
(2025) 02 NCLAT CK 0973

In the National Company Law Appellate Tribunal

Case No : Comp. App. (AT) (Ins) No.1698 of 2024 & I.A. No.6123 of 2024

Anuj Bajpai & Ors.

APPELLANT

Vs

Inderdeep Construction Company & Anr. & Anr.

RESPONDENT

Date of Decision : 13-02-2025

Acts Referred:

Insolvency and Bankruptcy Code 2016 — Section 60, 9, 33, 53

Citation : (2025) 02 NCLAT CK 0973

Hon'ble Judges : Rakesh Kumar Jain, Member (T); Naresh Salecha, Member (T)

Bench : Division Bench

Advocate : Abhijeet Sinha, Karan Valecha, Aditya Shukla, Naveen Pahwa, Rahul Gaikwad, Stuti Vatsa, Govind

Final Decision : Allowed

Judgement

Per: Justice Rakesh Kumar Jain:

This order shall dispose of two appeals bearing CA (AT) (Ins) No. 1698 of 2024 filed by the Liquidator (hereinafter referred to as 'first appeal') and CA (AT) (Ins) No. 1518 of 2024 filed by the Successful Bidder (hereinafter referred to as 'second appeal') against the common order dated 04.07.2024 passed by the National Company Law Tribunal, Ahmedabad Bench by which an application bearing I.A No. 1479 of 2023 filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by the Successful Bidder for seeking certain reliefs and concessions, has been dismissed.

2. The Liquidator has filed the appeal because of the observations made against him in para 21 of the impugned order.

3. The brief facts of this case are that M/s Continental Piling and Excavation Pvt. Ltd. filed an application under Section 9 of the Code r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against M/s Anwesha Engineering & Projects Ltd. bearing CP (IB) No. 20/9/NCLT/AHM/2020 before the Tribunal which was admitted on 25.01.2021 and Mr. Sachin Bhattbhatt

was appointed as the IRP, however, Anuj Bajpai was further appointed as the RP by the order dated 20.04.2021.

4. The erstwhile IRP constituted the CoC comprising of financial creditors, namely, State Bank of India with 98.58% voting share, Axis Bank with 4.21 % voting share and Aditya Birla Finance Ltd. with 5.21% voting share.

5. Pursuant to the publication of Form G on 20.04.2021, only one plan was received from Kalpataru Power Transmission Ltd. but the said plan was found to be conditional in nature and despite giving an opportunity, the said resolution applicant did not modify its clauses. It led to the invitation of fresh expression of interest and another form G was published on 29.10.2021 pursuant to which three resolution plans were received but all the three plans failed as they did not receive requisite majority when they were put to vote in the 16th meeting of the CoC rather the CoC voted for the liquidation and sale of the CD as a going concern by 100% majority as per Regulation 32 of the IBBI (Liquidation Process) Regulations, 2016 (in short 'Regulations'). At the relevant time, Regulation 32A(4) of the Regulations required the sale of the CD as a going concern only within the first 90 days from the date of liquidation of the CD. Regulation 32A(4) of the Regulations is as under "if the liquidator is unable to sell the CD or its business under clause (e) or (f) of regulation 32 within 90 days from the liquidation commencement date, he shall proceed to sell the assets of the CD under clause (a) to (d) of Regulation 32. Regulation 32 deals with sale of assets etc. which required that the liquidator may sell (a) an asset on a standalone basis (b) the assets in a slump sale (c) a set of assets collectively (d) the assets in parcels".

6. The liquidator preferred an application for liquidation of the CD under Section 33 of the Code on 15.04.2022 bearing I.A No. 373 of 2022. While, the said application was pending, an amendment was brought in Regulation 32A(4) on 16.09.2022 as per which the time limit of 90 days for conducting the sale of the CD as a going concern was amended and it was provided that as per 32A(4) liquidator may sell the assets of the CD under clause (e) of Regulation 32 exclusively only at the first auction whereas Regulation 32A (e) provides that the liquidator may sell the business (s) of the CD as a going concern.

7. I.A No. 373 of 2022 was allowed vide order dated 13.01.2023, after which the liquidator constituted the Stakeholders Consultation Committee (SCC) as per the Regulations wherein the State Bank of India had 90.58 % share, Axis Bank had 4.21 % share and Aditya Birla Finance Ltd. had 5.21% share.

8. The Appellant/Liquidator circulated the draft e-auction process document vide mail and at the time when the liquidation order dated 13.01.2023 was passed, there were no pending contracts of the CD.

