

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12TH DAY OF DECEMBER, 2025



PRESENT

THE HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE C.M. POONACHA

WRIT APPEAL NO. 68 OF 2025 (GM-RES)

BETWEEN:

1. SRI PANKAJ SRIVASTAVA
LIQUIDATOR OF
M/S SAMRUDHI REALTY LTD.
AGED ABOUT 50 YEARS
HAVING OFFICE AT NO.5
VI CROSS, NAVYA NAGAR
JAKKUR, BANGALORE - 560 064

...APPELLANT

(BY SRI MILIND DANGE, ADVOCATE)

AND:

1. SRI DINESH PULIPATI
AGED ABOUT 47 YEARS
S/O P. BHASKAR NAIDU
RESIDING AT NO.113, 11TH MAIN
IV 'T' BLOCK, JAYANAGAR
BANGALORE - 560 041

2. THE REGISTRAR
NATIONAL COMPANY LAW TRIBUNAL
RAHJEA TOWERS, M.G. ROAD
BANGALORE - 560 001
(PROFORMA PARTY)

...RESPONDENTS

(BY SRI B. VACHAN, ADVOCATE FOR C/R-1)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE ORDER PASSED IN W.P. NO.5759/2024 (GM-RES) BY THE LEARNED



SINGLE JUDGE OF THIS HON'BLE COURT DATED 12/12/2024, AND CONSEQUENTIALLY DISMISS THE W.P. NO.5759/2024 (GM-RES) FILED BY THE RESPONDENT NO.1 AND ETC.

THIS WRIT APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, JUDGMENT WAS PRONOUNCED AS UNDER:

CORAM: HON'BLE MR. VIBHU BAKHRU ,CHIEF JUSTICE
and
HON'BLE MR. JUSTICE C.M. POONACHA

CAV JUDGMENT

(PER: HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE)

1. The appellant has filed the present appeal impugning an order dated 12.12.2024 passed by the learned Single Judge in W.P.No.5759/2024 (GM-RES).
2. Respondent No.1 [**writ petitioner**] had filed the said petition impugning a letter dated 09.02.2024 issued by the appellant – Liquidator of M/s.Samrudhi Realty Limited [hereafter, '**the Liquidator**'] – communicating his decision to disqualify the writ petitioner as a successful bidder; cancel the Letter of Intent [**LOI**]; forfeit the Earnest Money Deposit [**EMD**]; and Interest Free Refundable Participation Deposit Money [**PDM**].

3. The learned Single Judge allowed the writ petition and directed the Liquidator to refund an amount of ₹ 70,00,000/- (Rupees seventy lacs) to the writ petitioner *albeit* without interest, within a period of four weeks from the receipt of the certified copy of the order. The learned Single Judge permitted forfeiture of the balance amount of ₹ 3,70,000/- by the Liquidator.

The Context

4. The National Company Law Tribunal [**NCLT**] had passed an order on I.A.No.116/2020 in C.P.(IB) 189/BB/2018 dated 13.03.2020, appointing the Liquidator as the Official Liquidator of M/s. Samrudhi Reality Limited [**SRL**].

5. In order to liquidate the assets of SRL, the Liquidator had issued a public notice dated 01.01.2024 for sale of certain assets by way of an 'eAuction'. The said notice was also accompanied by an eAuction Process Memorandum [**Auction Memorandum**] setting out the terms and conditions. The said notice had set out twelve (12) projects of SRL, which were proposed to be sold/monetized. Additionally, the bidders could also submit their bid for SRL as a 'going concern', comprising of all projects, which were also separately listed out in the notice. The notice specified the

reserved price for SRL as a going concern, as well as for separate projects and the EMD required to be deposited by intending bidders.

6. The notice expressly set out that the sale of assets through eAuction would be conducted strictly on "As is where is basis", "As is what is basis", "Whatever there is basis" and "Without any recourse basis".

