deposited in the Escrow account was forfeited. In the facts of the attendant case on hand, the amount agreed to be forfeited is only the ‘commitment advance’ and moreover, it is not the Resolution Plan which has been breached, but the terms of a ‘Private Sale auction’ in a liquidation whereby and whereunder a separate auction was held and ‘no loss’ was caused. Even the principle laid down in the

matter of *‘Kridhan Infrastructure Pvt. Ltd.’* (Supra) categorically lays down that it was the entire amount which was unconditionally agreed to be subjected to forfeiture, was the actual amount forfeited. The aforementioned case relied upon by the Learned Senior Counsel Mr. T.K. Bhaskar cannot be said to be strictly applicable to the facts of the attendant case as the non-adherence to the terms of a Resolution Plan, governed by IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, cannot be on the same footing as non-compliance with the payment terms in an auction of Private sale under Liquidation governed by IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Be that as it may, even otherwise, according to the principle in the matter of *‘Kridhan Infrastructure’* the amount strictly to be forfeited for laches / breaches in payment terms, could only be the actual committed and agreed terms, which again establishes adherence to Clause 9.

18. The fact of the matter is that the ‘Raichur’ assets of the Corporate Debtor was sold as a ‘going concern’. Regulation 32 of the Liquidation Regulations, 2016 deals with sale of assets, by which the Liquidator may sell in the following manner:

“32. Sale of Assets etc. - The liquidator may sell –

- (a) an asset on a standalone basis;*
- (b) the assets in a slump sale;*
- (c) a set of assets collectively;*
- (d) the assets in parcels;*
- (e) the corporate debtor as a going concern; or*
- (f) the business(s) of the corporate debtor as a going concern:*

Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.”

19. Disposal of Corporate Debtor as a going concern: Regulation 32 provides for manner of sale and Regulation 33 of these Regulations provides for mode of sale of assets of a company during liquidation process. This indicates that such sale can be by way of slump sale meaning transfer of an undertaking as a whole.

20. Asset distribution in corporate liquidation process - In the normal parlance “going concern” sale includes transfer of assets along with the liabilities. However, as far as the “going concern” sale in liquidation is concerned, there is a clear difference that only assets are transferred and the liabilities of the corporate debtor has to be settled in accordance with Section 53 of the Code.

SCHEDULE I MODE OF SALE

(Under Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016)

1. AUCTION

(1) Where an asset is to be sold through auction, a liquidator shall do so in the manner specified herein.

(2) The liquidator shall prepare a marketing strategy, with the help of marketing professionals, if required, for sale of the asset. The strategy may include-

- (a) releasing advertisements;
- (b) preparing information sheets for the asset;
- (c) preparing a notice of sale; and
- (d) liaising with agents.

(3) The liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any:

[Provided that the liquidator shall not require payment of any non-refundable deposit or fee for participation in an auction under the liquidation process:

Provided further that the earnest money deposit shall not exceed ten percent, of the reserve price.]

(4) The reserve price shall be the value of the asset arrived at in accordance with regulation 35.

(4A) Where an auction fails at the reserve price, the liquidator may reduce the reserve price by up to twenty-five percent of such value to conduct subsequent auction.

(4B) Where an auction fails at reduced price under clause (4A), the reserve price in subsequent auctions may be further reduced by not more than ten percent at a time.

(5) The liquidator shall make a public announcement of an auction in the manner specified in Regulation 12(3); Provided that the liquidator may apply to Adjudicating Authority to dispense with the requirement of Regulation 12(3)(a) keeping in view the value of the asset intended to be sold by auction.

(6) The liquidator shall provide all assistance necessary for the conduct of due diligence by interested buyers.

(7) The liquidator shall sell the assets through an electronic auction on an online portal, if any,

designated by the Board, where the interested buyers can register, bid and receive confirmation of the acceptance of their bid online.

(8) If the liquidator is of the opinion that a physical auction is likely to maximize the realization from the sale of assets and is in the best interests of the creditors, he may sell assets through a physical auction after obtaining the permission of the Adjudicating Authority. The liquidator may engage the services of qualified professional auctioneers specializing in auctioning such assets for this purpose.

(9) An auction shall be transparent, and the highest bid at any given point shall be visible to the other bidders.

(10) If the liquidator is of the opinion that an auction where bid amounts are not visible is likely to maximize realizations from the sale of assets and is in the best interests of the creditors, he may apply, in writing, to the Adjudicating Authority for its permission to conduct an auction in such manner.

(11) If required, the liquidator may conduct multiple rounds of auctions to maximize the realization from the sale of the assets, and to promote the best interests of the creditors.

(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety 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 ninety days.

(13) On payment of the full amount, the sale shall stand completed, the liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.

