

Through Videoconference

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT No. II**

**I.A. No. 1036/MB/C-II/2020
in
C.P (IB) No. 294/MB/C-II/2018**

**An Application under Section 60 (5) of the
Insolvency and Bankruptcy Code, 2016**

UPL Limited

UPL House, 610 B/2, Bandra Village, Off Western Express
Highway, Bandra – East, Mumbai- 400 051.

... **Applicant**

Versus

OM PRAKASH AGRAWAL

Liquidator of S Kumars Nationwide Ltd
Having his office address at B2, 5th Floor, Marathon
NextGen, Off G. K. Marg, Lower Parel, Mumbai – 400 013.

... **Liquidator**

In the matter of

IDBI Bank Limited

IDBI Tower, W.T.C. Complex, Cuffe Parade, Mumbai
400005

... **Petitioner/Financial Creditor**

Versus

S. Kumars Nationwide Limited

82 Floor, Marathon NextGen, Off G.K. Marg, Worli,
Lower Parel (W), Mumbai- 400 013

... **Respondent/Corporate Debtor**

Order Pronounced on: 12.02.2021

Coram:

Janab Mohammed Ajmal

Mr. Ravikumar Duraisamy

Hon'ble Member Judicial

Hon'ble Member Technical

Appearance:

For the Applicant : Mr. Nand Kishore, Advocate.

For the Respondent : Mr. Darshit Dave, Advocate.

ORDER

Per: Ravikumar Duraisamy, Member

1. The present application **seeks directions pertaining to auction sale of assets** for waiver of interest demanded vide letter dated 10.06.2020 on balance sale consideration; as well direction to the Respondent not to treat non-payment of interest on the balance sale consideration by the Applicant as a default and further refrain from disqualifying the Applicant as successful bidder and forfeit the earnest money deposit and for passing any other order/suitable direction in the matter.

Submissions made by Applicant by way of Interlocutory Application:

2. The liquidation in the matter commenced *vide* order dated 19.06.2019 passed by this Tribunal. The Respondent was appointed as the Liquidator for the Corporate Debtor *vide* the order dated 19.06.2019 Pursuant to the order, the Respondent issued an E-Auction Notice dated December 12, 2019 (hereinafter the “**E-Auction Notice**”) for the sale of certain assets (Lot 1 and Lot 2) of the Corporate Debtor, along with an E-Auction Sale Process Memorandum dated December 12, 2019 (hereinafter the “**E-Auction Memo**”) under the Insolvency and Bankruptcy Code, 2016 (hereinafter the “**IBC**”) and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

(hereinafter the “**Liquidation Process Regulations**”).

3. As per the E-Auction Notice and the E-Auction Memo, the assets of the Corporate Debtor described specifically in Clause 8 of the E-Auction Memo comprised of High Value Fine Cotton Fabric Manufacturing Unit at Bharuch (Gujarat) as a going concern which included leasehold and freehold land, factory building, plant and machinery, furniture and fixtures and net current assets pertaining thereto and the Brands/ Trademarks owned by the Corporate Debtor along with licences, permits, approvals and registrations to the extent they are transferable under the applicable law on an “*As is where is*”, “*As is what is*”, “*Whatever there is*”, and “*No recourse*” basis.

Lot 1 was described as under:

Part of Plot no. 825 of Jhagadia GIDC, Bharuch in the village Dadheda, Jhagadia Taluka, Bharuch District, Gujarat having a total land area of 42.04 acres / 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.

Lot 2 was described as under:

“Part of Plot no. 825 of Jhagadia GIDC, Bharuch in the village, Dadheda, Jhagadia Taluka, Bharuch District, Gujarat having a total land area of 28.57 acres / 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.”

The Freehold land for Lot 2 was described as under:

“Survey No. - 67 + 73 + 74 + 4A + 4B of Village Dadheda, Jhagadia Taluka, Bharuch District, Gujarat having a total land area of 20.10 acres / 81,326 sq. mt. These are the freehold land parcels.”

The Leasehold land under Lot 1 and Lot 2 is part of common Plot of land being Plot No. 825, of Jhagadia GIDC, Bharuch in the village, Dadheda, Jhagadia Taluka, Bharuch District, Gujarat which was acquired by the Corporate Debtor on leasehold basis from Gujarat Industrial Development Corporation (“**GIDC**”). Accordingly, for the purpose of transfer of Leasehold land comprised in Lot 1 and Lot 2, it was necessary to complete sub-division of the said Plot No. 825 from GIDC into the separate leasehold lands as described in Lot 1 and Lot 2 above. Accordingly, the E-Auction Notice and the E-Auction Memo, while describing the Leasehold land specified that the said Leasehold land, as described in the respective Lot 1 and Lot 2 is *“subject to sub-division of the said Plot”*.