7. The writ petitioner submitted his bid in respect of the IV Block Asset [**Block-IV**] which was a project named 'Song of Winds' being developed on a plot of land bearing Sy. No.256/4, measuring 3.86 acres located at Kudavathi Village, Nandi Hobli, Chikkaballapura Taluk, on 11.01.2024. The writ petitioner had prior to submission of the aforementioned bid, had also submitted the PMD of ₹ 6,70,000/- (Rupees six lacs seventy thousand only) along with the relevant documents regarding his eligibility. The writ petitioner also deposited a further amount of ₹ 67,00,000/- (Rupees Sixty Seven Lakhs only) as EMD on 03.02.2024.

8. The eAuction was held on 05.02.2024 and the writ petitioner was declared as a successful bidder for Block-IV. The Liquidator issued a LOI immediately thereafter (on 06.02.2024), calling upon

the writ petitioner to confirm acceptance of the LOI within two days as stipulated in the Auction Memorandum. The writ petitioner was also called upon to pay an amount of ₹ 2,17,50,000/- (Rupees two crores seventeen lacs fifty thousand only) being 15% of the total bid amount of ₹ 14,50,00,000/- (Rupees fourteen crores fifty lacs only) within a period of one day from the date of issuance of the LOI.

9. The schedule of payment of sale consideration, as set out in the LOI is reproduced below:

SL No.	EVENT	TIMELINE	AMOUNT (IN INR)
1	PMD received on 11 th Jan 2024	Amount Received	₹ 6,70,000
2	EMD received on 3 rd Feb 2024	Amount Received	₹67,00,000
3	Payment of 15% of total consideration by successful bidder as per the process memorandum dated 01.01.2024	To be paid on or before 7th February 2024 (Within 1 day of issue of LOI)	₹2,17,50,000
3	Payment of balance consideration by successful bidder post issue of LOI (within 90 days of issue of LOI)	On or before 6th May 2024	₹11,58,80,000
TOTAL SALE CONSIDERATION			₹14,50,00,000/

Provided that payments made after thirty days from Lol Date (07.03.2024) shall attract interest at the rate of 12% p.a. on balance consideration (Approximately ₹ 38,000/- Per day).

Provided further that in case the payments are not made as per the prescribed schedule, all the monies received by the

liquidator shall first be apportioned to the interest and then on the sale consideration.

10. The writ petitioner was also informed that if the payments were made after 30 (thirty) days from the date of the LOI, that is, after 07.03.2024, the same would attract interest at the rate of 12% per annum on the balance consideration. It was also stated that if the payments were not paid within the prescribed time schedule, the amounts received by the Liquidator would be apportioned towards interest and then towards sale consideration.

11. The writ petitioner did not accept the LOI, instead he sent an email dated 07.02.2024 clearly stating that the conditions provided in the annexure to the LOI could not be accepted by him. He claimed that his understanding of the liquidation process was that the Liquidator was selling assets both movable and immovable of the liquidating company (SRL), on a standalone basis. He also stated that he had no intention of commencing the project 'Song of Winds' immediately. He claimed that he was "shocked and surprised" to receive the LOI with an annexure containing certain obligations requiring him to continue with the development of the project and hand over a part of the same to erstwhile allottees. He also claimed that it was never his understanding regarding the

formation of a monitoring committee to be headed by the Liquidator to oversee the construction and completion of the project in question. He stated that he had serious objections to proceed with the transaction with this kind of obligations imposed on him. He also sought an opportunity to discuss the matter with the Liquidator.

12. According to the Liquidator, there were no additional terms or obligations imposed on the writ petitioner and he had unconditionally accepted the terms of the eAuction.

13. The writ petitioner claims that, notwithstanding the objections as set out in the email dated 07.02.2024, he got demand drafts prepared to pay the amount of ₹2,17,50,000/-. The copies of the said demand drafts bearing the date of 09.02.2024, have been placed on record. The writ petitioner states that he had visited the office of the Liquidator, but the Liquidator did not entertain him. On the same date that is, 09.02.2024, the Liquidator issued the impugned letter, disqualifying the writ petitioner as a successful bidder; cancelling the LOI, forfeiting the PMD and the EMD deposited by the writ petitioner.

