

**National Company Law Appellate Tribunal**

**Principal Bench, New Delhi**

**COMPANY APPEAL (AT) (INSOLVENCY) No.896 of 2020**

(Arising out of Order dated 07<sup>th</sup> August, 2020 passed by National Company Law Tribunal, Kolkata Bench, Kolkata, in CA (IB) No. 1313/KB/2019 Connected with C.P.(IB) No.-898/KB/2018).

**IN THE MATTER OF:**

**M/s. Visisth Services Limited,  
Shivam Chambers, 53, Syed Amir Ali Avenue  
4<sup>th</sup> Floor, Unit – 4F, Kolkata 700019**

**...Appellant/Successful  
Bidder**

**Versus**

**1. S. V. Ramani,  
Room No. 207, 'A' Block, Anandalok, 227,  
Acharya Jagadish Chandra Bose Road,  
Kolkata 700020**

**...Respondent No. 1  
/Liquidator**

**AND**

**2. United Chloro – Paraffins Private Ltd.  
32, Chowringhee Road, Om Tower,  
Room No. 907, 9<sup>th</sup> Floor,  
Kolkata 700071.**

**3. State Bank of India  
State Bank Bhawan, 14<sup>th</sup> Floor,  
Corporate Centre, Madame Cama Road,  
Nariman Point, Mumbai,  
Maharashtra 400021.**

**...Proforma  
Respondents.**

**Appellant: Mr. Jeevan Ballav Panda, Ms. Shalini Sati Prasad, Mr. Gaurav Sharma & Ms. Meher Tandon, Advocates.**

**Respondents: Mr. Sanjeev Kumar and Mr. Anshul Sehgal, Advocates for R-1.  
Mr. Om Narayan Rai, Advocate for R-3.**

**J U D G E M E N T**

**[Per: Shreesha Merla, Member (T)]**

1. The Present Appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as 'Code'), by M/s. Visisth

Services Limited (Hereinafter referred as 'Appellant') against the Impugned Order dated 07<sup>th</sup> August, 2020 passed by National Company Law Tribunal, Kolkata Bench, Kolkata, in CA (IB) No. 1313/KB/2019 connected with C.P.(IB) No.-898/KB/2018. By the Impugned Order, the Adjudicating Authority has dismissed the Application preferred by the Appellant and also disposed of the Application CA (IB) No. 1313/KB/2019 filed by the Liquidator with the following directions:

*“i). The Liquidator shall issue fresh invitation to the bidder to provide balance sale consideration within such time as per clause (12) of Schedule I of Regulation 33;*

*ii). In case of payment of the full amount the liquidator shall execute certificate of sale or sale deed to transfer the assets in the manner specified in the terms of sale as per bidding document following clause (13) of the Schedule I of Regulation 33;*

*iii). In case of failure to pay the balance sale consideration he is at the liberty to cancel the sale in favour of the bidder by forfeiting the EMD and the amount paid towards the price of bidding document and to proceed with sale as per Regulation 32-A;*

*(Emphasis Supplied)*

2. The facts in Brief are as follows:

- On 12.10.2018, an Application under Section 10 of the Code filed by the Corporate Debtor was admitted by the Adjudicating Authority. On 19.07.2019, an Order of Liquidation was passed and Mr. S. V. Ramani/the first Respondent was appointed as Liquidator. On 01.09.2019, the Liquidator issued advertisements inviting Bids from prospective buyers through e-Auction for sale of the Company under

Liquidation as a 'Going Concern'. The Appellant purchased e-Auction Process Information Document from the Liquidator upon payment of Rs. 5 Lakhs.

- On 04.09.2019, the Appellant issued an email to the Liquidator seeking clarifications on several issues with respect to e-Auction process and proposed different payment terms and specified in the email that their offer of acceptance was conditional to extinguish claims of Financial Creditors, Tax Department, Operational Creditors, Provident Fund Employees and other contingent liabilities.
- On 05.09.2019, the Liquidator issued two emails to the Appellant informing that the Terms and Conditions of the Bid Document could not be changed or revised after public notification. M/s. State Bank of India (SBI) had also replied to the email and clarified the conditions. The Appellant submitted EMD of Rs. 37,10,000/- to the Liquidator. On 08.09.2019, the Appellant sent an email to the Liquidator stating that if any litigation arises from any source, the EMD amount and the bidding document purchase amount was to be refunded within three days.
- On 26.09.2019, the Liquidator issued a provisional sale letter dated 25.09.2020 in favour of the Appellant upon receipt of communication from SBI confirming that it was the highest successful bidder in the e-Auction.
- On 29.10.2019, the Appellant addressed a letter to the Liquidator stating the Provisional Letter of Sale was inconsistent with the terms

of payment specified by the Appellant and sought for refund of the money paid with the interest.

