

(2023) 05 NCLT CK 0075

In the National Company Law Tribunal

Case No : IA No.195 Of 2023 In CP (IB) No.110/ALD/2017

?Ramesh Chaudhary Vs Anju Agarwal Liquidator ?

Date of Decision : 26-05-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 10, 32A, 33, 53, 54, 60(5), 238
Income Tax Act, 1961 — Section 79
National Company Law Tribunals, 2016 — Rule 11
Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016 — Regulation 32, 45(3)

Citation : (2023) 05 NCLT CK 0075

Hon'ble Judges : Praveen Gupta, Member (J); Ashish Verma, Member (T)

Bench : Division Bench

Advocate : Anand Chhibbar, Kalpana Sinha, Anuj Tiwari, Abhishek Anand, Mohak Sharma, Sajal Jain, Milan Singh Negi

Final Decision : Disposed Of

Judgement

1. This order will decide the IA No.195/2023. The Applicants herein are the Successful Auction Purchaser in the E-Auction for the sale of the assets of the Corporate Debtor as a going concern and the Respondent herein is the Liquidator of Corporate Debtor.

2. On a Petition under Section 10 filed under the Insolvency and Bankruptcy Code, 2016 (the Code) by M/s Shree Bhawani Paper Mills Ltd., the Corporate Debtor was put under Corporate Insolvency Resolution Process (CIRP) by an order dated 13.02.2018 of this Bench.

3. In the absence of a Resolution Plan, this Bench on 07.07.2021 passed an order for liquidation of the Corporate Debtor under Section 33 of the Code.

4. The Liquidator invited bids for the sale of the assets of the Corporate Debtor as a 'going concern' by an E-auction process. On 25.09.2021, the Liquidator published sale notice for e-auction in two local newspapers, i.e., Jansatta (Hindi) and 'Business Standard & Financial Express' (English), of the assets of the corporate debtor as a going concern, on "AS IS WHERE IS BASIS", "WHATEVER

THERE IS BASIS" and "WITHOUT RECOURSE BASIS". The Liquidator invited bids for the sale of the Corporate Debtor as a 'going concern' by an E-auction dated 25.10.2021.

5. The E-auction process states that the sale of the Company is proposed to be done on "as is where is basis", "as is what is basis", "whatever there is basis" and "without recourse basis". Further, the commencement of E-auction was 25.10.2021 and the last date for submission of bids was 16.10.2021 from 03:00 PM to 04:00 PM.

6. Key highlights of the assets of the sale process as mentioned in the E-auction process information document is as under :-

Sale of Corporate Debtor as a going concern

Reserve Price (in Rs. Crore)

EMD

Amount (in Rs. Crore

Incremental Value (in Rs. Crore

Shree Bhawani Paper Mills Limited- the Corporate Debtor as a going concern, including Land &

Building, Plant &

45.00

4.50

0.10

Machinery, Securities & Financial Assets etc.

7. In pursuance of E-auction conducted on 25.10.2021, the applicants, who later emerged as Successful Auction Purchaser being the highest bidder with a Bid amount of Rs.45,30,00,000/- were required to deposit the 1st instalment i.e. Rs.4,53,00,000/- as per the E-auction process document before the issue of Letter of Intent by the Liquidator. Therefore, the Liquidator has requested the applicant being the highest bidder to deposit the 1st instalment vide its demand notice (through email) dated 26.10.2021. The applicant being the highest bidder through its revert email dated 26.10.2021, permitted the Liquidator to release the Bank Guarantee issued by PNB of amount of Rs.4,50,00,000/-, which was deposited on 27.10.2021, and further informed that the balance of Rs.3,00,000/- shall be deposited by NEFT/ RTGS in the liquidation account of the company. The said balance amount was also deposited on the same date. The amount calculated is as under :-

S.N.

Particulars

Amount in Rs.

1.

Final Bid Amount

45,30,00,000

2.

Less: EMD Deposited (Being submitted in the form of Bank Guarantee, released as requested by the bidder and hence adjusted against the 1st

instalment on 27.10.2021

4,50,00,000

3.

