



CORAM:

Janab Mohammed Ajmal, Hon'ble Member (Judicial)

Shri V. Nallasenapathy, Hon'ble Member (Technical)

Appearance:

For the Applicants: Mr. Pratap Sampat, learned Senior Counsel with Ms. Aarti Suvarna, Advocate.

For the Liquidator: Mr. Kunal Kanungo, Advocate with Ms. Tanushree Sogani and Mr. Atishay Jain, Advocates.

*Per: V. Nallasenapathy, Member (Technical)*

### **ORDER**

1. The Applicants herein, being the successful bidders in the auction sale of the Corporate Debtor as a going concern, are before us with the following prayers:

- a) *That the Hn. Bench may approve and accept their bid for the amount of Rs.15.30 Crores in terms of the Auction Sale conducted on 18.03.2021 for the sale of M/s Enviiro Bulkk Handling Systems Pvt. Ltd. (under Liquidation) as a going concern*
- b) *That the Hn. Bench may consider and grant the reliefs as more particularly stated in Para 8(b) of the Application and as stated in the bid offer of the Applicants.*
- c) *That upon compliance of the terms of auction sale, all concerned authorities and parties be advised about the sale of the Corporate Debtor on going concern basis without antecedent liabilities of any kind as may be*

*relevant for the operation of the Company post its release from the liquidation.*

- d) That the Applicants be permitted to conduct the affairs of the company post its release from the liquidation in the manner as they may considered appropriate for the operation of the company's business.*
- e) Any other reliefs as the Hn. Bench may considered just and appropriate in the facts and circumstances of the case matter.*

2. The facts leading to the present Application are as under.
  - i. On a Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 (the Code), the Corporate Debtor was put under Corporate Insolvency Resolution Process (CIRP) by an order dated 04.12.2017 of this Bench.
  - ii. Upon failure of the Resolution process, the Committee of Creditors (CoC) of the Corporate Debtor in its 10<sup>th</sup> meeting recommended for the liquidation of the Corporate Debtor as a going concern. This Tribunal vide Order dated 27.03.2019 ordered the Corporate Debtor to be liquidated as a going concern and appointed Mr. Rajat Mukherjee as the Liquidator.
  - iii. Accordingly, pursuant to Section 33 of the Code, the Liquidator conducted an auction of Corporate Debtor as a going concern vide auction notice dated 21.09.2019 (First Auction). However, the Liquidator did not receive any firm bid from anyone and thus the First Auction was unsuccessful.

- iv. As the First Auction was unsuccessful, the Liquidator proceeded and filed an Application in IA No. 2131 of 2020 seeking permission of this Bench for sale of identified non-core assets of the Corporate Debtor through auction process.
- v. At this stage, the Applicants herein preferred an Intervention Application bearing IA No. 02 of 2021 in Liquidator's Application (IA No. 2131 of 2020), praying for the sale of the Corporate Debtor as a going concern.
- vi. This Tribunal vide its order dated 26.02.2021 disposed of IA No. 02 of 2021, giving directions to the Liquidator to issue fresh advertisement for the sale of the Corporate Debtor as a going concern and also allowed the Applicants to take part in the auction after depositing ₹.75,00,000/- in the Liquidator's Account. The Application of the Liquidator (IA No. 2131 of 2020) was kept pending for hearing.
- vii. Accordingly, the Liquidator published the announcement of e-auction of the Corporate Debtor as a going concern on 03.03.2021 as per Regulation 12(3) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Liquidation Regulations), inviting bids for the Corporate Debtor.
- viii. The Applicants in response to the said e-auction, submitted an expression of interest along with 5% upfront payment of ₹. 76,50,000/- on 06.03.2021 and subsequently participated in the e-auction held on 18.03.2021, wherein the Applicants were declared as the successful bidders/the sole eligible bidder. The Applicants

have submitted a bid amount of ₹. 15,30,00,000/-. The Applicants paid 20% of the bid amount on 23.03.2021, aggregating the payment to 25% of bid amount which is ₹.3.825 Crores.

