(2025) 03 NCLAT CK 0688

In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi

Case No : Company Appeal (AT) (Insolvency) No. 826,1655 of 2024 & I.A. No. 2989 of 2024?I.A. No. 1093 of 2025?Company Appeal (AT) (Insolvency) No. 1203 of 2024

Rajabhau Shinde APPELLANT

Vs

S.M. Electric Works Through Shri. Sunil Madhukar Saraf & Ors. RESPONDENT

Date of Decision : 18-03-2025

Acts Referred:
Insolvency and Bankruptcy Code 2016 — Section 35, 53

Citation : (2025) 03 NCLAT CK 0688

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

Bench : Full Bench

Advocate : Abhijeet Sinha, Prakhar Tandon ,Neha Agarwal, Vadlamani Seshagiri, Poorvi Avtar, Ananya Kukreti, Ankit Bhushan , P. Khayti, PS Thakre , Kanishk Garg, Manoj Mishra

Final Decision : Dismissed

Judgement

Ashok Bhushan, J.

These two appeals have been filed by the same Appellants, a Suspended Director of the Corporate Debtor challenging the order dated 27.02.2024 and order dated 15.07.2024 passed by the Adjudicating Authority (National Company Law Tribunal) Court Room No.1, Mumbai Bench in IA No.722 of 2024 and IA No.1693 of 2024 respectively.

2. Brief facts of the case giving rise to these two appeals are as follows:-

2.1. The CIRP against the Corporate Debtor- Trans Fab Power India Pvt. Ltd. commenced vide order dated 30.08.2019. Appellant, Suspended Director of the Corporate Debtor submitted a Resolution Plan in the CIRP of the Corporate Debtor which came to be approved by the Adjudicating Authority vide order dated 25.03.2021. Appellant (Resolution Applicant) failed to execute the plan. CoC decided to liquidate the Corporate Debtor. On an application filed by the Resolution Professional, an order dated 28.06.2023 was passed by the Adjudicating Authority directing for liquidation of the corporate debtor. Liquidator issued an e-auction notice dated 01.09.2023 for sale of corporate debtor as a going concern. The Respondent No.1- 'S.M. Electric Works' participated in auction held on 27.10.2023 and was declared as a successful bidder for the bid value of Rs.6,05,91,998/-. On 30.10.2023, a letter of intent was issued by the liquidator in favour of successful bidder. The successful bidder had paid an amount of 25% of the total bid amount on 25.01.2024. 28.01.2024 was the last date for making the remaining payment of 75%. Successful bidder having not paid the balance amount, the request made by the successful bidder to extend the time came for consideration before the 6th CoC meeting held on 29.01.2024. Stakeholders' Consultation Committee (SCC) observed that the request for extension of timeline for the payment cannot be considered since there is no provision in the Liquidation Process Regulations authorising the liquidator or the SCC to extend the timeline. The liquidator after expiry of 90 days' period returned the sale consideration already paid to the successful bidder and issued a sale notice for re-auction on 05.02.2024. Successful bidder filed an application IA No.722 of 2024 praying for extension of time in making payment of balance sale consideration. The Adjudicating Authority vide impugned order dated 27.02.2024 directed the liquidator to accept post dated cheques payable on or before expiry of 60 days from the last date along with the interest. Aggrieved by the order dated 27.02.2024, this appeal has been filed by Rajabhau Shinde.

2.2. After the order dated 27.02.2024, total consideration along with interest was paid by the successful bidder. The liquidator has filed an IA No.1693 of 2024 praying for approval of the sale of the corporate debtor in favour of S.M Electric Works. Liquidator also prayed for certain reliefs and concessions in favour of successful bidder. The application filed by the liquidator being IA No.1693 of 2024 came to be heard and disposed of by order dated 15.07.2024. Adjudicating Authority approved the sale in favour of S.M Electric Works and has also granted certain reliefs and concessions as noticed in paragraph 5. Aggrieved by the order dated 15.07.2024, Company Appeal (AT) (Insolvency) No.1655 of 2024 was filed by the suspended director.

3. We have heard Shri Abhijeet Sinha, Learned Senior Counsel along with Shri Prakhar Tandon, Learned Counsel for the Appellant. We have also heard Counsel appearing for the liquidator as well as successful bidder.

