

NATIONAL COMPANY LAW TRIBUNAL

CHANDIGARH BENCH (COURT I)

IA NO. 1047 OF 2024 IN CP (IB) NO. 117/Chd/Chd/2017

IN THE MATTER OF:

M/s Hajura Singh Bhim Singh

...Petitioner/ Operational Creditor

Versus

M/s Best Foods Limited

...Respondent/ Corporate Debtor

AND IN THE MATTER OF IA 1047/2024:

ASJ Finsolutions Private Limited
(Through Mr. Vishal Jain)
(CIN U74140DL2010PTC1999062)
having registered office at AP-11A, Pitampura,
New Delhi-110034

.... Applicant

Versus

M/s Best Foods Limited
(Through Liquidator Mr. Vikram Bajaj)
Having its Registered Office at 214, Tower A,
Spazedge, Sector 47, Gurgaon-122018

.... Respondent

Order Delivered on: 02.07.2024

SECTION: Sec 60(5) of the IBC, 2016

CORAM:

SH. HARNAM SINGH THAKUR, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For Applicant

: Mr. Atul V. Sood, Advocate

For Respondent/RP:

: Mr. Abhishek Anand, Advocate

Judgement

PER: SH. L. N. GUPTA, M(T) & SH. HARNAM SINGH THAKUR, M(J)

The present IA No. 1047 of 2024 in CP (IB)-117/2017 has been preferred by ASJ Finsolutions Private Limited (hereinafter referred to as the '**Applicant**') under Section 60(5)(c) of IBC, 2016 praying for the following reliefs:

- a. That this Hon'ble Tribunal be pleased to direct the respondent to refund 25 % of the bid amount which sums up to an amount of Rs. 6,39,00,000/- alongwith Interest @ 12%;*
- b. Pass any other Orders or directions in the facts and circumstances of the present Appeal and in the interest of Justice."*

2. To put the facts concisely, the underlying main Petition CP (IB)-117/Chd/Chd/2017 was filed by Mr. Hajura Singh Bhim Singh. against the Corporate Debtor (CD) namely, Best Foods Ltd., under Section 9 of IBC, 2016, which was admitted vide Order dated 02.02.2018 of this Adjudicating Authority. Subsequently, vide order dated 01.03.2021 of this Adjudicating Authority, Liquidation proceedings were initiated regarding the Corporate Debtor and Mr. Vikram Bajaj was appointed as the Liquidator (**hereinafter referred to as "Respondent"**), who is presently representing the CD.

3. Through the present Application, the Applicant is seeking refund of 25 % of the bid amount of Rs. 6,39,00,000/- along with interest @ 12%, which was forfeited by the Liquidator in terms of the e-auction dated 15.11.2021. In nutshell, the applicant has submitted the following, explaining the events which had happened near the auction period:

3.1 On 25.10.2021, the Liquidator issued e-auction notice for the sale of assets of the Corporate Debtor. The aforesaid e-auction was held on 15.11.2021 and the Applicant participated in the said e-auction with the interest of purchasing assets of Respondent No. 1 comprised in lot No. 5 i.e. a land measuring 68 Kanal 17 Marla, situated at village Nangal Khurd, Tehsil, District Sonipat, Haryana (hereinafter, “**Subject property**”).

3.2 The Respondent vide email dated 16.11.2021 declared the Applicant as the highest bidder for the sale of assets comprised in lot no. 5 i.e., land measuring 68K 17M situated at village Nangal Khurd, Tehsil, District Sonipat, Haryana. An Earnest Money Deposit (EMD) of 25 % of the bid amount which sums up to an amount of Rs. 6,39,00,000/- (Rupees Six Crores Thirty-Nine Lakhs) was deposited by the Applicant for discharging liability of the sale consideration for the subject property.

3.3 The Applicant had 30 days’ period from the date of confirmation, i.e., by 16.12.2021, to deposit the remaining balance amount of Rs. 19,17,00,000/- (Rupees Nineteen Crores Seventeen Lakhs). In case the same was not done by 16.12.2021, the outstanding amount, after 16.12.2021, was to be paid along with interest @12% p.a. maximum up to 90 days from the date of confirmation, i.e. by 14.02.2022. The Applicant accepted the said terms and confirmed that the balance amount shall be deposited by 14.02.2022. with interest at the rate of 12% p.a. vide email dated 15.12.2021.

3.4 The Applicant before depositing the outstanding consideration amount, sought clarification from the Respondent pertaining to the legal title of the subject property vide email dated 06.01.2022, and letter dated 06.01.2022 and IA No 1047 of 2024 in CP (IB) 117/Chd/Chd/2017

requested the Respondent to provide the certified copies of the complete chain documents of the subject property, as the same was not provided along with the bid document.

3.5 The Applicant became aware about a Writ Petition filed by M/s Aggarwal Trading Co. before the Hon'ble Punjab and Haryana High Court bearing title M/ s Aggarwal Trading Co. & Anr. Vs. Liquidator for Best Foods Ltd. & Ors on 29.01.2022, when the same was intimated by the counsel representing M/ s Aggarwal Trading Co. The said matter was, however, disposed of by the Hon'ble Punjab and Haryana High Court vide order dated 02.02.2022 directing M/s Aggarwal Trading Company to approach this Tribunal and staying the execution of sale deed of the subject property by the liquidator till 09.02.2022. Pursuant to the said order passed by the Hon'ble High Court, M/s Aggarwal Trading Co. filed an IA No. 123/2022 before this Adjudicating Authority on 11.02.2022, which was withdrawn subsequently.

3.6 The Applicant to protect its interest filed a Company Application No. 85/2022 in Company Petition (IB) No. 117/Chd/CHD/2017 before this Adjudicating Authority on 11.02.2022 (i.e., before the expiry of 90 days available for making the balance payment), seeking directions to the Respondent No. 2 to provide certified copy of the chain documents pertaining to the subject property sold through the aforesaid e-auction for verification before the payment of the balance sale consideration amount of Rs. 19,17,00,000/- (Rupees Nineteen Crores Seventeen Lakhs only); to extend the last date for payment of balance consideration on account of pending litigations w.r.t to the subject property and to waive off the interest liable to be paid

during the period of the litigation or the period during which the CA No. 85/2022 was pending before this Tribunal; and directing the Respondents to provide indemnity to the Applicant confirming that the clean title will be transferred to the Applicant and the legal title of the subject property is not disputed in any litigation and no third party right had been created.

