NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.462/2023

In the matter of:

1. Mr. Pankaj Kumar
2. Mrs. Chandra
(Both at No. 129, Perambalur Chetty Street,
Old Washermanpet, Chennai - 600 021.) **... Appellants/Petitioners**

Vs

M/s. Praiseworth Infra (P) Ltd. (in Liquidation)
Represented through its Liquidator,
Mr. C. Ramasubramaniam
Raji, 3B1, Gaiety Palace, No.1L, Blackers Road,
Mount Road, Chennai - 600 002. **... Respondent**

Present :

For Appellants : Mr. K. Bijai Sundar, Advocate
For Respondent : Mr. Pranava Charan, Advocate

WITH

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For Respondent : Mr. Pranava Charan, Advocate

JUDGMENT
(Hybrid Mode)

[Per: Jatindranath Swain, Member (Technical)]

1. These two appeals filed by the Appellants involve consideration of a common set of facts and law and hence they are being decided together.

2. In **CA (AT) (CH) (Ins) No. 462/2023**, the Appellants seek to challenge the impugned order dated 12.10.2023 passed in IA(IBC)/267(CHE)/2021, preferred in CP/350/IB/2018 under Section 60(5) of I & B Code, 2016 ("Code") to be read with Rule 11 of NCLT Rules, 2016, wherein the prayer of the Appellants was for issuance of direction to the Respondents to arrange for all documents pertaining to the auctioned properties, or alternatively to refund a total sum of ₹4,75,84,375/- paid towards the auction purchase together with interest at 18% per annum was dismissed.

3. In **CA (AT) (CH) (Ins) No. 463/2023**, the Appellants have put a challenge to the order dated 12.10.2023 as passed in IA/235/2022 preferred in CP/350/IB/2018, wherein the prayer of the Appellants to declare the letter of the Liquidator forfeiting the amount paid by the Appellants as illegal, non-est and not

valid in law and to direct the Liquidator to refund the same to Appellants with interest payable on it 18% was dismissed.

4. The reliefs sought in both the Appeals by the Appellants are identical, which is given below:

> '• *To set aside the order dated 12.10.2023 passed by the NCLT, Chennai Bench in IA(IBC)/267(CHE)/2021 in CP/350/IB/2018 and:*
> • *To declare the forfeiture of a sum of Rs.4,75,84,375/- by Respondent Liquidator vide his letter dated 19.03.2021 as null, void and non-est in law, and*
> • *To order for refund for the said sum of Rs.4,75,84,375/- along with interest @18% p.a. from the date of payment till realization*
> • *To order costs and pass such orders as this Honorable Tribunal would deem fit, proper and necessary under the circumstances of the case and render justice.*'

The brief facts of the case:

5. The Corporate Debtor, M/s. Praiseworth Infra (P) Ltd., was ordered for liquidation by Ld. NCLT vide its order dated 19.02.2019, and the Respondent herein viz. Mr. C. Ramasubramaniam was appointed as the Liquidator for the Corporate Debtor. On 21.02.2020, the Liquidator issued an advertisement in dailies, viz. Business Standard (English) newspaper and Maalai Malar (Tamil) newspaper for the e-auction of vacant land (Survey no. 1206- land 34,564.30 sq. ft) and a marriage hall (Survey no. 1062, Land 14,508 sq. ft) that was owned by the Corporate Debtor. The Appellants individually submitted their tender forms

on 18.03.2020 along with the EMD amount as prescribed in the tender document. The 1st Appellant (Mr. Pankaj Kumar) submitted his tender for the vacant land with EMD amount of ₹1,03,38,750/- by depositing the same with the Liquidator. The 2nd Appellant (Mrs. Chandra), submitted her tender for the marriage hall with land along with the EMD amount of ₹42,45,000/- was deposited with the Liquidator. The e-auction was conducted on 20.03.2020, and upon its conclusion the Appellants were declared as successful bidders by the Liquidator via email dated 21.03.2020. Subsequently, and in continuance to it on 23.03.2020, the Appellants deposited an additional amount being ₹1,65,08,125/- (by the 1st Appellant) and ₹64,92,500/- (by the 2nd Appellant) with the Liquidator to fulfil the requirement of deposit of 25% of the bid amount within 24 hours as required by the tender document.

6. Thereafter, the Appellants sought legal advice on the auctioned properties, and were informed by their Advocate that the marketable title of the assets could not be confirmed due to certain missing documents. As a result, they requested the Liquidator on 11.04.2020 to supply the necessary documents. On 12.06.2020, the Liquidator informed the Applicants that the auctioned property was attached by the DRT, and efforts to lift the attachment were ongoing, with the original documents being held by the DRT. On 09.07.2020, the Liquidator requested the Appellants to pay the remaining 75% of the sale consideration by 18.07.2020. The Appellants vide letters dated 11.07.2020 and 13.07.2020 asked for a six-

month extension on account of COVID-19 pandemic, but the Liquidator denied the request, insisting that the balance consideration to be paid by 25.07.2020 or the EMD would be forfeited. On 27.07.2020, the Appellants requested for an extension until 31.08.2020, so as to complete the payment and deposit an additional amount of ₹1 crore towards the purchase of the auctioned properties. On 05.08.2020, the Appellants asked the Liquidator to furnish the missing documents, to which the Liquidator responded, that the documents were with the bank and could be verified by them directly. The Liquidator also reiterated, that the remaining balance consideration must be paid by 31.08.2020, failing which the EMD would be forfeited.