- On 09.01.2020, an Affidavit was filed by the Appellant in the Application preferred by the Liquidator before the Adjudicating Authority seeking direction for 'Approval of the Sale' as a 'Going Concern', and sought for approval without transfer of any liabilities and if there exists any impediment, the Appellant sought for withdrawing from the Bid and the refund of the amount paid.

3. **Submissions of the Learned Counsel appearing on behalf of the**

**Appellant:**

- Learned Counsel strenuously contended that there was no valid contract between the parties. On 04.09.2019, a detailed email was addressed to the Liquidator seeking clarifications to facilitate the Appellant's participation and e-Auction Process. The Learned Counsel submitted that these queries pertain to the claims and liabilities of the Corporate Debtor such as charges over the assets, outstanding statutory dues to the Tax Authorities, Electricity Authorities, etc. It is submitted that the Appellant made it amply clear that it could be willing to participate in the e-Auction only if the liabilities attached to the units of the Corporate Debtor, both statutory and non-statutory in nature, were clarified and dispensed with and/or extinguished on the completion of the liquidation process. Different payment terms were also proposed and these conditional terms formed part of the multiple

subsequent correspondence issued by the Appellant to the Liquidator, including the letter dated 06.09.2019.

- The terms of the Bid laid down in the Bid document are not absolute and only an intimation to offer. The intending purchaser is at liberty to negotiate and agree upon the terms subject to which the offer will be made. In support of his contention, the Learned Counsel relied on the Judgement of the Hon'ble Supreme Court of India in the matter of '*Dresser Rand S.A vs. Bindal Agro Chem Ltd & Anr.*, (2006) 1 SCC 751 and '*Padia Timber Co. (P) Ltd. vs. Visakhapatnam Port Turst*', (2021) 3 SCC 24.
- The Liquidator selectively chose to remain silent on the issues despite repeated clarifications sought by the Appellant and the clear intention that the offer of the Appellant would be conditional.
- The Liquidator informed the Appellant that SBI had accepted most of the conditions made by the Appellant and therefore the Appellant deposited the EMD of Rs. 37,10,000/- assuming that the conditions set out in the email dated 04.09.2019 had been accepted.
- The Appellant addressed a letter on 06.09.2019 reconfirming its understanding of acceptance of the terms and conditions. The Liquidator proceeded to issue the Provisional Sale Letter on 25.09.2020 despite the clear contents of the Appellant's letter.
- The Appellant filed an Affidavit before the Adjudicating Authority on 09.01.2020 seeking to withdraw their Bid and sought for refund of the EMD and the amount paid towards purchasing the document.

- The Sale remain unconfirmed till July, 2020, by which date the pandemic hit the country and on account of this unprecedented *force majeure* event, the Appellant addressed an email dated 10.07.2020 informing the Liquidator about the poor financial health and seeking to withdraw from the Bid.
- It is contended that the Appellant had participated in the Bid with the *bona fide* intention to complete the Sale conditional to the terms proposed by it. However, the Liquidator failed to clarify the terms of the sale and the Appellant cannot be subjected to the terms that it did not agree to abide by.
- It is submitted that even in the case where a 'Going Concern' is on an 'as is very basis', the pre-existing pecuniary liabilities cannot be transferred. The Liquidation Regulations provide that the Liquidator shall identify and group the assets and liabilities to be sold as a 'Going Concern' in consultation with the Consultation Committee of Creditors. In the present case, the Liquidator has failed to exercise his duty of assisting the Appellant with information and documents pertaining to the liabilities of the Corporate Debtor.
- If the earnest money deposited is forfeited, the Corporate Debtor will be permitted to make unlawful gains and unjustly enrich at the expense of the Appellant.