4. Applicant further submits that as per the E-Auction Notice and the E-Auction Memo, the last date for submitting bids was January 13, 2020 (which was extended till January 16, 2020) and the E-Auction of the assets was to be conducted on January 16, 2020. As per Article 10 of the E-Auction Memo, all E-Auction participants were required to make an Earnest Money Deposit (hereinafter the “**EMD**”) of Rs.2,84,00,000/- (Rupees Two Crores Eighty-Four Lakhs Only) for Lot 2. For the successful bidder, the EMD was allowed to be set-off against or used as a part of the consideration in the final payment only. As per Article 11 of the E-Auction Memo, once a bidder was declared to be successful, a Letter of Intent (LoI) was to be issued by the Respondent whereby, the successful bidder would be invited to pay the balance sale consideration

with applicable GST for the Lot 2. The successful bidder was to deposit the balance sale consideration within 90 days from the date of such demand by the Liquidator through the LoI, provided that payments after 30 days were to attract interest at the rate of 12% p.a. Further, the sale was to be cancelled, if full payment was not received within 90 days from the date of such demand. Any default in payment of the balance sale consideration and any applicable GST, if any, on 100% of the bid sum by the successful bidder was to result in the disqualification of the successful bidder including the forfeiture of EMD.

5. Further, Article 13, clause B of the E-Auction Memo provided that the successful bidder shall bear the sub-division charges of land payable on land area for Plot No. 825 proportionate to area in Lot 1 and Lot 2, respectively. It further provided that the Respondent shall apply for subdivision of GIDC Plots after issuance of LoI to the successful bidder and such bidder shall pay the amount of sub-division charges within 10 days from the date of demand by the Liquidator. Article 13, clause B is reproduced hereunder for ready reference:

“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 subdivision 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 final payment”

Article 13 (B) of the E-Auction Memo further provides that, if the bid succeeds for only one of the Lots, then the successful bidder shall bear the entire sub-division charges and will get proportionate set off while making the final payment for the Lot it won.

6. The Applicant states and submits that from a reading of the provisions of the E-Auction Notice and the E-Auction Memo, the Applicant was of the *bona fide* view that the balance sale consideration towards the purchase of assets comprised in Lot 1 and / or Lot 2 was payable upon the Respondent completing the sub-division of the said Leasehold land from GIDC. This view of the Applicant was further strengthened by Article 13(B) which provided that if the bid succeeds only for one of the lots, then the successful bidder is required to bear the expense of sub-division charged by GIDC in respect of both the Lots and shall be given due set off for the excess amount from the subsequent final payment.
7. The Applicant, *vide* its email dated January 03, 2020, sought specific clarifications from the Respondent with respect to payment of balance sale consideration and the interest on delayed payment. The Applicant sought the following clarification:

“This is with respect to sub section B of Section 13-Cost, expenses and Tax implication 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 sub division of GIDC Plot shouldn’t attract any interest.”
8. Lot 1 comprised of leasehold land being part of Plot No. 825, Jhagadia GIDC, Bharuch, Gujarat admeasuring 42.04 acres, factory building, plant and machinery contained therein, brand name and other current assets. Lot 2 comprised of only leasehold land being a part of Plot No. 825 Jhagadia GIDC, Bharuch, Gujarat admeasuring 28.57 acres and Freehold land. With respect to the leasehold land, it was specified that the land is leasehold from GIDC and is subject to sub-division of the said

plot land was subject to sub-division from GIDC.

9. The Applicant submitted its bids for Lot No.2 for a sum of Rs. 43.43 crores along with an EMD of Rs. 2.84 crores. The Applicant was declared a successful bidder and a LoI dated January 18, 2020 was issued upon the Applicant demanding the balance consideration after adjusting the EMD.
10. The Respondent, *vide* his email dated January 09, 2020, replied to the above specific query, raised by the Applicant, as follows:
‘Interest on delayed payment shall be waived off to the extent the delay is on account of sub-division of leased land’

Clearly, the Respondent acknowledged that:

- a. the balance sale consideration in respect of auctioned assets whether for Lot 1 or Lot 2 shall be payable upon completion of sub division of the Leasehold land of entire Plot No. 825 into Lot 1 and Lot 2 from GIDC; and
 - b. accordingly, if there is any delay on account of subdivision of the Leasehold land of entire Plot No. 825 into Lot 1 and Lot 2, then interest on delayed payment, to the extent the delay is attributable to sub division of Leasehold Land, shall be waived off.
11. Applicant submits that in view of the clarifications provided by the Respondent, the Applicant submitted its bid on January 16, 2020 for the assets being (a) Part of Plot No. 825 of Jhagadia GIDC, Bharuch in the village Dadheda, Jhagadia Taluka, Bharuch District, Gujarat having leasehold land 28.57 acres/1,15,632 sq. mt. (subject to sub-division), and (b) Survey No. 67 + 73 + 74 + 4A + 4B of Village Dadheda, Jhagadia

Taluka, Bharuch District, Gujarat having a total freehold land area of 20.10 acres/81,326 sq. mt- listed, as Lot 2 of the E-Auction Notice and the E-Auction Memo (the “**Concerned Assets**”). The Applicant emerged as the successful bidder for the auction purchase of the Concerned Assets (comprising of Freehold land and Leasehold land for Lot 2) for a sum of Rs. 43,43,00,000/- (Rupees Forty-Three Crores and Forty-Three Lakhs Only) (the sale consideration).