7. On 30.08.2020, after reviewing extracts from the Town Survey Land Register for Survey No. 1062, the Advocates engaged by the Appellants informed them that the land in T.S. Nos. 35, 36, 37, and 38 were jointly owned by several individuals, including M/s. Praiseworth Infra (P) Ltd., the Corporate Debtor, and advised that to avoid future legal complications and defects in the ownership title, the correct Town Survey Numbers should be accurately reflected in the respective Sale Deeds and hence patta should be obtained in the name of the Corporate Debtor for the land owned by it. Accordingly, the Liquidator and the Appellants vide letters dated 06.11.2020 and 09.11.2020 respectively, requested the Tahsildar, Madhavaram Taluk, to depute a surveyor to measure the said land being in Survey No. 1062, and to issue an individual patta in the name of M/s.

Praiseworth Infra (P) Ltd. The Tahsildar vide reply letter dated 17.12.2020 denied to issue individual patta on the ground that the Sale Certificate dated 31.08.1965 to be read with Doc. No. 422 of 1965 registered at SRO, Sembium was not available with them, and it was in a mutilated condition in the records of the office of the Sub-Registrar, that other connected basic documents, such as proceedings in the old registers maintained by the survey department, are also not available, and that in the records of village Adangal, name of Mr. Vishnudoss (late) alone has been mentioned.

8. On 20.12.2020, the Applicants sent a registered letter to the Liquidator listing the documents that had not been provided despite multiple requests and stating that any delay caused in executing the registered sale deed would be due to the property's unclear marketable title and not because of a lack of funds on their part. In response, the Liquidator informed them on 05.01.2021, detailing the action taken by him in this regard and requested to pay the balance sale consideration, failing which the money already paid will be forfeited as per the provisions of the Code and as per the tender terms and conditions. Aggrieved by the action of the Liquidator, the Appellants sent legal notices on 17.01.2021 and 18.01.2021, demanding that the Liquidator should either provide the requested documents to verify the marketable title of the auctioned properties or refund the deposited amount with interest at 18% per annum. When the Liquidator did not respond, the Applicants filed IA(IBC)/267/CHE/2021 before Ld. NCLT praying

for directions to the Liquidator to either furnish the documents requested by the Applicants for ascertaining the marketable title of the auction properties, or to refund the entire amount deposited along with interest at the rate of 18% p.a.

9. Thereafter, while the aforesaid application was pending consideration before the Ld. NCLT, the Liquidator vide his letter dated 19.03.2021, forfeited the entire amount paid by the Applicants due to non-payment of the balance sale consideration amount. Aggrieved by the said action of the Liquidator, the Applicant filed IA(IBC)/235/CHE/2022 before Ld. NCLT. Ld. NCLT, after hearing both sides, dismissed both the applications by order dated 12.10.2023, which is being challenged in the instant Appeals.

The submissions of the Appellants:

10. The Appellants argue that Section 55 of Transfer of Property Act, 1882 mandates that it is the seller's duty to provide all title deeds and documents to the purchaser at the time of sale, which is a statutory duty that cannot be waived or estopped, even for an auction sale under the Code and therefore the Liquidator, acting as the vendor, is legally obligated to fulfill these duties including producing of all parent title deeds at the time of sale, which was said to have been deposited with the creditor bank by the borrower/owner of the property at the time of execution of the Memorandum of Deposit of Title Deeds. He has contended that he had asked for such documents as early as on 11.04.2020 soon after conclusion of the sale. However, the Liquidator failed to do so and also failed to disclose

material defects at the time of sale itself in the measurements of the property and that failure to furnish such documents and details, would render the sale as null and void as per provisions of Section 55 of Transfer of Property Act, 1882. They contend that Ld. NCLT has erred in holding that the said Section 55 of Transfer of Property Act, 1882, would not be applicable in case of an auction sale conducted on "as is where is" condition basis under the provisions of the Code. To support their contention, they cite judgment of Hon'ble High Court of Madras in ***V. Sridhar v. Authorized Officer, Indian Bank*** **(AIR 2018 Mad 87)** in **WP No.16579/2016** dated 23.01.2018 where in para-24 and 25 of the said judgment it has been laid that it is the responsibility of the seller (the bank in that case) to specify the encumbrances attached to the property while bringing the property for auction, even when the auction is conducted on "as is what is, as is where is" basis by referring to its earlier judgment in **WA No.530/2010** dated 04.01.2017 in the matter of ***V. Sambandan v. Punjab National Bank***.

11. The Appellants contend that the "as is where is" condition mentioned in the auction does not waive the purchaser's right to clear and marketable title as per the ratio laid down by Hon'ble High Court of Karnataka, in para-18 of its judgment dated 28.07.2023 in the matter of ***M/s. Paramount Construction Company v. Authorized Officer & Chief Manager, Punjab National Bank*** in **WP No. 33034/2019** nor does it validate the forfeiture of the EMD when a bona fide defense for a refund has been made, as held by the Hon'ble Supreme Court

in para-26 of its judgment dated 11.04.2023 in the matter of ***Mohd. Shariq v. Punjab National Bank and Ors.*** **[(2023) SCC Online SC 392]**.