3.7 This Tribunal, vide Order dated 31.03.2023, dismissed the aforesaid CA No. 85 of 2022. Against the said order, the Applicant preferred an Appeal before the Hon'ble NCLAT, which came to be dismissed vide order dated 21.4.2023. In furtherance against the order of the Hon'ble NCI.AT, the Applicant preferred a CWP No. 13489 of 2023 in the Hon'ble Punjab and Haryana High Court, which was dismissed vide order dated 18.12.2023. The Hon'ble High Court granted a liberty to the Applicant to avail remedies as per law without expressing opinion on the merits of the pleas raised in the petition.

3.8. In support of its prayer for refund of the forfeited EMD, the Applicant has raised the following contentions:

- I) The Applicant, at no stage expressed its unwillingness or inability to pay the balance consideration. Even during the pendency of the IA-85/2022, the Applicant expressed its willingness to pay the balance amount vide its e-mail dated 31.05.22.
- II) After withdrawal of the IA-123/2022 by M/s Aggarwal Trading Company, which was disputing 14 marla land, the applicant wrote an email to the Liquidator that he is ready to deposit the balance sale consideration.

- III) The Respondent vide e-mail dated 10.5.2023 replied by saying that the amount towards 25 % of the bid amount, which sums up to an amount of Rs. 6,39,00,000/- stands forfeited.
- IV) In an auction of another property of the same Corporate Debtor, vide the same auction notice, the last date of payment was 14.2.2022 and the payment was not made by that date and the auction purchaser took the plea of pendency of IA-123/22 (same as was taken by the Applicant herein) and this Adjudicating Authority vide order dated 13.5.2022 passed in IA No. 393 Of 2022, passed a direction to deposit 50% amount within a week and stayed any coercive action, meaning thereby that despite the default in payment of auction price within stipulated 90 days, the period was extended and interim protection of forfeiture as a consequence of default was granted. Further, vide orders dated 23.5.22, the period of payment of the balance 50% amount was extended till 10.6.2022.
- V) The subject property was put to fresh auction on 14.6.2023 and finally auctioned for a sum of Rs. 31.10 crore, i.e., Rs. 5.54 Crore over and above the last auction. Thus, there was no loss caused to the stakeholders.
- VI) After the disposal of CWP 13489/23 by the Hon'ble Punjab and Haryana High Court, the Applicant approached the Liquidator for refund of the amount already deposited vide e-mail dated 1.04.2024. The liquidator, vide its e-mail dated 15.04.2024, stated that the said amount stood forfeited.

4. On issuance of notice, the Respondent filed its reply and objected towards the prayer of the Applicant mainly by stating the following:

4.1 The present Application is not maintainable since the Order dated 31.03.2023 passed by this Adjudicating Authority has merged with the Order dated 21.04.2023 passed by the Hon'ble NCLAT. In view of the facts and circumstances, the present Application is liable to be dismissed.

4.2 The Applicant filed a Writ Petition bearing CWP No. 13489 of 2023 before the Hon'ble High Court of Punjab & Haryana. The Hon'ble High Court, vide order dated 18.12.2023, while dismissing the said Writ Petition granted liberty to the Applicant to avail remedy as available in accordance with law.

4.3 The Applicant has admittedly failed to pay the balance consideration within 30 days and furthermore, within 90 days along with interest as stipulated under clause 12 of Schedule I of the Liquidation Process Regulations, 2016.

4.4 Vide letter dated 16.11.2021, the Liquidator communicated that the amount deposited with respect to the auction shall be liable to be forfeited on failure to deposit the balance sale consideration by the outer limit of 14.02.2022. The Applicant confirmed vide letter dated 15.12.2021 that the balance sale consideration of Rs.19,17,00,000/- is to be deposited by 14.02.2022 with an interest @ 12%. However, the same was not done and in terms of clause 12 of Schedule of the Liquidation Process Regulations, 2016, the sale stood cancelled.

4.5 The use of word 'shall' in Clause 1(12) of Schedule I of the Liquidation Process Regulations, 2016 leaves no doubt that the same is mandatory in nature and upon completion of 90 days and on failure of an Applicant to pay balance sale consideration, the same requires to be cancelled.

4.6 Applicant knowing and willfully defaulted to comply with the terms of the provisions of the Code and underlying Regulations, and with the e-auction Bid Document dated 25.10.2021. The actions of the Applicant caused loss and were detrimental to the interests of the stakeholders. The actions of the Applicant were in clear violation of the provisions of the Code and contradictory to the terms and conditions of the Bid Process Documents.

4.7 The Hon'ble NCLAT vide its judgment dated 08.04.2024 in Comp. App. (AT) (Ins) No. 1543 of 2023 in **Potens Transmission & Power Pvt Ltd v Apex Buidlsys Ltd** (In Liquidation), held as under:

“30. The question in this case travels in a narrow compass in regard to the refund of the amount of the part payment by the Appellant after the failure of the bid his instance on the anvil of Section 74 of the Indian Contract Act?

38. Be that as it may, Counsel for the Respondent has relied upon a decision of this Court rendered in the case of Westcoast Infraprojects Pvt. Ltd. (Supra) in which, the facts were, that the highest bidder not only deposited EMD but also a part payment was made which was forfeited. Counsel for the Appellant therein raised a legal issue while referring to Section 74 of the Act submitting that the liquidator ought to have filed a suit for recovery of the penalty by way of compensation and the liquidator had no jurisdiction to forfeit the EMD and that the amount of Rs. 1,75,00,000/- deposited by the Appellant be refunded.