12. Accordingly, the Respondent issued a LoI dated January 18, 2020 to the Applicant. As per the LoI, the Applicant was required to pay the balance sale consideration together with the applicable GST and sub-division charges within 90 days from the date of the issuance of the LoI. The Applicant accepted the LoI by its letter dated January 21, 2020. However, the Applicant *vide* the acceptance letter to the LoI clarified that the Respondent, from time to time, had made the following representations with respect to Lot 2, that:
 1. The Lot 2 shall be transferred/ conveyed to us, free from all encumbrances, including the encumbrances created by the financial creditors (secured)/ lenders over the Lot 2; and
 2. In relation to Plot no. 825 in Jhagadia Industrial Estate, GIDC, Gujarat, which is a leasehold land and is part of Lot 2, the transfer or assignment shall happen after obtaining approval of Gujarat Industrial Development Corporation (GIDC).

13. The Applicant has unconditionally accepted the LoI by its letter of January 21, 2020 subject to two conditions: -
 - a) The Lot 2 Assets shall be transferred/ conveyed to the Applicant, free from all encumbrances, and

- b) In relation to Plot no. 825 in Jhagadia Industrial Estate, GIDC, Gujarat, which is a leasehold land and a part of Lot 2 Assets, the transfer or assignment shall happen after obtaining the approval of Gujarat Industrial Development Corporation (GIDC).
14. However, vide its letter dated March 12, 2020, the Respondent/ Liquidator, for the first time, informed the Applicant that based on the survey conducted by the GIDC of Plot no. 825, it has come to their notice that an area of land admeasuring 12, 982 sq mtrs. is additional thereto. Accordingly, they sought the Applicant's in-principle consent to purchase the additional portion of land.
15. The Applicant, accordingly, provided its consent thereto under its first letter of March 30, 2020.
16. While the Applicant was awaiting communication from the Respondent regarding sub-division of the Plot no. 825 of Leasehold land into Lot 1 and Lot 2 by GIDC, the Applicant received a second letter dated March 12, 2020 from the Respondent/ Liquidator, whereby the Respondent, for the first time, called upon the Applicant to make the payment of the balance sale consideration.
17. The Applicant, by its second letter of March 30, 2020, in answer to the Respondent/ Liquidator's second letter of March 12, 2020 demanding payment of balance sale consideration and interest @ 12% p.a., has categorically pointed out that the sub-division of land is still pending and

that the survey report in respect of plot no. 825 was still not provided to them, amongst other pending actions on the part of the Respondent.

18. Vide e-mail dated April 07, 2020, the Respondent / Liquidator informed the Applicant that sub-division of the land is in progress and that survey report of Plot No. 825 is not received.
19. Owing to the pandemic, a nationwide lockdown was imposed by the Government of India w.e.f. March 24, 2020. The lockdown continued till May 31, 2020. Regulation 47A was introduced in the Regulations, by way of Notification No. IBBI/2020-21/GN/REG060, dated April 20, 2020 (w.e.f. 17.4.2020), whereby the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak was not to be counted for the purposes of computation of the timeline for any task that could not be completed due to such lockdown, in relation to any liquidation process.
20. The Applicant vide e-mail dated April 14, 2020, informed the Respondent / Liquidator that owing to lockdown, the Applicant was facing difficulties in day-to-day business. In view of the unprecedented conditions, the Applicant sought extension of time being 15 days from the date when the lockdown is lifted by the Central Government for making balance sale consideration.
21. The Respondent / Liquidator vide reply mail dated April 16, 2020 acceded to the request of the Applicant for extension of time for payment of balance consideration. However, the extension was subject to payment of interest for the period including the lockdown period.

22. In the meanwhile, GIDC in its Provisional Order dated May 01, 2020 with respect to sub-division of Plot No. 825 into Lot 1 and Lot 2 (hereinafter the “**Provisional Order**”) stated that the request for sub-division of the Leasehold land, as applied for by the Corporate Debtor through the Respondent, can be considered, subject to fulfilment of various conditions prescribed in the said Provisional Order, which, *inter alia*, included all outstanding dues, instalment, revenue charges, water charges, to obtain a No-Dues Certificate from Ankleshwar Industries Association, payment of sub-division charges, regularization of unauthorised construction on the Plot, etc. Further, the said Provisional Order also required the Respondent to make payment of “*concessions*” amounting to Rs. 1,64,92,000/- (Rupees One Crore Sixty-Four Lakhs and Ninety-Two Thousand Only) and an interest amount of Rs. 2,75,11,368/- (Rupees Two Crores Seventy-Five Lakhs Eleven Thousand Three Hundred and Sixty-Eight Only).
23. The Applicant, by its email of May 05, 2020, raised several issues and observations with respect to the Provisional Order as under:
- a. Proposed Plot Size Mismatch - Leasehold land of Plot no. 825 to be allotted to the Applicant was originally of 1,15,632 sq. mts. and further 12,982 sq. mts. was additionally added. Total Plot area for Plot No. 825 indicated in the Provisional Order is 2,84,265.73 sq. mts. (which includes the additional area). However, in the E-Auction Notice and the E-Auction Memo, total area for Plot No. 875 was 2,85,765 sq. mts. and later additional land of 12,982 sq. mts. was added. Further the Provisional Order with respect to Lot 2 mentions an area of 1,12,742.20 sq. mts. as opposed to 1,15,632 sq. mts. The

discrepancy between the E-Auction Notice and E-Auction Memo on one hand and the Provisional Order on the other hand, needs to be rectified.