4. Shri Abhijeet Sinha, Learned Senior Counsel for the Appellant submits that the successful bidder has not been able to make the payment of the entire sale consideration within 90 days' time which was allowed by Liquidation Regulations 2016 Schedule 1 Clause 1(12). The sale was rightly cancelled by the liquidator. The provision of Clause 1(12) of Schedule 1 is a mandatory provision and there was no jurisdiction of the liquidator or SCC to extend the time.

Adjudicating Authority committed error in passing the order dated 27.02.2024 granting 60 days' further time to the successful bidder to make the balance payment which order is not in accordance with the Liquidation Regulations 2016 and deserves to be set aside. Counsel for the Appellant has relied on the judgment of this Tribunal in "Potens Transmissions & Power Pvt. Ltd. vs. Gian Chand Narang- Company Appeal (AT) (Ins.) No.532 of 2022" decided on 12.05.2022 as well as the judgment of the Hon'ble Supreme Court in "Civil Appeal Nos.9059-9061 of 2022- "V.S. Palanivel vs. P. Sriram, CS, Liquidator, Etc.". Counsel for the Appellant submits that when the sale itself was liable to be cancelled and has rightly been cancelled by the liquidator, there is no question of approval of sale by the Adjudicating Authority by subsequent order dated 15.07.2024, hence, the said order also deserves to be set aside.

5. Counsel for the successful bidder opposing the submissions of the Appellant submits that the Appellant who is Suspended Director of the Corporate Debtor have no right to challenge the orders passed by the Adjudicating Authority dated 27.02.2024 and 15.07.2024. Appellant has not even participated in the e-auction nor has submitted any bid, hence, they have no locus to challenge the orders. It is further submitted that the Appellant has submitted a Resolution Plan in the CIRP of the Corporate Debtor which Resolution Plan could not be implemented, hence, the liquidation order was passed. Appellant's only interest is to create hurdle in the resolution of the Corporate Debtor. The successful bidder has paid the entire amount. Adjudicating Authority vide order dated 27.02.2024 has directed for balance payment with interest of 10% on the delayed period to compensate the SCC. No prejudice has been caused to the SCC. SCC has accepted the amount paid within definite period and distribution to the stakeholders and thereafter the application was filed for approval of the sale which has also been allowed. Appellant has filed Appeal challenging the liquidation order which appeal also came to be dismissed by this Tribunal.

6. Counsel for the liquidator submits that the liquidator has conducted the proceeding in accordance with the Liquidation Regulations 2016 and when successful bidder could not make the balance payment within 90 days, liquidator has intimated cancelling the sale and has issued notice for re-auction. In view of the order passed by the Adjudicating Authority dated 27.02.2024, liquidator accepted the balance payment consideration which was paid along with interest and thereafter application was filed for approval of the sale which has also been allowed on 15.07.2024.

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

8. E-auction was held in accordance with Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations 2016. Schedule 1 of the Liquidation Regulations 2016 provides for 'Mode of Sale'. Regulation 12 provides for time during which balance sale consideration has to be paid. Clause 12 of Appendix 1 is as follows:-

“(12) [On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days or such period as mentioned in the auction notice under clause 3, of the date of such demand:

Provided that payments made after thirty days shall attract interest at the rate of twelve per cent.: Provided further that the sale shall be cancelled if the payment is not received within the period provided under this clause.]”

9. Counsel for the Appellant submitted that it is no more res integra that the provisions of clause 12 are mandatory and there is no jurisdiction in the liquidator or SCC to extend the period and in the present case, liquidator has rightly cancelled the sale after successful bidder failed to make the payment. Reliance has been placed on judgment of this Tribunal in “Potens Transmissions & Power Pvt. Ltd. vs. Gian Chand Narang” (supra) where it was held that the provisions of clause 12 are mandatory. In the above case, an application was filed by auction purchaser where appellant had made various prayers. Liquidator also filed an application seeking permission to cancel the sale. Facts have been noticed in paragraphs 2 and 3 of the judgment which are as follows:-