Less: Amount Transferred on 27.10.2021 as per Demand email Dated -27.10.2021

3,00,000

4.

Net Balance Consideration

40,77,00,000

8. Following a thorough review of the submitted bid application, the applicants being highest bidder were deemed eligible to participate in the e-auction scheduled for 25.10.2021. The e-auction proceeded smoothly, and Mr. Ramesh Chaudhary, son of Late Bhura Mal Chaudhary, residing at D 66 Chandrika Colony, Sagra, Chitupur, Mahmoorganj, Varanasi, Uttar Pradesh-221010 and M/s Interweave Polytex Private Limited, Co-bidder/ Purchaser, having registered office at B-Block, 8th Floor, Vinayak Plaza, Maldhaiya Crossing, Varanasi-221002 emerged as a sole bidder with a bid of Rs.45,30,00,000/-. On March 6th, 2023, the Liquidator had issued a Letter of Intent (LOI).

9. The Successful Bidder, Mr. Ramesh Chaudhary and M/s Interweave Polytex Private Limited, Co-bidder/ Purchaser deposited the entire sale consideration on 16.03.2023.

10. The successful bidder has paid the full sale consideration for the CD and emerged as successful auction purchaser, and now the next step is to transfer the corporate entity of the CD to the successful auction purchaser by issuing shares to them. At the same time, as per the provisions of Sec. 53 of IBC, all remaining debts and dues from the CD will be cleared, and there will be no further liability for the CD to be paid by the successful auction purchaser. The applicant is seeking approval from this Hon'ble Tribunal through this IA for

implementation of sale under the liquidation of Corporate Debtor as a going concern to the Successful Bidder.

11. The Applicant has prayed for the following reliefs:

a . The Applicants has paid the entire Sale Consideration and same be adjusted in the following manner: (i) INR 1,00,00,000/- (Indian Rupees One Crores only) by way of investment into the equity shares of the Corporate Debtor; and (ii) the balance amount of INR 44,30,00,000/- (Indian Rupees Forty Four Crore Thirty Lakhs only) in the form of unsecured debt.

b . A direction be issued that as on the date of issuance of Sale Certificate by the Liquidator, the applicant get all the rights, title and interest in whole and every part of the Corporate Debtor including but not limited to intellectual property rights, free from security interest, encumbrance, claim, counter claim . Sale Consideration shall be distributed by the Liquidator in terms of the Section 53 of the Code;

c . a direction be issued that on and from the date of sale certificate, all the claims or demands made by, or liabilities or obligations owned or payable to any actual or Potential creditor, Financial Creditors, Employees, Workmen including claims related to their social security contributions, Suppliers, Governmental Agencies, tax authorities of the Corporate Debtor (including but not limited to liabilities, interest, fines, penalties, duties, taxes, cess, surcharge, late fees etc . on account of income -tax, tax deduction at source, tax collection at source, goods and services tax, custom duty, value added tax, service tax, wealth - tax, cess, DGFT dues; dues relating to provident fund, gratuity, fire, electricity, SEBI, weights and measures, state Bo iler, stock exchange, Depositories (CDSL, NSDL) etc .; and pollution control board, Land revenue, Municipal tax, Water tax, Water cess, Factories Act dues , ROC dues etc .) whether direct or indirect, whether filed/admitted/verified or not, due or contingent, asserted or unasserted, crystallized or un -crystallized, known or unknown, secured or unsecured, disputed , undisputed, present or future, including any liability arising out of non - compliance of provision of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permissions as applicable on the Corporate Debtor, in relation to any period prior to the Date of sale certificate will be written off in full and shall stand permanently extinguished by the Liquidator in accordance with section 53 of IBC 2016 . Further no such claim, liability etc . shall be recoverable in any form or manner whatsoever from the Applicant and the payment of Sale Consideration by the Applicant into the liquidation account is a full and final settlement by the Applicant towards such claims, liabilities etc .