- b. Under the Provisional Order, the Respondent was directed to pay all outstanding dues, instalments, revenue charges, water charges, etc. However, the Provisional Order does not provide the amounts due and payable in respect thereof and that the Respondent ought to ascertain the same and that the same needs to be borne and paid by the Liquidator on behalf of the Corporate Debtor.
- c. The Provisional Order refers to the execution of a certain Deed of Agreement on a stamp paper of Rs. 300 as prescribed by GIDC on account of Plot No. 825 (forming a part of the Concerned Assets) being held on license from GIDC, which has to be executed/ implemented by the Respondent.
- d. A No-dues Certificate for water charges was to be obtained from GIDC. In this respect, outstanding water charges needed to be ascertained and paid and the process of obtaining such No-dues Certificate has to be initiated by the Respondent.
- e. GIDC has directed the Respondent to regularize the unauthorized non-violative construction by approving plans from their Executive Engineer, GIDC or Competent Authority concerned, within 30 days. As the Concerned Assets do have any construction thereon, a clarification ought to be obtained by the Respondent from GIDC.

f. With respect to the (a) sub-division charges, and (b) concession amount along with interest, the Applicant is agreeable to pay GIDC the applicable subdivision charges pertaining to Plot No. 825 (forming a part of the Concerned Assets). Further, as per the E-Auction Memo, at the time of the final payment of the balance sale consideration, the amount paid by the Applicant towards the sub-division charges to the Respondent in respect of assets under Lot No.1 of the E-Auction Memo would be set-off. However, the Applicant sought clarifications from the Respondent pertaining to the concession charges along with interest demanded by GIDC which is to be borne and payable by the Liquidator on behalf of the Corporate Debtor.

A No-Objection Certificate for sub-division of Plot No. 825 (forming a part of the Concerned Assets) from banks/financial institutions mentioned in the Provisional Order is required to be provided to GIDC.

24. In the meanwhile, the Respondent filed an Interim Application before this Hon'ble Tribunal seeking directions that Tax Deducted at Source ("TDS") @ 1% on the sale consideration ought not to be deducted by the Applicant at the time of making payment thereof under section 194IA of the Income Tax Act, 1961. The said Interim Application is pending till date and the next date of hearing is June 11, 2020.
25. The Applicant addressed a letter dated May 25, 2020 to the Respondent whereby, the Applicant opposed the Respondent's contention in its email April 16, 2020. The Applicant stated that interest @ 12% p.a. on delay in payment of the balance sale consideration ought not to be imposed on the Applicant, as the reasons for the delay were not attributable to the Applicant including the delay in compliance with the conditions of

Provisional Order for sub-division of Plot no. 825 in Jhagadia Industrial Estate, GIDC, Gujarat; lockdown due to COVID-19 and the restrictions imposed by the Governments of India and Gujarat, the pending Interlocutory Application with respect to waiver of TDS before the this Hon'ble Tribunal. It was categorically pointed out that the Respondent had clarified to the Applicant by its email of January 09, 2020 (which was prior to the submission of bids by the Applicant) that such interest shall not be payable to the extent the delay is on account of sub-division of Plot No. 825 into Lot 1 and Lot 2. Further, the Applicant also highlighted that, the Respondent had not complied with the conditions mentioned in the Provisional Order of GIDC owing to which the final order has not been passed till date. The Applicant further, drew the attention of the Respondent to Regulation 47A, whereby the period of lockdown imposed by the Central Government in the wake of COVID-19 outbreak could not be counted for the purposes of computation of the timelines for any task that could not be completed due to such lockdown, in relation to any liquidation process. Accordingly, the Applicant stated that interest @12% p.a. for delay in payment of balance purchase consideration will only be required to be charged and paid after 30 (thirty) days from the:

- (i) date of final order on sub-division of Plot No. 825 in Jhagadia Industrial Estate; or
- (ii) last date of period of lockdown imposed by the Central Government, whichever is later.

26. The lockdown imposed by the Central Government came to an end on May 31, 2020.

27. The Respondent vide letter dated June 10, 2020 rejected the request of the Applicant for waiver of interest on account of delay in sub-division and lockdown as requested by the Applicant vide its representation / letter dated May 25, 2020. Further, the Respondent called upon the Applicant to pay the following amounts at the earliest:
- a) Balance sale consideration of Rs.40,59,00,000/-
 - b) Applicable sub-division charges in proportion to the area purchased by the Applicant being Rs.95,78,577/-
 - c) Interest at 12% p.a. on the balance sale consideration upto the date of payment

Further, the Respondent informed the Applicant that in case of default in making payments within the stipulated period, the Applicant would be disqualified as successful bidder and the earnest money deposit shall be forfeited.