4. **Submissions of the Learned Counsel appearing on behalf of the first Respondent /Liquidator:**

- It is contended that the Appellant after payment of EMD, wrote a letter to the Liquidator on 06.09.2019 that the sale of the Corporate Debtor Company should be transferred without any liabilities. The Appellant was aware of the fact that the sale of the assets of the Corporate Debtor included its liabilities as the sale was on an 'as is very basis'. Learned Counsel to buttress his arguments placed reliance on the Judgement of this Tribunal in '*Tarun International Ltd. Vs. Mr. Vikram Bajaj*', Company Appeal (AT) Ins. No. 1194 of 2019 dated 03.03.2021.
- The e-Auction Process Information Document clearly states that the sale of the Corporate Debtor Company was on 'as is very basis'. It is also submitted that the Appellant was involved in the CIRP process where it was the Unsuccessful Resolution Applicant and thus was aware of the liabilities attached to the assets of the Corporate Debtor.
- The Liquidator in its response dated 05.01.2020 to the email sent by the Appellant dated 03.09.2020 had clarified that no changes can be made to the Information Document for the Auction, once it is published in the public domain. The Appellant is bound by its declaration dated 05.09.2020 submitted to the Liquidator that upon failure to act on the terms of the sale, the EMD and all other amounts would be forfeited.
- The Appellant has placed reliance on Section 54 of the Code which is wholly misconceived as that provision deals with the situation where

the assets of the Corporate Debtor have been completely dissolved and then the Liquidator applies to the Adjudicating Authority for dissolution of the Corporate Debtor and then to the concerned RoC for dissolution. In the present set of facts, the said situation has not arisen and hence the ratio of this Tribunal in '*M/s. Mohan Gems and Jewels Pvt. Ltd. Vs. Vijay Verma and Anr.*', Company Appeal (AT) (Ins.) No. 849 of 2020 is applicable.

5. **Submissions of the Learned Counsel appearing on behalf of the Respondent No. 2/Proforma Respondent (SBI):**

- Learned Counsel appearing for the 2<sup>nd</sup> Respondent submitted that subsequent to putting in its Bid on September 06, 2019, the Appellant having been declared Successful Bidder cannot seek to impose conditions as it has attempted to do so vide emails dated 06.09.2019, 08.09.2019 and 29.10.2019.
- The Bidder is bound by the terms and conditions of the Bid Document, wherein the payment of all statutory dues, taxes, fees, charges, as is specified to be the sole responsibility of the Successful Bidder.
- The Liquidator never either expressly or impliedly accepted the terms and conditions addressed to by the Appellant. The Appellant should refrain from participating in the Bid if it was desirous of sticking to the conditions put forth by it.
- It is denied that SBI had ever accepted the conditions proposed by the Appellant. The sale of the Corporate Debtor as a 'Going Concern as is

very basis' and therefore the assets and liabilities cannot be bifurcated. The Bid Document duly clarifies that the assets in Liquidation were being sold as a 'Going Concern'.

- The Appellant had accepted conditions or forfeiture of the EMD as mentioned in the Bid Document. The amount deposited by the Successful Bidder accounts for 10 percent for the Reserve Price and if there is forfeiture, the loss is indeed enormous. The Appellant has no right to make any claim in as much as it has failed to put in the subsequent due, less EMD deposit towards the sale consideration within the time frame of 90 days as per clause 12 of Schedule 1 of the Liquidation Process Regulations, 2016. The Learned Counsel drew our attention to the Bid Document amount and the terms and conditions of the proposed sale in support of his arguments.

**Assessment:**

6. The Issues which arise in this Appeal for consideration are:
  - a. Whether sale of Corporate Debtor as a 'Going Concern, in Liquidation Proceedings includes its liabilities;
  - b. Whether the Appellant herein can withdraw from the Bid after payment of the EMD and seek for refund of the amount paid on the ground that the offer made by the Bidder was a 'conditional offer'.
7. Regulation 32A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 reads as follows:

**"32A. Sale as a going concern.**

1. *Where the committee of creditors has recommended sale under clause (e) or (f) or regulation 32 or where the liquidator is of the opinion that sale*

under clause (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses.

2. For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the committee of creditors under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold as a going concern.

(3) Where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.

4. If the liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 within ninety days from the liquidation commencement date, he shall proceed to sell the assets of the corporate debtor under clauses (a) to (d) of regulation 32.”

