
(2024) 02 NCLT CK 0051

In the National Company Law Tribunal

Case No : IA. No.5737/2023 & IA.No.261/2024 In C.P.(IB)/03/MB/C-II/2017

?Manish Gupta

APPELLANT

Vs

Eshan Minerals Pvt. Ltd

RESPONDENT

Date of Decision : 13-02-2024

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 35, 35(1)(f), 60(5), 60(5)(c)

Citation : (2024) 02 NCLT CK 0051

Hon'ble Judges : Kuldip Kumar Kareer, Member (J); Anil Raj Chellan, Member (T)

Bench : Division Bench

Advocate : Jyoti A Singh, Sakil Ansari, Nishit Dhruva, Niyati Merchant, Subir Kumar, Disha Shah, Avinash R Khanolkar, Surekha Yadav

Final Decision : Dismissed

Judgement

Anil Raj Chellan, Member Technical

1. The issue involved in IA.No.5737/2023 and IA.No.261/2024 is more or less the same and as such have been taken up together and being decided by this common order.

2. Facts of the case in IA.No.5737/2023: -

(a) The Applicant in the IA.No.5737/2023 is the Liquidator appointed by this Tribunal vide order dated 28.07.2017 for Bhupen Electronic Limited ('the Corporate Debtor') who is seeking approval of this Tribunal for private sale of rights of the Corporate Debtor in the lease hold land, building and fixtures thereon situate at F-6, MIDC Industrial Area, Hingna Road, Nagpur 440 041 ('the said Property').

(b) The Corporate Debtor is the assignee of the rights in the said Property in a Court Auction though the said leasehold rights are not registered in the name of the Corporate Debtor due to non-payment of transfer charges and other levies to the Maharashtra Industrial Development Corporation (MIDC), the lessor. The said

Property forms part of the liquidator estate of the Corporate Debtor.

(c) The Liquidator has taken various steps and efforts to sell the realizable rights in the said Property through multiple public notices for e-auction, but no bidder or buyer has come forth for purchase of the rights in the said Property. This has resulted in an inordinate delay in the completion of the liquidation process of the Corporate Debtor. Though the liquidation period has been extended from time to time for completing the sale (more than 5 years), the same could not be completed.

(d) In February, 2023, the Liquidator received an offer from Eshan Minerals Private limited ('the Buyer') for purchase of the rights in the said Property by private sale for an amount of Rs.15.80 crore which is higher than the reserve price fixed for the last failed public auction.

(e) The Liquidator in this Application sought the approval of this Tribunal for sale/ transfer of the rights on the said Property in terms of Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ('Liquidation Regulations').

3. Submissions of the Liquidator.

(a) The Liquidator submits that he has availed the services of C1 India Private Limited for selling the rights of the Corporate Debtor on the said Property.

(b) The Liquidator has also conducted six public auctions as under:

(i) Public auction pursuant to advertisement in newspapers (Lokmat Marathi, Lokmat Times, Lokmat Samachar) all dated 22.02.2019 with reserve price of Rs. 26,80,25,000/-.

(ii) Public auction pursuant to advertisement in newspapers (Lokmat Marathi, Lokmat Times, Lokmat Samachar) all dated 27.03.2019 with reserve price of Rs.26,80,25,000/-.

(iii) Public auction pursuant to advertisement in newspapers (Lokmat Marathi, Lokmat Times, Lokmat Samachar) all dated 03.05.2019 with reserve price of Rs.23,10,00,000/-.

(iv) Public auction pursuant to advertisement in newspapers (Lokmat Marathi, Lokmat Times, Lokmat Samachar) all dated 28.10.2020 with reserve price of Rs.18,37,50,000/-.

(v) Public auction pursuant to advertisement in newspapers (Lokmat Marathi, Lokmat Times, Lokmat Samachar) all dated 24.12.2020 with reserve price of Rs.16,53,75,000/-; and.

