

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**MUMBAI BENCH, COURT-I**

**IA 1469/MB/2022**

**In**

**CP (IB) 3558/MB/2018**

Under Section 60 (5) & Regulation 32A of IBBI  
(Liquidation Process) Regulations, 2016

*In the matter of,*

**VDB Projects Private Limited,**

[CIN: U51909MH2004PTC147118]

842/A, VDB House, 100 Feet Road, Binnamangala,  
Indiranagar, Bangalore, Karnataka - 560038

...Applicant

Versus

**Anil Mehta,**

**Liquidator of Pratibha Industries Limited**

Office No. 1607/1608, 16<sup>th</sup> Floor, Cyber One, Behind  
Odissa Bhawan, Plot Nos. 4 & 6, Sector-30A, Vashi,  
Navi Mumbai – 400703

... Respondent

*In the matter of,*

**Bank of Baroda**

...Petitioner

Versus

**Pratibha Industries Limited**

...Corporate Debtor

**Order Delivered on 23.12.2022**

***Coram:***

Hon'ble Member (Judicial) : Justice P.N. Deshmukh

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

***Appearances:***

For the Applicant : Mr. Vikram Nankani, Ld. Sr. Counsel.

For the Liquidator : Mr. Sanjay Bhatt, Ld. Counsel.

**ORDER**

***Per Coram:***

1. The present application is filed by VDB Projects Private Limited, (hereinafter referred to as “the Applicant”) under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) read with Regulation 32A of IBBI (Liquidation Process) Regulations, 2016 (hereinafter referred to as the “regulations”) seeking the following:
  - a) Extension of time for the deposit of the amount of Rs. 67.86 Crores along with the interest at the rate of 12%, by a period of 13 days or by such period of time that this Tribunal deems fit as in any case, the period between 17.05.2022 and 01.06.2022 deserves to be excluded;
  - b) Clarification that the non-deposit of the said balance sale consideration on or before 06.06.2022 shall not culminate in cancellation of the sale process pursuant to the Process Document;
  - c) Pending the hearing and disposal of this application, stay the operation of the direction contained in the Order dated 03.06.2022 that *“failure to comply this order for depositing the balance amount will culminate to the cancellation of the sale process”*;
  - d) Urgent interim and ad-interim reliefs in terms of prayer clause (c) above;
  - e) Costs; and
  - f) Pass any other orders as the Tribunal may deem fit and proper.

**Submissions made by the Ld. Counsel of the Applicant:**

2. Bank of Baroda had filed a Petition for initiating Corporate Insolvency Resolution Process (hereinafter known as "CIRP") against the Corporate Debtor. Accordingly, this Tribunal passed an order initiating the CIRP against the Corporate Debtor on 01.02.2019. During the CIRP no resolution plan received. Thus, this Tribunal had directed liquidation of the Corporate Debtor by an order dated 08.02.2021. A copy of the order dated 01.02.2019 and 08.02.2021 has been annexed as Exhibit C and Exhibit D to the Petition.
3. The Respondent was appointed as the liquidator of the Corporate Debtor by an order dated 08.02.2021, a copy of the order dated 08.02.2021 has been annexed as Exhibit B to the Petition.
4. On an application of the Respondent, the Tribunal by an order dated 01.03.2021, clarified that the Respondent would make all endeavours to sell the Corporate Debtor as a going concern. A copy of an order dated 01.03.2021 has been annexed as Exhibit E to the Petition.
5. Pursuant to the above order of this Tribunal, the liquidator issued an invitation of Expression of Interest (hereinafter referred to as "EOI") as on 10.06.2021, inviting parties to submit their proposals under section 230 of the Companies Act, 2013. The proposals which were received were not accepted by the stakeholders consultation committee and thus the following process was closed.
6. The Respondent further issued a process document for the sale of Corporate Debtor on a going concern basis in terms of Regulation 32A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, by a public notice dated 23.10.2021. The applicant was the only bidder in response to the above process document. In compliance of the terms of the process document, the respondent

deposited the Earnest Money Deposit (hereinafter referred to as “EMD”) of ₹18.9 crores by the way of bank guarantee issued on 22.11.2021 on its behalf. However, the said process was closed since the e-auction could not be conducted. The copies of the e-auction Process Document, the bank guarantee and cheques dated 01.11.2021 amounting to ₹15 Lakh towards the Bid Application amount are annexed as Exhibits F, G & H respectively to the Petition.

7. Thereafter the Respondent issued the second e-auction public notice on 21.02.2022 with a reduction of around 20% in the reserve price for the sale of Corporate Debtor. A copy of the same is annexed as Exhibit I to the Petition. The Respondent further issued the E-Auction Process Document dated 31.01.2022 (Process Document). In para 5.3 (f), it has been clearly mentioned that:

*“The Corporate Debtor as a ‘going concern’ basis under Regulation 32A of the Liquidation Process Regulations is being sold with all the existing and future encumbrances/claims/dues/demands whether known or unknown to the Liquidator”.*

8. Clause 5.7 of the Process Document provides that in terms of Clause 12 of Schedule I (Mode of Sale) of Liquidation Process Regulations, the highest bidder shall be invited to provide balance sale consideration within 90 days of the Letter of Intent (LOI). If the Successful Bidder fails to make the payment within the said period, the sale shall get cancelled. Further, default in payment of the balance sale consideration and applicable taxes, if any, on 100% of the bid amount by the Successful Bidder will result in disqualification of the Successful Bidder including forfeiture of EMD.
9. The terms of the Process Document are detailed in the Petition as Exhibit J and are not laid out here for the sake of brevity.

