

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH-I  
KOLKATA**

***IA(I.B.C.)/4/(KB)2022***  
***IN***  
***C.P(IB)No.3/KB/2017***

*An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016  
read with Rule 11 and 43 of NCLT Rules, 2016*

***In the matter of:***

**Nicco Corporation Limited (In Liquidation)**

**And**

***In the matter of:***

**Bharat Bhagnani**

**..... Applicant**

**Vs**

**Vinod Kumar Kothari, Liquidator**

**.....Respondent**

**Order on: 23/02/2023**

**Appearances (through Video Conferencing/physical hearing)**

***For the Applicant*** : Mr. Ratnanko Banerjee, Senior Advocate  
: Ms. Urmila Chakraborty, Advocate  
: Mr. Nikunj Berlia, Advocate

***For the Liquidator*** : Mr. Joy Saha, Senior Advocate  
: Ms. Barsha Dikshit, PCS

**Coram:**

***Rohit Kapoor: Member (Judicial)***

***Balraj Joshi: Member (Technical)***

**CLARIFICATION**

1. When this matter was last heard, it was stated by the Applicant that it is similar to **I.A. (I.B.C) No. 930/KB/2020**.
2. However, after going through the same we find that the facts of the present application appear to be different from those contained in **I.A. (I.B.C) No. 930/KB/2020**.
3. Post this matter for clarification on 27.03.2023.

**Balraj Joshi,  
Member (Technical)**

**Rohit Kapoor,  
Member (Judicial)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH-I  
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***I.A. (I.B.C). No. 930/(KB)2020***

***IN***

***C.P. (I.B) No. 3/(KB)/2017***

*An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016  
read with Rule 11 and 43 of NCLT Rules, 2016*

***In the matter of:***

**Nicco Corporation Limited (In Liquidation)**

**And**

***In the matter of:***

**Sneha Techno Equipments Private Limited**

**..... Applicant**

**Vs**

**Vinod Kumar Kothari, Liquidator**

**..... Respondent**

**Date of pronouncing the order: 23/02/2023**

**Appearances (via hybrid mode)**

***For the Applicant*** : Mr. Jishnu Saha, Senior Advocate  
: Mr. Rahul Auddy, Advocate  
: Mr. Shaunak Mitra, Advocate  
: Mr. Aditya Gooptu, Advocate

***For the Liquidator*** : Mr. Joy Saha, Senior Advocate  
: Ms. Barsha Dikshit, PCS

**Coram:**

***Rohit Kapoor: Member (Judicial)***

***Balraj Joshi: Member (Technical)***

**ORDER**

*Per: Rohit Kapoor, Member (Judicial)*

1. This IA has been filed under section 60(5) of IBC Code 2016 read with Rule 11 of the NCLT Rules, 2016 by the applicant who was declared as the highest bidder in the e-auction held by the Respondent on 30<sup>th</sup> July, 2020.
2. The Respondent vide a letter dated 30.07.2020 had confirmed the applicant as H1 bidder and also requested to remit the amount of sale consideration as follows:
  - (a) 25% of the sale consideration within 5 days of the Demand, that is by 05.08.2020
  - (b) 75% of the sale consideration, plus applicable taxes within 15 days of the Demand i.e., by 15.08.2020.<sup>1</sup>
3. There were serious disruptions of normal business for all the businesses, departments in the State of West Bengal and 7 days were complete lockdown in the month of August 2020.<sup>2</sup>
4. The Applicant paid 25% of sales consideration amounting to Rs. 6,18,25,000/- in the following manner: -<sup>3</sup>

Sl.No	Date	Cheque No.	Amount (Rs)
1	05.08.2020	297792	2,00,00,000/-
2	10.08.2020	121726	2,00,00,000/-
3	14.08.2020	121727	1,00,00,000/-
4	17.08.2020	121728	1,18,25,000/-
<b>Total</b>			<b>6,18,25,000/-</b>

5. The Respondent vide an email dated 09.09.2020 confirmed the receipt of the above amount and further requested to remit the balance consideration including interest within 13.09.2020.<sup>4</sup>
6. The Applicant requested the Respondent to extend the timelines several times and lastly vide a letter dated 13.09.2020 requested that he will pay the balance consideration within the 90<sup>th</sup> day from the date of demand.

<sup>1</sup> Page 25 of the Interlocutory Application

<sup>2</sup> Annexure- A-6, Page 78-80 of the Interlocutory Application

<sup>3</sup> Page 14 of the Interlocutory Application

<sup>4</sup> Annexure- A-9, Page 87 of the Interlocutory Application

However, the Respondent *vide* a mail dated 14.09.2020 disregarded the said request and asked to clear the balance amount by close of banking hours on 16.09.2020.<sup>5</sup>

**7. Submissions made by the Ld. Sr. Counsel appearing on behalf of the Applicant are summarised herein after:**

7.1 The Ld. Counsel for the Applicant submits that the only question involved in this petition is whether the RP is entitled to forfeit the 25% part payment of Rs. 6.18 crores made by the petitioner towards price of the Shyamnagar Cable Manufacturing Unit of the company (in liquidation).