- ix. The Liquidator then sent a Letter of Intent to the Applicants stating that the Applicants are bound to implement the successful bid.
- x. The Applicants have mentioned consequential reliefs in their offer, which are prayed to be sanctioned under the present Application, for smooth and successful sale of the Corporate Debtor as a going concern.
- xi. In the above circumstances, the Applicants are before us with the following consequential reliefs (Para 8(b) of the Application):
  - a) The promoters be permitted to restructure the capital account of the company by cancellation of existing capital and substituting with the investment of the bid amount in such manner and for such amount as it may consider appropriate for the working of the capital base of the company.
  - b) The direction be issued that after payment of the entire bid amount, the Consortium gets all the rights, title and interest in the whole and every part of the Corporate Debtor including contracts, free from security interest, encumbrances, claim, counter claim, or any demur in the Consortium and the sale proceeds shall be disturbed against accordance with section 53 of the IBC.

- c) A direction be issued that upon completion of the sale of the Corporate Debtor as a going concern 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 Government dues whether direct or indirect, whether admitted or not, due or contingent, asserted or unasserted, crystalized or uncrystalized known or unknown, secured or unsecured, disputed or undisputed in relation to any period prior to the e-auction date or arising on account of the acquisition of control by the consortium over corporate debtor pursuance to e-auction, will be written off in full and shall stand permanently extinguished.
- d) A direction be issued that the cases pending/decreed against the Corporate Debtor by any court and/or tribunal and/or any quasi-Judicial authority will not be enforced against the Consortium or the Corporate Debtor.
- e) A direction be issued that upon all the existing shares of the Corporate Debtor be extinguished and existing shareholders will become claimants from liquidation proceeds u/s 53 of the Code.
- f) A direction be issued that to show that status of the corporate debtor in the ROC records as 'active' from the status of 'liquidation'.
- g) A direction be issued that upon sale of the company as going concern, the Board of Director of the Corporate Debtor be re-constituted as per the

Companies Act and that consortium be permitted to nominate 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 consortium nominee individuals as directors of the corporate debtor, who are individuals recommended by the consortium, in order to enable the company to file relevant returns required by applicable law;

- h) A direction be issued that all subsisting consents, licenses, approval, rights, entitlements, benefits and privileges whether under law, contracts, 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, be deemed to continue without disruption for the benefit of the corporate debtor and all additional licenses, registrations and consents to operate required by the corporate debtor be made available immediately on payment of the entire bid amount.
- i) 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 liquidation order.
- j) A direction be issued that all the benefits availed by the corporate debtor as MSME company, will be continued to new Corporate Debtor.

- k) A direction be issued exempting the corporate debtor from payment of registration fee/stamp duty and other local levies, taxes, duties with respect to transfer of the bid amount.
  - l) Pass an order to provide the applicant 100% exemption on stamp duty and registration fee and all local taxes and levies imposed by the appropriate Government, applicable in respect of any transaction required to be undertaken pursuant to the e-auction, and taxes thereon.
  - m) A direction be issued that upon completion of sale of the corporate debtor as a whole as a going concern all the assets specified in the complete e-auction process document shall continue to be the assets of the corporate debtor, towards which the consortium has made payment without encumbrances of any kind.
  - n) That the Secured creditors be directed to handover the title documents deleting all encumbrances mentioned in the assets secured to them including by way of assignment to any person other than the Corporate Debtor.
- xii. The Applicants have submitted that they are the promoters of the Corporate Debtor which is a MSME company and are eligible to make application u/s. 29A read with Section 240A of the Code. That the Corporate Debtor has been conducting business in regular manner even while the company was under liquidation.

- xiii. The Applicants submit that, for resumption and restructuring of the company after the auction sale and for the compliance of the statutory regulations subsequent to the auction sale, the consequential reliefs sought, may be considered and granted as they are in administrative nature and also for other statutory compliances. Hence the Application.
3. The Applicants have relied upon the following judgements in support of the grant of the above reliefs:
- a) *Gaurav Jain V/s Sanjay Gupta – IA No. 2264 of 2020 in CP (IB) No. 1239/MB/2018 – NCLT Mumbai.*
  - b) *Kalpana G, Liquidator of Southern Online Bio-Technologies Ltd. V/s Satish Kumar and Ors – IA No. 122/2020 in CP (IB) 343/7/HDFB/2018, NCLT, Hyderabad Bench – I.*
  - c) *Bank of India V/s Southern Online Bio-Technologies Ltd., IA No. 1083/2019 in CP (IB) 343/7/HDFB/2018, NCLT, Hyderabad Bench – I.*
4. The Liquidator has filed a reply to the Application and has reiterated all the above facts. It is submitted by the Liquidator that the Applicants have paid the entire bid amount of ₹. 15.30 Crores and accordingly the e-auction process has been successfully completed. With respect to the consequential reliefs sought by the Applicants, the Liquidator has submitted that the Adjudicating Authority has power to grant such reliefs and such reliefs maybe granted as per the discretion of the Tribunal.