10. The Applicant was provided access to the Virtual Data Room (hereinafter referred to as "VDR"), after which the Applicant conducted due diligence from 31.01.2021 until 07.02.2022. The last date for submission of EMD was 11.02.2022 which the Applicant had already complied with, by the way of Bank Guarantee issued by him of ₹18.9 Crores.
11. The e-auction was conducted on 15.02.2022 wherein the Applicant submitted its bid of ₹150,10,00,000/- (Rupees One Hundred and Fifty Crores and Ten Lakhs Only) in respect of Relinquished Assets of the Corporate Debtor on a going concern basis.
12. The Applicant was notified through an e-mail on 15.02.2022 that he was the highest bidder of the e-auction in respect of the Corporate Debtor. A copy of the notification dated 15.02.2022 is annexed as Exhibit K. On the same day the Respondent addressed an e-mail to the Applicant confirming that, at the closing of the e-auction the bid submitted by the Applicant had emerged as the highest bid for Package A, consisting of Relinquished Assets, subject to eligibility under Section 29A of the Code and compliance with the terms and conditions of the process documents. A copy of the e-mail dated 15.02.2022 sent by the Respondent is annexed as Exhibit L to the Petition.
13. Thereafter, the Respondent issued a Letter of Intent ("LOI") to the Applicant on 07.03.2022, Applicant being the highest bidder. The said LOI reiterated that the sale of the Corporate Debtor was on going concern basis and called on the Applicant to pay a sum of ₹67.86 crores within a period of 90 days after which credit would be given for the cash and bank balance lying with the Corporate Debtor accounting to ₹82.24 crores. It was informed to the Applicant that upon receipt of the sale consideration the sale would stand complete and the certificate of sale of

the Corporate Debtor as a going concern would be executed in favour of the Applicant. A copy of the said LOI counter signed by the Applicant is annexed as Exhibit M to the Petition.

14. The Applicant thereafter requested for the necessary bank details for discharge of the balance consideration by an e-mail dated 03.05.2022, in order to comply with the terms of the Process Document. The bank details as requested were furnished by the Respondent by an e-mail on 03.05.2022. A copy of the said e-mail is annexed as Exhibit N to the Petition.
15. Thereafter, the liquidator addressed an e-mail dated 17.05.2022 to the Applicant stating that the last date to complete the process, that is, 90 days from the issuance of the LOI was 05.06.2022. Along with it, the Respondent also enclosed a draft sale agreement which was to be executed along with the sale certificate, upon payment of entire sale consideration. A copy of the said e-mail is annexed as Exhibit O to the Petition.
16. The terms and conditions of the draft sale agreement shared by the Respondent are detailed in the Petition and annexed as Exhibit P, the same is not laid down here for the sake of brevity.
17. The Applicant upon perusal of the liquidator's e-mail replied to it by an e-mail dated 27.05.2022, intimating the Respondent that the process of discharge of the sale consideration had been initiated; further the terms pertaining to transfer of liabilities to the Applicant being the successful bidder had come as a surprise to him and no such terms had been referenced in any prior documents or discussions. It was further intimated that even the sale certificate pertained only to transfer of ownership of relinquished assets and the sale agreement was otherwise not mentioned anywhere other than the said certificate. The Process

Document itself did not contain any reference to a sale agreement. A copy of the above-mentioned e-mail is annexed as Exhibit Q to the Petition.

18. The Respondent on the same day addressed the above e-mail of the Applicant through an e-mail stating *inter alia* that since the Company was being sold as a going concern under Regulation 32A, all the assets and liabilities would also be transferred. The execution of the sale agreement would be done away with and the pointers could be dealt with by executing an MOU. A copy of the Respondent's e-mail is annexed as Exhibit R.
19. The Respondent on the immediately following day i.e., on 28.05.2022 addressed an e-mail purporting to recall the above e-mail addressed by him i.e., the e-mail dated 27.05.2022. A copy of the e-mail dated 28.05.2022 sent by the Respondent is annexed as Exhibit S.
20. Out of the uncertainty and ambiguity at this stage, the Applicant addressed an e-mail dated 30.05.2022 to the Respondent requesting the Respondent to confirm that only the assets of the Corporate Debtor would be transferred to the Applicant, and there could be no transfer of the liabilities. A copy of the Applicant's e-mail dated 30.05.2022 is annexed as Exhibit T.
21. The Applicant has not received any response to the above e-mail, nor any confirmation from the Respondent that the sale would be undertaken in accordance with the Process Document. The Applicant has already made payment of a sum of ₹18.9 crores being the EMD under the Process Document and further in the process of arranging and making payment of the balance consideration i.e., ₹67.86 crores, which is required to be paid on or before 06.06.2022 in compliance with the Process Document.

22. The Applicant further submits that sale as a going concern during liquidation contemplates that the Corporate Debtor will be functional as it would have been prior to initiation of CIRP subject to the restrictions mentioned in the Code. An advantage of sale on going concern is that the Corporate Debtor is transferred along with the assets and as a legal entity it continues without any dissolution. The undertaking which is taken over by an acquirer in a going concern sale includes the business of the Corporate Debtor, its assets, rights and properties, and excluding liabilities. Limited assets that are included in the auction memoranda may be put up for a sale. However, the crux of a going concern sale is that the purchase is of fixed assets free of any encumbrances. When the assets are transferred in a going concern sale during liquidation, the liabilities of the Corporate Debtor are to be settled in accordance with Section 52 of the Code. The attractiveness of a going concern sale is that the purchaser takes over assets without encumbrances and free from actions of creditors.
23. In order to sell the Corporate Debtor as a going concern during liquidation, secured creditors either ought to relinquish their security interest or postpone exercising their options under Section 52 to realize security interest outside the liquidation process. These options are provided to enable the liquidator to explore the possibilities of sale as a going concern, which means all assets and resources needed to continue to operate as an independent business activity are to be transferred.
24. The scope and objectives of the Code is to extinguish all claims specifically those which are not made during CIRP or in liquidation and to aid the purchaser of the Corporate Debtor to start on a clean slate.
25. The inevitable implication of the well settled principles as well as the applicable legal provisions and the orders of this Tribunal is that the sale

on a going concern basis was of the Corporate Debtor along with its assets and excluding all its liabilities. Any other sale attempted would amount to a violation of the provisions of the Code, Regulations, well settled principles of law in this regard and the Process Document. The e-mail dated 17.05.2022 addressed by the Respondent, along with the draft Sale Agreement shared by the Respondents disclose a clear breach of the applicable legal provisions and the Process Document.