d . a direction be issued that, from the date of the Sale Certificate, the Applicant shall be entitled to the benefit of Section 32A of the Code, any and all the legal proceedings (including any show cause, notice, adjudication proceedings, assessment proceedings, regulatory orders etc,), arbitration or other legal,

judicial, regulatory or administrative proceedings, initiated before any court, tribunal or authority by or on behalf of any creditor or governmental authorities, to enforce any rights or claims against the company shall be withdrawn, abated, settled and/ or extinguished with effect from the date of the Sale Certificate and the Applicant shall no longer be required to make any payments in relation to such litigations proceedings . Further direction to all the stakeholders of the Company (including creditors and governmental authorities), for not pursuing such litigations / proceedings and withdrawing all existing litigations / proceedings, wherever pending .

e . a direction be issued that all financial and pecuniary liabilities of the Corporate Debtor, (including without limitation, any penalty, whether contingent, assessed, known or unknown, interest, fines or fees and any other liabilities and/ or obligations which may have a financial impact) in relation to any period prior to the Date of Sale Certificate shall be deemed to be extinguished;

f . a direction be issued that any non - compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permissions prior to the date of execution of sale certificate shall be deemed to be extinguished;

g . a direction be issued that all t he existing shares/equity share capital of the Corporate Debtor shall be extinguished/cancelled without any consideration, and rights and liabilities arising out of the same shall also be extinguished;

h . a direction be issued that on and from the Date of Sale Certificate, the status of the Corporate Debtor in the records of the Registrar of Companies should be reflected as 'active' from the status of 'liquidation';

i . a direction be issued that from the Date of Sale Certificate, the Board of Directors of the Corporate Debtor be re - constituted as per the Companies Act, 2013 and that the following individuals be appointed as Directors of the Corporate Debtor duly appointed under the provisions of the Companies Act, 2013, and direct the Registrar of Companies to do all such acts, deeds and things that are necessary to appoint the following individuals as directors of the Corporate Debtor, who are individuals recommended by the Applicants, in order to enable the Corporate Debtor to file relevant returns required b y applicable law:

No

Name of the Proposed Director

DIN Number

1.

Gautam Chaudhury

00079958

2.

R. K. Chaudhury

00080136

3.

Amit Chaudhury

00080093

j. direction be issued that all subsisting consents, licenses, approvals, rights, entitlements, benefits and privileges whether under law, contract, lease or license, granted in favour of the Corporate Debtor or to which the Corporate Debtor is entitled to shall, notwithstanding any provision to the contrary in their terms and irrespective of the commencement of the insolvency/liquidation proceedings under the Code, in relation to the Corporate Debtor be deemed to continue without disruption, for the benefit of the Corporate Debtor and all additional licenses, registrations and consents required by the Corporate Debtor be made available immediately from the Date of the Sale Certificate;

k. a direction be issued that the Corporate Debtor shall have a right to review and terminate any contract that was entered into prior to the date of the issuance of Sale Certificate;

l. a direction be issued that on and from the Date of Acquisition, all the assets specified in the complete E - Auction Memorandums shall continue to be the assets of the Corporate Debtor, towards which the Applicant has made payment by way of the Sale Consideration;

m . a direction be issued to the Liquidator to cooperate with, and provide all necessary support and assistance to the Applicant, including but not limited to perfecting / amending / modifying / creating the land records in relation to all parcels of land, the immovable properties and assets, belonging to the Corporate Debtor in favour of the Corporate Debtor within 15 days from Date of Acquisition;

n . a direction be issued to the Liquidator to, immediately, write back all the liabilities of the Corporate Debtor, including creditors, term loans, working capital loans, tax liabilities, other statutory liabilities, etc . which are not payable and reflect the total liabilities at the amount of the consideration (as reduced by the amount of insolvency resolution process costs and the liquidation costs) determined in the auction; and (ii) the assets which are not recoverable (debtors, inventories and loans and advances, etc .) should be written down to their realizable value; in the financial statements (Profit and Loss Account and the Balance Sheet) of the Corporate Debtor as on 31st March 2023 .