“PRIVATE SALE”:

- (1) Where an asset is to be sold through private sale, a Liquidator shall conduct the sale in the manner specified herein.*
- (2) The liquidator shall prepare a strategy to approach interested buyers for assets to be sold by private sale.*
- (3) Private sale may be conducted through directly dealing with potential buyers or their agents, through retail shops, or through any other means that is likely to maximize the realizations from the sale of assets.*
- (4) The sale shall stand completed in accordance with the terms of sale.*
- (5) Thereafter, the assets shall be delivered to the purchaser, on receipt of full consideration for the assets, in the manner specified in the terms of sale.”*

(Emphasis Supplied)

21. It is seen from condition 3 of Mode of Sale that the Liquidator shall prepare the terms and conditions of the Sale, including Reserve Price and the Earnest Money Deposit, with a proviso that the EMD shall not exceed 10 % of the Reserve Price. Schedule 1 of the Liquidation Regulations 2016, does not anywhere specify regarding the forfeiture of any amount over and above what was agreed upon in the terms and conditions, which in the instant case is the accepted ‘Bid Offer’. When a Corporate Debtor Company is sold as a going concern, the entity of the Corporate Debtor itself gets transferred, the equity shareholding gets transferred or extinguished, new shares are issued, the

purchasers carry on the business of the Corporate Debtor after the sale of assets is confirmed, the existing employees will have a chance to continue any other employment and the proceeds from the sale of assets would be utilized for distribution to the Creditors in the manner specified under Section 53 of the Code. Therefore, all the Creditors of the Corporate Debtor gets discharged and the assets are transferred free of all encumbrances. The legal entity of the Corporate Debtor survives with only the ownership of the Company transferred to the Successful bidder. Under the IBC, the Liquidator has to follow the procedure prescribed under the relevant Regulations.

22. The ratio of the Westcoast Infrastructure of the Principal Bench, NCLAT is squarely applicable to the facts of this case. The terms in Clause 4.6 of the document dealt with forfeiture of *EMD and other amounts paid by the bidders*. At the cost of repetition, it is held in para 20 of the Judgment that *the terms and conditions of the 'Sale' as finalized by the liquidator under the E-Auction was held as binding on all Stakeholders including the bidders. The terms and conditions of the Process Document has been framed as per the statutory empowerment given to the liquidation by Schedule I of the Liquidation Regulations, 2016. When the clauses of the Process Document, empowers the liquidator to forfeit the EMD and the amounts paid, no exception can be taken.* In the instant case, likewise, applying the same ratio, all the Parties are bound by Clause 9 of the Bid Offer which is accepted.

23. The Appellant is bound by Clause 9 of the bid document and so are the Stakeholders of the Corporate Debtor Company specifically keeping in view that the second auction has fetched the price maximizing the value of the assets. The liquidator has not brought to the notice of this Tribunal to suggest that the total amount could be forfeited under some specific Regulation, Rule of the Liquidation Regulations, 2016. It is the case of the Learned Counsel for the Respondent that the 'Adjudicating Authority' has powers to pass any consequential Order. The question here is not whether the 'Adjudicating Authority' has powers to pass any consequential Order or not, but the issue is whether the 'Adjudicating Authority' is *justified* in giving a direction to forfeit the entire amount in the absence of any such term agreed upon in the Bid Document and when there is no loss caused. The only power is given in terms of the 'Bid Document'. Hence, any Order forfeiting, the amount beyond what is stipulated in Clause 9 of the Bid document, can be said to be in the absence of any specific Rule or Regulation provided for under the Code.

24. The question of forfeiture of the entire amount is also to be examined on the touchstone of the principle laid down by the Hon'ble Apex Court in a catena of Judgments whereby any 'undue enrichment' gained by the Parties involved is to be seen. The Learned Senior Counsel for the Appellant, Mr. Virender Ganda relied on the Judgment of the Hon'ble High Court of Madras in the matter of

‘Rubina Vs. Authorised Officer, Axis Bank Limited’ reported in [(2021) SCC Online MAD 2349], the Hon’ble High Court has observed as follows:

“7. The right to forfeit has, ordinarily, to be balanced against the rule against unjust enrichment. Merely because there is a forfeiture clause does not imply that the entire amount deposited has to be forfeited. The forfeiture clause, like an earnest money deposit clause or a liquidated damages clause, has to be regarded as a genuine pre-estimate of the loss that may have been incurred, but when a forfeiture clause does not indicate an amount but provides that the entire amount tendered would be forfeited, it may not be permissible to forfeit, say 99% of the payment made for the default in depositing the balance 1%. Thus, the quantum that can be forfeited will depend on the extent of the loss or damage suffered by the party not in breach and this is, essentially, a question of fact that has to be adjudicated by an appropriate forum. The High Court, in exercise of the jurisdiction under Article 226 of the Constitution, is not such forum.”

25. The Hon’ble Supreme Court in the matter of **‘Alisha Bank Vs. Indian Bank (Allahabad Bank & Ors.)’** in **S.L.P. Nos. 15959-15960/2021** has set aside the Order of forfeiture of 25 % of the amount of auction sale consideration and directed the Respondent Bank to refund / return the amount earlier deposited by the Appellant, within four weeks. The Learned Senior Counsel for the Appellant relied on the ratio of the Hon’ble Apex Court in the matter of **‘Katta Sujatha Reddy and Anr. Vs. Siddamsetty Infra Projects and Ors.’** reported in [(2023) 1 SCC 355] in support of his submission that interest should be awarded as the Stakeholders were in possession of the amounts for a considerable period of time.