*(Emphasis Supplied)*

8. At this juncture, it is relevant to reproduce paragraphs 3.2, 3.2.1, 3.2.2. 4.2 and 4.2.1 of the IBBI Discussion Paper on Corporate Liquidation Process along with Draft Regulations, which are dated 27.04.2019:

“.....

**3.2 Going Concern Sale under regulation 32 of the Regulations:**

The Liquidator has the option to explore Going Concern Sale (GCS)- sale of the CD as a going concern or sale of the business of the CD as going concern-alongside other available modes for sale. It is necessary to provide a complete framework to enable him to exercise this option. Sale of CD as a going concern under regulation 32(e) and sale of business of CD as a going concern under regulation 32(f) are different.

**3.2.1 Sale under regulation 32(e):** *In this form of GCS, the CD will not be dissolved. It will form part of liquidation estate. It will be transferred along with the business, assets and liabilities, including all contracts, licences, concessions, agreements, benefits, privileges, rights or interests to the acquirer. The consideration received from sale will be split into share capital and liabilities, based on a capital structure that the acquirer decides. There will be an issuance of shares by the CD being sold to the extent of the share capital. The existing shareholders will become claimants from liquidation proceeds under section 53 of the Code.*

**3.2.2 Sale under regulation 32(f):** *The business(s) along with assets and liabilities, including intangibles, will be transferred as a going concern to the acquirer, without transfer of the CD, and therefore, the CD will be dissolved. The existing shares will be extinguished. The remaining assets, other than those sold as part of business will be sold and the proceeds thereof will be used to meet the claims under section 53 of the Code.*

.....

#### **4.2 Should 'Going Concern Sale' be defined?**

*4.2.1. The term is well understood in legal parlance. The jurisprudence in this regard is fairly well-developed out of the erstwhile liquidation regime under the Companies Act, 1956. The Code recognises 'going concern' and envisages resolution as a 'going concern' but does not define it. It has been in vogue for more than two years and has not caused any difficulty. The Insolvency Law Committee in its report dated 26<sup>th</sup> March, 2016 noted that the phrase "as a going concern" implies that the CD would be functional as it would have been prior to initiation of CIRP, other than the restrictions put by the Code. It may not, therefore, be defined. However, it may be explained that going concern means all such assets and the liabilities, which constitute an integral business or the CD, that must be transferred together and the consideration must be for the business or the CD. The buyer of the assets and liabilities should be able to run business without any disruption. The business or the CD must be a running one, and it must be transferred along with its employees. In case of sale of the CD as*

*going concern, the equity shareholding of the CD must be transferred, and the buyer must take over the CD, its business, affairs and operations, including its licenses, assets, entitlements, beneficial interests, trademarks, brand, government approvals, etc.”*

*(Emphasis Supplied)*

9. It can be seen from the afore-noted discussion as well as Regulation 32 A of the IBBI (Liquidation Process) Regulations, 2016 that Sale as a ‘Going Concern’ means sale of assets as well as liabilities and not assets sans liabilities. Paragraphs 3.2.1 and 4.2.1 of the afore-noted discussion paper amply specified that all assets and liabilities, which constitute an integral business of the Corporate Debtor Company would be transferred together and the consideration paid must be for the business of the Corporate Debtor. We conclude that Sale of a Company as a ‘Going Concern’ means sale of both assets and liabilities, if it is stated on ‘as is where is basis’.

10. Now, we address to the issue whether the Successful Bidder, can, upon corresponding with the Liquidator, before the date of e-Auction, state that his Bid is conditional i.e. the liabilities would not be foisted upon the Bidder, and if in case his conditional offer is not accepted, he can withdraw from the Bid and seek for refund of his EMD amounts. Learned Counsel for the Appellant drew our attention to the email addressed by the Appellant to the Liquidator on 04<sup>th</sup> September, 2019. The relevant paragraphs of the said email is reproduced as hereunder:

*“.....The Company shall have no liabilities towards the persons currently classified as promoter or promoter group (including the Existing Promoter Group), persons acting in concert with promoters, holding companies, subsidiary companies,*

associate companies, group companies and/or their respective affiliates / associates). However, it is clarified that all claims of the Company against such related parties (and all Liabilities of such related parties towards the Company) shall remain outstanding due and payable to the successful bidder in accordance with their terms.