14. Aggrieved by the same, the writ petitioner preferred the impugned writ petition.

15. The writ petitioner stated that Clause 4.3 of the Auction Memorandum, which required the writ petitioner to enter into a memorandum of understanding/agreement with the home allottees by negotiating a cost escalation of ₹700 per square feet to ₹2,000 per square feet, was contrary to the writ petitioner's email dated 31.01.2024 sent to the Liquidator. The writ petitioner stated that the said condition was onerous. He had, accordingly, requested the Liquidator to modify the same, but did not receive a satisfactory response.

16. The writ petitioner claimed that the terms of the auction as set out in the Auction Memorandum was contrary to Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 [**IBBI Regulations**], which did not provide for any forfeiture.

17. The learned Single Judge allowed the said petition in terms of the impugned order. The Court accepted that, since Schedule I of the IBBI Regulations do not provide for forfeiture of EMD, the relevant clause of the Auction Memorandum permitting such

forfeiture was ultra vires the statutory provisions. Additionally, the Learned Single Judge observed that Block IV was sold to another bidder for ₹14.05 crores; thus, mitigating any potential loss.

18. The learned Single Judge held that the forfeiture of the entire EMD was not justified. Accordingly, directed that the sum of ₹3,70,000/- be forfeited as compensation and the balance of ₹70,00,000/- be refunded to the writ petitioner without any interest.

Submissions

19. The learned counsel appearing for the appellant submits that the EMD was required to be forfeited in terms of the Auction Memorandum and the same was in accordance with the terms and conditions of the eAuction.

20. He relied on the decisions of the Supreme Court in **Shri Hanuman Cotton Mills and others v. Tata Air Craft Limited : (1969) 3 SCC 522**, **Kailash Nath Associates v. Delhi Development Authority : (2015) 4 SCC 136**, **Authorised Officer State Bank of India v. C. Natarajan and another: (2024) 2 SCC 637** and **South Eastern Coalfields Limited and others v. M/s. S. Kumar's Associates AKM (JV) : (2021) 9 SCC 166**.

21. Mr. B.Vachan, the learned counsel appearing for respondent No.1 referred to the decision of the Supreme Court in **V.S. Palanivel v. Sri Lakshmi Hotels : (2025) 1 SCC 559** in support of his contention that the EMD could not have been forfeited. He also contended that the IBBI Regulations were mandatory and were required to be followed.

Reasons and conclusion

22. The controversy involved in the present appeal falls in a narrow compass. The only question to be addressed is whether the Liquidator appointed under the Insolvency and Bankruptcy Code, 2016, is empowered to forfeit the EMD deposited by the writ petitioner for participating in the auction.

23. At the outset we may note Clause 17 of the Auction Memorandum, which sets out the time table for the auction process. The same is reproduced as under:

"17. E-AUCTION PROCESS SCHEDULE

The following timetable shall apply to the E-Auction Process information Sheet. The timetable may be amended by the Liquidator through issuance of an addendum to the E-Auction Process information Document.

SL No.	EVENT	DAY AND DATE
1.	Sale Notice (Public Advertisement) of E-auction	Monday, 1 January, 2024
2.	E-Auction uploaded Process on Information Documents the website www.samruddhirealty.com	Monday, 1 January, 2024
3.	Submission of Interest Free Participating Deposit Money and requisite KYC documents, affidavits (Ann-1), Undertakings (Ann-II), etc. by the interested bidder & complying eligibility criteria	Tuesday, 16 January, 2024
4.	Shortlisting and intimating to the eligible Bidders	Wednesday, 17 January, 2024
5.	Start Date of Access to Data Room	Wednesday, 17 January, 2024
6.	Permission for site visit/Inspection to eligible bidders (subject to receipt of documents as stated at (3) above and prima facie found to be in compliance with the terms and conditions).	Thursday, 1 February, 2024
7.	Last Date of Access to Data Room	Thursday, 1 February, 2024
8.	Last date for Submission Earnest Money Deposit Into the designated bank account	Saturday. 3 February, 2024
9.	E-auction date	Monday, 5 February, 2024
10.	Declaration of Successful Bidder by Service Provider to the Liquidator	Tuesday, 6 February, 2024
11.	Issue of Email Confirmation by the Liquidator to Successful Bidder.	Tuesday, 6 February, 2024
12.	Signing of LOI by Successful Bidder	Thursday 8 February, 2024
12.	Payment of 15% of Bid Value within 1 days by Successful Bidder	Friday. 9 February 2024