(vi) Public auction pursuant to advertisement in newspapers (Lokmat Marathi, Lokmat Times, Lokmat Samachar) all dated 08.10.2021 with reserve price of Rs.15,71,06,250/-.

(c) The Liquidator submits that apart from conducting E-auctions, the Applicant met various property consultants, President of MIDC Industries Association, President of Vidarbha Industries Association etc during March 2019 and October 2021 to expedite the sale of rights on the said Property. The Liquidator also engaged in communication with MIDC, the lessor to ascertain the transfer charges/differential premium, if any, payable on the sale of the rights on the said Property. Accordingly, MIDC vide its letter dated 04.12.2020 stated that charges amounting to Rs. 17,16,64,355/- are payable on account of extension charges, service charges etc. Also that, a transfer fee at the rate of 30% of the difference between the allotted rate and current rate will be applicable at the time of transfer of leasehold rights in the said Property. Due to the aforesaid charges, various E-auctions conducted by the Liquidator failed despite reducing the reserve price incrementally.

(d) Considering the huge transfer and other charges informed by MIDC, the Applicant filed an IA No.830 /2022 against MIDC and the revenue officer, Tahsildar u/s 60(5) (c) of the Code seeking declaration that no transfer charges are payable to the MIDC, and that MIDC be directed to register the leasehold rights on the said Property in the name of the purchaser without paying any charges etc. The said IA is till pending for filing of reply by MIDC and final disposal.

(e) The Applicant states that while awaiting the outcome of IA.No.830/2022, the Liquidator continued to make efforts to find interested buyers for sale of rights on the said Property. The Applicant states that he received an offer vide letter dated 27.02.2023 from one Mr. Sanjeev Agrawal for the purchase of right in the said Property on private sale basis for an amount of Rs. 15.71 crore inclusive of GST. The said offer was subject to certain other conditions like limiting the MIDC charges upto Rs. 5 Crore, granting of 6-8 months' time period to settle with MIDC, liability, if any, above Rs.5 Crore to be borne by the Liquidator etc. The Liquidator rejected the said offer vide his e-mail dated 27.03.2023.

(f) Subsequently, the Liquidator received another offer for private sale from Fortuna Capital on behalf of Eshan Minerals Private Limited vide email dated 20.09.2023 for Rs.15,72,00,000/-.

(g) The Liquidator states that the requirement to form Stakeholders Consultation Committee (SCC) is not applicable in the case of Corporate Debtor as the CIRP of the Corporate Debtor was initiated on 19.01.2017 followed by liquidation vide order dated 31.07.2017; whereas the requirement in Regulation 31A to form the SCC was inserted in IBBI (Liquidation Regulations) 2016 vide notification dated 25.07.2019. IBBI also clarified vide its circular dated 26.08.2019 that the amendment will be applicable only to liquidation processes which commenced on or after 25.07.2019. The Applicant, however, put the offer received from Eshan Minerals Private Limited through its authorized representative Fortuna Capital, in the meeting of the Financial Creditors on 11.10.2023. In the said meeting, the offer price was revised from Rs. 15.72 Crore to Rs. 15.80 Crore plus GST at 18%

and confirmed by letter dated 06.11.2023. The Buyer, Eshan Minerals Private Limited also made a payment of Rs. 3.95 Crore i.e. 25% of the proposed sale consideration as Earnest Money Deposit (EMD) through bank drafts dated 18.09.2023, 26.09.2023, 26.10.2023 and 10.11.2023. The Buyer stated in the offer that the purchase would be on 'as is where is, whatever there is, and without any recourse basis and any other dues/ liabilities/ charges related to these leasehold rights shall be dealt with by the Buyer and shall not a liability and responsibility of the Corporate Debtor/Liquidator. The Applicant further submits that the said proposal was approved by 91.73% of the Financial Creditors who participated and a letter of intent dated 21.11.2023 was executed between the Applicant and the Buyer. As per the letter of intent, the private sale is subject to the approval of this Tribunal.