12. The Appellants further contend that the seller failed to disclose material information about the status of the property, such as the fact that the mother document, i.e., Doc. No. 422 of 1965, was not available in its original form and only a copy of it was available with the SBI and that required legal heir certificates which were needed to establish the transfer of ownership, were not provided. Further, the extent of area as per the title documents varied from the extent of land as actually shown in the joint patta (Revenue records) and the extent of area arrived at as per site measurement, and part of the marriage hall was constructed on government land (Vandi Pathai), which was illegal, and this was clearly pointed out by the valuer appointed by the Liquidator himself. They contend that though the Liquidator was aware of these shortcomings in respect of the property, yet he chose not to disclose those vital facts with respect to the property, which is contrary to the principles laid down by Hon'ble High Court of Madras in the judgment of ***V. Sridhar v. Authorized Officer, Indian Bank*** *(supra)* and of ***D. Kartikeyan v. Chairman, Indian Bank*** in **WP No.35513/2019**. They have further stated that the said action of the Liquidator goes against the verdict of Hon'ble Apex Court as provided in para-28 of its judgment dated 15.12.2019 rendered in **Civil Appeal No. 829 of 2003** in the matter of ***Haryana Financial Corporation v. Rajesh Gupta,*** which had held forfeiture of amount

paid towards such sale which could not be concluded, as to be illegal and directed refund of the amount with interest on the ground that the seller failed to produce the entire documentation as required under Section 55 of the Transfer of Property Act. He has contended that Ld. NCLT, while passing the impugned order failed to consider the implications of the concept of "as is where is" "as is what is" and "whatever there is" condition, which ought to apply only to the physical aspects of the property and not to its legal and marketable title.

13. The Appellant claims that the Respondent had suppressed vital information, leading to miscarriage of justice, and that his refusal to refund the EMD violates Section 73 of the Contract Act and Article 19 (1) (g) of the Constitution of India, resulting in unjust enrichment by the Liquidator.

14. They have further contended that the Liquidator's contention that Section 55 of Transfer of Property Act, will not be attracted because the land in question was sold under Government Grants Act in the first place is not correct. Though the initial Sale Certificate, i.e. Doc. No. 422 of 1965, was issued by the Government of India under the Displaced Persons (Compensation and Rehabilitation) Act, 1954, which applied specifically to individuals who were relocated from Pakistan after partition and would have contained restrictive clauses, it will not be attracted in the present case because the Liquidator, being neither the seller nor buyer under the Government Grants Act, 1895, will not fall

under its purview. Therefore, the Transfer of Property Act, 1882, will apply to the Appellants and Respondents in the instant case.

15. As to the query of why the Appellants had not taken independent steps to obtain a certified copy of Doc. No. 422 of 1965 from the SRO, Sembium, before submitting their tender documents, they have answered the same stating that even if they were to be considered as having obtained "constructive notice" under Section 3 of the Transfer of Property Act, 1882, it would not negate the applicability of the Act to properties initially transferred under the government grant. They assert that if Section 3 is accepted, then the obligations outlined in Section 55 of the Transfer of Property Act, 1882, would necessarily apply to the property in question.

16. The Appellants have contended that they came to know of the existence of the Doc. No.422 of 1965 only after becoming the successful bidders, and therefore, it would not have been possible for them to look for it before submission of the tender. They have further contended that the Memorandum of Deposit (MoD) of title deeds was created by the company under liquidation in June, 2015, and since the insolvency proceedings, CP(IB)/350/2018, were initiated on 26.03.2018, within three years of the loan being advanced, it raises the suspicion that the bank may be attempting to suppress documents, as clearly the bank did not conduct proper due diligence before accepting the documents while sanctioning the loan. They have stated that they had offered bid on the

properties believing that they had a clear and marketable title, which was contrary to the facts and the law, and that the Respondent cannot rely on the theory of "as is where is" basis to avoid responsibility, as he was aware of significant discrepancies in the property's title deeds and its measurements and had suppressed these information.

17. The Appellants argue that the Respondent Liquidator and the company under liquidation have unjustly enriched themselves by selling the properties to other buyers without disclosing the material defects, which were discovered later on. They have stated that the issues arose because (i) the company under liquidation, represented by the Respondent Liquidator, did not have a clear and marketable title to the properties, (ii) the revenue records were not in the company's name, and (iii) the extent of the property could not be accurately identified or determined by its prescient and that had these defects been disclosed in the advertisement or had opportunity been given for bidders to inspect the documents, they would not have participated in the bidding process.

18. They finally conclude by stating that in view of the above and the judicial precedents cited by them, they are entitled for the refund of EMD and further payments made by them, and accordingly, they pray for a refund of the forfeited amount, including the EMD amount with interest.

The submissions of the Respondent:

19. The Ld. Counsel for the Liquidator argued that the Appellants were fully aware of the terms and conditions of the e-auction sale process, and by participating in the auction, it would be deemed that they have effectively consented to these terms.

20. The sale notice was issued on 22.02.2020, and the auction was conducted on 20.03.2020. The terms of the auction required interested buyers to verify the property's title themselves, with no claims to the contrary to be entertained by the Liquidator post-auction. The Appellants didn't verify the title before the auction and had rather requested for additional time to pay the remaining sale consideration after the auction. They only raised concerns about the title only when the Liquidator declined their request to extend the payment deadline. The Appellants should have satisfied themselves on the marketable title of the property even before participating in the bidding process and if they were not fully satisfied with the title, they should not have offered their bid. Having not done so, the claims raised by them regarding the lack of a clear title of the auction property and such other alleged defects in the property cannot be considered as it has been done to cover up for their inability to pay the balance sale consideration in time.