39. This question has been answered by this Court while referring to Section 74 of the Act and held that "20. For purpose of this case, law as laid down in Paragraph 43.7 is relevant where Hon'ble Supreme Court has clearly held that when forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. The statement of law in paragraph 43.7 is fully applicable in the case of the present case. The present is a case where Appellant participated in the eAuction conducted by the Liquidator under the Liquidation Process Regulations, 2016. Section 74 of the Indian Contract Act has no application in the case of Auction conducted by the Liquidator under the Liquidation Process Regulations, 2016. The terms and conditions of the sale as finalized by the Liquidator under which the e-Auction was held is binding on all including the bidders. Bidders give an unqualified undertaking for participation in the e-Auction after knowing fully well of clauses of the eAuction Process Document and undertook to abide by the clauses. The submission of the Appellant cannot be accepted that Appellant's EMD cannot be forfeited even though he has committed default in making the payment of balance amount and the Liquidator should file a suit for forfeiting amount deposited by the Appellant. Such preposterous argument cannot be accepted in view of the fact that Liquidation Process is conducted under the statutory Liquidation Process Regulations, 2016. The terms and conditions of the Process Document has been framed as per statutory empowerment given to the Liquidator by Schedule I of the Liquidation Process Regulations, 2016 as noticed above. When the clauses of the Process Document as noted above, clearly empowers the Liquidator to forfeit the EMD and any payment made in event default is committed by the Highest Bidder, no exception can be taken to the action of the Liquidator in cancelling the sale and forfeiting the amount deposited by the Appellant."

40. It is pertinent to mention that the aforesaid judgment passed by this court was further challenged by the aggrieved party before the Hon'ble

Supreme court by way of Civil Appeal No. 4087 of 2023 which was dismissed on 05.07.2023.

42. Thus, in view thereof, we do not find any merit in the present appeal and the same is hereby dismissed though without any order as to costs.”

5. The Applicant filed its Written Synopsis, and Consolidated Synopsis mainly stating the following:

5.1 A perusal of the forfeiture communication nowhere states that it is the case of any party or any finding that the Applicants had any malafide intention that they will first participate with an agenda to weed out other bidders and then, will withdraw after the confirmation of the sale with intent to frustrate the process so that they can buy the property at a lesser price at a later stage.

5.2 The order of the Adjudicating Authority dated 21.04.2023 (while not extending time for payment of balance sales consideration) nowhere gives a finding or an "advise" that the bid amount should be forfeited.

5.3 The Hon'ble Supreme Court in the matter of "**The Authorised Officer, Central Bank of India Vs. Shanmugavelu**" (para 116-24) held that where period of 90 days for payment has not been extended, still forfeiture can be set aside if there is no likelihood of any hidden interest of the bidder to stall the sale to benefit the defaulting borrower and there was no agenda to participate in the auction to rig the prices.

5.4 The Applicant has also advanced counter-arguments to the objections raised by the Liquidator in tabular form, which are reproduced overleaf:

4. Arguments of Liquidator and Counter:

Arguments of Liquidator	Counter
This Hon'ble AA dismissed IA 85/2022 (on 31.3.23) and Hon'ble NCLAT(on 21.4.23) upheld the order. Hence, the order endorses forfeiture	In the said IA, the only issue raised and adjudicated pertained to "extension of time for payment". Moreover, forfeiture took place on 10.5.2023, i.e., after the orders of AA/NCLAT.
Period of 90 days in Regulation 12, Schedule 1 of Liquidation	- In IA 393/2022, pertaining to same auction, this AA had not
Regulations is sacrosanct and in no case can be extended by AA.	<p>only extended the time, but also condoned the delay in payment in violation of orders of AA. (Page 90-97 of IA)</p> <ul style="list-style-type: none"> - In <i>Potens Transmission vs. Gian Chand Narang</i> relied upon by Liquidator, in para 6 (Page 26 of WS of Liquidator), he is admitting that time was extended by AA.
As a corollary of the above, he natural consequence of not making payment within 90 days is forfeiture and no court can interfere.	<ul style="list-style-type: none"> - In the judgments relied upon by the Liquidator, the AA/SC are in the context that Section 74 of Contract Act and doctrine of unjust enrichment are not applicable. - The Applicant's case is not under the above. - The Applicant was willing to pay the balance amount even during the period when IA 85/22 was pending as recorded in order dated 17.11.22 (Page 83-86 of IA) - Even after the Appeal was dismissed by Hon'ble NCLAT on 21.4.2023, the Applicant had offered to pay the amount on 10.5.2023 (Page 87-89) - Hence, the Applicant was always willing to pay the amount.
The Judgment in " <i>The Authorised Officer, Central Bank of India Vs. Shanmugavelu</i> " was in the context of SARFAESI and not under IBC.	- Under Rule 9(5) of SARFAESI Rules, the consequence of not depositing auction amount has been specifically mentioned as forfeiture

<p>(Annexure A)</p>	<ul style="list-style-type: none"> - Under Regulation 1(12) of Schedule I, IBC, the forfeiture has not been mandated. Under Regulation 1(3), liquidator can prescribe terms and condition. Hence, the liquidator prescribed forfeiture as a consequence. - The legislature did not deem it fit to provide for forfeiture under IBC. - Hence, the Judgment is material as even where the law mandates forfeiture, still, it can be set aside.
<p>The NCLAT/SC has held that “<i>The Authorised Officer, Central Bank of India Vs. Shanmugavelu</i>” has been distinguished as not applicable to IBC</p>	<p>There is no specific finding in any of the judgments cited by the Liquidator to that effect that under no circumstances, the forfeiture can be set aside. There are instances where Hon’ble AA/NCLAT have extended the period of 90 days and set aside the forfeiture.</p>
<p>The Judgment of Hon’ble NCLAT in the matter of <i>Kuldeep Singh & Anr. Vs. Manjul Mittal</i>” is for private sale and provisions of Liquidation Regulations (Schedule I) are entirely different that those of public auction</p> <p>Annexure B and Annexure C</p>	<ul style="list-style-type: none"> - In this case, liquidator forfeited the paid amount as balance was not deposited within 90 days as per “terms of sale”. - This Hon’ble AA not only refused extention of time but also upheld forfeiture in accordance with “terms of sale” - Hon’ble NCLAT not only granted time beyond 90 days even after forfeiture, but also set aside the forfeiture. - Regulation 12 of Schedule 12 doesn’t provide a time, but also does’nt provide for forfeiture,

	<p>implying that the forfeiture clause is in the “terms and conditions of sale/LoI” in the same fashion as a public auction.</p> <ul style="list-style-type: none"> - Hence, both in private sale and public auction, the forfeiture is not prescribed by law, but by way of terms and conditions prescribed by liquidator. - If forfeiture under public auction is to be held as “sancrosanct”, then forfeiture under private sale should also be held “sancrosanct”. - Hence, the judgment clearly shows that neither 90 days not forfeiture is sancrosanct.
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6. The Respondent/Liquidator filed its Written Submissions mainly stating the following:

6.1 As per the e-auction process document dated 25.10.2021, all the Lots including the Lot 5 (Land Nangal Khurd) were proposed to be sold on "As is where is basis", "As is what is basis", "Whatever there is basis" and "No recourse" basis. The Applicant was declared as the Successful Bidder in e-auction conducted on 15.11.2021 whereby, it had offered a Bid amount of Rs. 25,56,00,000/-. The Earnest Money Deposit, being 25% of the Total Bid, amounting to Rs. 6,39,00,000/- was deposited by 16.11.2021 (which was the last date of depositing EMD).