7.2 The Liquidator has contended that he is entitled to do so in view of clauses 12.18 and 12.19 of the EOI (pages 66 and 67). The said clauses are reproduced hereunder as follows:

*“12.18 – The balance 75% of Sale Consideration shall be paid on or before 15<sup>th</sup> day of Demand or such time as may be permitted by the Regulations which will be communicated to the successful bidder. Any payment made after the said period will attract interest @ 12% p.a. If the H1 bidder fails to tender the full Sale Consideration within 45 days of the Demand or such time as the Regulations may provide the sale shall stand cancelled.*

*12.19 – In the event of default of payment within the stipulated period, as mentioned above, or any default in terms of the invitation, the EMD as well as all monies paid by the defaulting Bidder shall be forfeited and the assets shall forthwith be sold again and such defaulting Bidder shall forfeit all claims to the Sale Asset or to any part of the amount for which it may be subsequently sold”.*

7.3 In this context it is relevant to note that EOI was published on 8th July, 2020 after Item 1(12) of Schedule I of the IBBI (Liquidation Process) Regulations, 2016 had been substituted by a notification dated 25<sup>th</sup> July, 2019 with effect from 25<sup>th</sup> July, 2019. The amended Item 1(12) provides that –

*“(12) – On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days*

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<sup>5</sup>Annexure- A-13, Page 98 of the Interlocutory Application

*of the date of such demand: PROVIDED that payments made after thirty days shall attract interest at the rate of 12%: PROVIDED FURTHER that the sale shall be cancelled if the payment is not received within ninety days. ”*

7.4 The petitioner had made payment of 25% of the sale consideration within the time specified but had thereafter sought an extension of time to pay the balance within the 90 days’ period permitted by the substituted Regulation along with an offer to pay interest in terms thereof. The Liquidator, however, cancelled the sale in favour of the petitioner without granting it such time and thereafter proceeded to forfeit the 25% payment already made by it amounting to Rs.6.18 crores. In doing so the Liquidator relied on a Circular issued by the IBBI on 26<sup>th</sup> August 2019 providing that the amended Regulations “*apply only to liquidation processes commencing on or after 25<sup>th</sup> July 2019*”. are applicable to liquidation processes which commenced on or after 25<sup>th</sup> July 2019.

7.5 In this context the petitioner submits as follows:

- a) The IBBI Regulations are statutory regulations and as such have the force of law. The power to frame such regulation flows from section 196 (1) (t) which authorizes the Board - “*to make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor*”. The manner of exercise of such power is controlled by section 240 of the Code which provides in section 240(1) that – “*The Board may, **by notification**, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code*”. Accordingly, any amendment to any regulation made by a notification can only be made by a notification and cannot be made through a Circular.
- b) As such, the Circular issued by the IBBI on 26<sup>th</sup> August 2019 could not and did not alter the substituted Regulation made effective with effect from 25<sup>th</sup> July 2019 and providing for 90 days’ time to pay the balance purchase price with interest. This clearly appears from the amendment of Item 1(12) of Schedule- I of the Regulations.
- c) As the said Item 1(12) pertains to payment of sale consideration on the close of the auction, the material date is clearly the date of auction. This could clearly not be undone by a Circular providing that the amended Regulations would apply only to liquidation processes commencing on or after 25<sup>th</sup> July 2019. It appears that upon realizing the error in issuing

the Circular dated 26<sup>th</sup> August 2019 that by a Circular dated 6<sup>th</sup> May 2022 the IBBI withdrew the same. The Circular of 6<sup>th</sup> May 2022 in any event clarifies that the object of the Circular dated 26<sup>th</sup> August 2019 was only to clarify that “regulations 2A, 21A, 31A and 44 as amended/inserted by the Amendment Regulations 2019 apply only to liquidation processes commencing on or after 25<sup>th</sup> July 2019”. None of the said regulations touch upon the time to make payment of the balance sale price in an auction sale.

- d) The Circular dated 26<sup>th</sup> August 2019 could not alter the amended statutory regulation as the same was clearly ultra vires the provisions of section 196(1)(t) and 240(1) of the Code. While section 196(1)(t) empowers the Board to make certain Regulations and Guidelines, section 240(1) provides that this can only be done by issuing ‘notification’. The said sections do not empower the Board to amend or clarify regulations made by **notification** issued under section 240 by issuing Circulars. Reference in this regard may be made to *Subhash vs State of Maharashtra, 1995 Supp (3) SCC 332(para2)*. It has been held in the case of *State of Punjab v. Anita, (2015) 2 SCC 170 (para 18)* that government instructions in violation of the statutory rules are a nullity in law. It has been accepted in *Union of India v. Ashok Kumar Aggarwal, (2013) 16 SCC 147 (para 59)* that an authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory rules. Such instructions should be subservient to the statutory provisions.
- e) The petitioner was accordingly not in default as it had sought extension of time not beyond the 90 days’ time permitted to make balance payment and had also indicated its readiness to pay interest in terms of Regulation 33.
- f) Regulation 33 did not provide, and even after its amendment does not provide for forfeiture of any payment made by a purchaser even in the event of it defaulting in making payment of the balance sale consideration leading to the cancellation of the sale. This is in view of the settled position of law governing forfeiture. As such the Liquidator could not have provided a term in the EOI contrary to those contained in the statutory regulation. It may be noted in this regard that while section 35(1)(f) gives the Liquidator power to sell properties of the company in liquidation, such power is circumscribed by Regulation 33 which specifically provides that the Liquidator shall ordinarily sell in the manner specified in Schedule I, which does not authorize or