o . a direction be issued to draw up, prepare, finalize, and file the financial statements of the Corporate Debtor thereby recording extinguishment of all liabilities of the Corporate Debtor till the date of Sale Certificate and as clarified

by the reliefs and concessions granted by this Hon'ble Tribunal, and to file such financial statement with the relevant regulators such as Registrar of Companies, Income Tax Authorities and any other Government Authorities;

p . a direction be issued that the brought forward tax losses of the Corporate Debtor be permitted to be carried forward and set - off against future income as change of shareholding of the Corporate Debtor is pursuant to the bid submitted by the Applicant under the E -Auction Process;

q . a direction be issued to Uttar Pradesh State Industrial Development Authority to consider the present auction purchase of corporate Debtor (as a going concern) as induction of new shareholders to rehabilitate the Company upon the order of this Hon'ble Court and grant the reliefs as per their policy pertaining to sick companies and waive the requirement of obtaining an approval for change in ownership/ constitution/management of the Corporate Debtor;

r . the bid submitted by the Applicant should be considered to be a resolution plan under Section 79 of the Income Tax Act, 1961;

s . a direction be issued to the State Electricity Board to restore power connection to the factory premise of the CD, and waive all and any past dues;

t . a direction be issued that the Corporate Debtor and the Successful Bidder shall be granted an exemption from all Taxes, levies, surcharges, cess, fees, transfer charges, stamp duty, registration charges, transfer premiums, and surcharges that arise from or relate to implementation of Sale of Corporate Debtor as a going concern under Liquidation;

u . a direction be issued to SEBI and BSE for Delisting of Shares, all the shares of all classes of shareholders have completely lost their value in distribution as per section 53 of the code .

v . a direction be issued to that the authorised share capital of the Company is to remain intact, and transfer of ownership of the Corporate Debtor shall take place by way of writing off the entire equity shareholding of Corporate Debtor and issuance of fresh equity shares to Applicant and its nominees. Ministry of Corporate Affairs, Registrar of Companies, SEBI, Stock Exchange, Depositories and other Authorities to give necessary effect to the above change in Shareholding;

w . a direction be issued that the Corporate Debtor and/or the Successful Bidder shall be at liberty to seek remedy if any available before the Hon'ble Tribunal to address any difficulties faced with respect to implementation of the acquisition of the Corporate Debtor as a going concern;

x . Other or further order or orders be passed and/or direction or directions be given as this Hon'ble Tribunal may deem fit and proper.

2 . That the aforesaid reliefs and concession are essential for the successful implementation of the bid and is non prejudicial to any of the stakeholders of

the Corporate Debtor.

3 . That the present application is bona fide and in the interest of justice .

In view of the foregoing, it is humbly submitted that this Hon'ble Court may:

- (a) Pass an order allowing the present application; and
- (b) Pass an order granting reliefs and concession as mentioned in Para 10 (a) to (x) of the present application;
- (c) Pass any other order as this Hon'ble Court may deem fit.

12. Regulation 32 of the Liquidation Process Regulations provides for the realization of assets and the same is extracted below:

"[Sale of Assets, etc.

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;
- e) the corporate debtor as a going concern; or
- f) the business(s) of the corporate debtor as a going concern:

Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.]"

13. While the Liquidation Process Regulations recognizes going concern sale as one of the methods of sale, however, there is no definition as such for 'going concern' either in the Code or in the Regulations.

14. It is beneficial to refer the report of the Insolvency Law Committee dated 26/03/2018 (Para 8.1 of the Report), wherein the committee examined the term "going concern" as below:

The phrase 'as a going concern' imply that the Corporate Debtor would be functional as it would have been prior to the initiation of CIRP, other than the restrictions put by the Code."

15. It is beneficial to refer Para Nos. 7 & 8 of the Round Table of Insolvency and Bankruptcy Board of India held with the stakeholders on 21/05/2018, referring to the case of Gujarat NRE1, wherein a note was published by IBBI defining "going concern" as below:

"7. 'Going Concern' means all the assets, tangibles or intangibles and resources

needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource.”