Any Liabilities, claims, demands, capital contributions or any other form of financial commitment; including but not limited to pledge of shares or any security interest created or provided, whether guaranteed or contractually agreed in writing or otherwise by the Company on behalf of or for its subsidiary companies, associate companies, Group companies and / or their respective Affiliates, shareholders/associates; as the case may be, which are in existence prior to the Closing Date and which may be invoked prior to the Closing date or at any time thereafter, shall stand irrevocably and unconditionally waived and extinguished.

2. We propose the following payment terms if we are chosen as the successful bidder in the following manner:

Rs 42 lacs upfront as EMD and purchase of bidding document

50% of the remaining successful bid amount within 45 days of being the successful bidder.

Remaining Amount of successful bid within 75 days of being the successful bidder.

3. Finally we are having profit on one crore only in one of the three financial years prior to financial year 2018.19. If you can allow us given this eligibility to bid then only we can enable us to bid for it.

4. In the event of any litigation arising in any courts of India by any party upon payment by successful bidder and prior to successful transfer of all assets along with the company then all monies paid by the successful bidder will be refunded within 7 days.

5. In the event of non acceptance of any condition mentioned herewith by the bankers or liquidator all monies paid shall duly be refunded.

6. If the situation arises for refund of any monies paid to your good selves then any delay beyond the

*stipulated period mentioned above it would carry interest @15% per annum till the date of repayment.*