empower the Liquidator to forfeit any money.

- g) The term relating to forfeiture in the EOI is as in any event contrary to law and as such of no effect at all.
- h) The Liquidator is an Officer of Court and could not, of his own volition, act beyond the authority vested in him by the Regulations to include a clause in the EOI which the Regulations do not authorize him to do.
- i) The term in the EOI providing for forfeiture of a part the sale consideration paid by the purchaser consequent on its failure to make payment of the balance within the time stipulated, amounts to making a contract contrary to statute, which cannot be permitted. Reference in this regard may be made to Section 23 of the Indian Contract Act, 1872 which provides that the consideration or object of an agreement is not lawful if it is of such nature that if permitted, it would defeat the provisions of any law, or would involve or imply an injury to the property of another.
- j) With the acceptance of the petitioner's offer followed by the acceptance of payment 25% of sale consideration by the petitioner, a contract came into existence between the petitioner and the Liquidator. Accordingly, without making out a case of actual loss or damage suffered and without actual quantification of such loss, arbitrary forfeiture of 25% of the sale consideration paid by the petitioner merely by relying on clauses 12.18 and 12.19 of the EOI was clearly both wrongful and illegal. It is now settled law that any such forfeiture is contrary to law and cannot be made. Reference in this regard may be made to section 74 of the Indian Contract Act, 1872 and the decision in *Kailash Nath Associates –Vs- Delhi Development Authority and another, (2015) 4 SCC 136 (Paragraphs 33 to 43)*.
- k) The Applicant relies on the judgements reported in 1995 Supp (2) SCC 33, (2013) 1 SCC 345 and (2014) 14 SCC 272 permit forfeiture.

As will appear from the decisions reported in 1995 Supp (2) SCC 33, the Hon'ble Supreme Court came to the conclusion that the concerned party were seeking to wrongfully resile from the contract after having altered the possession of the land for which the contract had been entered upon. It as such treated the money paid as a guarantee for performance of the contract and allot forfeiture of the same in terms of the contract upon reaching the conclusion that the party concerned was not ready to

perform the contract and had in fact, in the meantime, caused loss and damage to the other party. In the instant case, however, the petitioner was at all times ready to perform the contract within the statutory period available to it.

As will appear from para 15 of the decision reported in (2013) 1 SCC 345, in the same the Hon'ble Supreme Court held that "it is also the law that part payment of the purchase price cannot be forfeited unless it is a guarantee of the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money than the forfeiture clause will not apply". In the instant case the earnest money was adjusted towards part payment of the consideration. The statute did not require the petitioner to give any guarantee for due performance of the contract, as even the regulations did not provide for forfeiture in the event of non-payment of the entire purchase price within the 90 day time stipulated, and only provided for cancellation of the same in such event.

As will appear from the decision reported in (2014) 14 SCC 272, the same is the case of frustration of statutory contract which provided for certain consequences in the event of failure to make a deposit. In the instant case, however, the time to make the deposit had not expired. The said case can as such have no application in the facts and circumstances of the instant case.

7.6 It is submitted that the monies paid by the Applicant should be directed to be refunded by the liquidator together with interest.

**8. Submissions made by the Ld. Sr. Counsel appearing on behalf of the Respondent are summarised herein after:**

8.1 The Respondent submits that the Respondent is bound by the decisions/regulations/ circulars issued by the IBBI, and it is beyond the Respondent's purview to make submissions regarding powers of IBBI. However, in view of the directions of the Hon'ble Bench the Respondent submits as under:

8.2 Section 196 of IBC vests certain powers and functions on IBBI, *inter-alia*, the power to "make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor"

[Section 196(1)(t)]. Again, section 240 of IBC also lays down specific provisions as regards power of the Board to make regulations. It states that–

*“(1) The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code.”*

8.3 It is submitted that the Liquidation Regulations have been specified by IBBI in pursuance of the powers conferred under sections 196 and 240 of IBC.