In view of this, the following options are submitted for consideration:

a. The corporate debtor may be sold as a going concern, as provided in the extant regulations. As the Company survives, there will be no need for dissolution of the Company in terms of section 54 of the Code. The assets along with all attendant claims, limitations, licenses, permits or business authorizations remain in the Company. The Company survives as it was; the ownership of the Company is transferred by the Liquidator to the acquirer. The Liquidator shall make an application to the AA for approval of the sale of the corporate debtor as a going concern and the AA may pass an order with respect to:

(a) Sale of the corporate debtor to the intended buyer as a going concern

(b) Transfer of shares of the corporate debtor to the intended buyer

(c) Transfer of the going concern of the corporate debtor to the buyers

(d) Continuation of the authority, powers and obligations of the Liquidator to complete the liquidation process as provided under the Code and the regulations including the control, operations and continuation of the liquidation bank account of the corporate debtor,

(e) Payment to stakeholders in accordance with section 53 from the liquidation bank account, and

(f) Protection of the intended buyer from all claims and liabilities pertaining to the period prior to the sale of the corporate debtor as a going concern.

In such a case, the final report of Liquidator, as required under clause (3) of regulation 45, shall form part of the application for the closure of the liquidation process of the corporate debtor and not for the dissolution of the corporate debtor to the AA to be made under section 54.

b. The regulations may provide another option of sale, that is, sale of business of the corporate debtor as a going concern. It will be only sale of business, not the corporate debtor which will be liquidated in accordance with the regulations. In this case, the assets and liabilities relevant for the business are transferred to a new entity, and stakeholders are paid from proceeds of sale in accordance with section 53 and the corporate debtor will be dissolved.”

8. Both the options require consent of the secured creditors to relinquish security interest. If security interest is not relinquished, other modes of sale will be used.”

16. One advantage of the sale of the Corporate Debtor as a ‘going concern’ is that the Corporate Debtor is retained, it will not be dissolved and the Corporate Debtor will be transferred along with the assets. So, the Corporate Debtor as a legal entity remains as such.

17. The crux of the 'sale as a going concern' is that the equity shareholding of the Corporate Debtor is extinguished and the acquirer takes over the undertaking with the assets, licenses, entitlements etc. The undertaking includes the business of the Corporate Debtor, assets, properties and rights etc. excluding the liabilities.

18. The Corporate Debtor survives, only the ownership is transferred by the Liquidator to the purchaser. All the rights, titles and interest in the Corporate Debtor including the legal entity is transferred to the purchaser. After the sale as a 'going concern', the purchaser will be carrying on the business of the Corporate Debtor.

19. In the normal parlance "going concern" sale is transfer of assets along with the liabilities. However, as far as the 'going concern' sale in liquidation is concerned, there is a clear difference that only assets are transferred and the liabilities of the Corporate Debtor has to be settled in accordance with Section 53 of the Code and hence the purchaser of this assets takes over the assets without any encumbrance or charge and free from the action of the Creditors.

20. This Bench feels that following are the advantages of selling the Corporate Debtor "as a going concern":

- a. The entity i.e., the Corporate Debtor itself gets transferred;
- b. The equity shareholding gets transferred or extinguished and new shares are issued;
- c. The purchaser is expected to carry on the business of the Corporate Debtor after the sale of assets is confirmed;
- d. The existing employees will have a chance to continue in their employment.

21. The decision to sell the Corporate Debtor as a going concern is taken by the Liquidator himself or in consultation with the Creditors / stakeholders and the proceeds from the sale of assets are going to be utilized for distribution to the Creditors in the manner specified under Section 53 of the Code. Hence all the Creditors of the Corporate Debtor get discharged and the assets are transferred free of any encumbrances. The legal entity of the Corporate Debtor however survives.

22. In the case of sale as a 'going concern' the Corporate Debtor will not be dissolved in terms of Section 54 of the Code. The assets with the attendant, claims, limitations, licenses, permits or business authorizations, remains in the Company. Only the ownership of the Company is acquired by the successful bidder from the Liquidator.