28. The Applicant states and submits that the demand of interest on the balance consideration by the Respondent is unjustified and untenable since the delay in payment of balance sale consideration is on account of sub-division of land by the GIDC and hence the delay is not attributable to the Applicant.
29. It is submitted that the delay is not on account of the Applicant who has time and again reiterated its commitment to expeditiously complete the transaction of purchase of Lot 2.
30. It is further submitted that the position adopted by the Respondent *vide* its e-mail dated April 8, 2020 that the Concerned Assets i.e. assets under Lot 2 were sold on “*As is where is*”, “*As is what is*”, “*Whatever there is*” and “*No recourse*” basis and that the payment of the balance sale consideration had fallen due for payment irrespective of sub-division of land, is legally

untenable and contrary to the pre-bid clarification issued by the Respondent that interest on account of delay in completing sub division by the Respondent shall be waived. It is further submitted that this contention of the Respondent is contrary to the express terms and conditions of the E-Auction Memo, whereby the sale of Leasehold Land in respect of Lot 1 and Lot 2 was subject to sub-division and it was the obligation of the Respondent to apply for and comply with necessary sub-division orders from GIDC.

31. It is further submitted that in the absence of sub-division order from the GIDC, there was no question of payment of interest for delayed payment of balance sale consideration on account of delay in completion of sub-division from GIDC.
32. The Applicant states and submits that the Provisional Order issued by the GIDC, GIDC has agreed to consider sub-division subject to fulfilment of various conditions provided therein. It is further submitted that the said Provisional Order clearly specifies that if the conditions contained therein were not fulfilled within one month from the date of the Provisional Order, then the said order shall automatically stand cancelled. It is, solely, the Respondent's obligation to fulfil the conditions mentioned in the Provisional Order. The Applicant *vide* e-mail dated May 5, 2020 pointed out various discrepancies in computations and sought various clarifications from the Respondent with respect to the conditions in the Provisional Order. However, till date the Respondent has not responded to the e-mail dated May 5, 2020 issued by the Applicant seeking clarifications. It is also pertinent to note here that the Respondent, by email dated April 07, 2020, confirmed that all dues have been paid with respect to Plot No. 825. However, in the Provisional Order, the GIDC has specifically highlighted several outstanding dues in

respect of Plot no. 825 and has directed the Respondent to make payment of the dues as a condition precedent to passing the final order to sub-division of Plot No. 825.

33. It is further stated and submitted that the process of conducting a survey of Plot No. 825 took two months for completion i.e. till March 2020 as evident from the Respondent's letter of March 12, 2020. Further, the Applicant was also informed of a change in the measurement of Plot No. 825 only in March 2020. Owing to the delay in ascertaining the area/ measurement of land and the completion of survey of Plot No. 825 by the Respondent, the final amount payable to Respondent could not be ascertained. Thus, the delay in payment of balance consideration, if any, is not on account of the Applicant.

No interest can be charged during the lockdown period

34. It is submitted that the Applicant, *vide* e-mail dated April 14, 2020, informed the Respondent that in view of the lockdown imposed on account of the Covid -19 pandemic, the Applicant is facing immense difficulties with day to day working of the Applicant. Accordingly, the Applicant requested the Respondent to grant extension for making payment of the balance sale consideration for acquisition of Lot 2 and completing the transaction, within 15 days from the date when the lockdown is lifted by the Government of India.
35. It is submitted that in response, the Respondent acceded to the request to grant extension of time for payment of balance sale consideration, till 15 days after the lifting of lockdown. However, the extension of time was subject to charge of interest of 12% per annum. The Respondent reasoned that since the Applicant has not made payment of the balance sale consideration within 30 days from the date of receipt of LoI, which

period expired much prior to the lockdown.

36. It is submitted that the above stand of the Respondent to charge interest during the lockdown period is contrary to Regulation 47A of the Liquidation Process Regulations and hence, untenable and unjust. The said Regulation is quoted hereinbelow for ease of reference:

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.

37. It is submitted that the Applicant had vide its letter dated May 25, 2020, supra, brought to the attention of the Respondent the above amended provision and requested that interest cannot be charged during the lockdown period. However, the Respondent, overlooked the express provisions of Regulation 47A, has, vide its letter dated June 10, 2020, called upon the Applicant to pay interest on the balance consideration till the date of payment thereby charging interest during the lockdown period. Thus, the letter dated June 10, 2020 demanding interest during the lockdown period is clearly illegal and contrary to the provisions of Regulation 47A of the Liquidation Process Regulations.
38. The Applicant states that the Applicant has already paid the EMD which continues to remain with the Respondent till date. The Applicant is seriously prejudiced by the delay on the part of the Respondent in complying with the directions of the GIDC contained in the Provisional Order and the consequent delay in completing the sub-division of Plot No. 825. The Applicant had accepted the LoI issued by the Respondent

more than 5 months ago. However, the sale of the Concerned Asset remains inconclusive till date.