26. The Applicant submits that the attempt of the Respondent to sell the Corporate Debtor along with its assets as well as its liabilities i.e., especially in view of clause 5 of the impugned agreement titled “No Extinguishment of Liabilities” makes it clear that the Respondent is now attempting to over reach the legal frame work within which the Process Document was issued and attempting to foist upon the Applicant an unviable and unlawful sale.
27. The Respondent is required to comply with the provisions of the Code and the regulations as well as the crystalized principles as laid down by the Hon’ble Supreme Court, Hon’ble National Company Law Appellate Tribunal (hereinafter referred to as “NCLAT”), and this Tribunal, from time to time, viz. that a sale as a going concern can only be of the Corporate Debtor as a legal entity along with its assets and expressly excluding any of its liabilities or encumbrances.

**Submissions made by the Ld. Counsel of the Respondent by the way of Reply:**

28. The Respondent submitted its detailed reply taken defence as below:

**I. NO VIOLATION OF THE PROVISIONS OF THE CODE OR LIQUIDATION REGULATIONS FRAMED THEREUNDER:**

29. The Respondent submits that the Corporate Debtor is undergoing liquidation process as a going concern in terms of this Tribunal's order dated 08.02.2021 read with order dated 01.30.2021.
30. In pursuant of the same, the Respondent issued a public notice on 21.01.2022 for the sale of Corporate Debtor as a 'going concern' , its business and assets in three packages:
- i. Package A- 'Relinquished Assets';
  - ii. Package B- 'Deemed Relinquished Assets' and
  - iii. Package C- 'Non- Relinquished Assets' on "As is where is basis", "As is what is basis", "Whatever there is basis" and "No recourse" basis by way of E- Auction to be held on 15.02.2022.

The Applicant emerged as the highest bidder for sale of Corporate Debtor as a 'going concern', its business and assets forming part of Package A with the bid of INR 150.1 crore.

31. Subsequently, the Respondent issued a letter of intent on 07.03.2022 (hereinafter referred to as "LOI") to the Applicant inter alia requiring the Applicant to pay the sale consideration within 30 days without interest or within 90 days from the date of LOI expiring on 05.06.2022 and the same was duly and unconditionally accepted and executed by the Applicant on 08.03.2022.
32. Nearing the expiration of the period of 90 days as stipulated under Schedule I of Regulation 33 of the Liquidation Regulations, the Applicant has filed the present application on the frivolous ground that the Respondent is now allegedly attempting to impose on the Applicant the sale of assets along with the liabilities in breach of the terms of the said Process Document as well as the provisions of the Insolvency and Bankruptcy Code, 2016 and the Liquidation Regulations.

33. From the bare perusal of the present application, it is *ex facie* apparent that the present application is based on the lack of understanding of the provisions of the Code, the Regulations and the settled position of law.
34. Therefore, the application is nothing but excuse to cause delay in not making the payment of the balance sale consideration in time and to prevent the forfeiture of the bank guarantee of ₹189,000,000/- (Rupees Eighteen Crore Ninety Lakh Only) deposited by the Applicant as EMD for participating in the E-Auction.
35. Apart from leveling several baseless and unwarranted allegations and insinuations against the Respondent, the Applicant has failed to fulfill its obligations with respect to payment of the balance of sale consideration within 90 days i.e., 05.06.2022 and has filed the present application with the motive of shifting the onus of delay on the Respondent by making frivolous and misconceived allegations and on this ground alone the present application is liable to be dismissed.
36. Nonetheless, the present application is liable to be dismissed on several grounds as mentioned hereafter. It is relevant to point out that in sub-clause (e) & (f) of clause 5.3 of the Process Document, it was clearly mentioned that the bidders should make their own independent inquiries regarding the encumbrances, titles of assets and claims/rights/dues/affecting the assets and should conduct their due diligence prior to submitting their bid. It further provided that the Corporate Debtor as a 'going concern' basis under Regulation 32A of the Liquidation Rules is being sold with all existing and future encumbrances/claims/dues and demands whether known or unknown to the Respondent. The extract from the document is as follows:

*“e) The sale of the corporate debtor as a going concern under the regulation of 32A of the Liquidation Process Regulation is proposed to be sold on “As is where*

*is basis”, “As is what is basis”, “Whatever there is basis” and “No recourse” basis and the same does not entail the transfer of any title, except the title which the Corporate Debtor had on its assets as on date of transfer. All local taxes/maintenance fee/electricity/water charges etc., outstanding as on a date or yet to fall due should be ascertained by the Bidder and would be borne by the Successful Bidder.”*

*“f) The Bidders should make their own independent inquiries regarding the encumbrances, titles of Assets and claims/rights/dues/affecting the Assets and should conduct their own due diligence prior to submitting their Bid. The Process Document does not constitute any representation or offer by the Liquidator. The Corporate Debtor as a ‘going concern’ basis under Regulation 32A of the Liquidation Process Regulations is being sold with all the existing and future encumbrances/claims/dues/demands whether known or unknown to the Liquidator. The Liquidation shall not be responsible in any way for any third-party claims/rights/dues.”*

Copy of Process Document is annexed as Annexure R-10.

