
(2025) 02 NCLAT CK 0939

In the National Company Law Appellate Tribunal

Case No : Company Appeal (AT) (Insolvency) No.106 of 2025

M/s Power Mech Projects Ltd.

APPELLANT

Vs

Essar Power (Jharkhand) Ltd., (In Liquidation) & Ors.

RESPONDENT

Date of Decision : 04-02-2025

Acts Referred:

Insolvency and Bankruptcy Code 2016 — Section 35, 54A, 54K

Citation : (2025) 02 NCLAT CK 0939

Hon'ble Judges : Ashok Bhushan, Chairperson; Barun Mitra, Member (T); Arun Baroka, Member (T)

Bench : Full Bench

Advocate : Abhijeet Sinha , Gaichangpov Gangmei, Arjun D. Singh, Harsh Kesharia , Yimyangkr Longkumer, Abhishek Anand , Shivani Sharma, Sanapreet Singh

Final Decision : Dismissed

Judgement

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the order dated 11.12.2024 passed by National Company Law Tribunal, Principal Bench allowing IA No.5745 of 2024 filed by the Liquidator seeking permission of the Adjudicating Authority, to sell the Corporate Debtor ("CD") as a going concern through private sale method. The Adjudicating Authority by the impugned order allowed the Application. Aggrieved by which order, this Appeal has been filed.

2. Brief facts necessary to be noticed for deciding this Appeal are:

(i) By an order dated 03.01.2020, liquidation process commenced against the CD – Essar Power (Jharkhand) Ltd. and Respondent No.2 was appointed as the Liquidator.

(ii) The Liquidator initiated e-auction process for sale of CD. Upto 18th e-auction held on 24.04.2024, only two residential units of the CD could be sold. Certain assets of the CD was lying with the Kolkata Port Trust. On an Application filed by

Board of Trustee for Kolkata Port Trust seeking permission of the Tribunal to direct sale of assets of the CD lying with Kolkata Port Trust, the Adjudicating Authority passed an order on 31.07.2024 directing sale of assets by the Liquidator.

(iii) On 02.08.2024, the Appellant sent a letter to the Liquidator showing interest in the assets of the CD. The Liquidator replied the letter of the Appellant providing the information sought for, after obtaining confidentiality undertaking.

(iv) A meeting was held on 26.08.2024 of the Stakeholder's Consultation Committee ("SCC"), where a decision was taken for sale of assets of the CD in two parts. First part included sale of assets lying at Kolkata Port Trust while Part-2 included sale of assets at Tori and Century JJP, Kolkata. The Liquidator received an offer dated 26.09.2024 from Orissa Alloy Steel Pvt. Ltd. ("OASPL") for acquiring the CD as a going concern, excluding the assets of the CD lying at the Kolkata Port Trust for consideration of Rs.67 crores.

(v) Stakeholder's Consultation Committee Meeting took place on 30.09.2024, where the Liquidator apprised the SCC of the offer submitted by OASPL for private sale of the CD as a going concern after excluding the assets of the CD lying at Kolkata Port Trust. It was noted in the Meeting that if the Liquidator chooses to conduct an auction process or Swiss Challenge Mechanism for value maximization, the Right of First Refusal ("RoFR") could be given to OASPL. The SCC deliberated on the offer and asked the Liquidator to invite OASPL to attend the SCC's meeting to be held on 01.10.2024.

(vi) In the SCC meeting held on 01.10.2024, OASPL was asked to give offer equal to or more than last reserve price of Rs.72.50 crores for the assets. The OASPL revised its offer to Rs.73 crores along with an offer to provide a 30% value of the consideration as EMD. The offer of OASPL was voted upon and was approved by the SCC with requisite majority. The SCC on 01.10.2024 has also decided for Swiss Challenge method for value maximization.

(vii) The Appellant was also called for a formal meeting between the Appellant and the Liquidator on 08.10.2024, which meeting took place and the Liquidator updated the Appellant about the process. The Appellant informed on 18.10.2024 that it is in process of evaluating the data provided by the Liquidator and certain clarification was asked for. The Appellant was also informed about the twenty-first round of e-auction for the sale of assets lying at Kolkata Port Trust.

(viii) The Liquidator filed an Application – IA No.5745 of 2024 before the Adjudicating Authority seeking permission to conduct sale of the assets of the CD under Swiss Challenge Mechanism with RoFR to OASPL, which Application was heard and allowed by the Adjudicating Authority vide order dated 11.12.2024.

(ix) After the order dated 11.12.2024, the Liquidator issued an advertisement on 26.12.2024 (E-Auction sale notice under Swiss Challenge Mechanism). Several Expression of Interest ("EoI") were received and on request made, a further

Notice was issued. On 21.01.2025, the e-auction scheduled for 22.01.2025 was deferred and informed to be held on 29.01.2025 from 03:00 PM to 04:00 PM.

(x) The Appellant aggrieved by the order dated 11.12.2024, granting permission to the Liquidator has filed this Appeal.

3. The Appeal was heard on 22.01.2025, on which date, the learned Counsel appearing for the Liquidator prayed for time to bring the SCC Minutes of 30.09.2024 on the record. In pursuance of the order dated 22.01.2025, an affidavit on behalf of the Liquidator has been filed dated 25.01.2025 bringing on record the Minutes of 36th and 39th meeting of the SCC. The Liquidator in the affidavit has also stated about the process adopted by the Liquidator for conducting the Swiss Challenge Mechanism.