21. It was clearly mentioned in the Terms and Conditions of the auction notice dated 21.02.2020 that the property was to be given on an "AS IS WHERE IS BASIS" and "WHATEVER THERE IS BASIS", requiring the purchaser to

deposit 25% of the sale price immediately upon confirmation and the remaining balance was to be paid within 90 days and failure to do so would result in cancellation of the sale and forfeiture of the amount paid. The said terms and conditions as per the advertisement with regards to forfeiture is extracted below: -

> *"Business Standard Advertisement:*
>
> *11. Upon confirmation of sale, the purchaser shall deposit 25% of sale price (including EMD) immediately and the balance sale consideration within 90 days of the date of such demand. Provided that payment made after 30 days shall attract interest at the rate of 12% as per Sub Regulation 12 of Regulation 1 of Schedule 1 of IBBI (Liquidation Process) Regulations, 2016 as amended from time to time.*
>
> *12. The sale shall be cancelled if the payment is not received within 90 days and the amount paid will be forfeited."*

22. Further, as per the undertakings submitted by the Appellants, along with the tender document, the Appellants' participation in bidding would amount to acceptance for forfeiture of EMD in case of their failure to complete the transaction within the time limit specified in the offer letter for any reason whatsoever. The relevant clause is extracted below: -

> *"4. I/We also agree that after my/our offer given in my/our tender for purchase of a property is accepted by the LIQUIDATOR if I/We fail to accept the terms and conditions of the offer letter or am/are not able to complete the transaction within the time limit specified in the offer letter for any reason whatsoever and/ or fail to fulfil any /all the terms and conditions of the tender and offer letter, the*

Earnest Money Deposit paid by me/us along with the tender is liable to be forfeited by the LIQUIDATOR and that the LIQUIDATOR has also a right to proceed against me/us for specific performance of the contract."

23. The Respondent/Liquidator had has also stated that he has accommodated several requests made by Appellants on 11.07.2020, 13.07.2020, 27.07.2020, and 05.08.2020 for extension of time to pay the balance sale consideration and has given them time up to 15.01.2021 to pay the said amount and therefore it cannot be alleged that the Liquidator has acted in an unjust manner. The liquidation process is highly regulated and must be completed within a specific time frame as per the legislative intent of the Code in order to protect the interests of all stakeholders, and therefore, he had to cancel the sale and forfeit the amount paid in line with the terms and conditions of the sale.

24. He has submitted that he had taken adequate steps including writing several letters to tahsildar and filing application under RTI to obtain necessary data on title and revenue records for the property and took all the relevant measures to retrieve the documents sought by the Appellants and that, the Appellants are attempting to mislead the Tribunal now, by raising issues about the property's title, with the aim to distract from the core issue, which is that they have in fact failed to make payment in time, which had led to forfeiture of the amount paid including the EMD amount. Regarding the issue of ownership of the property, the Liquidator has stated that the Corporate Debtor are the absolute owners of the properties, that no one has disputed it so far except for some deficiency in the

documents, and that after cancellation of the sale of the said properties to the Appellants herein, he has reauctioned the properties successfully on 17.11.2021, which proves that the contentions of the Appellants regarding the defects in the documents of the said properties are not material. He has further stated that in fact the Appellants did not raise these concerns about the title earlier and are now raising them in order to avoid their legal obligation to pay the auction amount and to get the refund of the amount forfeited, and therefore, the appeals may be dismissed.

25. The Respondent has cited a number of judgments to support his contention. He has stated that this Hon'ble Tribunal in ***Visisth Services Limited v. S.V. Ramani & Ors.*** **(Company Appeal (AT) (Ins.) No. 896 of 2020)** has held that:

> *"18. Keeping in view of the ratio laid down by the Hon'ble Supreme Court of India in a cantena of judgments that the Bidder cannot wriggle out of the contractual obligations arising out of acceptance of his Bid and also having regard to Regulations 32A and the scope and objective of the Code together with the Principle laid down by this Tribunal in 'Mohan Gems and Jewels' (Supra) we are of the opinion that the Appellant cannot be entitled to the EMD amount and the amount paid towards the Bid Purchase document, if he does not comply with the terms of the contract."*

26. He has further submitted that the Hon'ble Supreme Court of India in para. 17 of its judgment in the matters of ***Meerut Development Authority v. Association of Management Studies*** **[(2009) 6 SCC 171]** has held that terms of tender cannot be open to judicial scrutiny unless sufficient case is made out that

it has been prepared with a view to favour one particular party. Para-17 of the said judgment is extracted below: -

> *"17. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminating all others from participating in the bidding process."*

27. He has cited yet another judgement of this Tribunal in the matter of ***Westcoast Infra Projects Pvt. Ltd. v. Mr. Ram Chandra Dallaram Choudhary*** **(Company Appeal (AT) (Ins.) No. 1258 of 2022)**, where this Appellate Tribunal has held that defects in title of the auction property, which are curable, will not constitute to be a reason for not paying balance sale consideration. The relevant paragraphs from the said judgment are extracted below: -

> *"28. It is further pleaded that ultimately the revenue record was also corrected in the name of Anil Limited. We are of the view that issue raised by the email dated 17th June. 2022 by the Appellant that name of the land is not in the name of the corporate debtor is only a ruse not to make payment within time allowed by law. Admittedly, the land was in the name of Anil Products Limited which was the earlier name of the Corporate Debtor changed in to Anil Limited..... we thus are satisfied that there was neither defect in the title nor the fact that process of change of the name in the revenue record was*

underway was any reason for Appellant not to make the payment of balance consideration within time.