37. In addition to the above, sub-clauses (d), (e) & (f) of clause 5.4 of the Process Document further provided that the bidders should approach this Tribunal in case of any reliefs and concessions sought with respect to the sale of the Corporate Debtor on a ‘going concern’ basis without any deviation from time frame to make payment of balance sale consideration as stipulated under the Process Document. Any failure to approach this Tribunal to seek any reliefs and concessions shall not affect the E-Auction process and it shall stand completed once the full consideration is made by the Bidder.
38. The Respondent had also set up a Virtual Data Room (hereinafter referred to as “VDR”) for information relating to the Corporate Debtor and the VDR access was provided to both prospective bidders on

29.01.2022 which has been admitted by the Applicant in para 3.7 of the Application. In the VDR all the assets and liabilities of the Corporate Debtor were clearly mentioned inter alia (1) entire claim list was uploaded on the VDR (2) Details of Mortgage (3) Details of the Bank Guarantees (4) Details of the Consortium Agreements. No objection or query was received by the Respondent from any of the prospective bidders, including the Applicant.

39. The Respondent points out to clause 5.7 of the Process Document wherein the balance payment was to be made by the Applicant as per the Liquidation Regulations i.e., within 90 days from the issuance of LOI. The LOI further stated that the payments made after 30 days from the date of LOI shall attract interest at the rate of 12% per annum and further the sale shall be cancelled if the payment is not received within 90 days from the date of the LOI.
40. The LOI further provided that in event of any breach/default by the Applicant with respect to furnishing the Balance Sale Consideration within time period as specified in the Process Document, the Earnest Money Deposit provided by it shall be liable to be forfeited in accordance with clause 4.6 of the Process Document. The said LOI was unconditionally executed by the Applicant on 08.03.2022.
41. It is pertinent to note that clause 5.4 of the Process Document clearly states that the Applicant shall be free to seek any kind of relief and concessions which *inter alia* envisaged extinguishment of all claims/liabilities for the continuation of the Corporate Debtor as going concern based on the “clean slate” doctrine propounded by the Hon’ble Supreme Court in the case of *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors. [(2020) 8 SCC 531]* and various other judgements passed by various other coordinate Benches of the

Tribunal and the NCLAT in this regard. However, the applicant failed to take any steps for payment of the remaining sale consideration or filing any application before this Tribunal for such reliefs and concessions till date. Therefore, it is clear that the present Application is nothing but an attempt to cause delay in making payment of sale consideration and avoid forfeiture of EMD by taking such frivolous excuses.

42. The Insolvency Bankruptcy Board of India (hereinafter referred to as “IBBI”) in its discussion paper on Corporate Liquidation Process dated 27.04.2019 has stated the following:

“4.2 Should ‘Going Concern Sale’ be defined?

4.2.1. The term is well understood in legal parlance. The jurisprudence in this regard is fully well-developed out of the erstwhile liquidation regime under the Companies Act, 1956. The Code recognises ‘going concern’ and envisages resolution as a ‘going concern’ but does not define it. It has been in vogue for more than two years and has not caused any difficulty. The Insolvency Law Committee in its report dated 26.03.2016 notes that the phrase “as a going concern” implies that the CD would be functional as it would have been prior to initiation of CIRP, other than the restrictions put by the Code. It may not, therefore, be defined. *However, it may be explained that going concern means all such assets and the liabilities, which constitute an integral business or the CD, that must be transferred together and the consideration must be for the business or the CD. The buyer of the assets and liabilities should be*

***able to run business without any disruption. The business or the CD must be a running one and it must be transferred along with its employees.*** In case of sale of the CD as a going concern, the equity shareholding of the CD must be transferred and the buyer must take over the CD, its business, affairs and operations, including its licenses, trademarks, brand, government approvals, etc.”

43. The Respondent has relied on the judgement passed by the Hon’ble NCLAT in ‘*M/s. Visisth Services Limited Vs. S.V. Ramani & Ors.*’ [Company Appeal (AT) (Ins) No. 896 of 2020 dated 11.01.2022] wherein it was held that:

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

44. In view of the above the position of law is clear that the sale of the corporate debtor as a ‘going concern’ under Regulation 32A of the Liquidation Regulations means both assets and liabilities. At the last stage of the process where 80 days have passed out of 90 day timeline stipulated under the Liquidation Regulations, the Applicant has chosen to file the present application with the intent to delay in the payment of the balance sale consideration amount and attempting to evade the forfeiture of the bank guarantee of ₹18.90 crores by putting the onus on

the Respondent based on false, frivolous premises and misleading statements and incorrect interpretation of law.

**II. FAILURE TO MAKE PAYMENT WITHIN NINETY DAYS FROM THE DATE OF LOI SHALL RESULT IN CANCELLATION OF THE SALE PROCESS AND FORFEITURE OF THE EMD OF ₹ 18.90 CRORE SUBMITTED BY WAY OF BANK GUARANTEE.**

45. The Applicant in the present application has sought a restrain on the Respondent from utilizing the money paid by the Applicant by way of bank guarantee furnished for an amount of ₹18.90 crores. However, the same is misconceived, non-maintainable and untenable under law.
46. The Applicant is duty bound to make payments on or before 05.06.2022. However, the Applicant has failed to make payments before the thirtieth day, therefore it is liable to pay interest at 12% on the bid amount of ₹150,10,00,000/- together with interest @12% till the last date of payment wherein total interest amounts to ₹4,44,13,151/-.
47. Perusal of the second proviso to Sub-clause (12) of Clause I of Schedule I makes it clear that in the event of failure to make payments within ninety days, the sale shall be cancelled.

**III. NO ILLEGALITY IN REQUESTING FOR SALE AGREEMENT:**

48. In terms of clause 5.6 of the Process Document, a sale certificate and/or conveyance document and/or transfer document was to be executed between the Applicant and the Respondent for the sale of the Corporate Debtor as a 'going concern' under Regulation 32A of the Liquidation Process Regulations. However, the execution of the Sale agreement is not sine qua non for the execution of the Sale Certificate. For

maintaining transparency while transferring the management of the Corporate Debtor on successful completion of sale process and in order to conduct the liquidation process for remaining left out assets and properties of the Corporate Debtor as per the terms and conditions of the Process Document and LOI, the Respondent suggested for execution of the Sale Agreement.