8.4 The Ld, Counsel for the Respondent further submits that the power to issue clarifications, by way of circulars or otherwise, with respect to regulations notified by a regulatory body, inter-alia IBBI, is an extension of the power to make regulations, whereby the regulator guides the subjects as to the intent and purport of the regulations so notified. Since the Liquidation Regulations were made by IBBI in terms of the power conferred upon vide Section 196 read with section 240, it would be counter intuitive to argue that the IBBI does not have the power to clarify w.r.t. the applicability of the amendments introduced by it.

8.5 The Hon’ble Supreme Court of India (‘SC’) in *Union of India & Ors v. N.R. Parmar & Ors* [2012 13 SCC 340] has stated that *“Essentially, a clarification does not introduce anything new, to the already existing position. A clarification, only explains the true purport to fan existing instrument.”*

8.6 Hence, power of the IBBI to notify and amend regulations as well as issue clarifications in that regard is well-recognised under the law as well as by the Hon’ble Supreme Court.

8.7 It is submitted that it is a matter of record that the liquidation order with respect to the Corporate Debtor was passed by this Hon’ble Bench on 17<sup>th</sup> October, 2017, that is, much prior to the date of the Amendment Regulations, notified on 25<sup>th</sup> July, 2019.

8.8 The IBBI, vide Circular dated 25<sup>th</sup> August, 2019 clarified that

*“...the provisions of the Amendment Regulations are not applicable to the liquidation processes, which had commenced before coming into force of the said Amendment Regulations and that they are applicable only to liquidation processes, which commenced on or after 25<sup>th</sup> July, 2019.”*

8.9 The Respondent states that the Amendments were not applicable in case of the

Corporate Debtor, given the Liquidation Process of the Corporate Debtor commenced much prior to the date of Amendment, i.e., w.e.f. 17<sup>th</sup> October, 2017. Hence, the contentions of the Applicant that the Applicant ought to have been provided time for payment of consideration in accordance with the Amendments do not stand any ground.

8.10 Further, the question of extending the benefit of the Amendment Regulation to an auction process conducted after such notification was also discussed by the Hon'ble NCLT, Ahmedabad Bench vide its order dated 2<sup>nd</sup> December, 2020 *in the matter of Sundaresh Bhat, Liquidator of ABG Shipyard [I.A. No. 698 of 2020 in C.P. (IB) No. 53 of 2017]*, wherein the Hon'ble NCLT, Ahmedabad Bench held that:

*“It is a matter of record that the Liquidation application was allowed much prior to the amendment and thereafter, amendment came into force. Hence, the amendment benefit cannot be granted to the Applicant retrospectively in view of the clarification made therein dated 26.08.2019....”*

8.11 It is further submitted that the benefits, if any, of the Amendment Regulations could not be extended to the auction process in question since the liquidation process of the Corporate Debtor commenced much prior to 25<sup>th</sup> July, 2019.

8.12 The Respondent submits that the terms of the auction were transparent and clear, and were well understood by the Applicant, the Applicant is estopped from denying the existence of such clear terms. The Applicant cannot be permitted to defend his own admitted and explicit failure to abide by the terms of the auction. It is clear that the failed auction has caused damage to the liquidation process, as the realisation in the next auction was considerably lower than the failed auction. As a result, the Applicant was responsible for causing a loss to the stakeholders in the liquidation process, including the workmen.

8.13 The Ld. Counsel submits that liquidator has the right to lay 'terms and conditions' providing for forfeiture if IBC/regulations thereunder do not explicitly mention 'forfeiture'. Section 35(1)(f) of the Code empowers and enjoins upon the liquidator to sell the assets of the corporate debtor—

*“subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified*

*in such manner as may be specified”.*

8.14 Further, Regulation 33 read with Schedules I specifies the manner in which the sale can be conducted. Para 1(3) states-

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

8.15 Thus, IBC read with the Liquidation Regulations empowers the Liquidator to lay down terms and conditions with respect of sale of assets of the Corporate Debtor and the power is inclusive, that is to say, the Liquidator is empowered to lay down such terms and conditions of sale of assets of the Corporate Debtor which are beneficial to the Liquidation Estate.

8.16 The Respondent submits that there have been several instances before the NCLTs and even NCLAT, where the forfeiture by liquidators was challenged however, the judicial authorities have all owed such forfeiture - Visisth Services Limited v. S. V. Ramani, [CA (AT) (Insolvency), No, 896 of 2020, Saboo Tor Private Limited vs. Sanjay Gupta, Liquidator, CA (AT) (Insolvency) No. 1098 of 2020, Sundaresh Bhat, Liquidator of ABG Shipyard [I.A.No.698 of 2020 in C.P.(IB) No.53of 2017], etc.

8.17 At the time of hearing, the Applicant had placed reliance on Supreme Court Judgment in Kailash Nath Associates vs Delhi Development Authority & Anr [Civil Appeal No. 193 OF2015]. However, it is important to note that the Hon’ble NCLAT in the matter of Saboo Tor(supra), where the same ruling was pressed into service by the applicant in that case, has disregarded the said ruling, based on facts of the case, and relied upon National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410, and State of Haryana v. Malik Traders, (2011) 13 SCC 200 (as below). Hence, the Applicant’s reliance on Kailash Nath Associates (supra) is misplaced.