29. ……

30. ……

31. ……

32. We are thus satisfied that, issues regarding entry in the revenue record, permission of the Deputy Collector for sale were issues which had no effect on the title of the corporate debtor, and the issues were raised by the Appellant to avoid payment of the balance amount and to buy time in which the Appellant failed. We do not find any substance in the submissions that there was a defect in the title."

Based on the above, the liquidator has prayed for dismissal of the instant appeals.

Analysis and findings:

28. Separating the facts from the issue, the issue boils down to question, as to whether Section 55 of the Transfer of Property Act, will apply in the instant case of auction of the property of the Corporate Debtor. Section 55 of the Transfer of Property Act is extracted below: -

*'**55. Rights and liabilities of buyer and seller**.—*

In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:—

(1) The seller is bound—

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyers of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer, of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any encumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.'

It can be seen that it lays down the seller's liabilities and that in its Sub-Section (1) of the said Section, it provides for that the seller must disclose material defects in the property or title known to them but not to the buyer, he must produce all documents of title for examination upon request, he must answer all relevant questions regarding the property or title, he must execute a proper conveyance of the property upon rendering of the payment and must take care of the property and the title documents between the contract date and delivery. The buyer's liabilities include disclosing any fact of the property that significantly increases its value and must pay the purchase money at the time of completing the sale.

29. The Ld. Adjudicating Authority has held that Section 55 of the Transfer of Property Act is not applicable in this case as the auction sale was conducted under I & B Code, 2016, on "as is where is" and "as is what is" basis without any warranties and indemnities as per clause 4 of the tender document. The Appellants failed to verify the title documents and requested additional documents only after being successful in the auction, some of which including Doc. No.422 of 1965 were not in possession of the Liquidator and he cannot be expected to produce the documents, which are not in his possession. Further, the Appellant cannot claim a title defect after knowingly accepting the terms and conditions of the auction as per clause 38 of the said document. The argument of

the Liquidator / Respondent, has also been that the tender has been done on "as is where is" and "as is what is" basis, without any warranties or indemnities as stated in the clause 4 of the tender document and therefore the Appellants cannot claim that the sale process has been vitiated by operation of Section 55 of the Transfer of Property Act.

30. However, there are catena of judgments of different High Courts, and also of Hon'ble Supreme Court as cited by the Appellants, which hold that the condition of 'as is where is' and 'as is what is', is not sufficient, and that more information is required to be given by the seller so as to make the auction process valid in the eyes of law. The ratio in ***V. Sridhar v. Authorized Officer, Indian Bank*** as reported in **AIR 2018 MAD 87**, in its para.18 held that, "as is where is" condition is insufficient, which is extracted hereunder: -

> *'20. Learned counsel for the petitioner has relied on two unreported judgments of this Court reported in W.P.No.32337 of 2016 (RG Housing and Infrastructure Private Limited ..vs.. Union of India, represented by Secretary to Government, Ministry of Finance and two others), W.A.No.530 of 2016 (V.Sambandan ..vs.. The Punjab National Bank, represented by its Chairman cum Managing Director), which according to him, would come in aid to the contention raised by the petitioner. Hon'ble Division Bench of this Court, in W.A.No.530 of 2010 cited supra, by discussing elaborately, on this issue had held as follows:-*
>
> > *'36. Admittedly, when notice, under Section 13(4) of the SARFAESI Act, 2002, was issued by M/s.Punjab National Bank, Chennai, respondents herein, physical possession of the subject property mortgaged, was not taken.*

Reading of Rule 9 makes it clear that there is a clear distinction, between sale of immovable property, subject to encumbrance and costs, to be incurred for removing the encumbrance.

38. Auction notice does not indicate anything about the encumbrance in the subject property sought to be sold, but it only states that sale of the property would be in, "as is where is/as is what is" condition. Section 13(4) of the SARFAESI Act, 2002, enables the secured creditor to take actual possession of the secured assets of the borrower.

41. In the abovesaid notice, dated 28.07.2009, auction purchaser/appellant has also stated that there was suppression of material facts, in conducting the auction. He has also stated that the authorised officer was not in a position to deliver possession of the auctioned property, without any encumbrances and free of litigations. He has stated that the original title deeds, as well as copies of documents, including the judgment and decree from the competent Court, pertaining to the auctioned property, except the sale deed Document No.2125/1990, dated 02.07.1990, were not furnished to him and in the abovesaid circumstances, he has issued the said notice, calling upon the authorised officer to cancel the auction proceedings, held on 17.07.2009 and return the deposit amount of Rs.3,30,000/-, within a weeks' time, from the date of receipt of the said notice.