(h) The Buyer intends to make the balance payment of Rs. 11.85 Crore along with GST at the rate of 18% within 30 days of approval by this Tribunal or within 90 days from the approval by this Tribunal along with interest at 12% p.a.

(i) The Applicant further submits that after signing of the letter of intent on 06.11.2023, another proposal/Expression of Interest dated 23.11.2023 was received. The said proposal was not considered or replied to for the reason that the letter of intent had already been issued by the time and further that the fresh EOI dated 23.11.2023 was vague without stating any amount.

(j) In view of the above, the Applicant sought approval of this Authority for private sale of rights in the said Property.

4. Submissions of the Sachani Developers LLP, the Applicant in IA.No.261/2024

(a) M/s. Sachani Developers LLP filed the present IA No. 261/2024 to allow him to participate in the bidding process of the asset of the Corporate Debtor i.e. the rights on the said Property.

(b) The Applicant stated that the last public auction regarding the sale of rights on the said Property was conducted by the Liquidator in the month of October, 2021. The Applicant, therefore, sent an email dated 23.11.2023 showing its interest to purchase the rights of the Corporate Debtor on the said Property, but the Liquidator did not bother to respond to the Applicant. Subsequently, the Applicant came to know that an application seeking approval of this Tribunal has been filed by the Liquidator which was reserved for orders on 03.01.2024.

(c) The Applicant further submitted that the Applicant was not provided a reasonable opportunity to submit its bid for purchasing the rights in the said Property. Since the last auction was conducted in October, 2021, the Liquidator should have provided opportunity to other persons including the Applicant to participate in the private sale.

5. Submissions of MIDC

(a) Though MIDC, the lessor of the said Property was not made a Respondent in

the IAs, the counsel appearing for MIDC submitted that large amounts are due in respect of the said Property and also submitted that the transferee will have to pay the transfer charges and other dues payable to MIDC as per the lease deed.

Analysis and Decision

6. We have heard the counsels for the parties and perused the documents and records on record.

7. The fact brought on record indicates that the Liquidator has conducted six public auctions for sale of rights of the Corporate Debtor on the said Property. In the last public auction, notice was issued on 08.10.2021 and the reserve price was fixed at Rs.15,71,06,250/-. It has been brought to our notice that the public auctions failed mainly on account of pending transfer of title/rights in favour of the Corporate Debtor by MIDC and the huge outstanding dues, stated to be more than Rs. 17.16 Crore as on 04.12.2020 as also other transfer fee payable to MIDC, the lessor. The Liquidator having realized the issues involved in the transfer of leasehold rights in favour of the Corporate Debtor and the outstanding requirement of settling the dues of MIDC, explored various options including approaching MIDC and other agents for sale of the rights on the said Property. The Liquidator has received an offer from the Buyer for Rs. 15.72 Crore which was subsequently revised to Rs. 15.80 Crore plus GST at the rate of 18%. The Buyer has agreed to settle the dues of MIDC directly. The proposal for acquisition of rights on the said Property was considered by the Financial Creditors and approved by 91.73% and a letter of intent was issued to the buyer on 23.11.2023. The buyer has also deposited Rs. 3.95 Crore i.e. 25% of the Sale consideration as EMD and agreed to make the balance payment of Rs. 11.85 Crore along with GST at the rate of 18% within 30 days of approval by this Authority or within 90 days from the date of approval by this Authority along with interest at 12% p.a.

8. It is pertinent to observe that one Shri. Rajat Naidu sent an email to the Liquidator on 23.11.2023 i.e, after issue of letter of intent in favour of the Buyer informing that 'we are interested in the above stated property and are fully aware of the issues and intricacies of the land and hence request you to invite us to the ongoing sale processes of private treaty as this may improve the sale realization and lower the haircuts to stakeholders.' The Liquidator appears to have not responded to the mail and the Applicant (Sachani Developers LLP) in IA.No.261/2024 approached the Tribunal for giving opportunity for participating in the bidding process of the Corporate Debtor.