9. SBI holding 90.58% voting share addressed an email to the Appellant on 10.02.2023 indicating that in addition to the valuation of the financial assets of the CD, the Appellant should also conduct valuation of the land ? building and

plant and machinery once again. The Appellant accordingly received as many as six valuation reports. The liquidator tried to hold the meeting between April, 2023 to July, 2023 but SBI was unavailable which was holding 95.58% voting share and thus no meeting was held in the absence of SBI because of lack of quorum.

10. As per the liquidator, the period of 90 days, for conducting sale of the CD, as a going concern as per the Regulations, concluded on 19.04.2023. One Raj Radhe Finance Ltd. sent an email on 05.07.2023 to the Liquidator informing him that the debt of the CD, held by SBI, has been assigned to them, On confirmation of the same, the Appellant called the 2nd meeting of SCC on 12.07.2023 in which SBI was substituted with Raj Radhe Finance Ltd.. In the 3rd meeting of the SCC held on 17.07.2023, the e-auction process document were laid before it which was finalised during the 4th meeting of the SCC held on 20.7.2023 and the SCC agreed to proceed for holding an e-auction sale of the CD as a going concern for which a public notice was published on 26.07.2023 wherein the reserve price was fixed at Rs. 42.60 Cr. being the fair market value, in terms of the valuation reports received during the liquidation. In the fourth meeting of the SCC, It was informed that the 90 days mandate as per Regulation 32A(4) prior to the amendment of September 16, 2022 had already expired, therefore, out of abundant caution, the Appellant filed I.A No. 950 of 2023 for seeking condonation of delay. He sought condonation of delay of 131 days from 19.04.2023, being the date of conclusion of 90 days, for conducting the sale of the CD as a going concern till 28.08.2023 which was proposed as the date of conclusion of e-auction of the CD as a going concern. In the same application, the liquidator also sought permission to carry out the sale of the CD as per Regulation 32A(4) of the Regulations as amended by Notification No. IBBI/2022-23/GN/REG094 dated 16.09.2022. Accordingly, a public notice was issued on 26.07.2023 and the first e-auction for sale of the CD as a going concern was conducted on 28.08.2023 in which the Appellant in the second appeal was declared as Successful Bidder for the bid amount of Rs. 42.85 Cr. surpassing the fair market value of Rs. 42.60 Cr. The Appellant, in second appeal, remitted the entire bid amount and the sale certificate was issued to it on 25.09.2023. The Tribunal was informed of the successful sale of the CD as a going concern and a detailed affidavit was filed to the effect that mandate of Regulation 32A(4) has also been complied with. The I.A No. 950 of 2023 was disposed of. At the same time, the Appellant in the second appeal filed an application bearing I.A No.1479 of 2023 seeking certain waivers and concessions but it was rejected by the impugned order and while doing so the Tribunal made certain remarks against the liquidator and hence, both have come by their separate appeals before this Court.

11. Both the appeals have been contested by the Department of Income Tax because in the first appeal filed by the liquidator the Respondent No. 1 is the highest bidder and Respondent No. 2 is the Income Tax Dept. whereas in the second appeal, filed by the Successful Bidder, the liquidator is Respondent No. 1

and Income Tax Dept. is Respondent No. 2.

12. In the second Appeal filed by the Successful bidder, it is submitted that purshis was filed, referring to the amended provisions of Regulation 32A(4) and IA No. 950 of 2023 was disposed of on its basis vide order dated 08.04.2023 which was never challenged and had attained finality. It is further submitted that in the case of M/s Shiv Shakti Inter Globe Exports Pvt. Ltd. Vs. M/s KTC Foods Pvt. Ltd., CA (AT) (Ins) No. 650 of 2020 it has been clarified that clean slate principle is applicable to sale under Regulation 32A. In this regard, following paras needs to be highlighted which read as under:

"21. Adverting to the contention of the Learned Counsel for the Appellant that the Adjudicating Authority has erred in denying the sale of the 'Corporate Debtor' as a 'going concern' to the Appellant without including any contingent liabilities, we hold that it is a settled law that when the sale proceeds of a 'Corporate Debtor' are duly distributed in the Order of priority and in the manner prescribed under Section 53 of the Code, claims of any other Creditor cannot be entertained contrary to the provisions entailed under Section 53; subsequent to the distribution of sale proceeds under Section 53 no other entity including any Government entity can claim any past unpaid or outstanding dues against the Appellant who has purchased the 'Corporate Debtor Company' as a 'going concern'. It is significant to mention that the second Respondent/Liquidator has specifically submitted that even these claims by the Uttar Haryana Bijli Vitran Nigam were not submitted in the prescribed form either during the CIRP Process or at the Liquidation stage. We are of the considered view that at this stage subsequent to the sale of the 'Corporate Debtor Company' as a 'going concern', these claims cannot be foisted upon the Appellant. The scope and objective of the Code is 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'. The Hon'ble Supreme Court in 'Ghanshyam Mishra & Sons Pvt. Ltd.' Vs. 'Edelweiss Asset Reconstruction Company Ltd.& Ors.', Civil Appeal No. 8129 of 2019 and in 'CoC of Essar Steel India Ltd.' Vs. 'Satish Gupta & Ors.' (2020) 8 SCC 531 has laid down the proposition that the purchaser of the Company even in the Liquidation stage cannot be burdened with past liabilities when it is not mentioned in the 'Sale Notice'.

22. 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 distributed in accordance with Section 53 of the Code. The Impugned Order in I.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."

13. In the case of Haryana State Industrial and Infra Development Corporation Ltd. Vs. AAR Technoplast Pvt. Ltd. & Ors., CA (AT) (Ins) No. 606 of 2021 para 16 is relevant which is reproduced as under:-

"16. We are of the considered view that once the Liquidation sale has been completed and the Certificate of Sale has been executed followed by handing over possession to the Auction Purchaser, any claim relating to such properly for dues prior to the Auction cannot be raised against the Auction Purchaser specifically when the Company is in Liquidation and the dues were already claimed by the said party as an 'Operational Creditor', during the CIRP process as the Company was in Liquidation and the Appellant had already approached the Liquidator by filing a Form-B and the Liquidator has intimated to the Appellant that there is no amount left for the payment to any 'Operational Creditor', we are of the earnest view that the Auction Purchaser cannot be made liable for any dues arising on the property before the purchase of the said property in this case."

14. In the case of Jasamrit Designers Pvt. Ltd. Vs. Gian Chand Narang & Ors. CA (AT) (Ins) No. 258 of 2023 para 12 is relevant which is reproduced as under:-

"12. We while granting such liberty to the Appellant observe that law is well settled, a successful bidder who is declared as successful bidder of sale as going concern can seek access of the Adjudicating Authority and may pray for necessary directions in accord with and in consonance with the process document in the liquidation proceedings. In result, we partly allow this Appeal and hold that applicant's prayers i.e. relief/concessions/directions needs consideration by the Adjudicating Authority for which we grant liberty to the Applicant to make a fresh Application containing prayers which may be commensurate and in accord with terms and conditions of the process document of e-auction process document. The Appellant may submit a fresh application praying for reliefs, concessions and directions which may be considered and decided by the Adjudicating Authority in accordance with law. The Appeal is disposed of, accordingly"

15. The contention of Respondent No. 2 is that the TDS demand of Rs. 1,34,80,428/- is due from the period prior to the sale of the Company. It is contended that sale of the CD as a going concern shall mean that the CD survives but only the ownership is transferred by the liquidator to the purchaser. It is also contended that going concern means that sale is a transfer of assets along with liabilities but in the matter of liquidation only assets are transferred and the liabilities of the CD has to be settled in terms of Section 53 of the Code. It is thus submitted that claim of the Respondent No. 2 may be considered and

the Appellant may be directed to pay the outstanding demand of the Department.

16. Counsel for the Appellant has submitted that the only objection qua the sale was that it has gone beyond the period of 90 days as stipulated in the unamended provision but before sale took place on 28.08.2023 there was an amendment dated 16.09.2022 in Regulation 32A (4) as per which condition of 90 days has been changed and now the sale is required to be conducted in the first attempt.

17. It is submitted that the sale was in fact conducted in the first attempt During the pendency of I.A No. 950 of 2023, a purshis was also filed on 08.04.2024 indicating therein that Regulation 32A(4) was amended on 16.09.2022 and the sale has been conducted in the first attempt where the successful bidder has paid the full amount which is more than the reserve price and I.A. No. 950 of 2023 was disposed of accordingly.

18. It is also submitted that clean slate theory also applies in the case of liquidation sale by the liquidator, therefore, the Respondent No. 2 cannot claim the past dues. It is also submitted that there is no fault on the part of the liquidator for not conducting the sale within 90 days because of the non-participation of the SBI at the relevant time who has 90.58% vote share.

