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INSOLVENCY & BANKRUPTCY

Supreme Court Upholds Forfeiture of EMD Where Liquidation Auction Terms Expressly Provide for It

The Supreme Court in ASJ Finsolutions v. Vikram Bajaj upheld forfeiture of the EMD and other sums paid by a successful bidder in a liquidation auction who failed to pay the balance, because the e-auction notice expressly provided for it.

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In ***M/s ASJ Finsolutions Pvt. Ltd. v. Vikram Bajaj***, the Supreme Court considered whether the Earnest Money Deposit (EMD) and other amounts paid by a successful bidder in a liquidation auction can be forfeited where the e-auction notice expressly so provides, even though the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (the "Regulations") do not expressly provide for forfeiture.

Schedule I of the Regulations caps the EMD at 10% of the reserve price but is silent on forfeiture for non-payment of the balance sale consideration. The auction notice, however, stated that the entire amount paid by the bidder, including the EMD, could be forfeited on such failure.

The appellant admittedly did not pay the balance of approximately ?19.17 crore within 30 days or within the extended 90 days. The Court upheld the NCLAT's order affirming forfeiture and dismissed the appeal.

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Case at a Glance

- **Case:** M/s ASJ Finsolutions Pvt. Ltd. v. Vikram Bajaj
- **Court:** Supreme Court of India (Civil Appellate Jurisdiction)
- **Case No.:** Civil Appeal No. 13023 of 2025
- **Date of Judgment:** 28 September 2026
- **Citation:** 2026 INSC 1062; 2026 LiveLaw (SC) 998
- **Bench:** Justice J.B. Pardiwala and Justice K. Vinod Chandran (judgment authored by Justice Chandran)
- **Status:** Non-Reportable
- **Result:** Appeal dismissed
- **Counsel:** For the appellant: Ms. Meenakshi Arora, Sr. Adv., with counsel. For the respondent: Mr. Abhishek Anand, Adv., with counsel.

Facts

The appellant was the successful bidder in an auction held in the liquidation of a corporate debtor under the Insolvency and Bankruptcy Code, 2016. Liquidation followed when no resolution plan was filed after an operational creditor's application under Section 9 of the Code was admitted.

The property, Lot No. 5 at Village Nangal Khurd, Tehsil Sonepat, Haryana, with a reserve price of ?25.56 crore, was put up for sale through an e-auction notice dated 25 October 2021. The sale was on an "as is where is" basis, and the notice carried a note that a civil suit was pending over the sale deed of part of the land.

The auction was held on 15 November 2021, and the appellant succeeded with a bid at the reserve price. The EMD stipulated was ?2.55 crore, which is 10% of the reserve price. By email of the same date, the Liquidator informed the appellant that 25% of

the bid amount, ?6.39 crore, was to be deposited by 16 November 2021. This comprised the ?2.55 crore EMD and ?3.84 crore towards the balance consideration. The appellant paid it without demur.

The balance of approximately ?19.17 crore was payable within 30 days, that is by 14 December 2021, or within 90 days from the auction, that is by 14 February 2022, with interest at 12% per annum. On 15 December 2021, the appellant emailed the Resolution Professional stating that it would pay the balance with interest by 14 February 2022.

Meanwhile, M/s Agarwal Trading Company obtained an order from the Punjab & Haryana High Court, which rejected its writ petition but directed it to approach the NCLT and directed that no sale deed be executed by the Liquidator, as the company had been granted time till 14 February 2022. It filed an application before the NCLT on 11 February 2022 and withdrew it on 22 September 2022.

The appellant did not pay the balance sale consideration. On 11 February 2022, it filed Company Application No. 85 of 2022 before the NCLT seeking the prior deeds of the property. The NCLT rejected it on 31 March 2023, and an appeal was dismissed on 21 April 2023. The appellant challenged that order by a writ petition before the Punjab & Haryana High Court.

While the writ petition was pending, the property was sold at a fresh auction for ?31.10 crore, ?5.54 crore more than the appellant's bid. The High Court later rejected the prayer for prior deeds and reserved liberty to the appellant to avail remedies in accordance with law. Relying on that liberty, the appellant approached the NCLT to annul the forfeiture of the EMD and seek a refund.

Proceedings Below

The NCLT allowed the appellant's application for annulment of the forfeiture and refund, applying the "Triple Test". It found that (i) there was no hidden agenda to rig the auction, (ii) there was nothing to show a mala fide intention to frustrate the auction process, and (iii) the direction in the writ petition filed by Agarwal Trading Company gave the appellant a bona fide reason not to deposit the balance. On financial capacity, it relied on the appellant's email of 15 December 2021 and its later offer to pay with interest.

The NCLAT reversed the NCLT. It noted that the appellant bid with knowledge of the auction terms, including the "as is where is" basis and the forfeiture clause, and that in the earlier round the appellant's failure to pay had been held to be a wilful default.

Contentions and the Court's Reasoning

1. The Regulations Are Silent on Forfeiture; the Auction Notice Is Not

Appellant: Schedule I of the Regulations provides that the EMD shall not exceed 10% but contains no stipulation for forfeiture. Relying on *Authorised Officer, Central Bank of India v. Shanmugavelu* ((2024) 6 SCC 641), it argued that forfeiture in that case had statutory backing under the SARFAESI Act, which is absent here.

