NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal(AT)(Insolvency) No. 310 of 2021

IN THE MATTER OF:

Om Prakash Agrawal
Liquidator of S Kumars Nationwide Ltd.
B-2, 5th Floor, Marathon NextGen off
G. K. Marg, Lower Parel, Mumbai-400013 **...Appellant**

Vs.

UPL Ltd.
UPL House, 610 B/2,
Bandra Village, Off
Western Express Highway,
Bandra (East), Mumbai-400 051 **...Respondent**

Present:

For Appellant: Mr. Aayus Agrawal, Mr. A.K. Mishra, Mr. Rohan Agrawal and Mr. Nishit Dhruva, Advocates

For Respondent: Mr. Nand Kishore and Ms. Akshat Singh, Advocates.

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The present appeal has been filed under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (in short 'Code') against the order dated 12.02.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal), Mumbai Bench, in I.A.No. 1036/MB/C-II/2020 in C.P. (IB) No. 294/MB/C-II/2018.

2. The Adjudicating Authority, after hearing the submission of the parties, has analysed that, no doubt, there is a delay in payment on the part of the Respondent to pay balance sale consideration but the issue to be decided is whether the delay was solely on account of the Respondent and if 'yes' the Respondent has to pay interest for the delayed period. The Adjudicating Authority has also observed that no supporting documents fixing the responsibility to follow up with GIDC for subdivision of the land was produced by the Appellant and hence the Adjudicating Authority has directed the Liquidator/Appellant to refund the full amount of interest to the Respondent.

3. The Appellant is the 'Liquidator' of the Corporate Debtor' (CD) is aggrieved by the findings of the 'Adjudicating Authority' who has held that the delay in payment of balance sale consideration cannot be attributed to the 'Successful Bidder' /Respondent herein. The interest burden, thus, cannot be fasten on the Respondent / Successful Bidder. The Respondent is not liable to pay interest as claimed by the Liquidator/Appellant. Therefore, an amount of Rs. 1,57,46,696/- towards interest by the Successful Bidder/ Respondent herein paid under protest is to be refunded / adjusted by the 'Liquidator' within 30 days from the date of the order.

4. The Appellant has submitted that the process of sub-division of the land was restricted to the leasehold land and not to the other freehold land. The Respondent was assigned two parcels of land - one leasehold land and other freehold land. However, the Respondent has failed to pay the

sale consideration even for the freehold part of the land. Hence, making an issue of sub-division of the land is an afterthought process of the Respondent for lately releasing the payment. The subdivision of the land was an administrative process and was not linked to the payment of sale consideration for the subject land. The 'E-auction Sale Process Memorandum' "Annexure A-4" vide Clause 11 provides for the mechanism for the declaration of the Successful bidder which includes payment of sale consideration and attracting of interest, if not paid, within 30 days. Clause 11 of the E-auction Sale Process Memorandum is reproduced below:

> ***Clause 11. DECLARATION OF SUCCESSFUL BIDDER(S}*** *The Liquidator shall determine and at his sole discretion (which discretion shall not be used arbitrarily), declare at the end of the E-Auction, the Successful Bidder(s) for any asset lot(s). Determination of the Successful Bidder(s) shall be done on the basis of highest bid (not below the reserve price) received for each Lot of assets via the E-Auction, unless the Liquidator determines, acting reasonably, that the highest bidder shall not be identified as the Successful Bidder. Where the Earnest Money has been provided by means of a remittance to the Company's bank account 9r by Demand Draft, such funds will be retained by the Liquidator as part payment of the consideration that the Successful Bidder has agreed to pay for the relevant asset lot(s). The Liquidator is not bound to accept the highest offer and has the absolute right to accept or reject any or all offer(s) or adjourn I postpone I cancel the e-Auction or withdraw any asset lot or portion thereof from the E-Auction proceedings at any stage without assigning*