19. We have heard Counsel for the parties and perused the record with their able assistance.

20. It is pertinent to mention that the going concern sale means selling the CD on 'as is where is basis' and allows the liquidator to sell the business of the CD under liquidation alongwith all the rights, titles and interest in the CD including its legal entity which is transferred to the successful purchaser on the basis of which the successful purchaser is to carry on the business of the CD. Regulation 32A(4), before the amendment, required that the sale was to be concluded within a period of 90 days but after its amendment on 16.09.2022, which happened before the sale affected by the liquidator on 28.08.2023, it requires that the sale has to be conducted in first attempt. There is no dispute that the sale has been conducted in the first attempt and no second attempt has been taken. There is also no dispute that purchase price paid by the successful bidder is more than the reserve price.

21. Besides this, there was an application bearing I.A No. 950 of 2023 filed by the liquidator in which the following order was passed on 18.03.2024 which is reproduced as under:-

"This is an application with one of the prayers seeking to condone the inadvertent delay of about 131 days from April 19, 2023 wherein the liquidator has sold the assets of the CD as a going concern. The application should have been filed before the date of the conclusion of the 90 days period for conducting the sale of the CD as a going concern as per Regulation 39A(4) of the Regulations. The condonation is for the period till August 28, 2023, being the

proposed date of conclusion of E-auction of the CD as a going concern. However, it is observed that the liquidator has already sold the assets and realized the proceeds, pending this application and there are other prayers sought in the application.

Liquidator is directed to file detailed affidavit before next date of hearing. List for further consideration on 08.04.2024."

22. While the application was pending, the Appellant filed a purshis on 08.04.2024 in which the following averments were made:-

1. It is submitted that Regulation 32A(4) was amended on 16.09.2022.
2. Pursuant to the passing of the liquidation order dated 13.01.2023, I have complied with the amended Regulation 32A(4) and have sold the CD as a going concern in the first attempt vide an auction conducted on August 28, 2023.
3. The Successful bidder has paid full bid amount of Rs. 42.85 Cr. on September 25, 2023 and the same is distributed to the stakeholders.
4. Since the liquidation of the CD is carried out as per the amended liquidation as applicable as on date, it is prayed that appropriate orders to be passed in the captioned application.

23. The application bearing I.A No. 950 of 2023 was ultimately disposed of on 08.04.2024, after the purshis was filed, with the following order which is reproduced as under:-

Ld. Sr. Counsel for the Liquidator pleaded that the IA should get disposed off as the compliance to IBBI Circular was met even though the IA was filed seeking condonation. He is directed to file purshis today itself. In view of the clarification purshis filed, the IA is disposed off.

24. The net effect of the purshis dated 08.04.2024 is that the Tribunal was informed that there is an amendment in Regulation 32A(4) w.e.f 16.09.2022. The liquidator has complied with the amended Regulation and sold the CD as a going concern in the first attempt in the auction held on 28.08.2023, after the amendment was brought in. The successful bidder has paid the entire amount and the same was distributed to the stakeholders.

25. In such situation, the Tribunal could not have relied upon the unamended provision of Regulation 32A (4) in which it is provided that the sale has to be concluded within 90 days and the application has been filed for condonation of the delay by the Appellant was an inadvertent exercise on the part of the liquidator because of the amendment dated 16.09.2022 which has taken away the rigours of Regulation 32A(4) as it stood before its amendment.

26. Besides the aforesaid fact, the law is well settled as has been held by this Court in the case of M/s Shiv Shakti Globe Exports Pvt. Ltd. (Supra) that while approving CD sale as a going concern in liquidation proceedings without its

dissolution, it is essential to see that the CD is not burdened by any cost or remaining unpaid outstanding liabilities prior to the sale of the company as a going concern and after payment of the sale proceeds are distributed in accordance with Section 53 of the Code.

27. In the present case also, as has been stated in the purshis dated 08.04.2024, which has been duly taken into consideration while passing of the order in I.A No. 950 of 2023, that not only the Regulation 32A(4) has been duly amendment on 16.09.2022 and the sale as a going concern took effect on 28.08.2023 but also the entire amount has been paid by the highest bidder and that has already been distributed to the stakeholders by the Liquidator.

28. In such circumstances, the Tribunal has clearly committed an error in dismissing the application and thus there was no occasion for the Tribunal to make an adverse observation against the liquidator as well.

29. In view of the aforesaid discussion, the present appeals succeeds and the impugned order is set aside. No costs.

I.As, if any pending, are hereby closed.