6.2. Admittedly, the Applicant agreed to and is bound by the conditions stipulated in the E-Auction process document dated 25.10.2021 and LOI was unconditionally accepted by the Applicant and therefore, the Applicant is estopped in law to raise any issue or grievance for refund of any amount that has been forfeited in terms thereof.

6.3 The Hon'ble Appellate Tribunal vide judgment dated 11.01.2022 in "**Visisth Services Limited vs. S.V. Ramani**" in Company Appeal (AT) (Ins) No. 896 of 2022" held as under:

16.... "If the Bidder is allowed to withdraw from the bid at this stage and seek refund on the ground that their conditional offer has not been accepted, then the liquidation process would be a never ending one, defeating the scope and objective of the Code."

6.4 In "**Saboo Tor Private Limited v. Mr. Sanjay Gupta & Anr.**", Company Appeal (AT) (Ins) No. 1098 of 2020", it has been held by the Hon'ble Appellate Tribunal vide judgment dated 18.01.2021 that the amount paid by the successful bidder may be forfeited by the Liquidator in terms of the e-auction process information document. The relevant paragraph of the judgment is reproduced as under:

"14. In the present case, the material on record evidences that reminder e-mails dated 01.04.2020, 02.04.2020, 23.04.2020, 15.05.2020 and 18.05.2020 were issued by the Liquidator to the Appellant herein requesting for payment of the balance amount of the 25% of the consideration but the Appellant neither replied to the e-mails nor made any payment adhering to the terms and conditions. It can be safely construed

that the Appellant, by his own conduct, precluded the coming into existence of the concluded 'Sale' and cannot now be given an advantage or benefit of his own wrongdoing by not allowing forfeiture.

7. We heard the submissions of both the parties and perused the pleadings, including the Written Synopsis/Submissions filed by both the parties. The Liquidator has strongly objected to the prayer of refund of 25 % of the EMD amount of Rs. 6,39,00,000/- deposited by the applicant on the ground that this Adjudicating Authority vide order dated 31.03.2023 and Hon'ble NCLAT vide judgement dated 21.04.2023 declined the Applicant any further time to deposit the balance sale consideration. Therefore, in view of such findings, the present Application is not maintainable.

Per Contra, the Applicant has contended that the only issue raised and adjudicated in the IA decided by this Adjudicating Authority on 31.03.2023 and in the Appeal decided by Hon'ble NCLAT on 21.04.2023 pertained to "extension of time for payment". The order of the Adjudicating Authority dated 21.04.2023 (while not extending time for payment of balance sales consideration) nowhere gave a finding or an "advise" that the bid amount should be forfeited. As a matter of fact, forfeiture of the EMD took place only on 10.05.2023, when the Respondent/Liquidator for the first time communicated so to the Applicant, and that was after the orders passed by this Adjudicating Authority/Hon'ble NCLAT. Hence, the issue of forfeiture/refund of 25% of the EMD amount of Rs. 6,39,00,000/- arose post- the orders of this Adjudicating Authority and the Hon'ble Appellate Authority.

8. In the above backdrop, when we refer to the forfeiture communication dated 10.05.2023 of the Respondent/Liquidator to the Applicant, we observe that the Liquidator did not forfeit the Bid/EMD amount in terms of any direction passed by this Adjudicating Authority or Hon'ble NCLAT. Further, as per record, we find that no such direction regarding forfeiture of bid amount/EMD was ever passed.

9. Moreover, we notice from the record that the forfeiture of the bid/EMD amount deposited was challenged for the first time by the Applicant before the Hon'ble High Court of Punjab and Haryana in CWP 13489 of 2023. The said Writ Petition was dismissed by the Hon'ble High Court with the following observations:

*“6. Petitioner in this case admittedly has the remedy of appeal in terms of Section 62 of The Insolvency and Bankruptcy Code (IBC) 2016 for challenging order dated 31.03.2023 (Annexure P-14), passed by NCLT and order dated 21.04.2023 (Annexure P-15), passed by NCLAT, respectively. However, learned counsel for petitioner during the course of arguments did not press this prayer and **restricted the prayer for refund of amount deposited by petitioner. Still in the given factual matrix, we find no ground for interfering to the said limited extent as well for directing refund of forfeiture amount in exercise of jurisdiction under article 226 of the Constitution of India.***

....

*11. Keeping in view facts and circumstances as above this writ petition is dismissed **with liberty to petitioner to avail remedy(ies) as available in accordance with law. There is no expression of opinion on the merits of the pleas as raised in this writ petition with reference made thereto is only for purpose of decision of this writ petition.***

(Emphasis supplied)

10. Thus, on getting the liberty granted by the Hon'ble High Court (ibid), the Applicant has preferred the present Application to seek refund of the forfeited EMD amount, which plea, in our view, cannot be rejected solely on the ground that the Applicant was not allowed extension of time to deposit the balance sale consideration after the 90 days' period as seeking extension of time and seeking refund of EMD are two different prayers. **Hence, we find the present Application maintainable, and we would like to proceed ahead with the merits.**

11. The Respondent/Liquidator has contended that it had forfeited the bid amount deposited by the Applicant in terms of the provisions of the I&B Code and Regulations. In the pleadings as well as during the hearing, Ld. Counsel appearing for the Respondent/Liquidator referred to and emphasized on the Clause 1(12) of "Schedule I" of the Liquidation Process Regulations, 2016. Hence, we consider it appropriate to visit the Clause 1(12) of "Schedule I" of the Liquidation Process Regulations 2016, which is reproduced overleaf, for an immediate reference:

SCHEDULE I

MODE OF SALE

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

1. AUCTION

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

⁹³[(1A) Subject to provisions of regulation 2B, the liquidator shall issue a public notice of an auction for sale under regulation 32 within forty-five days from the liquidation commencement date unless the consultation committee advises to extend the timeline.