any reason there for. Return of Earnest Money Deposit of unsuccessful bidders The Earnest Money Deposit of unsuccessful bidders will be returned within 7 days from the declaration of the Successful Bidder .. Issuance of Letter of Intent The Liquidator shall, as soon as reasonably possible following the end of the E-Auction, but not more than 7 days from the end of E-Auction, issue to the Successful Bidder a letter of intent (" Loi" I "Letter of Intent"), inviting the Successful Bidder to provide balance sale consideration (plus any applicable GST, if any, on 100% of the bid sum) within 90 (ninety) days of the date of issuance of the Loi, This Loi per se does not confirm sale in favour of the Successful Bidder. Confirmation of sale is subject to the fulfilment of terms and conditions of E-Auction Sale and approval of the Liquidator. The Successful Bidder shall, within a period of 2 (two) days from the date of issuance of the Loi, unconditionally accept the Loi, and record such acceptance by providing the Liquidator with 1 (one) copy of the Loi with an endorsement stating that such Loi is, "Accepted Unconditionally", under the signature of the authorized Director I Authorized Signatory of the Successful Bidder. Failure to accept the Loi within the time period specified may result in the disqualification of the Successful Bidder along with cancellation of the Loi and forfeiture of the Earnest Money. Payment of Sale Consideration The Successful Bidder(s) shall deposit the balance sale consideration within 90 (ninety) days from the date of such demand. Provided that the payments after 30 (thirty) days shall attract interest at the rate of 12% p.a. Provided further that the sale shall be cancelled if full payment is not received within 90 (ninety) days.

Completion of Sale On payment of the full amount of sale consideration and any applicable GST (if any), the sale shall stand completed, and the Liquidator shall execute Certificate of sale or Sale deed and the assets shall be delivered to the Successful Bidder. The Certificate of sale or Sale deed will be issued and /or transaction I sale documents will be executed in the name of the Successful Bidder only and will not be issued in any other name(s). It is expressly stipulated that there are no implied obligations on the part of the Liquidator to do all acts, things and deeds whatsoever for the completion of the sale. Default in payment of the balance sale consideration and any applicable GST, if any, on 100% of the bid sum by the Successful Bidder will result in disqualification of the Successful Bidder including forfeiture of Earnest Money. The asset lot(s) may be put to re-auction or sold to the next highest Qualified Bidder and the defaulting Successful Bidder shall have no claim/ right in respect of such asset lot.

The Appellant has demanded interest based on the provision of this clause and the Respondent has released the payment bit late for which the Appellant has demanded interest in terms of the E-auction documents. The E-auction document provides date of auction announcement dated December 12, 2019 and date of E-auction January 16, 2020. The Appellant has confirmed that the interest will be waived off if delay is on account of sub division resulting from making a delayed application to the appropriate authority.

The Appellant has also submitted that the 'Letter of Intent' (LOI) dated 18.01.2020 was issued to the Respondent by the Liquidator/ appellant which was duly accepted by the Respondent and thus it was mandated for the Respondent to release the payment within 30 days failing which interest will be applicable @ 12 % p.a and outer limited for receipt of balance sale consideration was 90 days from the date of issuance of LOI. The Respondent was supposed to release the payment of balance sale consideration within 30 days i.e. by 17.02.2020. The Liquidator has also stated that sub division of the plot was accepted to the leasehold parcel of land and was not applicable to freehold land. His duty was restricted for filing of application and follow up the job of the Respondent. He has also categorically stated that he has applied for the subdivision of plot on 21.01.2020 within the stipulated time period and he has not delayed anything on his part. The Appellant has also stated that the E-auction document nowhere states that the subdivision of land is a precondition before the sale consideration is paid and the same has been unconditionally accepted by the Respondent. However, he has done in good faith and followed up with appropriate authority for subdivision of the earmarked plot which was delayed due to onerous condition stipulated by the 'GIDC' (appropriate authority) and he has approached the Adjudicating Authority to quash the unreasonable demand of the 'GIDC' while the Respondent has failed in releasing balance sale consideration within 30 days as clearly spelt out in the E-auction document and hence the interest is to be levied on the Respondent @ 12 % as stated in the document.

In the result, the appellant has prayed for setting aside the order of the Adjudicating Authority.

5. The Respondent has submitted that the 'Liquidator' cannot be aggrieved by the impugned order of the Adjudicating Authority as he is the 'Liquidator' and cited provisions of the Section 61 of the Code:-

> "*Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.*"

He has also stated that the E-auction memo has divided the assets in 'Lot 1' Assets and Lot 2 Assets. 'Lot 1' Assets comprised of Lease Hold Land etc., and other current assets while 'Lot 2' comprised of 'Leasehold land' and 'Freehold land'. The responsibility of the Liquidator is to provide peaceful possession of immovable property to the Respondent. Hence it was the Liquidator responsibility to do sub-division of the Leasehold land from the 'GIDC'. Successful bidder shall bear the cost of subdivision charges etc., no doubt the Liquidator is supposed to apply for subdivision to GIDC after issuance of LOI to the Successful bidder. This implicitly means the Respondent was supposed to pay balance sale consideration after the sub-division order is received by them of the said leasehold land from the appropriate authority (GIDC). The Respondent also stated that on a clarification sought from 'Liquidator' vide its email dated 03.01.2020:

> *"This is with respect to sub section B of subsection 13, Cost, expenses and tax implications and section 11 – Payment of Sale consideration. Balance payment consideration should be payable only upon successful sub division of land. Delay in payment of balance sale consideration on account of delay in subdivision of GIDC Plot should not attract any interest."*

The 'Liquidator' has clarified vide its email dated 09.01.2020 as follows:

> *"Interest on delayed payment shall be waived off to the extent the delay is on account of sub-division of leased land."*

The said clarification made the Respondent more than convincing that any delay on account of subdivision of the lease hold land, interest on delayed payment to the extent the delay is attributable to the subdivision of leasehold land shall be waived off '*mentioned at para 15 of the Reply of the Respondent dated 26.04.2021'*.

The Respondent further clarified that the Liquidator / Appellant failed to mark the letter dated 21.01.2020 addressed to the GIDC for subdivision of the leasehold land. The Appellant did not provide a copy to the Respondent. The Respondent has acknowledged that the actual area of the lease hold land is 295309.45 sq. mtrs. as survey by GIDC instead of 282977.40 Sq meter as provided in the e-auction memo and that the additional area is chargeable from the respondent at the bid rate. The Respondent has also accepted that the Liquidator/ Appellant has asked the Respondent vide its letter dated 12.03.2020 to make the payment of balance sale consideration. The Respondent has also submitted that vide its letter dated 30.03.2020 it has forwarded to the Appellant various issues pending at the Liquidator/Appellant including subject of the lease hold land, and survey report of the lease hold land from GIDC, relinquishing charged by the 'Secured creditors' on the 'Liquidation estate' etc. The Respondent has also sought an extension of time to pay the balance sale consideration owing to extension of lockdown upto 03.05.2020 vide its letter dated 14.04.2020. However, the Appellant has agreed the same vide its letter dated 16.04.2020 subject to payment of interest @ 12 % p.a. Amidst this IBBI vide IBBI/2020-21/GN/REG060, dated

20TH April, 2020 (w.e.f.17.04.2020) Regulation 47A was introduced to the Liquidation Process Regulation**.** Regulation 47A provides hereunder**:**

> *"Exclusion of period of lockdown.*
>
> *47A. Subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak shall not be counted for the purposes of computation of the time-line for any task that could not be completed due to such lockdown, in relation to any liquidation process.".*

The Respondent has also elaborately explained that although 'GIDC' was in correspondence with Appellant but whenever Appellant has asked for comments from Respondent they have provided adequate reply to assist the Liquidator in the process, particular, during May, 2020. Inspite of all this it is unfortunate to know that the Appellant/Liquidator is demanding interest payment on delay attributable to the GIDC approval but attributive all delay to the Respondent and is asking for interest for the same. The period from 23.03.2020 onward is unprecedented pandemic Covid-19 outbreak which has jeopardised not only individuals life but entire business set up and hence an extraordinary situation this itself should have been considered by the Liquidator on its own and that too after Adjudication by the Adjudicating Authority instead he has come in Appeal challenging the waiver of interest on account of delay in subdivision and Lockdown.

6. We have gone through the submission made by the parties and the order passed by the Adjudicating Authority and have the following observations:

   a. E-auctions sale process Memorandum dated 12.12.2019 vide Clause 3 (appearing at page 130 at Appeal Paper Book) provides as follows:

      BID PROCESS

      1. This Document has been issued for the purpose of carrying out electronic auction ("E-Auction") of assets of SKNL under IBC and Liquidation Process Regulations.

      2. All information provided in this document should be read together with the provisions of the IBC and the Liquidation Process Regulations. In the event of a conflict between this document and IBC or Liquidation Process Regulations, the provisions of the IBC or the Liquidation Process Regulations, as the case may be, shall prevail.

      3. The information contained in this document or subsequently provided to Bidder(s), whether verbally or in documentary or any other form by or on behalf of the Liquidator, is provided based on the terms and conditions set out in this document.

      4. This document is neither an agreement nor an offer by the Liquidator to the prospective Bidder(s) or any other person. The *purpose of this document is to provide interested parties with information that may be useful to them in making their bids pursuant to issue of this document. The assumptions, assessments, statements and information contained in this document may not be complete, accurate, adequate or correct. Each Bidder(s) should conduct their own investigations, analysis and should check the accuracy, adequacy, correctness, reliability and completeness of the assumptions, assessments, statements and information contained herein.*

5. Information provided in this document to the Bidder(s) has been collated from several sources. The information given is not intended to be an exhaustive account of statutory requirements and should not be regarded as complete. The Liquidator accepts no responsibility for the accuracy or otherwise for any statement contained herein.