13.	Payment of Entire Bid Value after deducting EMD & POM already paid by successful bidder within 30 days (payments after 30 days up to maximum of 90 days shall carry interest of 12% p.a.)	Tuesday 7 May, 2024
14.	Return of EMD and PMD to unsuccessful Bidder	Thursday March 2024

24. The Auction Memorandum is a comprehensive document, which also sets out the information as to various projects. As noted above, Block-IV is the project named "Song of Winds". The information as set out regarding the said project is reproduced below:

"Project 3 :-

Project Song of Winds:

Song of Winds is a plotted development project, and the land is owned by the corporate debtor. The project is 10% complete

Total plots proposed were 71 and 23 are sold; rest remain unsold.

Project-Song of Winds-Claim and Area Details

Status on LCD	Home Allottee Claim Amount	Home Allottee Admitted Principal	Area SBA (Sq. ft)	Total Units
ALLOTTED UNITS	2,84,71,651	2,30,54,295	26,961	22
CANCELLED ALLOTMENTS				1
UNSOLD			62,517	49
Grand Total	2,84,71,651	2,30,54,295	89,478	72

”

“Song of Winds : Project Details

Type of Property	Plots
Survey No.	Survey No. 256/4, Kudavathi Village, Nandi Hobli, Chikkaballapura Taluk
Location	Survey No. 256/4, Kudavathi Village, Nandi Hobli, Chikkaballapura Taluk
Location	Chikkaballapura
% of Completion	10% (approximately)
Plan Sanction Received (BDA & BBMP)	Yes
RERA Registration Number	PRM/KA/RERA/1254/460/PR/171214/000572
Registration Validity	31-07-2017 to 18-09-18
Registration Status	Expired
Timeline for each project - As per Rera	01-03-2019
JD Ratio (SRL% : OWNER%)	Own land
Agreement Available	Sale Deed Available
Land Area (Acres)	3.86
Total Saleable area (In Sq.ft)	89,514
SRL Share (In Sq.ft)	89,514

”

25. Clause 4.3 of the Auction Memorandum also sets out the conditions of sale in respect of incomplete projects. The said clause is reproduced below:

"4.3. Conditions of Sale of incomplete projects with Home Allottees under EAuction [Block 1 (Going Concern), Projects/Units in Block 2,4,6,7,8,9,10,11, 12,13]:

4.3.1. It is to be noted that the bidders cannot place a bid for the various blocks of assets at a value below the reserve price. Further, the bidders can increase their Bid by a minimum incremental amount as specified for the respective blocks in multiples of the amounts specified.

4.3.2. In relation to incomplete projects consisting of allotted units/areas to home buyers/allottees as on Liquidation Commencement Date(LCD), the successful auction purchaser of within 90 days of issue of sale certificate shall:

d. Enter into MOU/Agreement with Authorised Representatives of Home Allottees of each project and Liquidator and to mutually agree on the time and cost of completion each incomplete project;

e. Based on the Economic viability, negotiate a cost escalation ranging between ₹ 700/- (Rupees Seven Hundred) Per Square feet to ₹ 2000/- (Rupees Two Thousand) Per Square feet of the allotted area applicable for each project as part of MOU/agreement in clause (a) above.

f. Finalise the schedule of collection of balance amounts due from home allottees as on LCD for inclusion in the terms of MOU/agreement as per clause (a) above.

4.3.3. Post completion of Sale of aforesaid project block/s by auction, the Liquidator shall constitute Monitoring committees of each project with nominees of Authorised representatives of Home

Allottee Association of each Project and Authorised Representative of Successful Auction Purchaser of which he shall be the Chairperson. Liquidator shall chair the monitoring committee of each under construction project and hold periodical reviews including project progress, cashflow monitoring until 'completion and handover of each incomplete project to home allottees.