8.18 It is submitted that –

a. tender/invitation documents constitute a contract, once accepted; and

b. The terms of forfeiture serve dual purpose -(i) it acts as a deterrence, and (ii) it compensates the aggrieved party.

8.19 The Respondent relies on various rulings of SC, High Courts, NCLAT and NCLT in support of the aforesaid, *inter alia*, National Highways Authority of India v. Ganga Enterprises & Anr, [(2003) 7 SCC 410], State Of Haryana & Ors vs M/S Malik Traders, Civil Appeal No. 7033 of 2011, V. Lakhshmanan v. B. R. Mangalagiri & Others, Civil Appeal No. 4542 of 1984, Mary v. State of

Kerala and Others, Civil Appeal No. 9466 of 2003, Veena Garg v. Delhi Development Authority, Visisth Services Limited v. S. V. Ramani, JCA (AT) (Insolvency), No, 896 of 2020, Sahoo Tor Private Limited vs. Sanjay Gupta, Liquidator, CA (AT) (Insolvency) No. 1098 of 2020, etc.

8.20 The NCLAT rulings cited herein, Visisth Services(supra) and Sahoo Tor(supra) have allowed forfeiture clause, which clearly substantiates the view that the liquidator is well within his powers to include terms as to forfeiture in the sale invitations.

8.21 The Respondent has also placed reference to various judgments passed by the Hon'ble Apex court as in National Highways Authority of India v. Ganga Enterprises & Anr, [(2003)7SCC410]; State Of Haryana & Ors vs M/S Malik Traders, Civil Appeal No. 7033 of 2011; V. Lakhshmanan v. B. R. Mangalagiri & Others, Civil Appeal No. 4542 of 1984; Mary v. State of Kerala and Others, Civil Appeal No. 9466 of 2003;

In Veena Garg v. Delhi Development Authority, 19th April, 2022, the Hon'ble High Court of Delhi held as follows:

“10..... It is well settled law that participating in the tender, a bidder cannot seek for deviation from the tender document which has been accepted by the petitioner on his own accord. It goes against contractual obligations steeped in accepting such a tender, and therefore, violates the principles under Article 14 of the Constitution with respect to other bidders”

In Visisth Services Limited v. S. V. Ramani, CA (AT) (Insolvency), No, 896 of 2020, NCLAT was dealing with an appeal against order of NCLT which held that EMD and other amounts can be forfeited. Hon'ble NCLAT upheld the order of NCLT, on grounds that,

***“. . the Bidder cannot wriggle out of the contractual obligations arising out of acceptance of his Bid . . . 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.”***

NCLAT relied on SC rulings in Pawan Kumar Agarwal v. Association of Management Studies and Anr.; Meerut Development Authority 2009 (6) SCC 171, wherein SC held,

*“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.**”*

*Similar ruling was given in Sahoo Tor Private Limited vs. Sanjay Gupta, Liquidator, CA (AT)(Insolvency) No. 1098 of 2020, wherein the Hon'ble NCLAT placing reliance on the SC ruling in National Highways Authority of India v. Ganga Enterprises &Anr and State Of Haryana &Ors v. M/S Malik Traders, held as follows:*

*“14. In the present case, the material on record evidences that reminder 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”.*

*In Satish Batra v. Sudhir Rawal, Civil Appeal No. 7588 of 2012, the SC, relying on Shree Hanuman Cotton Mills v. Tata air Craft Ltd., (1969)3SCC 522, opined that:*

*“Law is, therefore, clear that to justify the forfeiture of advance money being part of “earnest money” the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor.”*

8.22 Thus, one can say that one cannot escape from the obligations and liabilities of the Invitation document, which was specifically agreed to be for participating in the auction, as the same will defeat the very purpose of the

time bound process of the IBC. The stand taken by Hon'ble Supreme Court and NCLAT in the aforesaid rulings clearly substantiate the principle.

8.23 In the **instant case**, para 12.19 of the EOI clearly says as follows:

*“12.19. The event of default of payment within the stipulated period, as mentioned above, or any default in terms of the Invitation, the EMD as well as all monies paid by the defaulting Bidder shall be forfeited and the assets shall forthwith be sold again and such defaulting Bidder shall forfeit all claims to the Sale Asset or to any part of the amount for which it may be subsequently sold”<sup>6</sup>*

8.24 The Respondent submits that the Applicant accepted the terms and conditions of the Invitation vide Confirmation Statement dated 28<sup>th</sup> July, 2020 (@Pg 75 of Reply Affidavit), as well as signed the Bid Form containing the terms as to forfeiture (@Pg 53 of Reply Affidavit). Also, the terms of payment of sale consideration, inter-alia the time-period and tranches, were duly reiterated and clarified in Confirmation and Demand Letter dated 30<sup>th</sup> July, 2020 (@Pg 80 of the Reply Affidavit).