6. The Liquidator, makes no representation or warranty and shall have no liability to any person, including any Bidder(s) under any law, statute, rules or regulations or tort, principles of restitution or unjust enrichment or otherwise for any loss, damages, cost or expense which may arise from or be incurred or suffered on account of anything contained in this document or otherwise, including the accuracy, adequacy, correctness, completeness or reliability of the document and any assessment, assumption, statement or information contained therein or deemed to form part *of this document or arising in any way from participation in the E-Auction process.*

7. The Liquidator accepts no liability of any nature howsoever caused arising from reliance of any Bidder(s) upon the statements contained in this document

8. The Liquidator may in its absolute discretion, but without being under any obligation to do so, update, amend or supplement the information, assessment or assumptions contained in this document.

9. The issue of this document does not imply that the Liquidator is bound to select a Bidder(s) as Successful Bidder(s) for the assets of the company and the Liquidator reserves the right to reject all or any of the Bidder(s) or bids without assigning any reason whatsoever.

10. Each Bidder(s) shall bear all its costs and charges associated with or relating to the preparation and submission of its bid and/ or participation in the E-Auction, including but not limited to preparation, copying, postage, delivery fees, expenses associated with any demonstrations or presentations which may be required by the Liquidator or any other costs incurred in connection with or relating to its bid.

11. E-Procurement Technologies Limited (Auction Tiger) has been appointed as the E-Auction Service Provider. The sale of the

Properties shall be undertaken by the E-Auction Service Provider for and on behalf of the Seller through an E-Auction platform provided on the website portal of the E-Auction Service Provider (Platform). Other details with respect to the e-auction are as follows:

Particulars	*Descriptions*
Types of Bid	*E-Auction*
Seller	*SKNL represented by the Liquidator Mr. Om Prakash Agrawal,*
E-Auction Service Provider	*E-Procurement Technologies Limited (Auction Tiger)*
Website of E-Auction Service Provider	*httQs://ncltauction.auctiontiger.net*
Annexure and Formats	*Annexure I -Affidavit and Undertaking* *Annexure II -Bid Form (to be filled in and signed and stamped by the Bidder(s) and uploaded) Annexures and Formats* *Annexure III-Declaration by the Bidder(s) (duly filled in and signed and stamped by the Bidder(s) and uploaded along with the Bid form)* *Annexure IV -Technical Terms and Conditions of E-Auction*

	Annexure V -Description of Assets
Special Instructions	*Please note that this bidding is a serious matter and last-minute Special Instructions bidding may lead to unnecessary lapses. Neither the E-Auction Service Provider nor the Liquidator will be responsible for any lapses on part of the Bidder(s)*

12. All terms and conditions with respect to the sale of the Properties shall be governed by the directions of the Liquidator, in accordance with the provisions of applicable laws and directions of Hon'ble NCLT. As mandated by the Hon'ble NCLT, the Liquidator shall exercise all rights with respect to sale of the Assets and it would be open to the Liquidator to appoint such experts, professionals or other persons, as the Liquidator might think necessary, so as to enable the sale of the Assets.

13. 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.

14. The Annexures to this Document shall form an integral part hereof and this Document shall always be read in conjunction with the Annexures hereto.

b. Similarly, Vide Clause 8 at Page 138 of the Appeal paper Book provides as follows:

Clause 8 - ASSETS TO BE AUCTIONED AND RESERVE PRICES

SKNL proposes sale of High Value Fine Cotton Fabric Manufacturing Unit at Bharuch (Gujarat) business as a going concern which includes Leasehold Land, and Freehold Land, Factory Building, Plant and Machinery, Furniture and Fixtures and net current assets pertaining to the Unit [Current Assets - Current Liabilities (Refer to liabilities accrued on or after the commencement of Corporate Insolvency Resolution Process i.e. April 24, 2018)] and the Brands/ Trademarks owned by SKNL along with licences, permits, approvals and registrations to the extent they are transferable under the applicable law on "As is where is basis", "As is what is basis", "Whatever there is basis", and "No recourse basis". The proposed sale of assets of the Company does not entail transfer of any title except the title which the Company had on its assets as on date of transfer of the Unit.

Given below is a list of assets to be auctioned along with their Reserve prices.