4. We have heard Shri Abhijeet Sinha, learned Senior Counsel for the Appellant and Shri Abhishek Anand, learned Counsel for Respondents.

5. Shri Abhijeet Sinha, learned Senior Counsel appearing for the Appellant challenging the order of Adjudicating Authority submits that Adjudicating Authority without giving any reason for permitting Swiss Challenge Mechanism, granted permission to the Liquidator. It is submitted that the Swiss Challenge Mechanism is against the principles of natural justice and there was no reason for adopting Swiss Challenge Mechanism. It is further submitted that even if Swiss Challenge Mechanism can be permitted, it can be done only in pursuance to approval of the Stakeholder's Consultation Committee. The Swiss Challenge Mechanism does not satisfy the principles of fairness, equity, and transparency. It is further contended that there was no basis to grant the approval to OASPL to have Right of First Refusal. It is submitted that Appellant was in negotiation with the Liquidator from 02.08.2024 and the Appellant was not given an equal opportunity. It is submitted that there was no reason for Liquidator to file an Application seeking permission of the Adjudicating Authority.

6. Shri Abhishek Anand, learned Counsel appearing for the Respondents submits that in the present case, liquidation process commenced on 03.01.2020 and even after 21 e-auctions held, the assets of the CD could not be sold, except two residential units. In the EoI received from various Applicants, it was OASPL, which gave offer of Rs.67 crores in September 2024, which offer was placed before the Stakeholder's Consultation Committee in the Meeting held on 30.09.2024, where the SCC directed the Liquidator to negotiate with OASPL to increase its offer to Rs.72.50 crores, which was the comparable reserve price of last e-auction. The OASPL was called to attend the meeting on 01.10.2024, where the OASPL agreed to increase its offer to Rs.73 crores, subject to other terms and conditions as given in its offer, including Right to First Refusal. On the basis of voting, a Resolution was passed by the SCC in principal approving the offer dated 01.10.2024, read with original offer dated 26.09.2024 of Rs.73 crores. The Liquidator was requested to take necessary action, including issuance of letter of approval and filing of requisite application before the NCLT seeking

necessary approval for sale of CD as a going concern basis and seeking permission of the NCLT to follow a Swiss Challenge Mechanism. In pursuance of the said decision, an Application - IA No.5745 of 2024 was filed, which Application was allowed by the Adjudicating Authority. It is submitted that the Appellant has never given any commercial offer to the Liquidator, although it was corresponding with the Liquidator with effect from 02.08.2024. No other interested party having given any offer, offer given by OASPL was considered and approved by Stakeholder's Consultation Committee. The Swiss Challenge Mechanism gives opportunity to all, including the Appellant to participate and is intended to maximize the value of the assets of the CD. No exception can be taken to the Swiss Challenge Mechanism. The Liquidation has received EoIs from several intending parties and Swiss Challenge Mechanism is to be conducted on 29.01.2025. It is submitted that there is no error in the order of Adjudicating Authority, granting permission to the Liquidator.

7. We have considered the submissions of learned Counsel for the parties and have perused the record.

8. As noted above, the Liquidator has conducted at least 21 e-auctions for sale of assets of the CD. However, no assets of the CD could be sold, except two residential units. An offer was received from OASPL dated 26.09.2024 for purchase of assets of the CD as a going concern, except the assets at Kolkata Port Trust for consideration of Rs.67 crores. Section 35 of the Insolvency and Bankruptcy Code, 2016 ("hereinafter referred to as the "IBC") enumerate the 'Powers and duties of Liquidator'. The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("2016 Regulations") provides for mode and manner of sale of assets. Regulation 33 provides for 'Mode of Sale', which is as follows:

"33. Mode of sale. (1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when-

- (a) the asset is perishable;
- (b) the asset is likely to deteriorate in value significantly if not sold immediately;
- (c) the asset is sold at a price higher than the reserve price of a failed auction; or
- (d) the prior permission of the Adjudicating Authority has been obtained for such sale:

Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

- (a) a related party of the corporate debtor;
- (b) his related party; or

(c) any professional appointed by him.

(3) The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties."

9. Schedule 1 of the Regulation provides for 'Mode of Sale'. Schedule 1, Item No.2, deals with 'Private Sale', which is as follows:

"2. PRIVATE SALE - (1) Where an asset is to be sold through private sale, a liquidator shall conduct the sale in the manner specified herein.

(2) The liquidator shall prepare a strategy to approach interested buyers for assets to be sold by private sale.

(3) Private sale may be conducted through directly liaising with potential buyers or their agents, through retail shops, or through any other means that is likely to maximize the realizations from the sale of assets.

(4) The sale shall stand completed in accordance with the terms of sale.

(5) Thereafter, the assets shall be delivered to the purchaser, on receipt of full consideration for the assets, in the manner specified in the terms of sale."