*Regard*

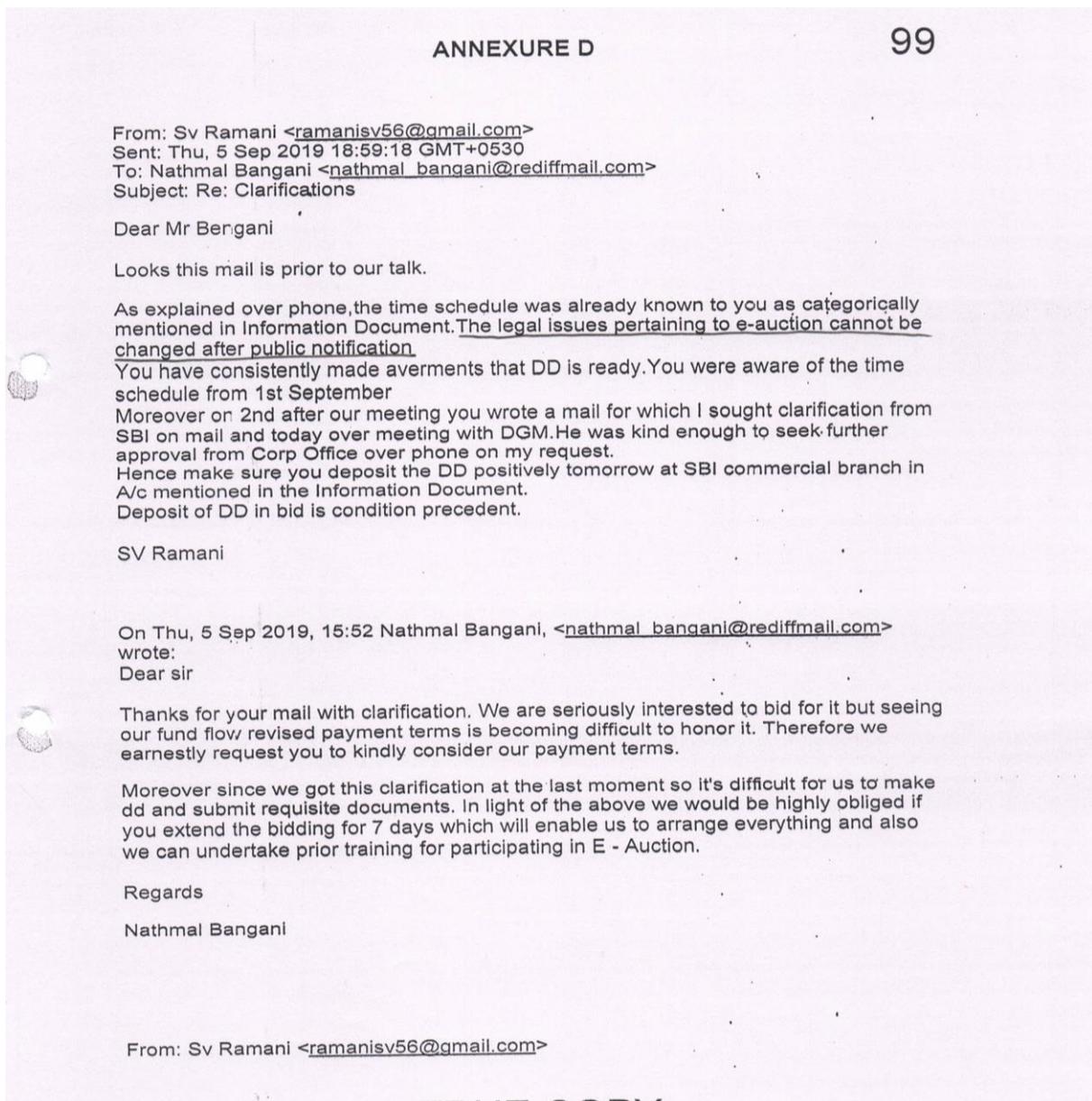
*Nathmal Bangani*

*Director*

*Visisth Services Ltd.”*

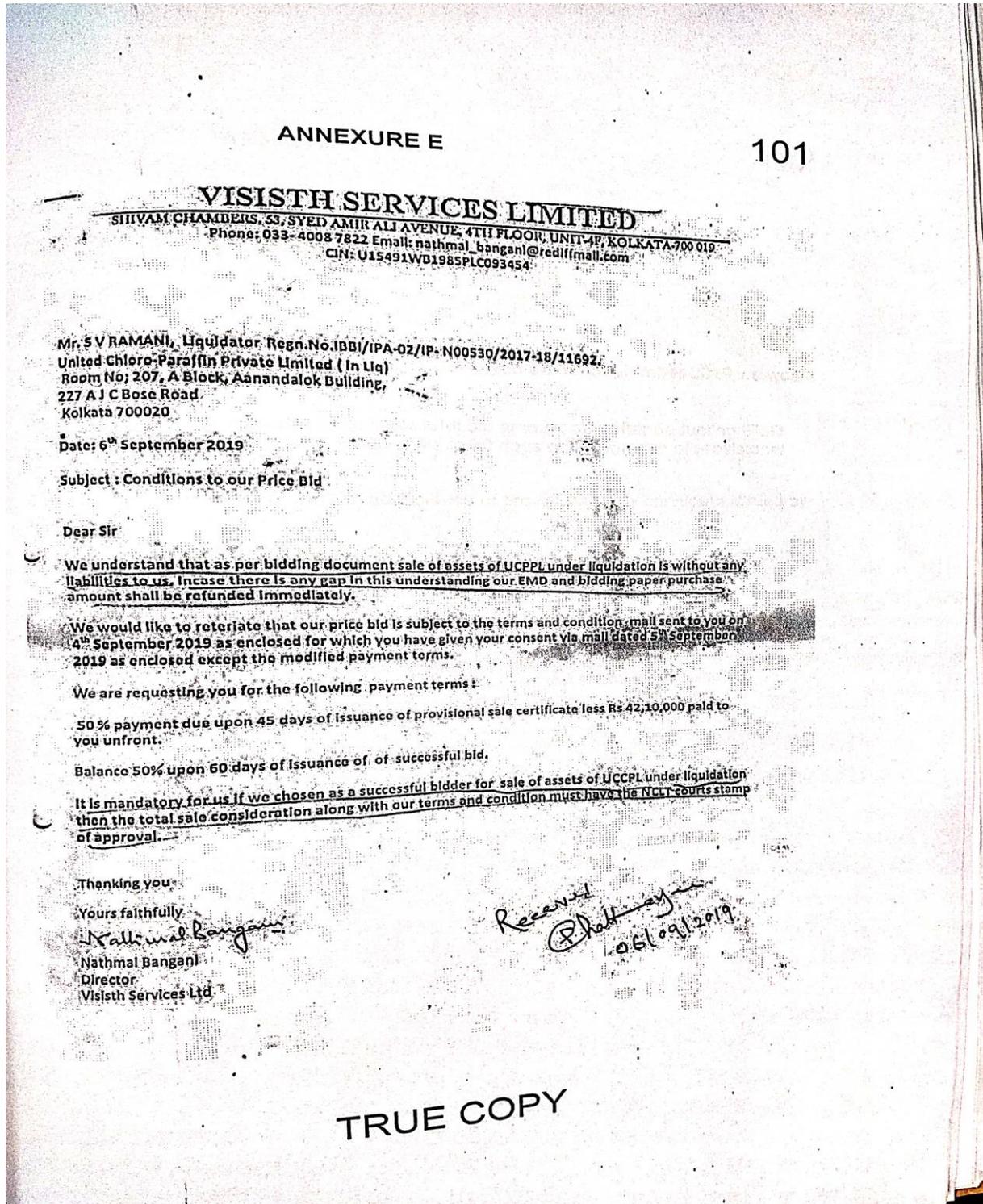
*(Emphasis Supplied)*

11. It is also relevant to reproduce the response dated 05.09.2019 by the Liquidator to the afore-noted email as under:



*(Emphasis Supplied)*

12. On 06.09.2019, the Appellant has addressed another Email to the Liquidator which is detailed as hereunder:



(Emphasis Supplied)

13. It is the main case of the Appellant having communicated to the Liquidator prior to the e-Auction date; they had participated in the Bid process with the bona fide intention to comply the sale process as the second Respondent/SBI had accepted the payment terms. Since the liquidator did not assist the Appellant in clarifying the liabilities of the Corporate Debtor, the Appellant informed the Liquidator that if their Bid is not accepted with its terms they would seek to withdraw from the Bid. An affidavit to this extent was filed before the Adjudicating Authority on 09.01.2020.

14. A perusal of the Terms And Conditions of the Proposed Sale show that clauses 12,13,14 and 15 are relevant to the facts of this case which read as under:

“.....

*12. The Applicant should thoroughly satisfy itself about the nature, conditions and quality of the assets. The Liquidator gives no guarantee or warranty as to title of assets or the conditions of the assets/material or/its quality for any specific purpose or use. It should be clearly understood that no claim/complaint about the quality/conditions/fitness for use will be entertained by the Liquidator.*

*13. The submission of the bid means and implies that the Applicant has read carefully and unconditionally and irrevocably agreed to and accepted all the terms and conditions laid herein.*

*14. Bids once submitted cannot be withdrawn or revised.*

*15. The Liquidator reserves the right to accept or reject any/or all the bids or adjourn, postpone or cancel the auction sale anytime without assigning any reason*

*thereon. Any notice of such adjournment/  
postponement/ cancellation of the auction sale shall be  
published on the website  
<https://ncltauction.acutitionigernet>.*