39. Aggrieved with the letter dated June 10, 2020, the Applicant filed the present Interlocutory Application.
40. Therefore, in view of the above, the Applicant is approaching this Hon'ble Adjudicating Authority under Section 60 (5) of the IBC seeking directions and order that the interest of 12% p.a. sought to be charged by the Respondent is not payable by the Applicant.

Events post the filing of the IA:

41. The Applicant paid the balance sale consideration of Rs.40.59 crores on June 15, 2020, which has been duly acknowledged by the Respondent.
42. The Applicant vide letter dated June 25, 2020, paid the interest, under protest, on the balance sale consideration at the rate of 12% per annum. The sum of Rs.1,57,46,696/- was paid by the Applicant towards interest. Therefore, the Applicant has made the full payment of the sale consideration, including the interest.
43. By letter dated June 25, 2020, the Respondent/ Liquidator acknowledged the receipt of the payment of interest, under protest, and further agreed to not distribute the interest amount to stakeholders pending final outcome of the present IA. The Respondent / Liquidator further agreed to refund forthwith, amount of interest so paid, if such amount partly or fully becomes refundable to the Applicant, pursuant to final decision of this Tribunal in the present IA.

Submissions made by Respondent by way of Affidavit in Reply:

44. The Respondent deny each and every allegations and insinuations made

in the said Affidavit in Reply, which are contrary and inconsistent with what is stated herein below. Nothing contained in the said Affidavit in Reply shall be deemed to have been admitted for specific non traverse and the same should be deemed to have been denied by this Applicant.

45. It is submitted that E-Auction notice and E-Auction Process memorandum was issued on 12th December 2019 to carry out the sale of the assets of the Corporate Debtor. The assets were divided into two parts Lot 1 and Lot 2 and the E-auction of assets was to be conducted on “As is where is”, “As is what is”, “whatever there is”, and “no recourse” basis.
46. Further it is submitted that pursuant to the e-auction notice dated 12th December 2019, the Applicant had submitted an expression of interest and indicated its interest in participating in the e-auction of the assets of the Corporate Debtor. The Applicant participated in the e-auction to purchase the properties of the corporate debtor held on 16th January 2020 and emerged as the successful bidder for Lot No. 2 of the Assets which was acquired by the Corporate Debtor on leasehold basis from **GIDC**. The Applicant through various emails and correspondences, the Applicant conducted due diligence when the Respondent had provided all the information and clarifications as requested by the Applicant.
47. Further it is submitted by Respondent that the Applicant sought clarifications vide their email dated 3rd January 2020, the Applicant sought clarification that balance sale consideration should be payable only upon successful sub-division of land and delay in payment of sale consideration on account of delay in sub-division shouldn't attract any interest. Thereafter vide email dated 9th January 2020, in clear and unequivocal terms it was clarified to the Applicant that successful bidder

shall get the property, only upon full payment of balance sale consideration as per terms of the process memorandum and that the interest would be waived if delay is on account of sub-division. The clarification with respect to the interest component was given to the Applicant with the intention that if the delay is on account of Liquidator to apply for the sub-division of land, by no stretch of imagination can it be construed that till the sub-division of land is complete and only then the balance sale consideration would be due and payable. Therefore, the Applicant's contention that the Balance sale consideration is payable upon successful sub-division of land and is an afterthought and only to avoid paying the balance sale consideration within the prescribed time period specified in the process memorandum and as well as the Insolvency and Bankruptcy ("Liquidation Process") Regulations, 2016.

48. Further it is submitted that the clarification issued that the interest will be waived in order of delay on account of sub-division of land, is grossly misinterpreted by the Applicant herein. During process of due diligence and clarifications sought from by the Applicant, vide an email dated 15th January 2020, It has been categorically stated that the Respondent shall apply for the sub-division of land with the GIDC the subsequent follow up of the sub-division has to be carried out by the successful bidder.
49. Further that the assets of the lot 2 consisted of two sets of land parcel, Freehold and leasehold, if the Applicant in order to avoid paying interest on the balance sale consideration could have made payments towards the freehold land, any break up in e auction, value which as it is without any encumbrances and doesn't require any sub-division. Therefore, the present application is nothing but an afterthought to avoid paying interest.

50. It is submitted that in order to conclude the sale, as per Clause 11 of the Process Memorandum, the Applicant was required to deposit the balance sale consideration within 90 (ninety) days from the date of conclusion of the auction sale/demand, provided that the payments made after 30 (thirty) days shall attract interest at the rate of 12% p.a. The relevant clause of the Process Memorandum in this regard is reproduced herein below:

“Clause 11. Declaration of Successful Bidders:

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”

51. Furthermore, as per Clause No. 11 of the E-Auction Sale Process Memorandum and the Letter of Intent (“LoI”), the Successful Bidder(s) were mandated to deposit the balance sale consideration within 90 (ninety) days from the date of issuance of LoI, provided that the payments after 30 (thirty) days would 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.
52. Thereafter having submitted the bid and subsequently having deposited the EMD, the Applicant was required to make the balance payments to the Liquidator as per the terms and conditions of the Process Memorandum within 30 days i.e. 17th February 2020 provided if Balance sale consideration is not paid within 30 days 12% interest would be applicable from the close of the Auction till payment is made and if the payment is not made within 90 days which is expiring on 17th April 2020

the sale shall be cancelled and the EMD will be forfeited.