49. In Kathikkal Tea Plantations vs. State Bank of India reported in (2009) 7 MLJ 24, Kathikkal Tea Plantations, represented by its Managing Director, availed loan. There was default. Symbolic possession was taken under Section 13(4) on 11.12.2006. Bank sold the property by a private treaty on 09.04.2007 and issued a sale certificate. Property was not physically dispossessed and continued to hold on de facto possession, even after without issuance of sale certificate. Therefore, bank, filed an

application under Sections 14(1)(2) of the SARFAESI Act, before the learned Chief Judicial Magistrate, Udhagamandalam, on 13.11.2008, seeking an order to take possession of the petitioner's property with the help of police aid and hand over the same to the bank. Permission was granted. Writ petition was filed challenging the order of the learned Chief Judicial Magistrate, Udhagamandalam contending inter alia that once sale certificate was issued in favour of the auction purchaser of the property, there is no secured debt and that the bank loses the character of the secured creditor. Contention has been made that the question of taking actual physical possession does not arise after the issuance of sale certificate. After considering Transcore vs. Union of India reported in (2008) 1 SCC 125, that banks are entitled to take actual possession of the property in terms of Section 13 of the SARFAESI Act, 2002 and other decisions, in Kathikkal Tea Plantations' case, a Hon'ble Division Bench of this court, at paragraph 16 observed thus:

"The third party, who comes forward to purchase the secured asset, must have a confidence that he would get the property at the earliest. If the transferring of the property by way of title is going to be delayed endlessly, then the object of the Act which is meant for speedy recovery, would be defeated in whole."

58. When rules permit sale, with encumbrance and without, contention of the learned counsel for the appellant that the sale should be free from encumbrance, cannot be accepted. On the facts and circumstances of the instant case, what is required to be considered by us, is whether the Bank has notified the encumbrances on the property sold.

59. In the light of the decisions, stated supra, we are unable to accept the contentions of the bank that by

imposing a condition, "as is where is" and "as is what is", the Bank has no obligation to mention in the auction notice, the encumbrance of the property, sought to be sold and it is suffice to contend that in the auction notice, the Bank has clearly stated that the property sold was in "as is where is" and "as is what is" condition and that the same would satisfy the requirements of Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, which states that the authorised officer shall state the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor. In Jai Logistics's case (cited supra), defence of the Bank that the encumbrance was not known to them, and hence, could not be published on the sale notice, to sustain the order of forfeiture, was not accepted by this Court.

60. On the facts and circumstances of the case, the Bank may be right in contending that physical possession need not be taken before bringing the mortgaged property for auction, but they cannot shirk their duty to hand over possession to the auction purchaser. If the bank was not in a position to take physical possession, before sale, then recourse ought to have been taken under Section 14 of the Act and under the scheme of the Act, the Bank cannot be permitted to contend that there is no statutory obligation, on its part, to put the auction purchaser in possession.

61. Ordinarily, a sale is completed, on receipt of the entire sale consideration and handing over possession. But if encumbrance is specifically mentioned in the sale notice and if the auction purchaser with eyes open, had purchased the property, then there could be a cause to contend that it is the purchaser, who had taken the risk. While issuing a sale notice, it is the duty of the Bank to mention all the encumbrances in the property. The condition, "as is where is" or "as is what is" may indicate that when the property is sold, everything is not clear. But at the same time, the purchaser cannot be expected to

know that the property sold was already mortgaged to another bank, viz., Nedungadi Bank and that there was a decree in O.S.No.328 of 1999, dated 10.07.2000, on the file of Subordinate Judge, Poonamallee.''

31. In the matters of ***V. Sambandan v. Punjab National Bank***, the Hon'ble High Court of Madras held that as per Section 55 of the Transfer of Property Act, it is the duty of the seller to produce all title deeds even though the auction has been held on "as is where is" basis. In ***Mohd Shariq vs. Punjab National Bank and Ors***., Hon'ble Supreme Court held that forfeiture of EMD is not valid, if the Respondents raise bona fide defence. In ***D. Karthikeyan v. The Chairman, Indian Bank and Ors.***, the Hon'ble Madras High Court held that the seller should disclose all material information regarding property sold. Further, in **WP No. 33034 of 2019** the Hon'ble High Court of Karnataka has ruled that "as is where is" basis and "as is what is" basis does not mean that the auction purchaser could not be put in possession of property, which is not free from encumbrance.

32. Though, all these case laws do not pertain to auctions conducted under the I & B Code, they pertain to a common set of governing principles to auctions conducted under SARFAESI Act on "as is where is" basis, which is similar to those which are conducted under the Code, and in fact, most of the auction procedures adopted under SARFAESI Act has been incorporated in the tender documents for the auctions conducted under the Code. Neither the Code nor the Regulations under it lay down the terms and conditions which are prepared by Liquidator. In such a situation, to state that Section 55 of Transfer of Property Act

will not be applicable for an auction conducted under the I & B Code will not be a correct interpretation to law, as the statute will have precedence and binding effect over the terms of the bidding document, especially when bidding documents are crafted in a manner to withhold vital information from the bidder.

33. In the instant case, the Ld. Adjudicating Authority has recorded that, the Liquidator has given to /shared with the Appellant, the present sale deed and all other documents, including extract of the town land survey register, which, in its opinion, are more than enough to execute a valid sale in favour of the Appellant. It has also recorded that the documents sought by the Appellant, which are the great grandmother document and the mother document, in relation to the property, are something the Liquidator does not have and hence he is not expected to produce the same. Since, the Liquidator is legally responsible to execute a valid sale deed, the Appellant couldn't have any premonition about whether the sale deed executed will constitute to be a valid title document in the absence of full set of mother documents being provided to the Appellant. However, the fact remains that the Liquidator, being on the job for more than 2 years should have taken pains to examine the sufficiency of the title documents and being the representative of the seller, he should have taken steps to collect the missing mother documents, and the great grandmother documents of the land in question and such other documents needed before he issued the auction notice. Since the said deficiency was discovered within months by the legal counsels for the

Appellants, there is no reason why the Liquidator could not have done the needful, and taken steps to rectify the same. He should have arranged for obtaining copies of the documents deposited by the bank with DRT and should have made them available to the auction purchaser / bidders before the bidding started as he was transferring title of immovable property or, in the alternative, should have clearly mentioned in the bidding document itself that certain documents are not available and that its non-availability will not make any material impact on marketable title of the land.