49. The Respondent provided to the Applicant the preliminary draft of the Sale Agreement through an e-mail on 17.05.2022, which was to be executed with the Sale Certificate, to be issued on payment of entire sale consideration along with interest and expenses.
50. After failing to make payments for almost 80 days, the Applicant in an e-mail dated 27.05.2022 responded to the Respondent's e-mail of 17.05.2022, assailing the liabilities which will get transferred to the Applicant as per the sale agreement at the last moment and further incorrectly alleged that the same has not been referred in any previous discussion, despite it being clearly mentioned in the Process Document that the sale of the Corporate Debtor is being made as a 'going concern' which itself means sale of assets together with liabilities.
51. The said e-mail further stated that, the sale agreement is not envisaged to be executed between the parties, as in the Process Document other than cross reference thereof in the sale certificate there is no mention of the same anywhere. The Applicant further stated that they would approach this Tribunal seeking certain prayers in connection with transfer of ownership and further requested to clarify the position and requested to indicate the amount of balance sale consideration as on 30.05.2022. A copy of the e-mail received by the Respondent is annexed as Annexure -R-14.

52. The Respondent on the same day, responded to the said e-mail by an e-mail on 27.05.2022 which was later recalled vide an e-mail on 28.05.2022 so that the Respondent could explain the correct position of law regarding the transfer of liabilities along with the assets of the Corporate Debtor in a sale as 'going concern'. Copy of the e-mail dated 27.05.2022 and 28.05.2022 sent by the Respondent is annexed as Annexure R-15.
53. On 30.05.2022, the Applicant requested the Respondent to confirm the settled position of law for transfer of only assets and not liabilities. Before the Respondent could clarify and agree to the request made by the Applicant for execution for Memorandum of Understanding ("MOU") instead of a Sale Agreement, the Applicant served the Respondent with copy of the present application i.e. IA 1469 of 2022. Copy of e-mail date 30.05.2022 is annexed as Annexure R-16.
54. Since then, the applicant has failed to make any payment whatsoever by then and on the last leg of the sale process, has sought to file present application alleging that the Respondent is trying impose the liabilities on the Applicant in breach of the Process Document.
55. In the hearing of 03.06.2022, the Applicant contended that in an event of failure to make payments within 90 days, there is no provision for cancellation of sale and thus, the sale period can be extended, which is ex-facie incorrect and contrary to the provisions of Schedule I of the Liquidation Regulations and therefore an attempt to mislead the Tribunal.
56. The Hon'ble NCLAT in the judgement passed in '*Potens Transmissions & Power Pvt. Ltd. Vs Gian Chand Narang*' [*Company Appeal (AT) (Ins.) No. 532 of 2022*] held:

*“8. When we look into the above regulations, 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. 2<sup>nd</sup> Proviso of the Item 12 of the Schedule I provides 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. Item 12 provides that payment is to be made within 90 days and with interest after 30 days at the rate of 12%. Non-compliance of 2<sup>nd</sup> Proviso, sale shall be cancelled if the payment is not received within 90 days. The Adjudicating Authority has rightly observed that in view of the Appellant having not made payment in 90 days, Adjudicating Authority has no option except to allow the Application filed by the Liquidator for cancellation of the sale. The action taken by the Adjudicating Authority is in accordance with the statutory provisions. We do not find any merit in the submission of the Learned Counsel for the Appellant as noticed above. Prayer ‘a’ in the Application which was filed through I.A. No. 3153 of 2021, itself is indicative that Appellant was never interested in making the payment and he by different prayers wanted to prolong the proceedings.”*

57. It is submitted that the Hon’ble NCLAT in ‘*Saboo Tor Private Limited Vs. Mr. Sanjay Gupta, Liquidator & Ors.*’ [Company Appeal (AT) (Ins.) No. 1098 of 2020 dated 18.01.2021 has permitted the forfeiture of EMD in the event of terms and conditions laid down in process document were satisfied.

58. The Respondent further submits that this Tribunal had directed the Applicant to pay ₹67.86 crore along with 12% interest on or before 06.06.2022 and the same shall be without prejudice to the interest of the Applicant and contentions shall be decided after hearing the instant application, failure to comply with this order for depositing the balance amount would culminate to cancellation of the sale process.
59. The Respondent submits that, in the view of the legal position, if that Applicant fails to submit the balance sale consideration amount of ₹67.86 crore together with interest with the Registry of the Tribunal, on or before 06.06.2022 in compliance of the order dated 03.06.2022 passed by this Tribunal, the sale shall be liable to be cancelled and the EMD of ₹189,000,000/- furnished by the Applicant shall be liable to be forfeited and this Application shall become infructuous.
60. In the view of the above, it is submitted that the instant application is liable to be dismissed being untenable in law only with the motive of delaying the sale process and to prevent forfeiture of EMD and therefore be dismissed as non-maintainable and untenable in fact and in law.

**Submissions made by the Ld. Counsel of the Applicant by way of Re-joinder:**

61. The submissions in brief are:
- i. The Applicant submits that, in law no liabilities can be transferred having regard to the scheme of IBC, and in Particular Sections 52 and 53 thereof;
  - ii. On facts too, in view of the terms and conditions of the Process Document issued by the Respondent, only assets and no liabilities are to be transferred;

- iii. The delay in deposit of the entire sale price within 90 days is due to wrongful action of the Respondent who after lapse of about 70 days from the date of LOI, attempted to foist illegal conditions as evident in the draft sale agreement, and hence the period from 17.05.2022 until the date of filing of the above IA be excluded by this Tribunal to enable the Applicant to deposit the balance amount of sale price;
- iv. As a consequence of (iii) above, allow IA No. 1517 of 2022 since auction sale cannot be cancelled because Respondent cannot take advantage of his wrong.

62. The facts as initially stated establish that:

- a. The Respondent has, at the very last moment, attempted to foist an unlawful and untenable sale on the Applicant, which is contrary to the provisions and the scheme and object of the Insolvency and Bankruptcy Code, 2016 and the regulations framed thereunder.
- b. The Respondent has violated the terms of the Process Document and shared the Impugned Draft Agreement containing entirely new terms which had never been previously referenced.
- c. The Respondent has also shown blatant disregard to the terms of Process Document which required all relevant data and material to be furnished to the bidders in advance of the e-auction.