Lot	*Nature of Asset*	*Description*	*Reserve Price (Inr Crores)*	*Earnest Money Deposit(INR Crores)*
1.	*Leasehold*	*Part of Plot no. 825 of Jhagadia GIDC, Bharuch in*		

	Land	*the village Dadheda, Jhagadia Taluka, Bharuch District, Gujarat having a total land area of 42.04 acres I 1,70,133 sq. mt. or 18,31,294 sq. ft. This land is leasehold from GIDC and is subject to sub-division of said Plot.*		
	Factory Building	*Plant building along with ancillary structures having total built up area of 61,994 sq. mt. or 6,67,298 sq. ft. This also includes land developments in form of boundary walls, Sewage line, streetlights, internal roads etc.*	*201.80*	*20.18*
	Plant and Machinery	*Plant and Machinery which includes all the machineries installed for manufacturing of fabric as well as equipment installed in utility such as boiler, DG set, ETP, STP etc. This also includes furniture & fixture, office equipment, Computers and vehicles.*		
	Brands	*Brands as owned by S.Kumars Nationwide Limited*		

	Net Current Assets	*Net Current Assets (Current Assets less Current Liabilities) amounting to Rs 5 crore approx. as on date. The Current Assets will not include the Debtors I Claims which are under litigation as on date of transfer of Unit.*	*Payable at book value as on date of transfer of Unit*	
Lot	*Nature of Asset*	*Description*	*Reserve Price (INR Crores)*	*Earnest Money Deposit (INR Crores)*
2.	*Lease Hold land*	*Part of Plot no. 825 of Jhagadia GIDC, Bharuch in the village Dadheda, Jhagadia Taluka, Bharuch District, Gujarat having a total land area of28.57 acres I 1,15,632 sq. mt. or 12,44,656 sq. ft. This land is leasehold from GIDC and is subject to sub-division of the said Plot*		
	Freehold Land	*Survey No. -67 + 73 + 74 + 4A + 4B of Village Dadheda, Jhagadia Taluka, Bharuch District, Gujarat having a total land area of 20.10 acres I 81,326 sq. mt. These are the freehold land*	*28.43*	*2.84*

		parcels.		

Kindly note that the Bidder(s) cannot place a bid for the Assets at a value below the Reserve price

Further, the Bidders can increase their Bid by a minimum incremental amount of Rs. 50,00,000 for Lot No. 1 and Rs 10,00,000/-for Lot No. 2 and in multiples of thereof.

Please find appended the details of underlying Assets in "Annexure V"

Interested Bidder(s) can bid for assets as per any one Lot or for both the Lots.

Cognizance should be taken of the fact that the liquidator does not give any assurance or warranty of the physical condition of assets and their suitability for any sort of operation that the bidder envisages.

c. Vide Clause 11 as stated supra the Successful Bidder was supposed to the deposit the balance sale consideration within 90 days from the date of such demand. However, payments after 30 days shall attract interest @12% p.a.

d. Vide Clause 13 (B) appearing at page 146 of paper book which reads as under:

"Clause 13 (B). -The Successful Bidder/s shall bear the sub-division charges of land payable on land area proportionate to area in Lot No.1 and Lot No.2 respectively. The Liquidator shall apply for sub-division of GIDC plot after issuance of LOI to the Successful Bidder/s and such Bidder/s shall pay the amount of sub-division charges within 10 days from the date of demand. In case, the bid succeeds only for one of the Lot no. 1 or for Lot no.2, the Successful bidder shall initially pay full amount of sub-division charges and said Successful Bidder shall be given due set off for the excess amount, in subsequent payments/ final payment."

e. The Appellant/Liquidator vide its email dated 09.01.2020 has also confirmed the Respondent as follows:

"Interest on delayed payment shall be waived off to the extent the delay is on account of sub-division of leased land."

f. However, the Respondent has failed to pay the sale consideration even for the freehold part of the land. Hence, making an issue of sub-division of the land is not fully correct for late releasing the payment.

g. Considering all these submissions of the 'Adjudicating Authority' has failed to consider the interest on delayed payment should have been considered on the delayed part of payment relating to freehold land.

7. In view of above observations, we still hold the view that the delay in payment of balance sale consideration in respect of leasehold land cannot

be attributed to the Respondent. However, the Respondent is responsible in respect of delay in payment of balance sale consideration in respect of freehold land. Accordingly, the Appellant is directed to refund the excess interest deducted by him to the Respondent to the extent of leasehold land. **We accordingly set aside the impugned order dated 12.02.2021 passed by the Adjudicating Authority with the above observations and directions.**

Pending IAs, if any stands disposed of. Interim Orders, if any, passed by this Appellate Tribunal stands vacated. No orders as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

19th July, 2021

New Delhi

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