10. The Liquidator after receiving the offer from OASPL, placed the said offer for consideration before the Stakeholder's Consultation Committee in its meeting held on 30.09.2024. The Minutes of the meeting has been brought on the record along with affidavit filed by the Liquidator. At Item No.14, details of offer received from OASPL has been noticed and discussed. It is useful to extract following part of the Minutes, which is as follows:

"14. To take a note of the offer received from one of the Prospective Investors and decide the way forward, in relation to the sale of assets of the Corporate Debtor: Liquidator apprised the members that, an offer has been received from one of the prospective investors, namely, Orissa Alloy Steel Private Limited (Rashmi Group) for acquiring the Corporate Debtor on a Going Concern Basis excluding the assets of the Corporate Debtor lying at KoPT. The Liquidator also stated that, the said private offer was annexed to the notice of this meeting. Accordingly, Liquidator presented following salient features of the private sale offer received from Orissa Alloy Steel Private Limited:

Particulars

Details

Date of Offer

September 26, 2024

Name
of
the
Orissa Alloy Steel Private Limited (Rashmi
Company
Group)

Target Assets

All Assets of the Corporate Debtor on a
Going Concern Basis excluding KoPT
Assets

Consideration

Rs.67 Crore

Timelines

10% as EMD – Within 7 days from SCC

Approval

90% Balance Payment – Within 10 days
from NCLT Approval.

Terms and

1. Private Sale of the Corporate Debtor on
Conditions

a Going Concern Basis for all Assets
excluding the KoPT Assets and All
Liabilities.

2. Offer is valid for 5 days from the date of
the proposal.

3. If the Liquidator chooses to conduct an
auction process or Swiss Challenge
Mechanism for value maximization, the
Right of First Refusal should be given to
Orissa Alloy Steel Private Limited.

4. Reliefs and Waivers will be indicated for approval of Hon'ble NCLT."

11. The Minutes further indicate that OASPL has submitted the offer, but other prospective bidders has not submitted any offer till date. It was further noted that negotiation can be done with OASPL to increase the amount to comparable reserve price, being Rs.72.50 crores. The Liquidator was requested to discuss and convey to the OASPL to extend the validity period of their offer and invite them to attend the tomorrow's meeting as a Special Invitee. On 01.10.2024, the Meeting again took place, where OASPL agreed to increase its offer at Rs.73 crores. It was further noted that OASPL requested to consider and approve the offer and not opt for Swiss Challenge or any other equivalent process and thereby close the process which would obviously be subject to approval of Hon'ble NCLT. However, it was noted in the Minutes that Swiss Challenge Mechanism is essential. It is useful to note following extract of the Minutes:

"They also stated that basis their offer if SCC choses to conduct an auction process or Swiss Challenge Mechanism for value maximization, the Right of First Refusal should be given to Orissa Alloy. However, they would request SCC to consider and approve their offer and not opt for Swiss challenge or any other equivalent process and thereby close the process which would obviously be subject to approval of the Hon'ble NCLT. The authorized representative of ICICI Bank Limited stated that with an intent to maximize the value of assets and to safeguard the interest of all the stakeholders of the Corporate Debtor, a Swiss Challenge Mechanism or equivalent process would be essential. On a separate note, the SCC also requested that, subject to discussion, negotiations on the commercials and other relevant terms of the offer of Orissa Alloy in the present meeting and prior to the same being put for e-voting for SCC consideration and the time involved in circulation of minutes and voting and the fact that mid-week holiday owing to Gandhi Jayanti and weekend on account of Durga Festivities week, Orissa Alloy is requested that the validity period of the original or revised offer, if any be extended by a period of ten days which is currently expiring on October 06, 2024. The authorised representative of Orissa Alloy stated that, the validity period of the original or revised offer, if any would be extended by a period of seven days excluding the date of the offer which would end on Tuesday, October 08, 2024."

12. The Agenda Item was put to vote and Resolution No.2, which is to the following effect was approved with 66.52% vote:

"Resolution 2

To consider and in-principally approve the offer received the Prospective Investor, namely, Orissa Alloy Steel Private Limited and request the Liquidator to take necessary action in relation thereto:

In reference to the discussion that took place in the Thirty-Sixth SCC Meeting,

the Liquidator hereby proposes the following agenda item in relation to the offer received from Prospective Investor namely Orissa Alloy Steel Private Limited ("Orissa Alloy") for SCC's consideration:

A. To consider and in-principally approve the revise offer dated October 01, 2024, read with original offer dated September 26, 2024 of Orissa Alloy Steel Private Limited for Private Sale of the Corporate Debtor on a Going Concern Basis (excluding assets lying at the KoPT) in terms of the relevant provisions of the Code read with Liquidation Regulations.

B. Subject to SCC approving the aforesaid offer, SCC hereby approves and request the Liquidator to take necessary action including issuance of letter of approval to Orissa Alloy and subsequently, filing requisite application before the Hon'ble National Company Law Tribunal, Principal Bench ("NCLT"), seeking necessary approval for sale of the Corporate Debtor on a Going Concern Basis (excluding assets of the Corporate Debtor lying at KoPT) and seeking necessary permission of the Hon'ble NCLT for a Private Sale in terms of Regulation 33 of the Liquidation Regulations followed by a Swiss Challenge mechanism or any other equivalent process with an option to Orissa Alloy a right to match the highest bid.