53. Further pursuant to unprecedented difficulties arising out of the nationwide lockdown imposed by the Government of India from 24th March 2020 owing to the Corona Virus Pandemic. Upon the Applicant's request vide letter dated 14th April 2020, the Applicant was granted an extension of time for payment of balance sale consideration latest within 15 days from the date of lifting of lock-down by the Government subject to payment of interest for the extended period.
54. It is stated and submitted by Respondent that Article 13, clause B of the Process memorandum states that "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 subdivision 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". It is pertinent to note that the Respondent, according to Clause B has applied for sub-division of the said land pursuant to the issuance of the LoI.
55. As stated in the E-auction Memorandum, the Respondent has adhered to all timelines since issuance of the LoI i.e. 18th January, 2020 and the balance payment towards the sale consideration was payable within 30 days from the issuance of LoI i.e. 17th February 2020, however, payment of consideration after 30 days i.e. 17th February 2020 would attract interest @ 12% till the date Applicant makes the payment.
56. Further the Applicant Vide Letter dated 21st January 2020, has, unconditionally accepted the LoI which stated as below:

"In relation to plot no. 825 in Jhagadia Industrial Estate, GIDC, Gujarat, which is a leasehold land and is part of Lot 2 Assets, the transfer or assignment shall

happen after obtaining approval of Gujarat Industrial Development Corporation (GIDC)”.

57. Respondent states that the LoI referred to transfer of the land after obtaining approval of the GIDC. Therefore, by no stretch of imagination could the Applicant construe that the balance consideration was payable after obtaining final order from the GIDC or after sub-division of land by GIDC.
58. It is submitted that the Applicant has acknowledged and thereby agreed to the clause 11 of the E-Auction Process Memorandum that the balance sale consideration was payable within 90 days from the date of issuance of LoI provided that payments made after 30 days, shall attract interest at the rate of 12% p.a. The Respondent further states that, it is with this concern that the Applicant, vide its letter dated 14th April, 2020 sought an extension of time to pay the balance sale consideration on or before the expiry of the 90 days period i.e. 17th April, 2020.
59. It is submitted that Respondent had filed, applied for sub-division of land immediately upon issue of Letter of Intent to the Applicant on 23rd January 2020. GIDC after applying for sub-division has taken time to survey the land. The delay was on account of GIDC carrying out several surveys of the land, eventually passing a provisional order dated 1st May 2020 for sub-division subject to certain terms and conditions.
60. It is submitted that Respondent had filed an application challenging the provisional order of the GIDC dated 1st May 2020, wherein the GIDC has arbitrarily withdrawn Concession granted to Corporate Debtor when the land was leased to the corporate debtor in the year 2006. GIDC is also charging interest from year 2006 till date on concession given to the Corporate Debtor, which is arbitrary, without any merit and smacks of

attempts for unlawful enrichment. GIDC is also charging exorbitant amounts for carrying out sub-division of land without any basis and criteria for charging such exorbitant amounts for sub-division. The Corporate Debtor who is undergoing Liquidation cannot be subjected to pay such exorbitant amounts for sub-division let alone withdrawing concession after the Corporate Debtor being in occupation and generating employment for past 12 years on the land. Application was filed on 28th June 2020, however the same is not listed for hearing before this Hon'ble Tribunal.

61. Respondent further stated and submitted that the Applicant was well aware of its duty to make the payment towards balance consideration and also was peculiarly aware about interest being charged on payments made post 30 days from the date of issuance of LoI.
62. Respondent submits on the Applicant's reference and reliance upon Regulation 47A of the Liquidation Process regulation which excludes such time period; if the process could not meet the timeline. It is further submitted that this exclusion cannot be deemed to be availed by an auction purchaser who was otherwise bound to make payments of balance consideration with 90 days of issuance of LoI.
63. It is further stated by Respondent that the Applicant is trying to take the aegis of the provisions of the E-auction Memorandum and Regulation 47A of the Liquidation Process Regulations to avoid the payment towards interest due to the Liquidator in respect of the sale of land on behalf of the Applicant. It is further pertinent to note that the Government of India had imposed a nationwide lockdown starting from 24th March, 2020 and further from 15th April 2020 as such the notification shall have retrospective effect beginning from 24th March

2020, and the interest free payment was due on 17th February 2020 which is way before the lockdown was imposed.