Respondent: The appellant bid with open eyes, knowing of the dispute over the sale deed, and paid the deposit without protest. It could not rely on the Regulations against a forfeiture condition in the auction notice.

Court: The Court noted that Schedule I limits the EMD to 10% and does not expressly provide for forfeiture on failure to pay the balance sale consideration. It held that the argument "falls flat" in view of the specific condition in the auction notice, which made forfeiture an inevitable consequence of that failure. The appellant had deposited 10% of the reserve price along with part of the balance consideration, which itself was an undertaking to pay the rest within 30 days, or 90 days with interest. The Court did not separately address *Shanmugavelu* in its judgment.

The clause in the notice provided that the entire amount paid by the applicant/bidder, including the EMD, could be forfeited at any time on the occurrence of certain events, one of which was that a bidder identified as the successful bidder fails to pay the balance sale consideration as per the terms of sale. As the appellant paid the money voluntarily and the notice provided for forfeiture of the entire amount, the Court found no reason to order a refund.

2. Alternative Plea: Forfeiture Limited to 10% of the Reserve Price

The appellant submitted that, if forfeiture was approved at all, it could extend only to 10% of the reserve price. The judgment does not deal with this plea separately. The Court noted that the EMD was ?2.55 crore and that ?6.39 crore was paid without demur, and upheld forfeiture of the entire amount paid under the clause in the auction notice.

3. The Triple Test

The Court set out the Triple Test as asking whether the bidder (i) acted with a hidden agenda to rig the auction, (ii) turned out to be not a genuine bidder with adequate financial capacity, or (iii) was prevented by extraneous reasons from making full payment of the balance sale consideration. It agreed with the NCLAT's disagreement with the NCLT.

The Court held that, given the specific clause threatening forfeiture on failure to pay the balance sale consideration, forfeiture on cancellation is a necessary consequence, and that the Triple Test did not, on the facts, absolve the appellant. It noted that:

- The NCLAT had earlier found the appellant's failure to pay within the stipulated period to be a wilful default, and liquidation proceedings are strictly time-bound.
- The contention that upholding the cancellation of the bid would not affect refund of the EMD could not be countenanced.

4. Financial Capacity and Title Verification

The Court observed that proof of financial capacity cannot rest on repeated communications expressing willingness to pay and requires material substantiating the capacity to pay. The email of 15 December 2021 was sent long before the 90 days expired, at a time when the appellant was already aware of the cloud over the sale deeds.

The auction was on an "as is where is" basis, and the notice indicated that sale deeds were not available for a portion of the property. The appellant made no query about verification of the deeds during the bid process and did not seek them before bidding or depositing the EMD. It could not use this as a ground to resile from payment, and such a request was not permissible at that stage.

5. Agarwal Trading Company's Proceedings as an "Extraneous Reason"

The Court held that the extraneous consideration relied on by the appellant was an afterthought. Agarwal Trading Company, on the directions in the writ petition, merely filed an application and withdrew it a little later. The Court viewed the plea as an excuse to scuttle the auction and avoid the liability to pay the balance sale consideration.

6. Discrimination

The appellant argued that another auction purchaser had been granted time beyond 90 days to pay. The Court held that this contention could have been taken at the first instance, when the proceedings for supply of prior deeds were initiated, and that it was too late to raise it. The orders relied on were not produced before the Court for the respondent to respond, but only with the written submissions, which the Court was not inclined to look into. The Court added that, apart from the assertion of willingness to pay, nothing had been produced to show capacity to pay the balance as on the last date.

7. Earlier Decisions

The respondent relied on the NCLAT decisions in *Westcoast Infraprojects Private Limited v. Mr. Ram Chandra Dallaram Choudhary* (Company Appeal (AT) (Ins) No. 1258 of 2022) and *Potens Transmission & Power Pvt Ltd v. Apex Buidlsys Ltd (In Liquidation)* (Company Appeal (AT) (Ins) No. 1543 of 2023). These were affirmed by the Supreme Court in Civil Appeal Nos. 4087 of 2023 and 4116 of 2022 respectively. In *Westcoast Infraprojects*, forfeiture of both the EMD and any other deposit, as per the clause in the e-auction notice, was upheld where the successful bidder failed to pay the balance sale consideration on time. The Court applied the same principle here.

8. Fresh Auction

The property was sold at a fresh auction for ?31.10 crore, ?5.54 crore more than the appellant's bid of ?25.56 crore. The Court observed that the higher value was only because of the inherent value of the property and was not in set-off of the expenses incurred.

Decision

The Court found no reason to interfere with the NCLAT's order. The appellant had paid the money voluntarily, the auction notice provided for forfeiture of the entire amount paid by a successful bidder, including the EMD, on failure to pay the balance sale consideration as per the terms of sale, and there was therefore no reason to order a refund. The appeal was dismissed and pending applications, if any, were rejected.

Key Takeaway

The decision turns on the express terms of the e-auction notice. Although the Regulations do not provide for forfeiture of the EMD on non-payment of the balance sale consideration, on the facts of this case, the forfeiture clause in the auction notice was enforced against a successful bidder who failed to pay within the stipulated period.

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