Details of Votes Cast

Result

Declared for

Particulars

Voting Share

Voting Share

the above

(Rs. in Crore)

in Percentage

resolution

(In %)

(Resolution

No.2)

Votes Cast

in

3,416.05

66.52

Favour

Approved by

Votes

Cast

-

-

Requisite

Against

Majority

Votes Abstained

1,719,20

33.48

Total

5,135.25

100.00

13. It was after approval of Stakeholder's Consultation Committee that an Application was filed by the Liquidator seeking permission of the Adjudicating Authority. The Adjudicating Authority in its impugned order has noted the prayers made in the Application, which are as follows:

"a) That this Hon'ble Tribunal be pleased to allow the present Application;

b) That this Hon'ble Tribunal be pleased to pass an order granting permission to sell the Corporate Debtor on a Going Concern Basis excluding the assets of the Corporate Debtor lying at KoPT;

c) That this Hon'ble Tribunal be pleased to pass an order granting permission to the Liquidator to sell the Corporate Debtor on a Going Concern Basis excluding the assets of the Corporate Debtor lying at KoPT through private sale method by carrying out Swiss Challenge Mechanism or any other equivalent process wherein the Right of First Refusal would be given to OASPL to match the highest bid; and

d) For such other reliefs as this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case."

14. The Adjudicating Authority after noticing the prayers had made following observations while allowing the Application:

"Mr. Abhishek Anand, Ld. Counsel for the Liquidator present in Court and states that the proposal is filed after approval of the SCC which is recorded at page 170

& 173 of the application in the meeting held on 30.09.2024 (voting concluded on October 07, 2024). He further states that they have already received several offers and the SCC intend to reach out to a wide network of intending bidders and to undertake the Swiss challenge so as to maximize the same proceeds by sale of a CD as a going concern minus the assets lying in KoPT. In view of the submissions made, we deem it appropriate to allow the application. Ld. Counsel for the Liquidator undertakes to come back to us for final approval after the auction is completed. For wide publicity, Mr. Abhishek Anand, Ld. Counsel for the Liquidator undertakes to make use of the new portal which has been created by IBBI and other platforms in case not available. All other similarly power sectors of the same category will also be notified by the Liquidator. In view of above, application is allowed.”

15. Two main submissions, which have been made by learned Counsel for the Appellant are – (i) Swiss Challenge Mechanism was not required to be held, which mechanism is against the principles of natural justice and transparency; (ii) OASPL, ought not to have been given Right of First Refusal; (iii) Learned Counsel for the Appellant has further submitted that Liquidator cannot be clothed with unlimited jurisdiction and power to decide the mode and manner of liquidation process. The Liquidator is clearly bound by provisions of the IBC and 2016 Regulations.

16. We have already noticed Regulation 33 of the 2016 Regulations, which provides for Mode of Sale. Regulation 33, sub-regulation (1) refers to Schedule I and in Schedule-I, private sale as mentioned at Sl. No.2 has been extracted above. Item No.2, sub-clause (3) provides for private mode and manner of conducting the private sale. One of the Clauses in Schedule 2, sub-clause (3) is “or through any other means that is likely to maximize the realizations from the sale of assets”. The statute, thus, empowers the Liquidator to adopt any other means, that is likely to maximize the realizations from the sale of assets.

17. Now coming to the first submission of learned Counsel for the Appellant that Swiss Challenge Mechanism is against the principles of natural justice and does not provide transparency, we have noticed above that Swiss Challenge Mechanism, for maximizing the realizations from the sale of the assets of the CD, was approved by the Stakeholder’s Consultation Committee in its 36th Meeting held on 30.09.2024. In the Meeting held on 01.10.2024, OASPL has requested the SCC to consider and approve their offer and not opt for Swiss Challenge. The request made by the OASPL was considered and declined. The Authorised Representative of the ICICI Bank stated that with an intent to maximize the value of assets and to safeguard the interest of all the stakeholders of the CD, a Swiss Challenge Mechanism or equivalent process would be essential. Thus, the SCC deliberated on Swiss Challenge Mechanism and decided to adopt Swiss Challenge Mechanism with Right to First Refusal to OASPL, which is clear from the Minutes of the Meeting dated 01.10.2024 as extracted above. Swiss Challenge Mechanism is a method for discovering the maximum price,

which can be offered by the Applicants. The submission of the Appellant that Swiss Challenge Mechanism is against the principles of natural justice and does not provide for transparency has no substance. In Swiss Challenge Mechanism all Applicants, who comply with the terms and conditions of process documents, are entitled to participate and Swiss Challenge Mechanism gives opportunity to all competitors and thus provides transparent process. We do not find any substance in submission of the Appellant that Swiss Challenge Mechanism ought not to have been adopted.

