

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH,
COURT – V**

IA-(IB) No.2819/2022

IN

CP (IB)-160/PB/2017

An Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 and Regulation 32(e) of the Insolvency and Bankruptcy Board of India (Liquidation Process Regulations), 2016 and read with Rule 11 of the National Company Law Tribunal Rules, 2016.

IN THE MATTER OF:

M/S LEVCON VALVES PRIVATE LIMITED

6th Floor 13 Camac Street,

Kolkata, West Bengal-

700017

.....OPERATIONAL CREDITOR

VERSUS

M/S ENERGO ENGINEERING PROJECTS LIMITED

.....CORPORATE DEBTOR

AND IN THE MATTER OF:

MR. SUBHASH GUPTA

Successful Auction Purchaser

... APPLICANT

CORAM:

SHRI P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

Order Delivered on: 04.08.2023

ORDER

PER: SHRI P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

1. The Application I.A. (IB) No. 2819/2022 in C.P. (IB) No. 160/PB/2017 is preferred on behalf of Mr. Subhash Gupta ('Applicant'), Successful Auction Purchaser of M/s. Energo Engineering Projects Limited under section 60(5) of the Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 ("NCLT") seeking approval of the sale of the Corporate Debtor and seeking the following relief(s):-

- a) Allow the present Application and approve the sale of Corporate Debtor as a going concern in favour of the Auction Purchaser/ Applicant, pursuant to the E-Auction conducted by the Liquidator on 12.05.2022;
- b) Issue directions that the bid submitted by the Applicant should be considered to be a resolution plan under Section 79 of the Income Tax Act, 1961;
- c) Issue directions that immediately upon payment of the entire Sale Consideration, the Applicant get all the rights, title and interest in the 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, and the Sale Consideration shall be distributed by the Liquidator in terms of the Section 53 of the Code;
- d) Issue directions that on and from the date of acquisition, all the claims or demands made by, or liabilities or obligations owned or payable to any actual or potential creditors of the Corporate Debtor including the Government Dues (including but not limited to liabilities, Interest and penalties, duties, 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, etc.) whether direct or indirect, whether admitted or not, due or contingent, asserted or unasserted, crystallized or uncrystallized, known or unknown, secured or unsecured, disputed or undisputed in relation to any period prior to the date of acquisition will be written off in full and shall stand permanently extinguished, including all encumbrances over the assets of the Corporate Debtor shall stand satisfied;
- e) Issue directions 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 acquisition of the Corporate Debtor, along with the liberty to review and terminate any contract that was entered into prior to the date of the Liquidation Order, in the interest of the projects and the Corporate Debtor;

- f) Issue directions that the Applicant shall not be held liable for 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 acquisition and the same shall be deemed to be extinguished;
- g) Issue directions that the Applicant shall not be held responsible / liable for any of the past liabilities of the Corporate Debtor in inquiries, Investigations, assessments, notices, causes of action, suits, claims, disputes, litigations, arbitration or other judicial, regulatory or administrative proceedings against or in relation to, or in connection with the Corporate Debtor prior to the date of acquisition, or arising on account of the sale shall be deemed to be withdrawn or dismissed;
- h) Issue directions that Applicant shall not be responsible for any finding and/or conclusion of by any investigative authorities regarding any illegality/ misconduct/ mismanagement within the Corporate Debtor pertaining to the period prior to the approval of the sale by the Hon'ble Tribunal;
- i) Issue directions that from the date of payment of the sale consideration, 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;
- j) Issue directions to the Liquidator to, immediately, (1) 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 (ii) the assets which are not recoverable (debtors, Inventories and loans and advances, etc.) should be provided for or written down to their realizable value; in the financial statements (Profit and Loss Account and the Balance Sheet) of the Corporate Debtor as on date of acquisition;

- k) Issue directions to the Liquidator that all the compliances for the period up to the Date of Acquisition including filing of necessary documents and returns with the Registrar of Companies, Income Tax Authorities any other Government Authorities should be completed;
- l) Pending the approval of the sale as a going concern, permit the Applicant to supervise the ongoing projects and Projects under defect ability period of the Corporate Debtor as mentioned in Annexure A-13,
- m) Issue directions that all the existing shares of the Corporate Debtor shall be extinguished without any consideration, and rights and liabilities arising out of the same shall also be extinguished, as well as that on and from the Date of Acquisition, the status of the Corporate Debtor in the records of the Registrar of Companies should be reflected as 'active' from the status of liquidation';
- n) Pass such other and further orders or directions, as may be deemed fit and proper by this Hon'ble Court in the facts and circumstances of the present case.