4.3.4. Successful Auction Purchaser shall bear the administrative expenses of monitoring committee including fees payable to the Chairman and out of pocket expenses."

26. Any person interested in participation in the eAuction was required to deposit (the Interest Free Refundable Participation Deposit Money) as stipulated for various projects. In terms of the Auction Memorandum, a person interested in bidding for Block-IV (Project Song of Winds) was required to deposit a sum of ₹ 6,70,000/- as PMD along with the Expression of Interest.

27. The Auction Memorandum also stipulated that access to the details of the assets of SRL would be provided to eligible bidder, subject to the bidder submitting the requisite forms, documents, authorisations, affidavit and undertaking and executing a confidentiality undertaking. Additionally, the bidder would also require to furnish the required PDM and EMD.

28. Clause 4.13 of the Auction Memorandum provided for forfeiture of EMD and PDM. The said clause is set out below:

"4.13. Forfeiture of Earnest Money deposit (EMD) & Interest Free Refundable Participation Deposit Money (PDM)

It is to be noted that the Entire Amount paid by any of the bidders (including EMD & PDM), is liable to be forfeited including cancellation of the sale if any, without any further notice or intimation by the Liquidator and without any recourse by the bidder, upon the occurrence of any one of the following events:

- (a) If any of the conditions under this E-Auction Process Document are breached by the Eligible Bidder or in case the Eligible Bidder is found to have made any misrepresentation;
- (b) Existence of any collusion between the relevant Bidder/s, or between the Bidder and the Company's related parties, or any creditors of the Company and the Bidder/s.
- (c) If the Eligible Bidder or any person acting jointly or in concert with such Eligible Bidder is found to be ineligible to submit a bid under Section 29A of the IBC or is found to have made a false or misleading declaration of eligibility under Section 29A of the IBC; or found to be ineligible owing to previous failure or withdrawal by the Bidder in any previous offer as contemplated above in the document.
- (d) If the Successful Bidder does not accept and sign the Letter of Intent issued, by the Liquidator within the period of 2 days from the closure of E-Auction and in the manner specified or
- (e) if the Successful bidder falls to pay the sale consideration (plus any applicable taxes, registration fees, if any, on 100% of

the bid sum) before the expiry of the period for payment of the same as provided in this E-Auction Process Document.

- (f) if the Bidder/E-Auction of auction Participant(s) withdraws from the bidding process (either before or after allocation of login and Password to submit bid on portal) after depositing the Refundable Participation Deposit as well as deposit of EMD for the proposed bid or does not bid in the E-Auction portal.

29. It is relevant to refer to Clause 6 of the Auction Memorandum, which is set out below:

"6. ISSUANCE OF LETTER OF INTENT:

6.1. The Liquidator shall, as soon as reasonably possible following the end of the E- Auction, issue to the Successful Bidder a Letter of Intent ("LoI"/ "Letter of Intent"), inviting the Successful Bidder to provide entire sale consideration (Bid amount) as per Schedule 1 Para 12 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016 within 90 (Ninety) days from the date of LOI after adjusting the EMD already deposited, as below

- i. 15% of the entire Bid Value (excluding 10% of EMD already paid) to be paid immediately within one day after declaration of successful bidder and issuance of LOI.
- ii. 75% of the entire Bid value to be paid as per the norms provided in the Regulations, however:
- iii. payments made after 30 (Thirty) days of the successful e-auction shall attract interest at the rate of 12%:
- iv. that the sale shall be cancelled if the entire payment is not received within ninety days of successful EAuction.

6.2. The Successful Bidder shall, within a period of 2 (two) days from the date of issuance of the Lol, unconditionally accept the Lol, and record such acceptance by providing the Liquidator with 1 (one) copy of the Lol with an endorsement stating that such Lol is, "Accepted Unconditionally", under the signature of the authorized Director/Authorized Signatory of the Successful Bidder.