18. It is further submitted by learned Counsel for the Appellant that Adjudicating Authority has not given any reason for approving the Swiss Challenge Mechanism. When the Application was filed by the Liquidator being IA No.5745 of 2024, it was in pursuance of the Resolution taken by the SCC on 30.09.2024 and 01.10.2024. The reasons for adopting Swiss Challenge Mechanism are clearly reflected in the Minutes of the SCC. It is relevant to notice that Hon'ble Supreme Court had occasion to consider Swiss Challenge Mechanism in a case of liquidation under the 2016 Regulations in R.K. Industries (Unit-II) LLP vs. H.R. Commercials Pvt. Ltd. & Ors. – (2024) 4 SCC 166. In the above case also in the liquidation proceedings, Liquidator initiated the process of Swiss Challenge Mechanism for sale of the assets. The Hon'ble Supreme Court held in the said case that Swiss Challenge Mechanism is just another method of private participation, which has been recognized by this Court for its transparency. In paragraph 66 of the judgment, following has been held:

“66. To put it otherwise, an anchor bidder has no vested right beyond the RoFR, being the origination of the proposal. It must be borne in mind that the Swiss Challenge Process is just another method of private participation that has been recognised by this Court for its transparency. [Refer : Ravi Development [Ravi Development v. Shree Krishna Prathisthan, (2009) 7 SCC 462 : (2009) 3 SCC (Civ) 172] .] Ultimately, IBC has left it to the discretion of the liquidator to explore the best possible method for selling the assets of the corporate debtor in liquidation, which includes private sale through direct negotiations with the object of maximising the value of the assets offered for sale.”

19. Thus, the conduct by Swiss Challenge Mechanism of sale of assets by Liquidator is a well-recognized mode and has approval of the Hon'ble Supreme Court as noticed in the above case. We, thus, do not find any substance in the submission of the Appellant that order of the Adjudicating Authority approving the Swiss Challenge Mechanism was based on no reason.

20. The second submission of the Appellant is that OASPL ought not to have been given the Right of First Refusal. It is submitted that the Appellant has also vide its letter dated 02.08.2024 has expressed its interest in the assets of the CD and has written to the Liquidator asking various details. The Liquidator had no jurisdiction to place the offer of OASPL before the SCC in the Meeting dated 30.09.2024, nor the offer to OASPL giving Right to First Refusal, required approval, which is against the equal participation.

21. In the Minutes of the Meeting dated 30.09.2024 of the SCC brought on the record, it is clear that in the Minutes it was recorded that there was only Orissa Alloy, who has submitted offer for private sale, whereas the other prospective investors seem to have not submitted any offer till date. Only offer which was received was by the Orissa Alloy. As noted above, there have been 21 e-auctions, but the assets could not be sold inspite of 21 e-auctions held. The liquidation order was passed in 2020 and more than four years have elapsed without any successful e-auction. The Liquidator received offer from OASPL of Rs.67 crores, which was promptly placed before the SCC. The SCC in the Minutes have noticed that no other prospective investor has given any offer. In the affidavit filed by the Liquidator, it has been mentioned that the Appellant has not given any formal commercial offer.

22. In the Minutes of 30.09.2024 of the SCC, offer which was submitted by OASPL has been quoted at Item No.14, which we have noticed above. In one of the conditions of the offer under the terms and conditions of the offer, following was stated at Item No.3 by OASPL:

"14. ...3. If the Liquidator chooses to conduct an auction process or Swiss Challenge Mechanism for value maximization, the Right of First Refusal should be given to Orissa Alloy Steel Private Limited."

23. Thus, the offer given by OASPL was hedged with above condition and when SCC decided to negotiate with OASPL and the OASPL revised its offer to Rs.73 crores, the revised offer was as per the terms and conditions given in earlier offer dated 26.09.2024. The revised offer dated 01.10.2024 has also been noticed in the Minutes of the SCC Meeting held on 01.10.2024. In the Minutes of 01.10.2024, with regard to revised offer, following has been noticed:

"Subsequent to the meeting, Orissa Alloy shared a revised offer dated October 01, 2024, and for reference of the SCC members, the relevant term of the said offer is presented as follows:

Particulars

Details

Date of Offer

October 01, 2024

Name

of

the

Orissa Alloy Steel Private Limited (Rashmi

Company

Group)

Value of Offer

Rs.73 Crore (Corporate Debtor as a going concern excluding KoPT Assets)

Timelines

30% as EMD – Within 7 days from SCC

Approval

Balance within 10 days of completion of Swiss Challenge and Final Offer Letter.

Terms

The revised proposal shared with SCC along with the minutes of this present meeting

Terms and

1. Private Sale of the Corporate Debtor on Conditions

a Going Concern Basis for all Assets excluding the KoPT Assets and all Liabilities.

2.Offer is valid for 7 days for SCC consideration from the date of the offer or any other date explicitly communicated between the Orissa Alloy and the Liquidator.

3.The other terms and conditions remain same and unchanged as mentioned in the original offer dated September 26, 2024.”

24. Thus, the revised offer also was as per the terms and conditions given in offer dated September 26, 2024, which was hedged with the condition that in event Swiss Challenge Mechanism is adopted OASPL should be given Right of First Refusal. The SCC agreed in principle and the said proposal was put to vote

and approved with 66.52% vote share. Hence, the offer of OASPL was approved by SCC. We do not find any error in giving Right of First Refusal to OASPL, who was the only entity, who has given offer and the offer was with the above condition. We, thus, do not find any substance in the submission of the Appellant that OASPL ought not to have been given Right of First Refusal. Hon'ble Supreme Court in R.K. Industries (supra) in paragraph 66 as extracted above has also recognized the Right of First Refusal to an anchor bidder, who is originator of proposal.