8.25 It must be noted that the Applicant herein had conveyed its acceptance to such terms in full and without any objection and/ or reservations. Hence, the fact that non-payment of the sale consideration within the timeline laid down in the Invitation would render forfeiture of all monies paid by the defaulting bidder was known to the Applicant at all times.

8.26 The clauses from the Invitation and the Bid Form as cited above sufficiently evidence that the Applicant had voluntarily subscribed to the risk of forfeiture of all monies paid, in case of any default in payment of full consideration. Thus, in view of the aforesaid rulings and facts, the Respondent's right to forfeit the monies paid by the Applicant pursuant to the sale considerations stands substantiated.

8.27 The Respondent further submits that Supreme Court Judgment in the matter of Kailash Nath Associates v. Delhi Development Authority & Anr [CivilAppealNo.193OF2015], is not a precedent in this case. While placing his arguments, relied upon the Hon'ble Supreme Court Judgment in Kailash Nath Associates vs Delhi Development Authority & Anr [Civil Appeal No.193

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<sup>6</sup> Page 71 of the Reply Affidavit

OF 2015], however, the Hon'ble NCLAT in the matter of Saboo Tor (supra) , where the same ruling was pressed into service by the applicant in that case, has disregarded the said ruling, based on facts of the case, and held that, "forfeiture has no nexus with any consequential benefit gained/or loss suffered by the Respondent".

8.28 Further, the Respondent humbly submits that the said judgement is clearly distinguishable and will not apply in the instant case for the reasons mentioned below:

- (a) The judgment in *Kailash Nath Associates* (supra) was passed in the year 2015, i.e., prior to introduction of Insolvency and Bankruptcy Code, 2016 ('IBC, 2016'), and was based on the Indian Contract Act, 1872, and therefore should not be placed reliance while dealing with the cases pertaining to Insolvency and Bankruptcy Code, 2016, as Liquidation under IBC,2016 is a time bound process and the very purpose of the IBC,2016 will be frustrated if the timeline under IBC,2016 is not maintained. Therefore, a person who fails to meet a commitment under an action is liable to face forfeiture of amount paid -this is not merely compensatory but also has an element of deterrence. It has no nexus with any consequential benefit gained or loss suffered by the liquidation estate.
- (b) In *Kailash Nath Associates*, the DDA had realised much higher amount in the subsequent auction of the same asset (Refer para 42 of the Order), however, in the instant case, the realisation in the next action was Rs. 23.33 Crs. (**@pg 7 of the Reply Affidavit**], which was Rs. 1.43 Crs. lower than the bid placed by the Applicant herein. Clearly, the next auction was adversely impacted. besides the present value loss of an in determinable amount, caused in the liquidation proceedings. It may be noted that the auction in which the Applicant participated was held on 30<sup>th</sup> July, 2020, and the next (successful auction) happened on 5<sup>th</sup> October, 2020.
- (c) In *Kailash Nath Associates*, no pre-forfeiture notice was issued to the Bidder prior to forfeiting the EMD amount (refer para 66 of the Order), however, in the given case, the Applicant was given several reminders include Pre-deadline Reminder (**@Pg 85 of Reply Affidavit**] and Pre-Forfeiture Notice (**@Pg96 of the Reply Affidavit**]

(d) In any case, the Respondent humbly submits that section 238 of the Insolvency and Bankruptcy Code, 2016 has an overriding effect over other laws, as the same reads as follows:

*“The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”*

**9. ANALYSIS AND FINDINGS:**

9.1 Heard the Ld. Counsel appearing for both the parties and perused the records.

**9.2 Issue that arises for consideration is whether forfeiture of EMD by liquidator is bad in law?**

9.3 For deciding the issue framed above, we may refer to the following factual position on record.

- On 09 September, 2020 – the Respondent confirmed the payment of Rs.6,18,25,000/- by the Applicant and requested to remit further balance.
- A chart showing the details is as follows: -

Invitation for EOI	08 July, 2020
Bank Guarantee (EMD Money) by the Applicant for Rs.50,00,000/-	24 July, 2020
Applicant submitted signed EOI	28 July, 2020
Applicant was declared as the H1 bidder (bidding amount – Rs.24,73,00,000/-)	30 July, 2020
Rs. 2 Crore paid by the Applicant	05 August, 2020
Rs. 2 Crore paid by the Applicant	10 August, 2020
Rs. 1 Crore paid by the Applicant	14 August, 2020
Rs. 1.1825 Crore paid by the Applicant	17 August, 2020

- The Applicant *vide* letter dated 09 September, 2020 intimated the Respondent for granting time for 90 days as because of COVID 19 restrictions, the banks were taking time to sanction the loan.