(1B) The liquidator shall issue public notice for the next auction, in case of failure of the auction, within fifteen days from the last failed auction unless the consultation committee advises to deviate from the specified time period.

(1C) Notwithstanding anything contained in this Schedule, the liquidator shall complete an auction process within thirty-five days from the issue of public notice for auction.

(1D) The liquidator shall provide at least fourteen days from issue of public notice for submission of eligibility documents by prospective bidder.

(1E) The liquidator shall provide to qualified bidder at least seven days, for inspection or due diligence of assets under auction, from the date of declaration of qualified bidder.

(1F) A prospective bidder in an auction process shall deposit earnest money deposit at least up to two days before the date of auction.]

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

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

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

⁹⁴[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.]

⁹⁵[Provided further that the liquidator shall mention in the auction notice, the period extended under clause (h) of sub-regulation (1) of regulation 31A.]

- (4) ⁹⁶[The reserve price shall be the value of the asset arrived at in accordance with regulation 35 and where an auction fails, the reserve price in subsequent auctions may be further reduced by not more than ten percent at a time:

Provided that in cases where the reserve price of the failed auction of the asset was fixed as per the valuation under sub-regulation (1) of regulation 35, the liquidator may, on the advice of the consultation committee, reduce the reserve price up to twenty-five percent, once during the process.] .

- (5) The liquidator shall ⁹⁷[issue a public notice] of an auction in the manner specified in Regulation 12(3);

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

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

- (7) ⁹⁸[From a date to be notified through circular by the Board, the liquidator shall sell the assets only through an electronic auction platform empanelled by the Board.]

- (8) If the liquidator is of the opinion that a physical auction is likely to maximize the realization from the sale of assets and is in the best interests of the creditors, he may

sell assets through a physical auction after obtaining the permission of the Adjudicating Authority. The liquidator may engage the services of qualified professional auctioneers specializing in auctioning such assets for this purpose.

- (9) An auction shall be transparent, and the highest bid at any given point shall be visible to the other bidders.
- (10) If the liquidator is of the opinion that an auction where bid amounts are not visible is likely to maximize realizations from the sale of assets and is in the best interests of the creditors, he may apply, in writing, to the Adjudicating Authority for its permission to conduct an auction in such manner.
- (11) If required, the liquidator may conduct multiple rounds of auctions to maximize the realization from the sale of the assets, and to promote the best interests of the creditors.

⁹⁹[(11A) Where the liquidator rejects the highest bid in an auction process, he shall intimate the reasons for such rejection to the highest bidder and mention it in the next progress report.]

- (12) ¹⁰⁰[On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days or such period as mentioned in the auction notice under clause 3, of the date of such demand:

Provided that payments made after thirty days shall attract interest at the rate of twelve per cent.:

Provided further that the sale shall be cancelled if the payment is not received within the period provided under this clause.]

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

From the bare perusal of Clause 1(12) of “Schedule I” of the Liquidation Process Regulations 2016 (ibid), we observe that it only stipulates of cancellation of sale, if the payment is not received within the period provided. But, we do not find any explicit / direct provision regarding forfeiture of bid amount/EMD. Hence, it would be not be correct to say that the forfeiture of EMD was made in terms of the provisions of the I&B Code or Regulations.

12. Since neither the IBC 2016 nor the Liquidation Regulations directly, and explicitly mandate the Liquidator to forfeit the EMD in case of default, at this stage, we consider it necessary to visit the terms and conditions of the Auction Document, to find the exact terms. Accordingly, we refer to the relevant terms and conditions of the Auction Document, as placed on record, which reads thus:

The Entire Amount paid by the applicant / bidder including the Earnest Money Deposit can be forfeited at any time, upon the occurrence of any of the following events:

- I. If any of the conditions under this Document are breached by the Bidder(s) or in case the Bidder(s) is / are found to have made any misrepresentation; or
- II. If the Bidder(s) is / are found to be ineligible to submit the bid under Section 29 and Section 35(1) (f) of the IBC (as amended from time to time) or is / are found to have made a false or misleading declaration of eligibility under Section 29A and Section 35(1) (f) of the IBC (as amended from time to time); or
- III. If the Bidder(s) is / are identified as the Successful Bidder(s) and fails to pay balance sale consideration as per terms of the sale.
- IV. If the Bidder(s) is / are found to have indulged in any of fraudulent or corrupt practices.

13. From a perusal of the aforesaid terms and conditions of the Auction, it is observed that the Liquidator had specifically made a clause for forfeiture of the entire amount paid including the EMD. The inclusion of the forfeiture clause is not a new innovation, but it is a practice followed from years, which can be generally seen in the Auctions under Government Tenders, Auctions under the SARFAESI Act etc.

The intent of including such a forfeiture clause was discussed by the Hon'ble Supreme Court in the matter of "**NHAI Vs Ganga Enterprises and Anr.**", **(2003) 7 SCC 410**, the relevant contents of which reads thus:

*"9. In our view, the High Court fell in error in so holding. By invoking the bank guarantee and/or enforcing the bid security, there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Contract Act, 1872. The Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. **It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the***

capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.