25. Learned Counsel for the Appellant has also submitted that Liquidator cannot exercise wide and unlimited powers in conducting the sale of assets of the CD. The power and jurisdiction of the Liquidator are regulated by IBC and 2016 Regulations. The powers vested and the duties cast upon the Liquidator have been subjected to directions of the Adjudicating Authority under Section 35. The present is a case where Liquidator filed an Application seeking direction under Regulation 35(h) of the Regulations and the Adjudicating Authority has approved such prayer. When Adjudicating Authority has granted the approval, it cannot be said that the Liquidator exercised any unguided or arbitrary powers. The Hon'ble Supreme Court in R.K. Industries has held that when stakeholders have endorsed the view taken by the Liquidator, it is not for the Court to undertake further scrutiny of the desirability or reasonableness of the said decision or substitute the same with its own views. The observation made by the Hon'ble Supreme Court in the above case is as follows:

"76.Thereafter, the matter was taken to the adjudicating authority (NCLT) for necessary permissions under Section 35(1) IBC that was duly granted. The decision taken by Respondent 2 liquidator cannot be treated as arbitrary, capricious or unreasonable for interference by this Court. The said decision is tempered with sound reason and logic. It is a purely commercial decision centred on the best interest of the stakeholders. The stakeholders having unanimously endorsed the view of Respondent 2 liquidator, it is not for this Court to undertake a further scrutiny of the desirability or the reasonableness of the said decision or substitute the same with its own views."

26. Shri Abhijeet Sinha, learned Senior Counsel for the Appellant has placed reliance on the judgment of the Hon'ble Supreme Court in R.K. Industries to support his submission that anchor bidder in the Swiss Challenge Mechanism could not have any vested right, nor it can insist that process be taken to its logical conclusion. R.K. Industries was a case in which Liquidator after failed auction has made an application to the NCLT for permission to sell the assets of the CD through private sale, which was allowed by the NCLT. On receiving offers from potential buyers, the Liquidator approached the stakeholders, who took a decision to go in for the sale of the Dahej material and scrap at amounts higher than the reserve price. The Stakeholders' Consultative Committee approved Swiss Challenge Process, which Swiss Challenge Process was adopted for sale of the assets of the CD through private sale. The Liquidator published an

advertisement inviting bidders to participate in Swiss Challenge Process and submit their bids against the anchor bid. In response to which R.K. Industries submitted its bid. H.R. Commercials filed an IA before the NCLT challenging the bid process in the Second Swiss Challenge Process. The Adjudicating Authority passed an interim order on 08.04.2021 directing the Liquidator to complete the Second Swiss Challenge Process only up to the stage of announcement of the highest bidder. R.K. Industries filed an Appeal, which was disposed of with direction issued to NCLT to expeditiously decide IA No.273 of 2021 moved by H.R. Commercials Pvt. Ltd. In the meantime, one Welspun sent an email to the Liquidator, expressing its interest in the Dahej materials as well as land. The request of the Welspun was turned down by the Liquidator, who filed an Application before the Adjudicating Authority praying for direction to consider its offer. The NCLT on 05.07.2021 directed the Liquidator to permit Welspun to inspect the assets of the CD. After the inspection, Welspun hiked its offer for the consolidated assets from Rs.627.50 crores to Rs.650 crores. The SCC in its meeting conducted on 13.08.2021 decided that it would be beneficial if the Dahej material and the shipyard are sold as composite assets to maximise realization to the stakeholders. Welspun sent an email to the Liquidator increasing its offer to Rs.675 crores. The Liquidator apprised the NCLT about the recommendation made by SCC for entertaining the consolidated offer received from Welspun. The NCLT passed an order on 16.08.2021 permitting the Liquidator to go in for private sale of all the assets of the CD and complete the entire sale process. The aforesaid order was challenged by R.K. Industries before the Appellate Tribunal, which dismissed the Appeal and the matter was thereof taken to the Hon'ble Supreme Court. The learned Counsel for the Appellant has relied on paragraphs 66 to 75 of the judgment of the Hon'ble Supreme Court in R.K. Industries. The Hon'ble Supreme Court in paragraph 64 to

69 has made following observations:

"64. Merely because the appellant herein had submitted a bid under the anchor bid document and was declared as the anchor bidder in the Second Swiss Challenge Process, could not vest a right on it for it to insist that the said process must be taken to its logical conclusion. The appellant has been harping about the vested right that had allegedly accrued in its favour on being declared as the anchor bidder. But it has conveniently glossed over an affidavit dated 23-3-2021 filed by it, undertaking inter alia that it would remain unconditionally and irrevocably bound by the Swiss Challenge Process document and the decision of Respondent 2 liquidator.

65. Given the aforesaid terms and condition of the anchor bid document and the Second Swiss Challenge Process document, read collectively with the unqualified undertaking given by the appellant acknowledging that Respondent 2 liquidator was well empowered to cancel/modify or even abandon the said process, it does not lie in the mouth of the appellant to urge that once it was set into motion, there was no justification to discontinue the Second Swiss Challenge Process. No

special rights came to be bestowed on the appellant as the anchor bidder for it to insist that the said process ought to be taken forward and concluded, irrespective of the subsequent decision taken by Respondent 2 liquidator, backed to the hilt by the stakeholders of discontinuing the Swiss Challenge Process and opting for private sale of the consolidated assets of the corporate debtor to be conducted through direct negotiations.