- On 10 September, 2020 – the Respondent replied that the extension sought cannot be granted<sup>7</sup>.
- The Applicant again *vide* letter dated 13 September, 2020 requested to extend 90 days from the date of demand notice issued by the respondent i.e., **28 October, 2020**<sup>8</sup>. However, the same was rejected by the Respondent *vide* its email dated 14 September, 2020<sup>9</sup>.

9.4 2nd proviso to Clause 1(12) under Schedule I of the Liquidation Process Regulations, 2016 after amendment on 25<sup>th</sup> July, 2019 stands as:

**“1 Auction.**

*(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days of the date of such demand:*

*Provided that payments made after thirty days shall attract interest at the rate of 12%:*

*Provided further that the sale shall be cancelled if the payment is not received within ninety days.”*

*(Emphasis supplied.)*

Whereas, prior to this amendment, period to make payment was 15 days.

9.5 **According to Ld. Sr. Counsel for Liquidator**, amendment as mentioned above is not applicable in case of the Applicant as Liquidation Process of the Corporate Debtor commenced on 17<sup>th</sup> October, 2017, much prior to the date of Amendment on 25<sup>th</sup> July, 2019. Hence, the contentions of the Applicant that the Applicant ought to have been provided ninety days’ time for payment in accordance with the amendment do not stand any ground.

9.6 **Ld. Sr. Counsel for liquidator while laying emphasis on his argument has also relied on a circular dated 26-08-2019,**

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<sup>7</sup>(Annexure -11).

<sup>8</sup>(Page 30 of the Application)

<sup>9</sup>(Annexure 13 of the Application)

**Insolvency and Bankruptcy Board of India**  
7<sup>th</sup> Floor, Mayur Bhawan, Connaught Place, New Delhi-110001

**CIRCULAR**

No. IBBI/LIQ/024/2019

26<sup>th</sup> August, 2019

To  
All Registered Insolvency Professionals  
All Recognised Insolvency Professional Entities  
All Registered Insolvency Professional Agencies  
(By mail to registered email addresses and on website of the IBBI)

Dear Madam / Sir,

**Sub: Applicability of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 notified on 25<sup>th</sup> July, 2019.**

The Insolvency and Bankruptcy Board of India notified the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019 (Amendment Regulations) on 25<sup>th</sup> July, 2019. They came into force on the date of their publication in the Official Gazette, that is, on 25<sup>th</sup> July, 2019.

2. The stakeholders have expressed a difficulty in applying the Amendment Regulations to a liquidation process, which commenced before 25<sup>th</sup> July, 2019. It is reiterated that the provisions of the Amendment Regulations are not applicable to the liquidation processes, which had commenced before coming into force of the said Amendment Regulations and that they are applicable only to liquidation processes, which commenced on or after 25<sup>th</sup> July, 2019.

3. This Circular is issued in exercise of the powers under section 196 of the Insolvency and Bankruptcy Code, 2016.

Yours faithfully,  
Sd/-

(I. Sreekara Rao)  
Chief General Manager  
Email: sreekararao@ibbi.gov.in

9.7 Now while examining the plea regarding period of 90 days for deposit of balance amount of consideration and effect of circular referred above, in the first instance we seek to place reliance on an order passed by Hon'ble NCLT New Delhi, in Company Appeal (AT) (Insolvency) No. 532 of 2022, **Potens Transmissions & Power Pvt. Ltd Versus Gian Chand Narang** has held:

*8. When we look into the above regulation, it is clear that 90 days' period provided for making the deposit is the maximum period under which the Auction Purchaser had to make the deposit.*

*2nd Proviso of the Item 12 of the Schedule I provided that sale shall be cancelled if the payment is not received within 90 days. When the Consequence of non-compliance of the provision is provided in the statute itself, the provision is necessary to be held to be mandatory.*

9.8 Therefore, there is no doubt period of 90 days to make balance payment is mandatory and not left to the discretion of liquidator while laying down terms and conditions of auction notice.

9.9 Now, with a view to analyse argument of validity of circular, we have gone through:

- i. Section 196 of IBC while issuing this Circular.
- ii. law laid down by Hon'ble Supreme Court in AIR 2005 SC 3485, their Lordships have expressed the view that **“it is well settled principle of law that Circular cannot override the rules occupying the field and if there is a clash between the Rule and the circular, the circular has to be treated as non- est.”**

*(Emphasis supplied)*

- iii. ***Ajaya Kumar Das v. State of Orissa, (2011) 11 SCC 136: (2011) 2 SCC (L&S) 204 : 2009 SCC OnLine SC 1405 at page 139, it was held:***

*Neither the Circular dated 18-6-1982 nor the subsequent Circular dated 19-3-1983 modifying the earlier Circular dated 18-6-1982 can override the statutory provision contained in Rule 74(b) of the Code if it results in reduction of pay of the employee on promotion. That the Orissa Service Code has been framed under Article 309 of the Constitution of India is not in dispute. It is well settled that the statutory rules framed under Article 309 of the Constitution can be amended only by a rule or notification duly made under Article 309 and not otherwise. Whatever be the efficacy of the executive orders or circulars or instructions, statutory rules cannot be altered or amended by such executive orders or circulars or instructions nor can they replace the statutory rules. The Rules made under Article 309 of the Constitution cannot be tinkered by the administrative instructions or circulars.*