“2. This Appeal has been filed against the Order dated 25th April, 2022 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Principal Bench) in I.A. No. 3153 of 2021, I.A. No. 5255 of 2021 and I.A. No. 4317 of 2021. The Appellant is the Auction Purchaser whose bid was accepted on 03rd June, 2021 in E-Auction. The earnest money of 7.3 crores was deposited on 31st May, 2021 and Bid of 73.01 Crores was submitted and he was declared to be Successful Bidder. Liquidator asked the Appellant to deposit the sale consideration by 10th June, 2021 and further balance by 3rd July, 2021. Appellant deposited Rs. 10,95,25,000/- on 10th and 11th June, 2021. The term sheet was executed between the parties for sale of Corporate Debtor as a going concern on 15th June, 2021 in which 3rd July, 2021 date was fixed as timeline for payment of balance amount of Rs. 54,75,75,000/- whereas after 3rd July, 2021 payment of the balance amount of Rs. 54,75,75,000/- with interest at the rate of 12% on or before 1st September, 2021. Appellant did not deposit the balance amount and I.A. No. 3153 of 2021 was filed by the Appellant wherein prayers contained 'a' to 'z'. It shall be sufficient to notice only prayer 'a' out of 'a' to 'z' which is as follows:

“(a) allow the Applicant to pay/adjust the Sale consideration in the following matter (i) INR 50 Crore/- by way of investment into the equity shares of the Corporate Debtor; and (ii) the balance amount of INR 23 Crore/- in the form of Optionally Convertible Debentures;”

3. The Appellant having not made the payment by 1st September, 2021, which was the timeline when 90 days was expiring, the Liquidator filed an Application I.A. No. 5255 of 2021 wherein making following prayers:

“a). Allow the present application and permit the Liquidator i.e. the Applicant to cancel the sale of Corporate Debtor as a going concern in view of the failure of

Respondent to make payment in terms of 2nd proviso to Clause 1(12) under Schedule I of the Liquidation Process Regulations, 2016; and

b). Consequentially, grant further time to the Applicant to conduct a fresh E-Auction in the matter of the Corporate Debtor as a going concern, which is in the interest of the Stakeholders and for maximization of value of assets of the Corporate Debtor under Regulation 32A of the Liquidation Process Regulations, 2016;

c). Pass any other or such further order(s) as may be deem fit and necessary in the facts and circumstances of the case;"

10. Adjudicating Authority in the above case has allowed the application filed by the liquidator and cancelled the sale on account of failure by the auction purchaser to deposit the amount.

11. The above case is a case where Adjudicating Authority has rejected the application of successful bidder and allowed the application of liquidator permitting him to cancel the sale. This Tribunal in the above case has held that the provision of Clause 12 Schedule 1 is mandatory. No exception can be taken to the law as declared by this Tribunal in the above case.

12. Counsel for the Appellant has also relied on the judgment of the Hon'ble Supreme Court in "V.S. Palanivel vs. P. Sriram, CS, Liquidator, Etc.". The above was a case which was filed by shareholder/ managing director of the corporate debtor challenging the order of the NCLT against which three appeals filed by the appellant were dismissed. In the above case also, successful bidder could not pay the amount within 90 days and an application was filed by the successful bidder for extension of time which application was allowed by order dated 05.05.2020 against which Company Appeal (AT) (CH) (Ins.) No.343 of 2021 was filed which was dismissed. In the facts of the above case, the Hon'ble Supreme Court had occasion to consider the Schedule 1 of the Liquidation Regulations 2016 and has held that the provision of Rule 12 of Appendix 1 has to be treated as mandatory. Counsel for the Appellant has relied on paragraph 35.11 of the judgment of the Hon'ble Supreme Court which is as follows:-

"35.11 In view of the analysis undertaken above, Rule 12 would have to be treated as mandatory in character for the reason that it contemplates a consequence in the event of non-payment of the balance sale consideration by the highest bidder within the stipulated timeline of 90 days, which is cancellation of the sale by the Liquidator. To that extent, there is substance in the submission made on behalf of the appellant that since the second proviso under Rule 12 contemplates a consequence of cancellation of the auction on nonpayment of the balance sale consideration within 90 days, the Liquidator was not empowered to extend the timeline."

13. There can be no dispute to the proposition laid down by the Hon'ble Supreme Court in the above case. Clause 12 of Schedule 1 is mandatory and non-

compliance leads to cancellation of the sale. It was also held by the Hon'ble Supreme Court that the liquidator was not empowered to extend the timeline.

14. The present is a case where it is not the liquidator who has extended the time to deposit the balance consideration rather in the present case, it was the Adjudicating Authority who has allowed the application filed by successful bidder for extending the time for payment of balance sale consideration. Adjudicating Authority in the impugned order in paragraph 7 directed as follows:-

"7) Accordingly, we direct the Liquidator to accept the post-dated cheques payable on or before Expiry of Sixty (60) days from the last date along with the interest. Current E-auction process shall be remained stayed and may be proceeded with in case the applicant herein fails to deposit the cheques and also to honor the cheques issued by him, without any further recourse to this Tribunal."