6.3. Failure to accept the Lol within the time period specified may result in the disqualification of the Successful Bidder along with cancellation of the Lol and forfeiture of the Earnest Money Deposit and Participation Bid Amount, without any recourse by the successful bidder,

6.4. In case of disqualification of a Successful Bidder, the Eligible Bidder who had submitted the next highest bid, may be considered as the new Successful Bidder if the latter is unwilling or express their inability to accept bid submitted by them after above consideration by the Liquidator to give such opportunity to next highest bidder, the Liquidator, at his sole discretion, may decide to carry out afresh E-Auction."

30. There is no cavil as to the terms of the auction. The writ petitioner was fully aware of the terms of the auction as well as said Clause 4.3, which clearly indicated that the successful bidder for the incomplete projects would require to enter into a Memorandum of Understanding / agreement with the authorized representatives of home allottees and to mutually agree on the time and costs for completion of the incomplete project. The successful bidder was also required to re-negotiate the cost of escalation ranging between

₹700 to ₹2,000 per square feet of the allotted area applicable for the project as per MOU.

31. It was expressly stipulated that, if the successful bidder did not accept the LOI within a period of two days from the closure of the eAuction in the manner as specified or if the participant withdrew from the eAuction, the EMD as well as the PDM would be liable to be forfeited.

32. In the present case, the writ petitioner had issued a communication unequivocally stating that the terms and conditions as stipulated in the annexure to the LOI were not accepted by him. He clearly stated that he had no intention of commencing the project. He had also stated that unless the issues pointed out by him were resolved, he would neither sign the LOI nor make any additional payment. Since the writ petitioner had failed to accept the LOI, the Liquidator forfeited the EMD furnished by the writ petitioner in terms of the Auction Memorandum.

33. In view of the above, there can be no dispute that in terms of the Auction Memorandum, the Liquidator is entitled to forfeit the EMD and the PDM.

34. The writ petitioner's challenge to the forfeiture rests essentially on two grounds. First, that forfeiture of the said amount violates Section 74 of the Contract Act, 1872 [**Contract Act**]. And, second, that the same is contrary to the IBBI Regulation. The writ petitioner contends that since the IBBI Regulations as were in force at the material time — that is on the date of the auction — did not provide for forfeiture. Therefore, it was not permissible for the Liquidator to forfeit the PDM and / or the EMD. There is no cavil that PDM and EMD are in the nature of earnest money which was required to be deposited for participating in the bidding process.

35. It is settled law that in the event a party does not complete its obligation, the earnest money can be forfeited. It only forms a part of the purchase price once the transaction proceeds forward.

36. In **Shri Hanuman Cotton Mills** (*supra*), the Supreme Court had referred to various decisions and had summarized its principles regarding earnest money as under:

"25. From a review of the decisions cited above, the following principles emerge regarding "earnest":

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) 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."

37. In the present case, the PDM and EMD being components of the earnest money, represented the bidder's assurance that they would participate in the bidding process and if successful, would complete the contract.

38. In a recent decision in the case of **Authorised Officer, State Bank of India** (*supra*), the Supreme Court rejected the contention that forfeiture of 25% of the sale price, which was paid pursuant to an auction conducted for enforcement of security interest under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [**SARFAESI Act**] could be termed as unjust or inequitable. In the said case, the terms of the auction expressly provided that earnest money would be forfeited in case, the auction purchaser failed to pay the balance consideration. The contesting respondent had participated in the eAuction and had deposited 25% of the sale price, but had failed to pay the balance. The Supreme Court rejected the contention that

the forfeiture of the amount was impermissible or amounted to unjust enrichment by the bank in question.

39. The decision in **Kailash Nath Associates** (*supra*), also does not support the proposition that earnest money cannot be forfeited or such forfeiture would run contrary to Section 74 of the Contract Act. In the said case, the Supreme Court noted that the earnest money could be forfeited in case of default, breach or non-compliance of any terms and conditions of the auction or misrepresentation on behalf of the bidder. However, in the facts of the said case, the Supreme Court did not accept that there was any breach on the part of the appellant of any terms and conditions of the auction. The Court found that the auctioning authority (DDA) had not insisted upon payment of the balance amount, but on the contrary, had specifically waived the condition of payment of the balance consideration within a stipulated period. The Supreme Court also held as under:

"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."