(Emphasis supplied)

14. Further, the Hon'ble Supreme Court in its judgement dated 10.04.2023 **“Authorised Officer State Bank of India vs C. Natarnajan & Anr.”**, Civil Appeal No. 2545/2023, held the following:

*“24. The up-shot of the aforesaid discussion is that whenever a challenge is laid to an order of forfeiture made by an authorized officer under sub-rule (5) of rule 9 of the Rules by a bidder, who has failed to deposit the entire sale price within ninety days, the tribunals/courts ought to be extremely reluctant to interfere unless, of course, a very exceptional case for interference is set up. **What would constitute a very exceptional case, however, must be determined by the tribunals/courts on the facts of each case and by recording cogent reasons for the conclusion reached. Insofar as challenge to an order of forfeiture that is made upon rejection of an application for extension of time prior to expiry of ninety days and within the stipulated period is concerned, the scrutiny could be a bit more intrusive for ascertaining whether any patent arbitrariness or unreasonableness in the decision making process has had the effect of vitiating the order under challenge. However, in course of***

such scrutiny, the tribunals/courts must be careful and cautious and direct their attention to examine each case in some depth to locate whether there is likelihood of any hidden interest of the bidder to stall the sale to benefit the defaulting borrower and must, as of necessity, weed out claims of bidders who instead of genuine interest to participate in the auctions do so to rig prices with an agenda to withdraw from the fray post conclusion of the bidding process. In course of such determination, the tribunals/courts ought not to be swayed only by supervening events like a subsequent sale at a higher price or at the same price offered by the defaulting bidder or that the secured creditor has not in the bargain suffered any loss or by sentiments and should stay at a distance since extending sympathy, grace or compassion are outside the scope of the relevant legislation. In any event, the underlying principle of least intervention by tribunals/courts and the overarching objective of the SARFAESI Act duly complimented by the Rules, which are geared towards efficient and speedy recovery of debts, together with the interpretation of the relevant laws by this Court should not be lost sight of. Losing sight thereof may not be in the larger interest of the nation and susceptible to interference.”

(Emphasis supplied)

15. Also, the Hon'ble Supreme Court in its recent judgement dated 02.02.2024 in the matter of "**The Authorised Officer, Central Bank of India Vs. Shanmugavelu**" **Civil Appeal No(s) 235-236 of 2024**, while reiterating in para 116 the abovementioned paragraph 24 of the "Authorised Officer State IA No 1047 of 2024 in CP (IB) 117/Chd/Chd/2017

Bank of India vs C. Natarnajan & Anr.”, held in paragraph 117 of the Judgement the following:

“117. Thus, this Court held that **where extraneous condition exist that might have led to the inability of the successful auction purchaser despite best efforts from depositing the balance amount to no fault of its own, in such cases the earnest-money deposited by such innocent successful auction purchaser could certainly be asked to be refunded.**”

(Emphasis supplied)

16. We are cognizant of the fact that there are timelines under Liquidation, and the Liquidator cannot be faulted for including such a forfeiture clause in the terms of the auction in order to weed out the non-serious bidders or bidders having ulterior motive like rigging of prices as observed by the Hon’ble Apex Court in the judgements (ibid).

17. Though the Applicant was not given any further time to deposit the balance amount to participate in the Auction by this Adjudicating Authority and Hon’ble NCLAT, however, in the interest of justice, the conduct of the Applicant is still needs to be analysed in terms of the Judgements of Hon’ble Supreme Court (ibid). In this context, the points that emerge from the aforesaid Judgements of the Hon’ble Supreme Court for our examination are (a) Whether the Applicant had any hidden interest/intention to stall the sale of the subject property to benefit the defaulting borrower or rig the prices with an agenda or affect the outcome of auction adversely in any manner; (b) Whether the

Applicant was a genuine bidder having adequate financial capacity and intention to pay the remaining amount; and (c) Whether there was any extraneous or external circumstance existed that prevented the Applicant (H-1 bidder) to deposit the balance amount.

18. To find out **whether the Applicant had any hidden interest/intention to stall the sale of the subject property to benefit the defaulting borrower or rig the prices with an agenda or affect the outcome of auction adversely**, we refer to the forfeiture communication dated 10.05.2023 from the Liquidator to the Applicant, which reads thus:

Vikram Bajaj <bajaj.vikram@gmail.com>
To: ASJ FINSOLUTIONS <asjfinansolutions@gmail.com>

10 May 2023 at 16:09

Dear Sir

Please refer to the trailing mail.

You are well aware that the sale already stands cancelled and the amount deposited already stands forfeited on your failure to deposit the entire Bid Amount with applicable interest by 14-2-2022. The pertinent terms of the Bid Document are reproduced hereunder for your reference:

The successful bidder will have to deposit the balance sale consideration within 30 days from issuance of Letter of Confirmation of Sale. Provided that the Liquidator shall accept payment of balance sale consideration up to maximum of 90 days, subject to payment of interest at 12% p.a. on payments made after 30 days. In case of failure to make the complete payment (including applicable taxes and interest, if any) within 90 days, the entire amount paid including EMD, shall stand forfeited and confirmation of sale shall stand cancelled automatically. The asset(s) may be put to re-auction or sold to the next highest Qualified Bidder, at the sole discretion of the Liquidator and the defaulting Successful Bidder shall have no claim/right in respect of such asset. The Liquidator may at his sole discretion proceed with fresh auction sale of the assets or disposal in any other manner.

The same was clearly communicated to you in the sale confirmation email dated 16-11-2021:

"Please note that the amount deposited in respect of Lot 5 shall be liable to be forfeited on failure to

<https://mail.google.com/mail/u/0/?ik=f4182b6067&view=pt&search...mpl=msg-a:r991449326247700437&simpl=msg-f:1765503350754909382> Page 1 of 2

deposit the balance sale consideration by outer limit of 14-2-2022 (with applicable interest) and the sale shall stand cancelled."

You had made an application IA 85/2022 before Hon'ble NCLT for extension of time which stands dismissed vide order dated 31-3-2021. Further the said order was assailed in appeal and the appeal filed by you also stands dismissed vide order dated 21-4-2023.

It is pertinent to mention that the Hon'ble NCLT has while dismissing the application duly noted the terms of Bid Document and communications made to you advising the amount deposited shall stand forfeited on non deposit of balance amount with interest by 14-2-2022. Relevant excerpts are reproduced for your ready reference:

"Para 7 - Page 5

.....
The Respondent informed the Applicant that if the said Balance Consideration is not paid within 90 days, the amount deposited shall stand forfeited.
"

Accordingly you are well aware that you have no right either on the amount deposited as the same already stands forfeited or on the subject property as the sale already stands cancelled.