64. The unlock process in the state of Gujarat began from 1st of June 2020. I say that the assets under the Lot 1 and Lot 2 are situated in the state of Gujarat. Therefore, payment demanded from the Applicant as the extension was coming to an end under the extension provided to the Applicant.
65. Further attention was drawn by Respondent to the Insolvency and Bankruptcy Board (Liquidation Process) Regulations, 2016 under Regulation 33 provides for mode of sale of assets of the Corporate Debtor. I refer to Schedule I, Article 1, Clause 12 of the Liquidation Regulations, which states as under:-

*“(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%;
Provide further that the sale shall be cancelled if the payment is not received within ninety days.”*

The Respondent is therefore duty bound to demand the payment immediately upon the auction is closed without any reservations or conditions precedent.

66. It is admitted by Respondent that the Applicant has made the payment of the balance sale consideration on 15th June, 2020. and interest payable thereon to the Respondent on 26th June, 2020 was made under protest.
67. Respondent mention that he had already issued sale certificate in favor of the Applicant herein and the Applicant and Respondent are also in

process of finalizing the Sale Deed in favor of Applicant herein.

68. Further it is submitted by Respondent that once again vide letter dated 7th July 2020 he requested the Managing Director / Vice President of the GIDC to not withdraw the concession and also requested to revise the charges levied by the GIDC for sub-division of land.
69. In view of the above, it is prayed that the Respondent has acted bonafidely and in the interest of the Corporate Debtor and as such, the Applicant is liable to make the payment towards Interest in view of the delayed payments as against the Balance Consideration as per the terms and conditions of the E-Auction Memorandum and as per the Code.
70. In view thereof, the Interlocutory Application of the Applicant deserves to be dismissed and the interest at the rate of 12% is liable to be paid by the Applicant.
71. We have carefully perused entire submissions of the Applicant, Respondent, clauses referred to in E auction notice and auction memo, clarification issued by the Liquidator/Respondent to the Applicant, sub division process of the Leasehold land by GIDC etc. It is apparent that there was a delay on the part of the Applicant to pay balance sale consideration but the issue to be decide in this case is whether the delay was solely on account of the Applicant and if yes, the Applicant has to pay interest for the delayed period @12 % P.A. as per regulation, auction notice.

However, in the instant case the Applicant had sought a specific clarification from the Liquidator who has clarified as discussed in pre-para GIDC also taken time to arrive at the amount payable as sub division charges, surveys conducted on various occasions, issued

provisional order to pay “concession charges” along with other conditions to be fulfilled etc. From the submissions it is noted that the Applicant never denied payment of balance sale consideration neither on account of incapable, financial difficulty, nor willful nonpayment but on the other hand because of the specific clarification issued by the Respondent, time taken by GIDC as discussed above and finally on account of COVID 19 situation and Regulation 47 A of IBBI Regulation etc. It is also noted that the Applicant had made payment of Rs.1,57,46,696/- on 25.06.2020 towards interest under protest. The submissions of the Applicant is acceptable. **The submission of the Respondent that responsibility to follow up with GIDC for sub division of the land in upon the Applicant, no supporting document is produced for the same. Therefore, this submission is also not acceptable.**

The Respondent vide his email dated 09.01.2020 clarified that in case of delay in sub division of land the interest will be waived, the same is quoted in par 12 above. Therefore, now the Respondent cannot claim interest for the delayed period on account of subdivision of land by GIDC. The submission of the Respondent that if any delay on account of the Respondent to apply for subdivision and cannot be construed till the sub division of land is not a tenable, acceptable argument. Because sub division is a basic and necessary function to be completed so that the successful bidder can peacefully enter in to the legally earmarked property. As noted above this process took some time to complete as submitted by the Respondent himself. Therefore, any delay by third party cannot be fastened upon the Applicant and we are inclined to agree with the submissions of the Applicant. The Applicant had also submitted its in-principle consent to buy additional piece of land 12,982 sq mts which

was subsequent to the auction process which also shows its bonafide and financial capacity.

In view of the above findings we hold that the delay in payment of balance sale consideration cannot be attributed to the Applicant, successful bidder. The interest burden thus cannot be fastened on him. The Applicant is not liable to pay interest as claimed by the Respondent. Therefore, an amount of Rs 1,57,46,696/- paid towards interest by the Applicant under protest is to be refunded/adjusted by the Liquidator within 30 days from the date of this order.

72. With the aforesaid observations, the present **IA No. 1036 of 2020 in CP (IB) No. 294 of 2018** is allowed. The **IA No.1036 of 2020** is disposed of.

Sd/-
JANAB MOHAMMED AJMAL
MEMBER (JUDICIAL)
12.02.2021
SAM

Sd/-
RAVIKUMAR DURAISAMY
MEMBER (TECHNICAL)

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH - COURT NO. – II**

*** **

IA/ 1036/2020 in CP (IB) 294/MB/2018

**IDBI Bank Limited
Versus
S. Kumars Nationwide Limited**

*** **

Dated 12.02.2021

ORDER

The matter is taken up on videoconference. Counsel for the Applicant is present. No representation for the Respondent. Order is pronounced. The Application is **allowed** vide separate orders.

**Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)**

**Sd/-
MOHAMMED AJMAL
Member (Judicial)**

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