2. Succinctly stated facts of the present case as averred by the Applicant are that is that the Corporate Debtor ('Energo Engineering Projects Limited') was admitted into Corporate Insolvency Resolution Process vide this Adjudicating Authority order dated 05.09.2017. It was further submitted that since no Resolution Plan had been approved within the stipulated time as prescribed under the Code, the Resolution Professional was constrained to prefer an Application being CA No. 746 (PB) of 2018 under Section 33(1) of the Code, seeking liquidation of the Corporate Debtor. The aforesaid application was allowed by this Adjudicating Authority vide order dated 21.08.2018, and the Corporate Debtor was ordered to be liquidated in terms of the mandate of Section 33(1)(a) of the Code and Mr. Arvind Garg was appointed to act as the Liquidator.

3. Moreover, it was submitted that the Liquidator preferred an Application bearing IA No. 5561 of 2021 before this Adjudicating Authority under Sections 35(1)(n) and 60(5)(c) of the Code, 2016 seeking permission to carry out the sale of the Corporate Debtor as a going concern and the same has been allowed by this Hon'ble Adjudicating Authority vide order dated

21.03.2022 and in pursuant to the allowed Order the Liquidator had issued a Sale Notice dated 25.04.2022, wherein the reserve price for the Corporate Debtor (as a going concern) was fixed as Rs. 4,53,00,000/- (Rupees Four Crores Fifty Three Lacs Only) and the same has been published in the Financial Express & Jansatta newspapers, inviting bids for the Corporate Debtor as a going concern through the method of E-auction, in terms of Regulations 32(e) and 32A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

4. Further, it transpires that the Auction purchaser in desire to acquire the Corporate Debtor as a going concern, deposited the Earnest Deposit Money ('EMD') amounting to Rs.45,30,000/- (Rupees Forty Five Lacs Thirty Thousand Only) and duly participated in the E-auction conducted on 12.05.2022, also complied with all the requirements/terms and conditions as set out in the sale notice, along with the funding the margin money against all the Live Bank Guarantees (i.e Rs8,80,28,335/-) seeking discharge of the existing Live Bank Guarantees (hereinafter referred as to BGs) which was required, before transfer of assets of Corporate Debtor to the successful bidder. The Auction Purchaser, applicant herein was confirmed as the Successful Bidder at Rs. 4,57,00,000/- (Rupees Four Crores Fifty Seven Lacs Only) vide email dated 12.05.2022 sent by the Liquidator to the Auction Purchaser.
5. It was also submitted that upon completion of sale, an application has been preferred before this Hon'ble Tribunal by the Liquidator bearing IA No. 2708/2022 for approval/ ratification of the sale Corporate Debtor as a 'going concern' to Auction Purchaser and for dispensing with the requirement of seeking dissolution of the Corporate Debtor under Section 54 of the IBC. The same is presently pending for adjudication. Accordingly, the auction purchasers seeks the certain reliefs, concessions from this Adjudicating Authority to acquire the Corporate Debtor as a going concern.

6. We have heard the Ld. Counsels for the Applicant and perused the averments made in the application and written submissions filed by the parties. The relevant documents annexed with the respective submissions have been perused.
7. Having gone through the above submissions made by the Applicant it would be material to see if the prayed reliefs and concessions sought by the Successful Bidder/ Applicant can be granted or not.
8. In the sale of "Corporate Debtor as a going concern" under Regulation 32(e) of IBBI (Liquidation Process) Regulations, 2016 the Corporate Debtor will not be dissolved. In the sale of "Corporate Debtor as a going concern", the entire business, assets and liabilities, including all contracts, licenses, concessions, agreements, benefits, privileges, rights or interests of the Corporate Debtor will be transferred to the acquirer, except the existing shares.
9. From the records, we observe that the sale of the Corporate Debtor as a going concern is on 'AS IS WHERE IS'; 'AS IS WHAT IS'; 'WHATEVER THERE IS'; 'WITHOUT RECOURSE' basis and the E-Auction was conducted on 12.05.2022 with a Reserve Price of Rs.4,53,00,000/- and the Applicant herein had submitted a bid of Rs.4,57,00,000/-. The Liquidator had declared the Applicant as a successful bidder and the same was communicated to the Applicant vide e-mail dated 12.05.2022, consequent to which Letter of Intent ('LoI') was issued to the Applicant on 27.05.2022. The details of payments made by the applicant in consideration of the sale of Corporate Debtor as going concern is as follows:-

Particulars of Payment	of	Last Date for Payment	Date of Payment
---------------------------------------	-----------	----------------------------------	----------------------------

Rs.45,30,000/- towards Earnest Money Deposit. DD No. 698609	10.05.2022	09.05.2022
Rs. 68,55,000/- towards 15% of sale consideration. UTR No. PUNBR520220520 12760126	20.05.2022	20.05.2022
Rs. 3,43,15,000/- towards balance sale consideration.	11.06.2022	10.06.2022