34. The Liquidators are not new to this job of holding bids and possess wide experience in dealing with such land matters. In addition, they are also free to engage counsels to assist them in such works. Therefore, the Liquidator's plea that, since, he was not asked for such document and therefore he could not take steps to produce them to the interested bidders including the Appellants before the auction will not be a valid defence. Of course, as it panned out, absence of Doc. No. 422 of 1965 would not have made much difference. However, that will not absolve the Liquidator of his professional duty to provide the complete valid documents asked for, for the property under sale.

35. Further, apparently the Liquidator did not provide the information with respect to the variations in the extent of land and its boundaries, as per documents and as actual in field and also failed to disclose that part of the marriage hall has been erected in government land amounting to encroachment. In our view,

provision of this information would have made a substantial difference in the auction process. As per Section 55 of Transfer of Property Act, it is the seller's responsibility to disclose to the bidders all the true and correct information relating to the land in question, which was available to the bidders. The Liquidator, had himself conducted valuation of the said land through professional agencies and in the valuation report, the valuers did point out a number of inconsistencies such as that the land area as per the title document, as on the ground and as per the patta are not matching and that the area available on the ground is lesser than that mentioned in the document and that there are encroachments over the land and that part of the marriage hall has probably been built on public land, adjoining the land of the Corporate Debtor. The Liquidator should have verified all these things before putting the land into auction and should have disclosed all the facts in the tender notice. Since, he has failed in the same, the auction process will attract the ratios given by Hon'ble High Court of Madras in ***D. Karthikeyan v. The Chairman, Indian Bank*** that specific notice about encumbrance and other materials must be given, and by Hon'ble Supreme Court in ***Leelamma Mathew v. Indian Overseas Bank***, that even when auction is conducted on "as is where is" basis, less area cannot be given. It will also attract the judgment of Hon'ble Supreme Court in the matters of ***Haryana Financial Corporation and Anr. v. Rajesh Gupta***, where it has been held that since the seller failed to produce entire documentation as required under Section 55(1) (b)

of Transfer of Property Act, the forfeiture of amount deposited by the buyer has to be refunded.

36. The Respondent has sought to vindicate his action of forfeiting of amount deposited by the Appellants by referring to the ratio laid down by Hon'ble Supreme Court in ***Association of Management Studies (AMS) v. Meerut Development Authority***, which holds that the tenders will have limited judicial review, and the tender terms are not open to judicial review, because it is in the realm of contract and can be reviewed only if it has been tailor made to favour a particular party which is not the case argued here. And also, he has relied on the judgment of this Tribunal in the matter of ***Visisth Services Limited v. S.V. Ramani and Ors.***, to argue that the Successful Bidder cannot wriggle out of the contracted obligation and cannot be entitled to the EMD amount and the amount paid towards Bid Purchase Document, if he does not comply with the terms of the contract.

37. We are of the view that admittedly, Liquidator not having the mother documents and great grandmother documents, was not expected to produce the same for inspection by the interested bidders. But, he could have made efforts to procure them, when sufficient time was available for him to procure the same. The clause of the tender document that the bidder should ascertain the true state of affairs is a general clause available in all such tender documents. However, still this clause in itself does not absolve the Liquidator of his duty to provide

whatever information he had and at least those information, which he had such as those contained in the valuation report wherein the defects/inconsistencies in the property had been pointed out by the valuers, to the interested bidders. Withholding such information by hiding behind the clause that it is the duty of the bidder to do due diligence will create information asymmetry and, in such cases, those with inside information and access to the system will get an undue advantage. This will be enough to invalidate the tender, as laid down in the judgement of Hon'ble Supreme Court in ***Association of Management Studies (AMS) v. Meerut Development Authority***. Further, it is a well-known principle that information asymmetry will lead to sub-optimal solutions and lower-value bids being placed for the assets, which otherwise should have fetched a higher-value, if full information is given and all efforts are taken to cure the defects in the assets before they are put into public auction. Mere assertion that, the disclaimer clause in the tender document absolves the Liquidator from his responsibilities under Section 55 Sub-Section (1) of Transfer of Property Act, will not be enough to avoid taking necessary steps to attach fairness to the bidding process.

38. Further, the disclosure of the fact, at belated stage, that the land has been subsequently put into auction, after cancellation of the tender awarded in favour of the Appellant and that the land has been successfully sold and handed over to the Successful Bidder in the second auction will not, in any way, water down or

wash away the inconsistencies in the present auction process, which is being pointed out by the Appellant, by relying on the facts painstakingly collected by them as well as the ratios they have produced.