The Hon'ble Supreme Court in *Ghanshyam Mishra and Sons Private Limited v. Edelweiss Assets Reconstruction Company Limited [Civil Appeal No.8129 of 2019]*, has held that legislative intent behind the Code is to freeze/extinguish all claims so that the liquidation purchaser starts on a "clean slate" and is "not flung with any surprise claims". The doctrine of fresh/clean slate was also propounded by the Hon'ble Supreme Court

in *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, (2020) 8 SCC 531, and is equally applicable not only to the CIRP stage but also to sale as a going concern at the liquidation stage.

63. Section 52 and 53 of the Code provides for the scheme to be followed in the case of liquidation proceedings of a Corporate Debtor which are as follows:

Section 52 *inter alia* provides that a secured creditor may choose to either relinquish its security interest in favour of liquidation estate or otherwise realize its security interest as provided for. It is therefore the purport of these provisions once a secured creditor chooses to relinquish its security interest, an asset in respect of which the security interest is relinquished becomes part of the liquidation estate and is made available free of any encumbrances or liability. All that the secured creditor would then be entitled to is a distribution in the priority as provided under Section 53 from the proceeds of sale.

64. The object of liquidation under the Code is also enable a viable Corporate Debtor without extinguishing its identity. Even in liquidation, which is a last resort under the Code, the object remains that any purchaser is able to begin on a clean slate. The attempt of the Respondent therefore to sell the Relinquished Assets to the Applicant is completely contrary to the object and purpose of the Code, which even in liquidation sale requires that the Corporate Debtor remain viable.
65. The reliance on Regulation 32A is misplaced. Regulation 32A cannot be read so as to transfer assets and liabilities. Such an interpretation would be in conflict with Sections 52 and 53. Once a creditor relinquished the

security interest and opts to receive sale proceeds under Section 53, as provided under Sections 52(1)(a), all liabilities are extinguished. No liabilities survive for transfer since Section 53 covers all creditors-secured, unsecured, workers and Government. Merely identifying and listing liabilities under Regulation 32A does not mean assets and liabilities are to be transferred. Such a situation would militate against Section 52 and Section 53 and is common to all forms of sale under Regulation 32 including clauses (e) and (f) thereof. Any other interpretation would result in Regulation 32A ultra vires the statute.

66. So also phrases such as "as is where is" and the like used in the Process Document does not mean that assets along with liabilities are to be transferred. It only means that the Corporate Debtor or its business, as the case maybe, is taken over in the same condition as it exists on the date of sale. But the transfer has to be free of encumbrances and liabilities. Alternatively, the liabilities must be read down to mean those day to day liabilities such as procurement of raw materials, or workmen salaries going forward or tax payments required to keep the unit running but not the past liabilities which existed pre-CIRP/liquidation. To illustrate no person would bid if the total liability of almost ₹4000 crores as disclosed in VDR is transferred, which is well above the liquidation value. This is more so when reserve price was in the present case reduced to ₹150 crores, which means no prudent person would pay ₹150 crores, being the liquidation value and yet inherit a liability of ₹4000 crores. The entire case of the Respondent is therefore fundamentally fallacious and absurd.
67. The clauses of the Process Document clearly disclose that the sale of the Relinquished Assets required to be undertaken on a going concern basis i.e., only of the assets without any liability. Any protection or immunity

that was afforded to the Respondent only operated insofar as any subsequently discovered encumbrances were concerned. It is in no manner contemplated that the sale under the process document was to be a sale along with liabilities.

68. Clause 6 of the Process Document provided the timelines of the sale process, and Annexure VI contained the draft of the sale certificate which was in terms of the sale as contemplated under the process document itself. No reference was made to any "sale agreement" to be entered into, and especially not in the terms as the Impugned Draft Agreement. The reference to the draft sale certificate to be executed in favour of the successful bidder in clause 5.11(e) and the same being available in the VDR also establishes that the relevant documents pertaining to the sale had all been placed in the VDR so as to enable the bidders through undertake their due diligence prior to participation.
69. The omission of the Impugned Draft Agreement from the VDR and the Process Document, coupled with the belated manner in which the Respondent has shared the Impugned Draft Agreement, has not only taken the Applicant by surprise, but is also in breach of the basic terms of the Process Document as well as in breach of the Respondent's duties as an officer of this Tribunal.
70. The Respondent is required to comply with Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016 which prescribes the code of conduct for Insolvency Professional. The Code of Conduct requires the Respondent to conduct the liquidation process in a fair and transparent manner. The Respondent was also expected to adhere to the highest standards of ethics and professionalism and conduct a fair and rule base liquidation process as per the provisions of the Code and its regulations. The way

the Respondent has withheld the Impugned Draft Agreement and shared the same with the Applicant more than 2 months after the issuance of the LOI and almost at the close of the timeline for payment of the balance sale consideration smacks of mala fides and does not befit an officer of this Tribunal.

71. The principle that terms and conditions of the tender cannot be changed subsequently equally applies to the auction sale by the liquidator. The Hon'ble Supreme Court in *Ramana D. Shetty v. Airport Authority of India (1979)* held that the tendering authority cannot change the "goal post" after the bids have been received, the and more so, accepted, as in the present case.
72. This Tribunal in *Gaurav Jain v. Sanjay Gupta, 2021 SCC Online NCLT 489*, recognized that there was no definition of "going concern" either in the Code or the Regulations. The Tribunal then took note of the Report of the Insolvency Law Committee dated 26.03.2018 which had examined that the term "going concern" meant that the Corporate Debtor would be functional as it was prior to the initiation of CIRP other than the restrictions placed by the court. The advantage of a going concern sale was also appreciated in as much as the Corporate Debtor would be retained as a legal entity and was to be transferred along with the assets. This Tribunal specifically laid down as follows:

*“25. The crux of the going concern sale is that the equity shareholding of the Corporate Debtor is extinguished and the acquirer takes over the undertaking with the assets, licenses, entitlements, etc. The undertaking includes the business of the Corporate Debtor, assets, properties and rights, etc. excluding the liabilities. However, in this case the assets that are included*

*in the E-Auction Memorandum only have to be taken over by the Applicant."*

This Tribunal also recognized that liabilities would be considered settled in view of section 53 of the Code which provided for distribution of sale proceeds. It was held that the ongoing concern sale in liquidation was to be treated differently since only assets were to be transferred and liabilities would be settled in accordance with Section 53.