10. The Liquidator had issued a Sale Certificate dated 09.09.2022, acknowledging Mr. Subhash Gupta ('Applicant'/Successful Bider) as the owner of M/s. Energo Engineering Projects Limited ('Corporate Debtor') as a going concern, from the date of this certificate.
11. The Hon'ble NCLAT in the matter of **M/s. Visisth Services Ltd. Vs. Mr. S. V. Ramani, Liquidator of United Chioro-Paraffins Pvt. Ltd. Company Appeal (AT)(Ins) No. 896 of 2020** held that, 'as per Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016 the Sale as a 'Going Concern' means sale of assets as well as liabilities and not assets sans liabilities. We conclude that Sale of a Company as a 'Going Concern' means sale of both assets and liabilities, if it is stated on 'as is where is basis'.
12. It is necessary to refer the Judgement dated 25.02.2022 of Hon'ble NCLAT in **M/s Shiv Shakti Inter Globe Exports Pvt. Ltd. Versus M/s. KTC Foods Pvt. Ltd. Through Liquidator Mr. Anup Kumar Singh and Anr. (Company Appeal(AT)(Insolvency) No. 650 of 2020)**, wherein it was observed that:-

“21. ... The scope and objective of the Code is to extinguish all claims specifically the ones which were not even made during the CIRP or in the Liquidation stage, to aid the purchaser of the Company as a ‘going concern’ to start on a ‘clean slate’....

22. It is no longer Res Integra that while approving a ‘Corporate Debtor’ sale as a ‘going concern’ in Liquidation Proceedings without its dissolution in terms of Regulation 32(e) of the Liquidation Process Regulations, 2016, it is essential to see that the ‘Corporate Debtor’ is not burdened by any past or remaining unpaid outstanding liabilities prior to the sale of the Company as a ‘going concern’ and after payment of the sale proceeds distributed in accordance with Section 53 of the Code. The Impugned Order in I.A. 889 of 2020 is modified to the extent that the sale of the first Respondent as a ‘going concern’ is upheld and the direction sought for in prayer (c) & (e) in CA No. 1189 of 2019 seeking extinguishment of past/remaining unpaid outstanding liabilities including contingent liabilities, prior to the sale as a ‘going concern’, after payment of sale proceeds distributed in accordance with Section 53 of the Code, is allowed.”

13. Thus, there are following steps to be taken by the Liquidator after sale of the Corporate Debtor as a going concern:-

- I. Distribute the sale consideration in accordance with the Waterfall Mechanism incorporated in Section 53 of the Code, 2016.
- II. Handover, the assets of the Corporate Debtor to the auction purchaser in terms of notice for sale as a going concern.

14. Further, as on the date of approval by the Adjudicating Authority, all such claims which are not a part of statement of claims, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim which is not a part of the statement of claims.

15. Consequently, the auction purchaser takes over the Corporate Debtor as a going concern, without any past liabilities/past claims as all past liabilities/past claims stands extinguished, sans such liabilities that are required to be discharged for running the Corporate Debtor as going concern.

16. At this juncture, it is relevant to refer the Judgement of the Hon'ble NCLAT in **Jasamrit Designers Private Limited v. Gian Chand Narang, Liquidator of Apex Buildsys Limited and Another [2023 SCC OnLine NCLAT 334**

wherein it was held that:-

“10. In view of the subsequent facts and notices brought on record by the Appellant and other terms and conditions of the process document as extracted, we are of the view that ends of justice will be served in granting liberty to file an Application before the Adjudicating Authority claiming reliefs/concessions/directions which may be necessary for operationalization of the Corporate Debtor as per terms and conditions of the process document.

11. We may also observe that prayers which were included in I.A. No. 3207 of 2022 were too elaborate and general prayers which cannot be made by a Successful Bidder who have been declared as Successful Bidder. Successful Bidder on e-Auction of the Corporate Debtor as a going concern can make only such prayers for reliefs/concessions which are commensurate and in accordance with the terms and conditions of the process document. Prayers in general in a very wide term as contained in I.A. No. 3207 of 2022 may not require any consideration by the Adjudicating Authority.

12. We while granting such liberty to the Appellant observe that law is well settled, a successful bidder who is declared as successful bidder of sale as going concern can seek access of the Adjudicating Authority and may pray for necessary directions in accord with and in consonance with the process document in the liquidation proceedings.”

17. In view of the above discussion, this Adjudicating Authority hereby direct as follows:-

- a) the sale of the Corporate Debtor as a going concern be governed as per the relevant provision of IB Code, 2016 and the terms contained in Sale Document, Process Document and Letter of Intent issued by the Liquidator for the sale of Corporate Debtor as going concern.
- b) the Successful Auction Purchaser to file necessary application(s) before the necessary forum/ authority in order to avail the necessary relief and concessions, in accordance with respective laws.

18. The Applicant is expected to take over and run the Corporate Debtor on a clean slate basis in terms of the process document and subject to the compliance of various applicable laws and provisions of IBC, 2016 and regulations. With the aforesaid findings, the present I.A. 2819 of 2022 stands disposed of in all respects.

Sd/-

**(DR.BINOD KUMAR SINHA)
MEMBER (T)**

Sd/-

**(SH. P.S.N PRASAD)
MEMBER (J)**