39. One more glaring inconsistency between the tender conditions and the action of the Liquidator need to be brought to light here. The tender conditions as per the newspaper advertisement stipulated cancellation of the sale and forfeiture of the amount paid, if the payment is not received within 90 days. However, the tender conditions as reflected in the undertaking given by the bidder envisages forfeiture of the EMD amount in case the bidder fails to accept the terms and conditions of the offer letter or is not able to complete the transaction within the time limit specified. The said undertaking nowhere mentions forfeiture of the amounts deposited in addition to the EMD amount. Further, in the newspaper advertisement, it has been merely stipulated that the amount paid will be forfeited. It does not specify whether it is the EMD or EMD plus further any amount which is deposited by the successful bidder. However, the Liquidator has proceeded to forfeit the entire amount deposited (EMD + the further amount deposited) after the Appellants have failed to deposit balance sale consideration within the timeline, on the ground that the Appellants failed to comply with the tender conditions. The question here is as to which one reflects the binding tender conditions, the newspaper advertisement or the undertaking submitted by the

Appellants, especially, when apparently there is a variation between them in respect of forfeiture clause.

40. In our view, the signed undertaking will be the one which is the correct representation of the tender conditions and it will be having more binding encumbrance, as it has been signed by the Appellants and submitted to the Liquidator with EMD who in turn has accepted the offer without any deferment. In that view, even when the Liquidator is held to be entitled to forfeit the amount deposited, he can forfeit only the EMD and not the amount which has been deposited subsequent to confirmation of the sale. Therefore, the forfeiture of the amount deposited over and above the EMD amount by the Liquidator will constitute to be in contravention with the tender conditions itself.

41. Further, the ratios relied upon by the liquidator will not apply to the facts of the instant case. ***Visisth Services*** (*supra*) deals with a situation where the bidder initially submitted a conditional bid, even after being informed categorically by the Liquidator that no changes can be made to the information memorandum accompanying the auction and therefore his participation in the bid was taken to be an acceptance of the tender conditions and hence request for refund of EMD was turned down. In the present case, the issue is that of suppression of certain vital information and non-compliance with Section 55 of Transfer of Property Act which is entirely different. The facts of the case in ***Meerut Development Authority*** (*supra*) are also quite distinct and different. The

issue therein was that of a dispute between Meerut Development Authority (MDA) and Association of Management Studies (AMS), with MDA cancelling a tender in favour of AMS and then going for a re-tender. Therein the Hon'ble Apex Court held that Courts have limited scope for judicial review in tenders and their role is primarily limited to assessing whether decisions are reasoned, rational and free from arbitrariness. This is not the case here where intervention is sought on the basis that principles of Transfer of Property Act is being violated. In the case of ***Westcoast Infraprojects Pvt. Ltd. v. Ram Chandra Dallaram Choudhary***, the Liquidator had cancelled the sale and forfeited the amount deposited against which the Appellant had appealed to NCLAT, similar to the case at hand. But in that case, no violation of Transfer of Property Act in form of suppression of information and non-furnishing of documents was alleged. The Appellant had requested refund of forfeited amount on the ground that the title was defective and revenue record changes were incomplete. However, the same was held to be curable defect which has been cured by the time the Appeal was taken up for hearing and hence it was held by this Tribunal that '*we do not find any substance in the submissions that there was defect in title*'.

42. Ld. Adjudicating Authority has relied on ***West Coast Infraprojects v. Ram Chandra Dallaram Choudhary*** to hold that clauses of the tender document clearly empower the Liquidator to forfeit the EMD and any payment made in the event of default by the bidder and therefore the action of the Liquidator in

cancelling the sale and forfeiting the amount deposited is correct in law. However, it has not given any reasons why Section 55 of Transfer of Property Act cannot be made applicable to an auction sale made under I & B Code. Of course, Section 55 sets down the default rights and liabilities of the buyers and sellers of immovable property when they have not agreed to the contrary in a contract. Presumably, along the said lines, Ld. NCLT has determined that since the buyers and the seller in the present case have agreed to a certain set of terms and conditions as set down in the tender document, rights and liabilities of the parties as set down in Section 55 will not apply and there will not be any obligation on the Liquidator to produce documents being asked for. However, the catena of judgments cited by the Appellants have determined the same to be otherwise and have held that even in tenders being conducted on "as is where is, as is what is" basis, principles of Section 55 will apply and the seller (Liquidator in the instant case) is duty bound to provide entire documentation and the information available to him, failing which he cannot enforce the terms of the tender by forfeiting the amount paid. In that view, the action of the Liquidator in forfeiting the amount deposited and the impugned order of Ld. NCLT confirming the same is vitiated.

43. Accordingly, the impugned order is set aside and the Liquidator is hereby directed to refund the amount of ₹4,75,84,375/- forfeited by him to the Appellants/Successful Bidders in full within six weeks from uploading of the

order. As regards the prayer of the Appellants to pay an interest of 18% on the said amount, it is turned down because there have been certain lacuna on part of the Appellants also. Ideally, they should have paid the entire amount and thereafter, should have asked for a specific performance by the Liquidator, which they failed to do. Instead, they had signed the contract by submitting to the bid, and whatever be the defects in the tender, they had willy-nilly accepted the same without doing the due diligence, which was expected on their part before submitting the bid and therefore, they are not entitled to claim interest on the said amount. Further, the Liquidator is directed to discharge the Appellants from any other liability, that might have accrued because of the failure on their part to comply with the terms and conditions of the letter of intent issued to them, including their eligibility to bid in the future tenders. The appeal is thus 'allowed' in terms of the directions given above. All interlocutory applications, if any, will stand 'closed'.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

04 / 11 / 2026

AR/MS/AK