Sincerely,

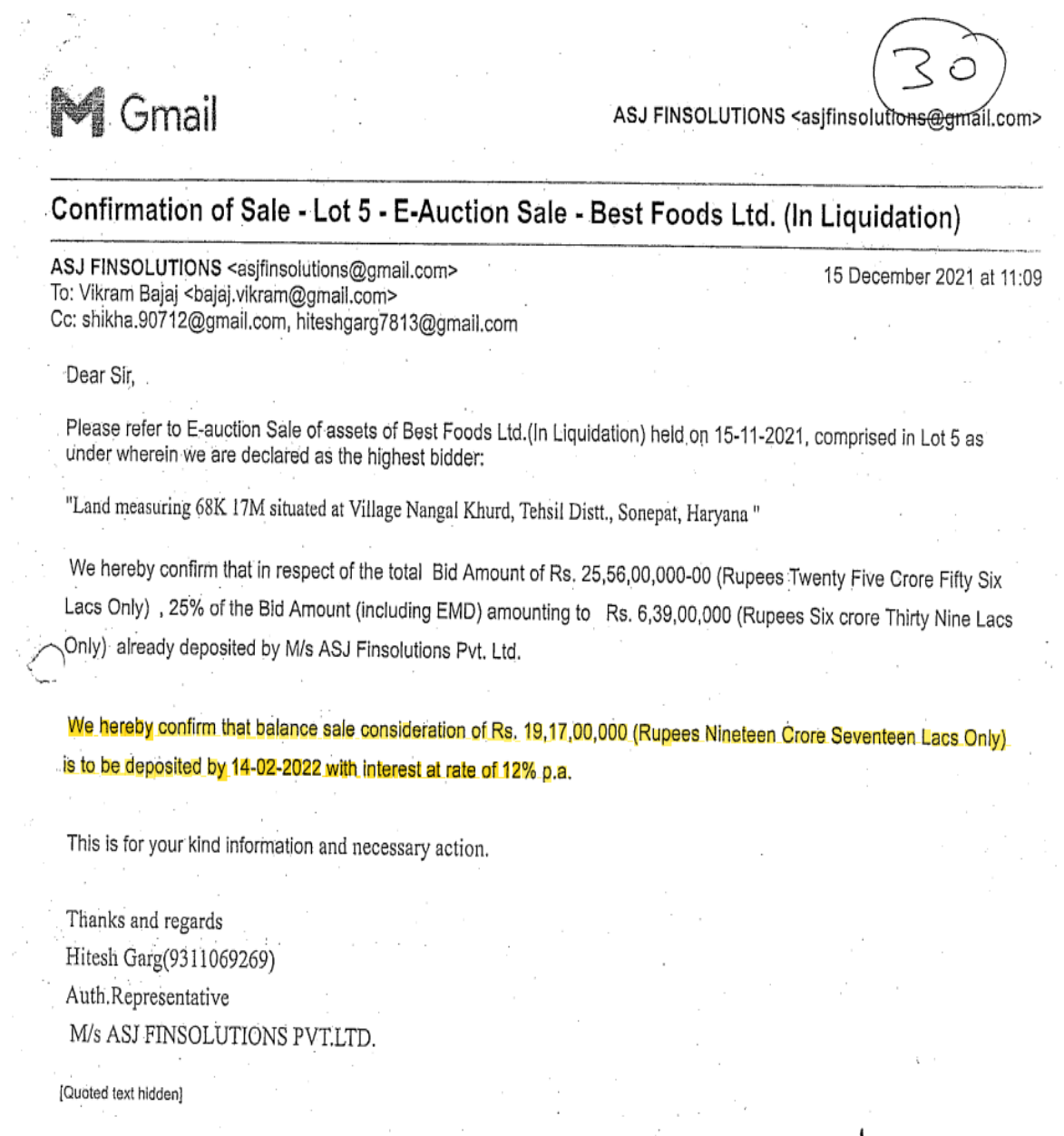
Vikram Bajaj
IBBI/IPA-002/IP-N00003/2016-2017/10003
Liquidator
Best Foods Ltd. (In Liquidation)
[Quoted text hidden]

From the aforesaid communication, we find that the Liquidator has nowhere held that the Applicant had any hidden interest/intention to stall the sale of the subject property to benefit the defaulting borrower or rig the prices with an agenda or affect the outcome of auction adversely in any manner.

Further, neither in the pleadings nor during the course of hearing, any such allegation was made by or on behalf of the Liquidator. **Hence, we agree with the contention of the Applicant that it is nobody's case that the Applicant had any mala fide intention to frustrate the auction process of the subject property.**

19. For the next issue **whether the Applicant was a genuine bidder having adequate financial capacity and intention to pay the remaining amount**, we refer to the different communications between the Applicant and respondent placed on record.

19.1 We find first such communication vide e-mail dated 15.12.2021 by which the Applicant, after having deposited EMD, informed the Liquidator that it will pay the balance amount till 14.02.2022. The said email reads thus:



19.2 The applicant, in its pleadings, has mentioned that it was willing to pay the balance amount even during the pendency of IA-85/2022. In this regard, we refer to the order of this Adjudicating authority dated 17.11.2022, the relevant portion of which reads thus:

IA No. 85/2022

3. Heard the learned counsel for parties. Despite last opportunity given earlier, none appeared on behalf of respondent Nos. 3 and 4. It seems that respondent Nos. 3 & 4 are not interested in these proceedings and their right to file reply is hereby closed. The learned counsel for applicant has stated that his client is ready to pay the balance amount. Keep it for consideration on next date of hearing.

4. Learned counsel for respondent Nos. 1 & 2 is directed to file an affidavit from the bank regarding the bid documents which were uploaded on the e-auction website. Let the same be filed at least one week before the next date of hearing. List on 13.12.2022.

19.3 Further, it has been stated by the Applicant that even after dismissal of Appeal by the Hon'ble NCLAT, the Applicant had offered to pay the balance amount with interest vide its letter dated 9.05.2023 sent to the Respondent by e-mail dated 10.05.2023 (pg.87-89 of application). Therefore, we refer to the letter dated 9.05.2023 which reads thus :



PH. : 011-49076967

ASJ FINSOLUTIONS PRIVATE LIMITED

AP-11A, PITAMPURA, NEW DELHI-110034

EMAIL : asjfinsolutions@gmail.com CIN : U74140DL2010PTC199062

To,

Date: 09.05.2023

Sh. Vikram Bajaj
(Liquidator of M/s Best Foods Limited)
Registration Number IBBI/PA-002/IP-N00003/2016-2017/10003
308, Third Floor, Pearls Business Park
Netaji Subhash Place Delhi-34

Sub: Request for either accept the balance amount with interest or return the paid amount in respect to the property of M/s Best Foods Limited shown at Lot No-5.