73. The Hon'ble NCLAT in *Shivshakti Interglobe Exports Pvt Ltd v. KPC Foods Pvt Ltd through liquidator*, [2022 SCC OnLine NCLAT 85] after taking note of the scope and object of the Code namely "to extinguish all claims specifically the ones which were not even made during the CIRP or in the liquidation stage, to aid the purchaser of the company as a going concern to start on a clean slate" held in respect of a going concern sale as follows:

*"24. It is no longer Res Integra that while approving a 'Corporate Debtor' sale as a 'going concern' in Liquidation Proceedings without its dissolution in terms of Regulation 32(e) of the Liquidation Process Regulations, 2016, it is essential to see that the 'Corporate Debtor' is not burdened by any past or remaining unpaid outstanding liabilities prior to the sale of the Company as a 'going concern' and after payment of the sale proceeds disturbed in accordance with Section 53 of the Code. The Impugned Order in L.A. 889 of 2020 is modified to the extent that the sale of the first Respondent as a 'going concern' is upheld and the direction sought for in prayer (c) & (e) in CA No. 1189 of 2019 seeking extinguishment of past remaining unpaid outstanding*

*liabilities including contingent liabilities, prior to the sale as a 'going concern', after payment of sale proceeds distributed in accordance with Section 53 of the Code, is allowed. This Appeal is allowed to the extent indicated above."*

74. It is clear that a going concern sale is required to comply with the settled law in this regard, as well as be compatible with the objectives of the Code. The very attractiveness of a going concern sale is that the purchaser is enabled to take over assets without any encumbrances or liabilities and is therefore free from action of creditors.
75. The Respondent has, since 17.05.2022 been in blatant disregard and breach of the terms of the process documents and the applicable provisions of the Code and the Regulations and well settled principles of law. This is clear from the following:
- i. On 17.05.2022, the Respondent addressed an email to the Applicant enclosing the impugned draft agreement and intimating the Applicant that the last date for payment of sale consideration was 05.06.2022.
  - ii. The draft sale agreement was therefore made available to the Applicant at an extremely belated stage and admittedly less than 3 weeks from the last date of the balance sale consideration.
  - iii. The draft sale agreement contained several terms and clauses which were new and did not form part of the process documents nor did the said draft conform to the scheme of the process document. For instance definition of the word "liabilities" or Clauses 2.1.10 and 2.1.11 which are not part of the Process Documents. No new conditions can be added once the bid has been accepted on the terms of the Process Document.

- iv. When the Applicant addressed an email dated 27.05.2022 to the Respondent, stating inter alia that the draft sale agreement which provided for a transfer of liability had been shared at the last moment without any reference in prior discussions and was not therefore required to be executed, the Respondent by his email dated 27.05.2022 sought to do away with the impugned draft but continues to his unlawful insistence on the transfer of liability, purportedly in accordance with regulation 32A.
  - v. The very next day the Respondent addressed an email stating, without any reason or explanation, that the email dated 27.05.2022 was recalled and was to be ignored.
  - vi. The Applicant was constrained to address an email dated 30.05.2022 seeking some clarity from the Respondent on the sale being compliant with the process document and settled law. However, no reply was forthcoming from the Respondent.
76. The conduct of the Respondent at less than 3 weeks from the last date of payment of the balance sale consideration was unreliable and disclosed unilaterality and arbitrariness, compelling the Applicant to file IA-1469 before this Tribunal. Apprehending that it would be imposed with an unlawful sale the Applicant sought clarification from this Tribunal that the sale would be undertaken in accordance with the law pertaining to going concern sale as well as the Process Document. The Respondent cannot be permitted take advantage of his own wrong and seek to now set aside or cancel the same in favour of the Applicant on account of delay which is attributable entirely to the Respondent's conduct. It was in this background that the Applicant was compelled to file IA-1517 seeking an exclusion of the period from 17.05.2022 until 06.06.2022 from the timeline for payment of the balance sale consideration. The

Applicant is entitled to an exclusion of the said period since the same cause grave prejudice to the Applicant. The time in which the Respondent has been in breach of the process document and in violation of applicable legal position is liable to be excluded so as to enable the Applicant to make the balance payment.

**THE APPLICANT IS A BONA FIDE BUYER AND REMAINS READY AND WILLING TO PURCHASE THE RELINQUISHED ASSETS:**

77. The Applicant's bona fides are writ large from the record in respect of the sale of the Corporate Debtor's assets which is clear from the following:
- (i) The Applicant was the only participant/bidder in both rounds of the e-auction undertaken in respect of the Corporate Debtor.
  - (ii) In the first round of e-auction the Applicant deposited the Bank Guarantee dated 22.11.2021 in the sum of ₹18.90 crores towards the EMD. The same bank guarantee was used even in the second round of auction despite being in excess of requisite EMD for the second round. The Applicant in good faith did not seek a refund of the excess amount, nor did the Applicant replace the bank guarantee.
  - (iii) The Applicant also filed the present IA as soon as was feasible upon learning of the Respondent's breaches. However, at no time did the Applicant seek a cancellation of the sale process and remains committed to go through with the sale.
78. The conduct of the Applicant discloses its keenness and readiness to go ahead with the sale and purchase of the Corporate Debtor's assets despite the patent illegalities committed by the Respondents. The Applicant is

therefore entitled to the exclusion of time during which the Respondent has been in breach of the process document.