15. The present is a case in pursuance of the order dated 28.02.2024, successful bidder has made the balance payment and an application IA No.1693 of 2024 was filed by the liquidator seeking permission of the Adjudicating Authority for approval of the sale. The prayers made in IA No.1693 of 2024 have been quoted in paragraph 2 of the order dated 15.07.2024 which is as follows:-

"2) The present Interlocutory Application has been filed by the Applicant, praying for the following reliefs:

a) That this Honorable Tribunal may be pleased to approve the sale of the Corporate Debtor as a going concern to the successful bidder viz. S.M. Electric Works.

b) That this Honorable Tribunal may be pleased to issue following directions with respect to the sale of the Corporate Debtor as a going concern:

i. Writing-off the entire existing shareholding of the Corporate Debtor and issuance of fresh equity shares to the successful bidder.

ii. Continuation of the authority, powers and obligations of the Liquidator to complete the liquidation proceedings and also control and operate the liquidation account.

iii. Payments to the stakeholders in accordance with Section 53 of the Code;

iv. Protection of the successful bidder from all claims, liabilities. etc. pertaining to the period prior to liquidation commencement date of the Corporate Debtor.

v. The Registrar of Companies shall change the status of the Corporate Debtor from 'In Liquidation' to 'Active'."

16. The liquidator, thus, approached the Adjudicating Authority for approval of the sale after receiving the entire amount and prayed for certain reliefs and concessions.

17. The Hon'ble Supreme Court in "V.S. Palanivel vs. P. Sriram, CS, Liquidator, Etc." (supra) itself had occasion to consider the power of the Adjudicating Authority in reference to extension of time for deposit of the balance consideration. It is useful to extract paragraphs 35.15 and 35.16 of the judgment of the Hon'ble Supreme Court which is as follows:-

"35.15 The aforesaid Rule is not to be read in isolation but in conjunction with Section 35 of the IBC that deals with the powers and duties of the Liquidator and states that the Liquidator shall have the powers and duties specified in clauses (a) to (o) of sub-section 1 including the power to sell an immovable/movable property of the Corporate Debtor in liquation by public auction/private sale as per clause (f), subject to the directions of the NCLT. Pertinently, it has been observed in Arun Kumar Jagatramka v. Jindal Steel and Power Limited54 that "the Liquidator exercises several functions which are quasi-judicial in nature and character. Section 35(1) itself enunciated that the powers and duties which are entrusted to the Liquidator are "subject to the directions of the Adjudicating Authority". The Liquidator, in other words, exercises functions which have been made amenable to the jurisdiction of NCLT, acting as the Adjudicating Authority…..".

35.16 In the facts of the present case, the Adjudicating Authority exercised statutory powers under Section 35 of the IBC read with its inherent powers under Rule 11 of the NCLT Rules, 2016 for extending the time to deposit the balance sale consideration on sufficient cause being shown, i.e., in view of the countrywide lockdown due to the Covid19 pandemic. This latitude that was given in the aforesaid extraordinary circumstances to meet the ends of justice, cannot be faulted."

18. The Hon'ble Supreme Court held that the Adjudicating Authority exercised statutory powers under Section 35 read with Rule 11 of the NCLT Rules for extending the time. Thus, Hon'ble Supreme Court itself did not find any fault in the order of the Adjudicating Authority extending the time of payment after expiry of time of payment prescribed. As noticed above, an application filed by successful bidder/ successful auction purchaser for extension of time was allowed by the Adjudicating Authority on 05.05.2020 which was challenged by the Appellant in Company Appeal (AT) (Ins.) No.343 of 2021 which came to be dismissed on 16.09.2022. The Hon'ble Supreme Court did not interfere with the order passed by this Tribunal dismissing the appeal of the appellant affirming the order extending the time by the Adjudicating Authority. The law laid down by the Hon'ble Supreme Court in paragraphs 35.15 and 35.16 as noted above, clearly comes to the aid of the successful bidder in the present case. Adjudicating Authority having extended the time for deposit of the amount which deposit was made and thereafter application was filed for approval of the sale which has also been granted by the Adjudicating Authority.

19. In these appeals by suspended director, we do not find any ground to interfere with the impugned orders.

20. Both the appeals are dismissed.