23. It is to be noted that even though there is no specific provision in the Code regarding "sale of the Company as a going concern", IBBI has formed the Liquidation Process Regulations, under the Code and we have to take them as guiding principles in dealing with the case.

24. The Hon'ble Supreme Court in Arcelor Mittal India Private Limited V/s Satish Kumar Gupta and Others (MANU/SC/1123/2018) has referred to Regulation 32 of the Liquidation Process Regulations which states that the Liquidator may also sell the Corporate Debtor as a 'going concern'. Hence there is no impediment for the sale of the Corporate Debtor as a 'going concern'

25. As a consequence to the above discussions and on perusal of the pleadings and submissions made by the Ld. Sr. Counsel for the applicants and having been satisfied with the need for smooth implementation of sale under liquidation of the Corporate Debtor as a going concern to applicant as successful auction purchaser, following order is passed keeping in view the provisions of Section 60(5) of the Code and Rule 11 of NCLT Rules, 2016 :

i. The reliefs sought in prayer clauses (a), (g), (j), (k), (p), (q), (r), (t), (u) and (v) shall be dealt with as per the provisions of applicable laws.

ii. Prayer (b) is allowed. The Applicant shall get all the rights, title and interest over whole and every part of the Corporate Debtor, including but not limited to contracts free from security interest, encumbrance, claim, counter claim or any demur. The sale consideration, when received, shall be distributed by the Liquidator in terms of the Section 53 of the Code. Prayer (b) is accordingly allowed.

iii. Prayers made in (c) to (f) are covered by the provisions of Section 32A and 238 and hence, no separate relief in response to these prayers is required to be granted. Therefore, the said provision would ipso facto apply.

iv. Prayer (h) is allowed. The ROC concerned shall take action to change the status of the Corporate Debtor in records of the ROC from the status of "liquidation" to the status of "active".

v. Prayer (i) is allowed. The Board of the Corporate Debtor can be re-constituted as indicated in prayer (i) and necessary filings may be made to the RoC concerned.

vi. Prayer (l) is allowed. From the date of acquisition, all the assets specified in the complete E-Auction Memorandum shall continue to be the assets of the Corporate Debtor, towards which the Applicants has made payments by way of the Sale Consideration.

vii. Prayer (m) is allowed. The Liquidator is directed to provide all support and assistance to the Applicant for the smooth functioning of the Corporate Debtor to complete the acquisition.

viii. As regards the prayer (n), and (o), the Liquidator and Applicant shall be at liberty to take all the steps required to make accounting entries for the smooth transmission and clearing the balance sheet as per the applicable accounting standards prescribed under the Companies Act, 2013. The Liquidator is directed to ensure completion of pending filings with the Registrar of Companies, Income

Tax Authorities and any other Government / Statutory Authorities

ix. As regards prayer (s), the State Electricity Board/ Department/ undertaking are directed to restore/ provide new power connection to the factory premises of Corporate Debtor as per the provision of the applicable Electricity Act/ Rules without enforcing the past liabilities existing on the date when CIRP started for which claim has already been filed during CIRP/ Liquidator Process.

x. Prayers in (w) and (x) are general in nature and hence, not adjudicated.

26. The Liquidator is directed to provide all support and assistance to the Applicant for the smooth functioning of the Corporate Debtor to complete the acquisition.

27. The Liquidator and Applicant shall be at liberty to take all the steps required to make accounting entries for the smooth transmission and clearing the balance sheet.

28. The Liquidator is directed to ensure completion of pending filings with the Registrar of Companies, Income Tax Authorities and any other Government / Statutory Authorities.

29. The liquidator is directed to send the copy of this order within 7 days from the date of pronouncement to the Registrar of Companies, Uttar Pradesh, Kanpur.

30. The Registry is directed to communicate this order to the Registrar of Companies, Uttar Pradesh, Kanpur for updating the master data.

31. In terms of the above, IA No.195 of 2023 filed by the Applicants stands disposed of accordingly.