79. The Applicant was precluded from furnishing the demand draft as directed by the Tribunal's order dated 03.06.2022 on account of unknown logistical hurdles; however, Applicant is ready and willing to make the deposit as require so as to enable the sale being successful. The Respondent on the other hand has been in breach and now seeks to take advantage of his unlawful conduct by seeking cancellation of the entire sale process and an unlawful forfeiture of the earnest money despotized. This conduct of the Respondent cannot be condoned and the Applicant ought to be permitted the exclusion of time for the balance payment. In this regard, the decisions relied on by the Respondent are distinguishable as under:

(i) In *Potens Transmission v. Gian Chand Narang [Company Appeal (AT) (Insolvency) No. 532 of 2022]*, the successful bidder applied for a modification/variation of the payment terms and extension of time for the balance sale consideration, and the liquidator filed an application seeking that the sale be cancelled/set aside on account of failure of the successful bidder to deposit within time. In this background the Hon'ble NCLAT upheld the Tribunal's decision which had allowed the liquidator's application and concluded that the 90-day period for payment was mandatory. However, the Applicant herein is seeking an exclusion of time on account of the Respondent's breaches. Had the said breaches not occurred, there would not have arisen any need for the Applicant to approach this Hon'ble Tribunal at all.

80. To conclude, the Applicant is a bona fide participant in the e-auction for sale of the Corporate Debtor's assets on a going concern basis. However,

the Respondent attempted to foist an unlawful terms and conditions of sale on the Applicant, in breach of the Process Document and the applicable well-settled legal position that a 'going concern' sale is only of assets and exclusive of liabilities. The Respondent further imposed the Impugned Draft Agreement on the Applicant at a belated stage after omitting to make the same as part of the VDR. The conduct of the Respondent compelled the Applicant to approach this Hon'ble Tribunal to ensure that the sale would be carried out in accordance with the law and the Process Document which does not provide for transfer of liability in sale of the Corporate Debtor as a Going Concern and accordingly, the Applicant is entitled to the exclusion of time prayed for in connection with payment of the balance sale consideration, i.e. 13 days which shall be made available from the date of adjudication and disposal of the captioned applications for payment of balance sale consideration and further the Applicant must be permitted to make payment of the balance sale consideration by way of financial bank guarantee within a period of 13 days from the date of adjudication and disposal of the above captioned applications, which can then be encashed by the Respondent. The Respondent ought not to be permitted to take advantage of his own wrongs.

**FINDINGS:**

81. We have heard the arguments of the Applicant and the Respondent and perused the records.
82. We have examined that facts of the case in the light of NCLAT judgement in 'M/s. Visisth Services Limited Vs. S.V. Ramani & Ors.' [Company Appeal (AT) (Ins) No. 896 of 2020] dated 11.01.2022, where the Bench concluded that sale of a Company as a 'Going Concern'

means sale of both assets and liabilities, if it is stated on 'as is where is basis'. The same coram by order in Shivshakti Interglobe Exports Pvt Lid v. KPC Foods Pvt Ltd through liquidator, [2022 SCC OnLine NCLAT 85] dated 25.02.2022 held that in a 'Corporate Debtor' sale as a 'going concern' in Liquidation Proceedings without its dissolution in terms of Regulation 32(e) of the Liquidation Process Regulations, 2016, it is essential to see that the 'Corporate Debtor' is not burdened by any past or remaining unpaid outstanding liabilities prior to the sale of the Company as a 'going concern' and after payment of the sale proceeds disturbed in accordance with Section 53 of the Code. The same was held as it will saddle the new purchaser with numerous liabilities which will ultimately defy the object of IBC, 2016.

83. Further, we have also considered the discussion paper published by IBBI on the Going Concern sale of the Corporate Debtor, where it was held discussed that the Going Concern sale means the sale of Corporate Debtor with the liabilities.
84. We have perused the Regulations outer limit for Going Concern sale and liquidation which prescribes a period of 90 days from the date of receipt of Letter of Intent for the payment of sale consideration, if any sale has to be consummated as a Going Concern.
85. This Adjudicating Authority not inclined to give benefit of provision of 90 days to pay balance sale consideration as per amended clause 12 of Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. Relying on Circular issued by the IBBI, we hold that benefit cannot be granted as the liquidation order in the proceeding was passed before the amendment dated 25.07.2019 benefit under amended clause 12, could not be granted. Therefore, E-Auction dated 15.02.2022 is null and void as bad in law.

IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH, COURT-I

IA 1469/MB/2022 In CP (IB) 3558/MB/2018

86. This Tribunal vide order dated 03.06.2022, directed the applicant to deposit the sum of Rs.67.86 Crores along with interest at the rate of 12% on or before 06.06.2022 which was not complied by the Applicant. The relevant portion of the said order reads as follows:

*“Accordingly, we allow the Applicant to deposit an amount of Rs.67.86 Crores along with interest at the rate of 12% on or before 06.06.2022 with the Registry of the Court by Demand Draft. Needless to further state, that failure to comply this order for depositing the balance amount will culminate to the cancellation of the sale process.”*

Thus, it can be inferred that time and again opportunity was given to Applicant and the same has not been complied with. In the aforesaid backdrop the Applicant is in clear breach of the aforesaid order, hence sale stands cancelled.

87. The Liquidator is directed to get assets valued again and issue fresh E-Auction sale notice in accordance with Liquidation Regulations as at 01.04.2018 (applicable) and complete Auction expeditiously.

88. With the aforesaid observations Application **IA No. 1469 of 2022 In CP No. 3558 of 2018**, is stands disposed of.

**Sd/-**

**SHYAM BABU GAUTAM**  
**Member (Technical)**

23.12.2022

SAM

**Sd/-**

**JUSTICE P. N. DESHMUKH**  
**Member (Judicial)**