*(Emphasis supplied.)*

- iv. The Hon'ble High Court of Delhi in **W.P.(C) 4452/2008** on 31<sup>st</sup> May, 2011 has held:

*“36. In Godrej & Boyce Mfg. Co. Ltd. V. State of Maharashtra reported at (2009)5 SCC 24, the Apex Court held that circulars are administrative in nature and cannot alter the provisions of a statute nor can*

*they impose additional conditions. Para 64 of the judgment of the judgment reads as under:*

*"64. Having regard to the nature of the law the submission advanced on behalf of the municipal authority would lead to palpably unjust and inequitable results. The landowner whose land is designated in the development plan as reserved for any of the purposes enumerated in Section 22 of the Act or for any of the amenities as defined under Section 2(2) of the Act or Regulation 2(7) [sic Regulation 3(7)] of the Regulations is not left with many options and he does not have the same bargaining position as the municipal authority. Therefore, surrender of the land in terms of clause (b) of Section 126(1) of the Act cannot be subjected to any further conditions than those already provided for in the statutory provisions. It is of course open to the legislature to add to the conditions provided for in the statute (or for that matter to do away with certain conditions that might be in existence). But it certainly cannot be left in the hands of the executive to impose conditions in addition to those in the statutes for accepting the offer to surrender the designated land."*

*Thus, applying the settled position of law to the facts and circumstances of the present case, I find that the impugned circular dated 03.04.2008 seeks to impose a condition that was not the intention of the legislature as expressed in the SEZ Act or in the SEZ Rules framed thereunder and thus, is liable to be set aside."*

*(Emphasis supplied.)*

9.10 Analysing the above position, we are of the view there is no power to issue such circular under Section 196 of IBC 2016.

9.11 Now, advertent to the plea of the Ld. Sr. Counsel appearing for the Respondent who has placed reliance on an order passed by the NCLT Ahmedabad Bench while arguing on the aspect when the amended regulation will apply. It is an admitted position that after

the amendment of 25.07.2019, the period of 15 (fifteen) days that was prior to this amendment, was changed to 90(ninety) days. Probably, the law makers were of the view that 15 days period is too short to provide the balance sale consideration and therefore it was enlarged to 90 days by virtue of this amendment.

9.12 It is significant to note, Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process Regulations), 2016 i.e., Mode of Sale deals with sale through auction by liquidator in the manner as specified therein. Thus, providing for balance sale consideration within 90 days from the date of demand, is the obligation created by law after amendment on 25.07.2019. **Admittedly**, in the present case, EOI was issued by the liquidator on 08.07.2020, i.e. after the date of amendment of period for payment of balance sale consideration to 90 days. In the EOI issued on 08.07.2020, the period was mentioned to be 15 days by the liquidator, whereas applicant sought extension up to 90 days from the date of demand in terms of the amendment dated 25.07.2019. Therefore, we are of the considered view that the liquidator was required to issue EOI in terms of the amendment that was in place on the date of issuance of EOI, thereby providing 90 days for payment of balance sale consideration from the date of demand.

9.13 Notwithstanding the fact, liquidation order was passed prior to this amendment, *there is no provision for providing any period for payment of EOI at the time of passing the order of liquidation by Adjudicating Authority*. It is only in the EOI, this period is/was required to be provided in terms of Schedule I under Regulation 33 of Insolvency and Bankruptcy Board of India Liquidation Process Regulations), 2016.

9.14 We, on the basis of law laid down, as referred above, hold that the circular dated 26.08.2019 as **non-est in law**. We therefore, with utmost regard to the order passed by the NCLT Ahmedabad Bench, are of the view, that the liquidator, after the amendment was required to grant 90 days for making payment of balance sale consideration in the EOI issued by him on 08.07.2020 and by not doing so in accordance 2nd proviso to Clause 1(12) under Schedule I of the Liquidation Process Regulations, 2016 after amendment on 25<sup>th</sup> July, 2019 and subsequently forfeiting the EMD, has acted contrary to law.

9.15 In view of the above position, it is held that forfeiture of EMD by liquidator is contrary to law and the same is, therefore, liable to be set aside. We accordingly allow the present application by setting aside forfeiture of EMD and direct the liquidator: -

- a. to refund the amount of EMD forfeited by him within 30 days the date of this order with an interest @ 4% from forfeiture date, failing which, liquidator will be liable to pay the forfeiture amount of EMD along with an interest of 7% till the actual payment is made to the applicant.

9.16 With these observations, the application is **disposed of** accordingly.

**Balraj Joshi,**  
**Member (Technical).**

**Rohit Kapoor,**  
**Member (Judicial)**

The order is pronounced on the 23<sup>rd</sup> day of February, 2023