*.....”*

*(Emphasis Supplied)*

15. Clauses detailed above show that Applicant has accepted all the terms and conditions and cannot revise the same. The Bid Document also specifies under the heading ‘Costs, Expenses and Tax Implications’ that payment of all statutory and non-statutory dues, taxes, rates, assessments, charges, fees, owed by the Corporate Debtor to anybody in respect of the subject property shall be the sole responsibility of the Successful Bidder. It is also significant to note that an email dated 06.09.2019; the Liquidator has clearly mentioned that ‘*legal issues pertaining to e-Auction cannot be changed after public notification*’. By paying the EMD amount and accepting the Bid, the Successful Bidder cannot now say that it was not a concluded contract. The Bidder-Appellant is bound by the terms and conditions of the Bid document and no communication to the Liquidator stating that it is a conditional offer, is sustainable. If the Appellant had any apprehensions and conditions about the liabilities the Appellant could have exercised their choice of not participating in the Bid. Having participated, the Appellant cannot propose certain conditions subsequent to their participation and putting in their Bid. We are also conscious of the fact that the Appellant was supposed to comply the auction purchase in 2019 itself and the Pandemic erupted in the year 2020. The Judgment ‘*Dresser Rand S.A*’ (supra) relied on by the Learned Counsel for the Appellant is not applicable to the facts of the

instant case as the Liquidator in the email dated 05.09.2019 communicated to the Appellant that the *'legal issues pertaining to e-Auction cannot be changed after public notification'*. The decision of *'M/s. Padia Timber Company Pvt. Ltd. Vs. The Board of Trustees of Visakhapatnam Port Trust through its Secretary'*, (Supra) is also not applicable for the same reason noted above. Learned Counsel for the Appellant had also relied on the decision of National Company Law Tribunal, New Delhi, Principal Bench in Mohan Gems and Jewels Pvt. Ltd. in CP(IB) No. 590(PB)2018 which was set aside by this Tribunal vide Order dated 2.08.2021 in Company Appeal (AT) Ins. No. 849 of 2020.