40. Notwithstanding the above, Mr. Milind Dange, the learned counsel appearing for the Liquidator also contended that there was an immediate loss of ₹45,00,000/- suffered by the Liquidator on account of failure on the part of the writ petitioner to perform his obligations. He pointed out that Block IV was sold for ₹14,05,00,000/- (Rupees fourteen crores five lakhs) as against ₹14,50,00,000/- (Rupees fourteen crores fifty lakhs) bid by the writ petitioner.

41. We may also note that Mr. Vachan fairly did not contend that the forfeiture of earnest money would be otherwise contrary to law. His submissions were mainly focused on the challenge to the forfeiture of PDM / EMD on the ground that the same was contrary to the IBBI Regulations. He also referred to Section 238 of the Insolvency and Bankruptcy Code, 2016 [**Code**] and contended that the said Code would override anything inconsistent in any other law, for the time being in force. He submitted that since IBBI Regulations were made under the Code, the same would override the provisions of any other law including the Contract Act. He contended that Schedule I of the IBBI Regulations, which contained provisions regarding mode of sale did not provide for forfeiture of earnest money. He also pointed out that the IBBI Regulations were

amended by a Notification dated 28.01.2025 prospectively with effect from 29.01.2025. The amendments introduced in the IBBI Regulations by virtue of the said Notification included insertion of Rule (12D) in Article of Schedule I to the IBBI Regulations. The said Rule expressly provided that "if a bidder is found ineligible, the earnest money deposited by him shall be forfeited." He submitted that at the time of e-Auction, Rule (12D) of Schedule I of the IBBI Regulations was not in force.

42. We are not persuaded to accept the said contentions for several reasons. First of all, Schedule I of the IBBI Regulations provides for mode of sale by auction as well as by private sale. The said Schedule must be read along with Regulation 33 of the IBBI Regulations which is set out below:

"33. Mode of sale.

(1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The liquidator may sell the assets of the corporate debtor by means of private sale only after prior consultation with the consultation committee under regulation 31A, in the manner specified in Schedule I when -

(a) the asset is perishable;

(b) the asset is likely to deteriorate in value significantly if not sold immediately; or

(c) the prior permission of the Adjudicating Authority has been obtained for such sale:

Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

(a) a related party of the corporate debtor;

(b) his related party; or

(c) any professional appointed by him.

(3) The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties."

43. A plain reading of Regulation 33(1) of the IBBI Regulations clearly indicates that it is not mandatory to follow Schedule I. The use of word "ordinarily" clearly indicates that it is not the legislative intent that Schedule I of the IBBI Regulations be followed in each and every case.

44. As noted above, in the present case, the auction was conducted on 05.02.2024. Rule 1(3) of Schedule I of the Regulations as in force at the material time reads as under:

"(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."

45. As is apparent from Rule (3), the Liquidator is required to specify the terms and conditions of the auction including the EMD, which cannot be more than ten per cent of the reserve price. The PDM and EMD as stipulated in the Auction Memorandum is compliant with this Rule.

46. It is also relevant to refer to Rule 1 (12) of Schedule I of the IBBI Regulations as applicable at the material time, which reads as under:

"(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."

47. Although there was no Rule regarding forfeiture of earnest money, the earnest money by its very nature is a party's guarantee that the contract would be fulfilled. The condition to furnish earnest money is provided to bind the bidder to the terms and conditions of

the bidding process and the commitment to honour the bid. As noted above IBBI Regulations do not prohibit forfeiture of earnest money. Thus, providing for forfeiture of the earnest money on account of default on the part of the bidder to comply with the terms and conditions of the auction and proceed with the transaction cannot be considered as conflicting with Schedule I of the IBBI Regulations.

48. As noted above, Regulation 33 of the IBBI Regulations required the liquidator to "ordinarily" follow Schedule I. Thus, it did not preclude the Liquidator from setting out terms and conditions, which were different from the one set out in the Schedule.