Dear Sir,

With respect the matter cited above , it has been refer to E-Auction in respect of sale of assets of M/s Best Foods Limited (In Liquidation) held on 15-11-2021, comprised in lot 5 as under where in we are declared as the highest bidder. Thereafter the Appellant has deposited amount of Rs.6.39 Crores (25% of the total bid amount) on 16.11.2021. Your good self being Liquidator to issue the letter of intent on 16.11.2021. According to letter, the balance amount has to be deposited in 30 days or with interest upto 90 days confirming the Applicant company being successful bidder as per the Liquidation Regulation, 2016.

Thereafter some litigations have been started from both sides with different prayers including third party.

Now the applicant company do not want to occupy itself in further litigation and want to sort out the entire issue amicably, therefore following is prayed to you being authority in the matter:-

1. The applicant company showing its genuineness and ready to pay the entire balance sale consideration amounting which is Rs.19,17,00,000/- along with interest till date.

2. In case above proposal regarding payment is not acceptable by Liquidator due to any reasons, then it is requested to you please return the 25% bid amount which is equivalent to Rs.6.39 Cr.

In view of the above, it is requested to your good office please consider the above request and confirm to undersigned the same.

With regards

For ASJ FINSOLUTIONS PVT. LTD.

(Authorized Representative Hitesh Garg)

ASJ Finsolutions Pvt. Ltd.

Registered Office at AP-11A Pitampura Delhi-34

19.4 Further, from the Application, we find that the Applicant has, inter alia, averred the following:

41. That rather, the bona fide of the Applicant is further amplified from the fact that in same auction pertaining to the same Corporate Debtor, which was held on 15.11.2021, the Applicant sister concern M/s SPJ Properties Private Limited participated for Lot 4 separately and was declared the successful bidder at RS. 9.26 Crs against reserve price of RS. 9.26 Cr. and had made the payment within the stipulated period on 21.12.2021. A copy of the auction notice and the sale certificate dated 04.02.2022 is annexed hereto as **Annexure A-16.**

This was not denied by the Respondent/Liquidator. Hence, this fact also adds to the bona fide/ genuineness of the Applicant bidder.

Thus, from the repetitive communications (ibid) sent by the Applicant and above-said submissions made on his behalf, **we conclude that the Applicant was a genuine/bona fide bidder having requisite financial capacity and intention to pay the remaining amount with interest.**

20. For the last issue, **whether there was any extraneous or external circumstance existed that prevented the Applicant (H-1 bidder) to deposit the balance amount,** the Applicant had repeatedly referred to a litigation regarding the subject property between M/s Aggarwal Trading Co. and the CD before the Hon'ble High Court of Punjab and Haryana, that emerged after deposit of EMD. That CWP was finally disposed of only on 02.02.2022, with a liberty to the Applicant to approach this Adjudicating Authority/NCLT. The operating part of the order of the Hon'ble High Court is reproduced overleaf for immediate reference:

Prima facie, it appears to us that the petitioners can avail the remedy before the NCLT as provided in Section 60(5)(c) and impugn the e-auction notice issued by the first respondent.

Therefore, without expressing an opinion on the contentions of either parties, we direct the petitioners to approach the NCLT, Chandigarh for seeking appropriate relief in the matter. The petitioners shall do so within a period of one week from today and till the said date, no sale deed shall be executed by the Liquidator in favour of the purchaser since it is stated by the first respondent that the purchaser had been given time till 14.02.2022 to make the full payment for purchasing the assets after participating in the e-auction notice dt.25.10.2021.

Disposed of in above terms.

20.1 In furtherance, M/s Agarwal Trading and Co. filed an Application before this Adjudicating authority, which was something beyond the control of the Applicant and which caused uncertainty regarding the title of the property, especially to a bidder, who had already deposited EMD. In order to peruse the chain documents of the subject property, the Applicant had approached this Adjudicating Authority and had sought time to deposit the amount, which was declined by this Adjudicating Authority and subsequently upheld by the Hon'ble NCLAT as the Auction was conducted on "As is where is Basis". Nevertheless, this chain of events does not imply that the Applicant was not a *bona fide* auction purchaser, when it had already deposited a substantial amount of Rs. 6,39,00,000/- as EMD and was, always willing to deposit the balance amount as observed in the previous paragraphs from the communications sent by the Applicant.

20.2 In our considered view, **this sudden litigation before the Hon'ble High Court of Punjab and Haryana (and resultant uncertainty regarding the title of the property), which continued before this Adjudicating Authority in terms of IA-123 of 2022 filed by M/s Agarwal Trading and Co., was certainly an 'extraneous factor'** that had caused uncertainty, and prevented the Applicant from depositing the balance amount within the time provided.

21. From the aforesaid analysis, we find that the Applicant has been able to cross all the 03 parameters as identified in para 17 of this order; and as stipulated by the Hon'ble Supreme Court or emerged from the judgements viz., **"Authorised Officer State Bank of India vs C. Natarnajan & Anr., Civil Appeal No. 2545/2023"** ; and **"The Authorised Officer, Central Bank of India Vs. Shanmugavelu" Civil Appeal No(s) 235-236 of 2024"**; and the Applicant has been able to make out an exception for refund of the EMD amount deposited by it with the Liquidator.

22. Further, as noted in para 3.8 (V), the property was subsequently sold at a higher price of Rs. 31.10 crore, i.e., Rs. 5.54 Crore over and above the last auction, which reflects that the Stakeholders did not suffer any loss but rather, benefitted.

23. Hence, in our considered view, and in order to meet the ends of justice, we are inclined to allow refund of the entire amount of EMD to the Applicant. **Accordingly, we allow the Application and direct the Liquidator to refund the entire bid amount of Rs. 6,39,00,000/- to the Applicant within a**

period of two weeks of this order. However, we are not inclined to allow the prayer regarding payment of interest.

24. The IA No. 1047/2024 is allowed in the aforesaid terms. Parties to bear their own cost.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(HARNAM SINGH THAKUR)
MEMBER (J)