In the aforementioned matter, it was held that though there is a forfeiture clause in the agreement, this Court with a view of rendering complete justice between the Parties, deems it appropriate to direct the vendors / Appellants to repay the said amount with interest at 7.5 % per annum from the date of such payment made by the purchaser to the vendor till the amount is paid back.

26. In the instant case, the Appellant had made a payment of Rs. 37.80 Crores, which is more than 30 % of the sale consideration and admittedly could not pay the balance amount within the specified period of time, though has filed Applications before the ‘Adjudicating Authority’, seeking extension of time. At the cost of repetition, the only clause in the bid offer, dated 02/09/2021, which refers to forfeiture, is 10 % of the bid amount. Undisputedly, in the instant case, the forfeiture was consented to by the SCC on 02/08/2022, the ‘Adjudicating Authority’ rejected IA No. 952/2022 on 04/08/2022 and the e-auction sale notice of the Raichur assets was published by the Respondent on 12/08/2022 and admittedly, the offer of the successful bidder of Rs. 145 Crores was consented to by the SCC, which establishes that there was no inordinate delay or loss of time or any financial loss having been incurred.

27. The Learned Senior Counsel, Mr. Virender Ganda drew our attention to the Minutes of the 13th SCC Meeting held on 01/08/2022 in which it was deliberated that *‘pending the outcome of the Application filed by the buyer, it would not be prudent to distribute the amounts at that stage and that the amount would be*

retained by the Liquidator and appropriate action would be taken based on the final verdict of the NCLT in this regard’ and therefore, the Stakeholders ought not to have distributed the amount when the Appeal was pending here. It is the case of the Learned Senior Counsel for the Respondent, Mr. T.K. Bhaskar that subsequent to this Meeting, the Application filed by the Appellant was dismissed by the ‘Adjudicating Authority’, vide Order dated 10/08/2022 and only subsequent to that Order the Stakeholders had distributed the amounts and therefore, there are no latches in this regard.

28. It is pertinent to mention that the forfeited amount has been distributed amongst the Stakeholders in December 2022, during the pendency of the Appeal before this Tribunal. Keeping in view that the ‘Sale’ is a ‘Private Sale’, there was extension sought for subsequent to 31/05/2022, IA No. 826/2022 was mentioned on three working days, the Hon’ble High Court of Madras has given liberty to raise all contentions available in law, the Company was sold as a ‘going concern’ under Regulation 32 of the Liquidation Regulations, 2016, the subsequent auction resulted in maximization of the price from Rs. 105.21 Crores to Rs. 145 Crores, any forfeiture over and above the commitment amount mentioned in Clause 9 of the bid offer, is unjust leading to ‘undue enrichment’ of the Stakeholders of the Corporate Debtor. There is no evidence that any loss was suffered in consequence of default by the Appellant. It is not the case of the Respondent that the subject asset had depreciated in value since the date of the auction nor is there

any documentary proof that any special damage had resulted. Having regard to the facts of this case, I am of the view that beyond the maximized value of the asset (Rs. 145 Crores, which is the final sale consideration), if any amount of the unsuccessful auction bidder, over and above the ‘commitment advance’, is forfeited and added into the account of the Corporate Debtor, benefitting the Stakeholders of the Corporate Debtor Company, it would amount to ‘undue enrichment’. For all the foregoing reasons, it is observed that the forfeiture of the part consideration over and above the ‘commitment advance’, is held to be arbitrary and not in accord with fair play and equity. Therefore, it is held that only 10 % of the bid amount is to be forfeited and the balance amount which has been distributed amongst themselves is required to be refunded as provided for under Regulation 43 of the Liquidation Regulations, 2016 which states as follows:

“43. A Stakeholder shall forthwith return any money received by him in distribution, which he was not entitled to at the time of distribution, or subsequently became not entitled to.”

29. In the instant Case, the Stakeholders are not entitled to the amounts distributed over and above the commitment amount and are directed to return the same as provided for under Regulation 43 of the Liquidation Regulations, 2016, within four weeks from the date of this Order, failing which the amounts shall attract interest at 6 % p.a. from 02/08/2022.

30. For all the forgoing reasons, these Appeals are allowed in part holding that from the entire forfeited amount of Rs. 37.80 Crores, 10 % of the bid amount (Rs. 105.21 Crores) i.e. Rs. 10.521 Crores is required to be forfeited as per Clause 9 of the Bid offer, dated 02/09/2021 and accepted by the SCC on 15/09/2021 and confirmed by the ‘Adjudicating Authority’, vide Order dated 22/09/2021 and the balance amount distributed by the Stakeholders, during pendency of the Appeal, is directed to be refunded within four weeks from the date of this Order, failing which the amount shall attract interest at 6 % p.a. from 02/08/2022 till the date of realization. No Order as to Costs. All connected Pending Interlocutory Applications, if any, are closed.

[Shreesha Merla]
Member (Technical)

20/10/2023
SPR/TM