49. In the aforesaid view, we are unable to accept that the terms and conditions of the auction were in conflict with Schedule I of the IBBI Regulations. In any view, Regulation 33 of the IBBI Regulations merely required the liquidator to ordinarily follow the same. Thus, it did not prohibit the Liquidator departing from terms as set out in Schedule I of the IBBI Regulations.

50. Mr. Vachan also contended that in terms of clause 1 (12) of Schedule I of the Regulations, the sale could be cancelled only if the balance payment was not received within a period of ninety

days. He contended that in the present case, the sale was cancelled immediately on the next date, that is on 09.02.2024. He also referred to the Sale Deed executed in favour of the second highest bidder, which recorded that the said bidder had paid the sum of ₹2,10,75,000 by way of remittance through banking channels on 09.02.2024 towards signing of the LOI and being declared a successful bidder. On the aforesaid basis, he submitted that the Liquidator had already taken a decision not to accept payments from the writ petitioner within a period of two days from the date of the auction.

51. We find no merit in the aforesaid contention as well. The sale of Block IV was not confirmed in favour of the writ petitioner and therefore, the cancellation of the same did not arise. The Auction Memorandum clearly specified that the auction would be conducted on 05.02.2024; the successful bidder would be declared on 06.02.2024; an email confirmation would be sent to the successful bidder on the same day; and the successful bidder would require to sign LOI on 08.02.2024. The LOI merely indicates the party's intention to proceed. In this case, the LOI represented the Liquidator's intention to enter into sale of the subject project in favour of the writ petitioner. However, the writ petitioner declined to

accept the LOI in unequivocal terms as was necessary for the Liquidator to proceed further. In effect, the writ petitioner rejected the terms on which he was declared as successful bidder. Thus, the question of the Liquidator to confirm a transaction for sale did not arise. Since the writ petitioner had not accepted the terms of which he was declared the successful bidder, the said declaration was voided. The transaction with him could not proceed further. At the threshold, the question of confirming the sale in favour of the writ petitioner did not arise. The question of cancelling the sale would arise only if the writ petitioner had accepted the LOI and paid the balance 15% of the amount, which was required to be paid by 09.02.2024.

52. The reliance placed by Mr. Vachan on the decision of the Supreme Court in **V.S. Palanivel** (*supra*), is not apposite. In the said decision, the auction was conducted by following the procedure as specified under Schedule I of the IBBI Regulations. The question arose whether the liquidator would have any discretion to condone the delay contrary to the procedure as specified in the said schedule. In the said context, the Supreme Court had interpreted the relevant Rules of Schedule I of the IBBI Regulations and held that the provisions of Rule 12 would have to

be treated as mandatory since it contemplated consequence for non-payment of the balance consideration. The Court rejected the contention that the liquidator could extend the time for paying the balance beyond the period as specified in Rule 12 of Schedule I of the IBBI Regulations.

53. In the present case, the bidding process was undertaken in terms of the Auction Memorandum. Further, the cancellation of the LOI cannot be termed as cancellation of the sale as contemplated under clause 1 (12) of Schedule I of the IBBI Regulations.

54. We may also note that the writ petitioner had accepted the terms of the Auction Memorandum without reservation and had participated in the bidding process being fully aware of the terms and conditions of the auction. It was not open for the writ petitioner to indirectly challenge the same after his earnest money was forfeited in terms of the Auction Memorandum.

55. In view of the above, we are unable to concur with the impugned order directing refund of the EMD and PDM to the extent of ₹70,00,000/-.

56. A plain reading of the impugned order also indicates that the learned Single Judge had faulted the writ petitioner for not

complying with the terms of the Auction Memorandum, However, had confined the amount of forfeiture to ₹3,70,000/-. We find no basis for the same. In terms of the Auction Memorandum, the Liquidator was entitled to forfeit the EMD and PDM, which in this case amounted to about 5.08% of the bid amount.

57. In view of the above, the appeal is allowed and the impugned order is set aside.

**Sd/-
(VIBHU BAKHRU)
CHIEF JUSTICE**

**Sd/-
(C.M. POONACHA)
JUDGE**

KPS/AHB