9. Section 35(1) (f) of the Code provides that the Liquidator may, subject to the directions of the Adjudicating Authority, sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified. Sub Regulation (2) of Regulation 33 of Liquidation Regulations provides

that the Liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule 1 when, inter alia, the asset is sold at a price higher than the reserve price of a failed auction; or the prior permission of the Adjudicating Authority has been obtained for such sale.

10. Based on the said provisions relating to sale of assets through private treaty, the Liquidator justified private sale on the grounds that the proposed sale consideration of Rs. 15.80 Crore is higher than the reserve price of Rs.15.71 crore fixed for the last failed auction. The Liquidator also submitted that the sale consideration of Rs.15.80 crore proposed by the Buyer is justifiable from the point of liquidation value arrived by the Valuers taking into account the outstanding amounts payable to MIDC (as intimated by letter dated 04.12.2020 is above Rs. 17.16 Crore), and the process involved in the transfer of rights to the Buyer. While there was no requirement under the Liquidation Regulations to consult SCC as the liquidation of the Corporate Debtor was commenced before 25.07.2019 (the date when IBBI (liquidation process) (Amendment) Regulation, 2019 came into force), the Liquidator consulted the Financial Creditor who approved the proposal of private sale with 91.73% voting.

11. While the Liquidator has taken various steps to ensure the private sale is reasonable and transparent, we cannot ignore the fact that the Liquidation Regulation provides for some more checks and balances on the private sale in Schedule 1 of the Liquidation Regulations which includes, inter alia, preparation of a strategy to approach interested buyers for assets to be sold by private sale, liaising with potential buyers or their agents, completion of sale in accordance with the terms of sale, etc. It is observed that the Buyer approached the Liquidator on his own and expressed interest to acquire the rights over the said Property above the reserve price fixed at the last failed auction. Though belated i.e., after issue of letter of intent in favour of the Buyer, another person (the Applicant in IA.No.261/2024) has come out with an expression of interest to acquire the rights on the said Property. Thus it is evident that there is interest in the market to acquire the rights in the said Property even though there are other outstanding issues. Furthermore, substantial time has passed after the last public auction in October 2021.

12. It is also pertinent to observe from the Liquidation Regulations that the private sale has to be conducted in a manner so as to maximize the realizations from the sale of assets. The Hon'ble NCLAT in the case of State Bank of India Vs. Bhuvée Stenovate Private Limited and Ors. Comp. App. (AT) (Ins) No. 1013/2022 observed that the Liquidator, for conducting private sale is not to identify one buyer and sell the assets; rather, strategy has to be made to approach the interested buyer for assets which is with the object to attract more and more interested buyers to maximize the realization from the sale of assets. Keeping in mind the above decision and considering the interest shown by the Applicant in IA.No.261/2024, we feel it appropriate to give an opportunity to the Applicant in IA No.261/2024 and other interested parties, if any, to participate in the sale

process.

13. For the foregoing reasons, we disallow private sale in terms of the Letter of Intent annexed as Exhibit O in IA. No. 5737 of 2023 and dismiss IA No. 5737 of 2023 with the following directions to the Liquidator under Section 35 of the Code:

(i) The Liquidator shall issue fresh notice of conducting sale in two newspapers circulating in the area where the said Property is situate and invite bids above the bid submitted by the buyer by adopting Swiss Challenge method, thereby treating the bid offered by the Buyer as an anchor bid. The interested bidders will have to submit 10% of the bid amount as EMD along with the bid. In the event of receipt of higher bid than the anchor bid of the Buyer, the Buyer shall have the option to match the same.

(ii) The Liquidator may finalize other terms relating to MIDC dues, time period for making deposit of consideration, documentation, etc.

(iii) The entire sale process to be completed within one month from the date of the order and there is no requirement of obtaining fresh consent/approval of financial creditors for confirming the private sale in favour of the highest bidder subject to satisfaction of other terms and conditions as may be specified by the Liquidator.

14. In view of the directions issued as above, IA No.261/2024 stands allowed while IA No. 5737/2023 is dismissed.