66. To put it otherwise, an anchor bidder has no vested right beyond the RoFR, being the origination of the proposal. It must be borne in mind that the Swiss Challenge Process is just another method of private participation that has been recognised by this Court for its transparency. [Refer : Ravi Development [Ravi Development v. Shree Krishna Prathisthan, (2009) 7 SCC 462 : (2009) 3 SCC (Civ) 172] .] Ultimately, IBC has left it to the discretion of the liquidator to explore the best possible method for selling the assets of the corporate debtor in liquidation, which includes private sale through direct negotiations with the object of maximising the value of the assets offered for sale.

67. In the instant case, there was good reason for Respondent 2 liquidator to have halted the Second Swiss Challenge Process midstream and approached the adjudicating authority (NCLT) armed with an offer of Rs 675 crores received from Respondent 7 Welspun who had shown interest in the composite sale of the Dahej assets. In fact, this was all along the preferred choice of Respondent 2 liquidator as can be seen from the fact that when public auctions were conducted by him on five earlier occasions, bids were invited for the composite assets of the corporate debtor. It is a different matter that the earlier e-auctions turned out to be unsuccessful, thus compelling Respondent 2 liquidator to explore other options, including the option to sell the assets in smaller lots.

68. In his wisdom, Respondent 2 liquidator found the offer made by Respondent 7 Welspun to be of better value for more than one reason. Firstly, unlike the sale proposed under the Second Swiss Challenge Process that was confined to the Dahej material, Respondent 7 Welspun expressed its willingness to purchase the Dahej land and the scrap as a composite asset thereby curtailing two rounds of sales, first for the Dahej material followed by the Shipyard and the other assets. Secondly, Respondent 2 liquidator had valid reasons to believe that a consolidated sale of the assets of the corporate debtor will lead to a higher return and a quicker recovery for the stakeholders. Thirdly, composite sale of the assets would lead to maximisation of recovery within a guaranteed timeline. In the assessment of Respondent 2 liquidator, a two-tier process of selling the Dahej material in the first round through the Swiss Challenge method, followed by the sale of the Dahej land in the second round, would have caused prejudice to the stakeholders for the reason that continuing the Second Swiss Challenge Process would have meant that the appellant or the H1 bidder, as the case may be, would have to be granted at least 15 to 18 months to lift the material from the Dahej Shipyard, thus stalling the entire process of the sale of the Dahej land to a period well beyond 18 months. This delay in concluding the process could directly

impact the value of the assets of the corporate debtor and hurt the interest of the stakeholders.

69. We are of the firm view that it is not for the Court to question the judiciousness of the decision taken by Respondent 2 liquidator with the idea of enhancing the value of the assets of the corporate debtor being put up for sale. The right to refuse the highest bid or completely abandon or cancel the bidding process was available to Respondent 2 liquidator. The appellant has not been able to demonstrate that the decision of Respondent 2 liquidator to discontinue the Second Swiss Challenge Process and go in for a private sale through direct negotiations with prospective bidders was a mala fide exercise.

27. The Hon'ble Supreme Court in the above case held that anchor bidder had no vested right to insist that the process must be taken to its logical conclusion. R.K. Industries was treated to be anchor bidder, but due to intervening facts, including the offer received from Welspun for purchase of materials as well as the land, SCC had decided to go for private sale of consolidated assets. Due to the above reasons, the Liquidator left the process of Swiss Challenge and discontinued the Swiss Challenge Process opting for private sale. The above observation of the Hon'ble Supreme Court was in reference to the facts of that case. There can be no dispute to the proposition that an anchor bidder has no indefeasible right. Anchor bidder has to place first bid, after which other bidders are required to participate and give a higher bid. The present is a case where the OASPL, offer was treated to be a base bid giving right of RoFR and the Swiss Challenge Process was to proceed thereafter, which was fixed for 29.01.2025. The judgment of the Hon'ble Supreme Court in R.K. Industries' case as noted above, in no manner support the submission of the Appellant in the present case that the OASPL could not have been given Right of First Refusal.

28. Shri Abhijeet Sinha, learned Senior Counsel for the Appellant has relied on Discussion Paper issued by IBBI dated 27.08.2021 in its written submission. The Appellant has referred to Discussion Paper dated 27.08.2021 with respect to Swiss Challenge Method. It is useful to quote paragraph 10 of the Written Submission, where Discussion Paper deals with Swiss Challenge Method, which is as follows:

"10. That in addition to the aforesaid, reference is drawn to the Discussion Paper with regards to the issues related to a corporate insolvency resolution process (CIRP) dated 27th August, 2021 by the Insolvency and Bankruptcy Board of India with respect to report pertaining to Swiss Challenge Method and is being extracted herein for ready reference and convenience

Swiss Challenge Method

... 24. In the Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process', the sub-committee noted that swiss challenge is a time-tested mechanism and has proven to be highly effective in value maximisation and ensuring transparency of the process. The provisions

of the Code and Rules and Regulations thereunder with respect to the Pre-packaged Insolvency Resolution Process (PPIRP) provides for a hybrid method for value maximisation during the resolution process. The hybrid method is inspired from the Swiss challenge with certain modification(s)/improvement(s) necessary for successful implementation under the PPIRP. The hybrid method provides for a resolution plan from CD as base resolution plan and challenging plans are sought from the third-party resolution applicants disclosing the score of the base plan and basis for evaluation. Post receipt of plans, if the best plan is significantly better than the base resolution plan, the submitter of the base resolution plan loses the right for first refusal. Whereas, if the best alternate plan is not significantly better, the submitters of the best alternate plan and base plan are given multiple chances to outbid each other on an electronic platform. They get multiple chances for improvement until one of the submitters opts out. The said process of improvement is to be closed within a definite time period not exceeding the window provided under law.”