16. The Liquidator will carry on the business of the Corporate Debtor for its beneficial Liquidation as prescribed under Section 35 of the Code. The Liquidator will only act and cannot modify/revise the terms of the contract. The Liquidator shall endeavour to sell the Corporate Debtor Company as a 'Going Concern' only in accordance with the law. 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. In the declaration signed, the Appellant-Bidder unconditionally agreed to abide by the terms of the e-Auction which is inclusive of forfeiture of the EMD, in the event the Bidder did not perform their part of obligation after the acceptance of the Bid in their favour. The acceptance was conveyed to the Bidder on 25.09.2019. Clearly noting the terms and conditions that the Company was being sold as a *'Going Concern in an as is very basis'*, the

Bidder cannot now be permitted to turn around and plead that their offer was conditional. The Hon'ble Supreme Court of India in '*Pawan Kumar Agarwal Vs. Association of Management Studies and Anr.; Meerut Development Authority 2009(6) SCC 171*' has observed in Paragraph 26 as follows:

*"26. 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 eliminate all others from participating in the bidding process."*

*(Emphasis Supplied)*

17. The Hon'ble Apex Court in '*Punjab Urban Planning and Development Authority and Ors. Vs. Raghu Nath Gupta and Ors*' (2012) 8 SCC 197 has referred to another Judgement of the Hon'ble Supreme Court in '*UT Chandigarh Admn. Vs. Amarjeet Singh*', (2012) 8 SCC 202 and observed as follows:

*"The Apex Court after having referred to the Judgement of this Court in Shantikunj Investment Case, this Court held as follows:*

*"19. ....In a public auction of sites, the position is completely different. A person interested can inspect the sites offered and choose the site which he wants to acquire and participate in the auction only in regard to such site. Before bidding in the auction, he knows or is in a position to ascertain,*

*the condition and situation of the site. He knows about the existence or lack of amenities. The auction is on 'as-is-where-is-basis'. With such knowledge, he participates in the auction and offers a particular bid. There is no compulsion that he should offer a particular price.....*

*20. Where there is a public auction without assuring any specific or particular amenities, and the prospective purchaser/lessee participates in the auction after having an opportunity of examining the site, the bid in the auction is made keeping in view the existing situation, position and condition of the site. If all amenities are available, he would offer a higher amount. If there are no amenities, or if the site suffers from any disadvantages, he would offer a lesser amount, or may not participate in the auction. Once with open eyes, a person participates in an auction, he cannot thereafter be heard to say that he would not pay the balance of the price/premium or the stipulated interest on the delayed payment, or the ground rent, on the ground that the site suffers from certain disadvantages or on the ground that amenities are not provided.”*

*17. We are of the view that the judgment in Amarjeet Singh is a complete answer to the various contentions raised by the respondents. We may reiterate that after having accepted the offer of the commercial plots in a public auction with a superimposed condition i.e. on “as-is-where-is” basis and after having accepted the terms and conditions of the allotment letter, including instalment facility for payment, the respondents cannot say that they are not bound by the terms and conditions of the auction notice, as well as that of the allotment letter. On facts, we have found that there was no inordinate delay on the part of PUDA in providing those facilities.*

*18. We are of the view that the High Court was not justified in holding that the respondents are not liable to pay the interest, penal interest and penalty for the period commencing from 1-6-2001 to 31-12-2002 for the belated payment of instalments. Consequently, the*

*judgments of the High Court are set aside and the writ petitions would stand dismissed and the appeals would stand allowed as above. There will be no order as to costs.”*

*(Emphasis Supplied)*

18. Keeping in view the ratio laid down by Hon'ble Supreme Court of India in a catena 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.

19. We do not find any illegality or infirmity in the well-reasoned order of the Adjudicating Authority. Hence this Appeal fails and is dismissed, accordingly. No order as to costs.

20. The Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Kolkata Bench) forthwith.

**[Justice Anant Bijay Singh]  
Member (Judicial)**

**[Ms. Shreesha Merla]  
Member (Technical)**

**NEW DELHI**  
**11<sup>th</sup> January, 2022**  
*Basant B.*