29. Before we enter into Discussion Paper, it is to be noticed that IBBI is a regulator, who plays a critical role in promoting a dynamic and responsive regulatory regime for the IBC ecosystem. It is useful to extract the statement made by IBBI with regard to its role in following words:

“As a regulator of insolvency and bankruptcy processes and associated professionals, the Insolvency and Bankruptcy Board of India (IBBI/Board) plays a critical role in promoting a dynamic and responsive regulatory regime for the IBC ecosystem. IBBI as a regulator performs its role under a unique provision that mandates public discussion and economic analysis as precursors before issuance of a regulation. IBBI has been in the forefront of developing research to get detailed analytical and critical exploration of various facets of insolvency ecosystem.”

30. When we look into the paragraph 24, as quoted above of the Discussion paper, the said paragraph clearly mentions that Swiss Challenge is a time-tested mechanism and has proven to be highly effective. The Swiss Challenge Mechanism has also been incorporated in hybrid method pertaining to pre-packaged insolvency resolution process. Section 54K of the IBC contemplates the base resolution plan by the Applicant and thereafter other competitive resolution plans are invited in event the base resolution plan is not approved.

31. Another part of Discussion Paper dated 27.08.2021, which is on the subject “Strengthening Regulatory Framework of Liquidation Process”. In paragraph 11 of the written submission, the Appellant extracted following part of Discussion Paper:

“11. That further reliance is placed on the Discussion Paper on Strengthening Regulatory Framework of Liquidation Process dated 27th August, 2021 by the Insolvency & Bankruptcy Board of India wherein the Swiss Challenge Mechanism and its related issues have been discussed in detail. The relevant extracts of the

said discussion paper is being extracted herein for ready reference and convenience

....Issue – 6: Swiss Challenge as a Mode of Auction under

Liquidation Process

47. A Swiss Challenge Method (SCM) is a bidding process wherein a bidder ('original bidder') makes an unsolicited bid to the auctioneer. Once approved, the auctioneer then seeks counter proposals against the original proposal and chooses the best amongst all options (including the original bid). The original bidder in most cases is granted the 'right to first refusal'. If the original bidder agrees to match its offer to the challenging proposal, the project is awarded to him, else it is awarded to the challenging bidder.

48. In the absence of express provision for adoption of SCM for sale of assets during liquidation process, the Hon'ble High Court of Delhi, while disposing off a writ petition in the matter of M/s Amira Pure Foods Private Limited, vide order dated 15. 12.2020, has directed the Board to consider the petition as a representation on the issue of adoption of SCM as a form of auction under its Regulations. ...

Issues under SCM

54. The SCM begins with a base bid. A liquidator may not have any preferred party or bid at its first place. It may be noted that recently under the Pre-packaged Insolvency Resolution Process (PPIRP) framework, a process like swiss challenge has been adopted, but the base resolution plan submitted by promoters there forms the base bid for swiss challenge. There may be concerns regarding transparency in choosing the preferred bidder, or it has to be a two-stage bidding, first stage to become preferred bidder and second stage for the swiss challenge, which has cost and time implications.

55. Considering the afore-mentioned position, there is a need to deliberate whether a guided path is to be explicitly stipulated for the adoption of SCM for the auction under liquidation, especially in the context of absence of prohibition on adoption of any method of auction in the Liquidation Regulations currently. ..."

32. When we look into paragraph 47 as quoted above, the said paragraph itself mentions that original bidder in most cases is granted the 'right to first refusal'. In paragraph 54 of the Discussion Paper as quoted above, the provision of Pre-packaged Insolvency Resolution Process has been noticed, where Swiss Challenge has been adopted.

33. The Discussion Papers issued by IBBI are Discussion Papers to elicit response from stakeholders and to inform the stakeholders about the issues, which arose regarding working of IBC and Regulations. Discussion Papers are only to inform the issues and elicit response to strengthen the regulatory framework. The Discussion Paper in no manner can affect the statutory and regulatory scheme

governing the liquidation process as noticed in foregoing paragraph of this judgment. We, thus, are of the view that Discussion Paper dated 27.08.2021 relied and as extracted by the Appellant, in no manner help the Appellant to support his submission in the present case.

34. The power and duties given to the Liquidator under the IBC and the 2016 Regulations, has to be exercised within the four corners of the statutory provisions. The decision taken by the Liquidator to proceed with private sale by adopting Swiss Challenge Mechanism, cannot be said to be a decision beyond the jurisdiction or authority of the Liquidator. Furthermore, SCC has already endorsed the said decision after detailed discussion as noted above. The Adjudicating Authority did not commit any error in allowing prayers made in IA No.5745 of 2024 filed by the Liquidator.

35. In view of the foregoing discussions, we do not find any error in the order dated 11.12.2024 passed by Adjudicating Authority, which warrant any interference by this Tribunal in exercise of its appellate jurisdiction. There is no merit in the Appeal. The Appeal is dismissed. Pending IAs, if any, are also disposed of. Parties shall bear their own costs.