5. It is submitted that unless the said reliefs are granted, the Corporate Debtor cannot function as a going concern and the revival and working of the Company as a going concern will be adversely affected post its release from the liquidation.
6. We have heard the learned counsel appearing for the Applicant as well as the Liquidator. It would be beneficial to refer to the following paras of the Judgment of this Bench in *Gaurav Jain V/s Sanjay Gupta - (IA No. 2264 of 2020 in CP (IB) No. 1239/MB/2018 - decided on 09.03.2021)*:

*"20. Regulation 32 of the Liquidation Process Regulations provides for the realisation 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.]"*

*21. While the Liquidation Process Regulations recognises 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.*

*22. 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."*

*23. 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 NRE<sup>1</sup>, 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*

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<sup>1</sup> Gujarat NRE – NCLT KOLKATA BENCH: C.P. (IB) No. 182/KB/2017

*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.”*

*24. 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.*

*25. The crux of the 'going concern sale' 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. However, in this case the assets that are included in the E-Auction Memorandum only have to be taken over by the Applicant.*

*26. 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.*

*27. As far as the Liquidator is concerned, when the sale consideration is received from the bidder / purchaser, the same will be distributed to the*

*Creditors in accordance with Section 53 of the Code. Since the amount is paid to the Creditors in terms of the Code, the liabilities of the Corporate Debtor towards the Creditors are treated as settled and the purchaser takes the assets free of any encumbrances or whatsoever.*

*28. 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.*

*29. 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.*

*30. 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 utilised 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.*

*31. 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 authorisations, remains in the Company. Only the ownership of the Company is acquired by the successful bidder from the Liquidator.*

*32. 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.*

*33. The learned senior counsel for the Applicant referred to Para 83 of the Hon'ble Supreme Court's judgement in the case of ArcelorMittal India Private Limited....V/s....Satish Kumar Gupta and Others (MANU/SC/1123/2018). The Hon'ble Supreme Court in the said Judgment has referred to Regulation 32 of the Liquidation Process Regulations which states that the Liquidator may also sale the Corporate Debtor as a 'going concern'. Hence there is no impediment for the sale of the Corporate Debtor as a 'going concern'."*

7. As a consequence to the above discussions and on perusal of the pleadings and submissions made by the learned counsel for the Applicants and the Liquidator the following order is passed.

ORDER

The Application be and the same is allowed subject to the following.

- I. In respect of prayer 1.(a), since the Liquidator has already accepted the bid for ₹. 15.30 Crores and the auction sale of the Corporate Debtor as a going concern is completed on 18.03.2021, no specific order or ratification of the sale is required. The action of the Liquidator is in accordance with the relevant provisions of the Code and consequences thereof would follow according to law. Reiteration by the Tribunal is neither contemplated nor necessary.
  
- II. As far as the consequential reliefs sought for in Para 8(b) of the Application are concerned, the following orders are passed.
  - a. The promoters are permitted to restructure the Capital account as prayed for.
  - b. The Liquidator shall distribute the sale proceeds as per Section 53 of the Code. No separate order in that regard is required.
  - c. As far as prayer "c" is concerned, since already the purchase consideration is paid by the Applicants, the Applicants shall not have any more liability as far as the debts of the Corporate Debtor are concerned.
  - d. The Applicants will not be responsible for any cases/proceedings pending or decreed against the Corporate Debtor till this date.

- e. The existing share capital of the Corporate Debtor shall stand extinguished.
- f. The Registrar of Companies (RoC) concerned is directed to show the status of the Company as "Active" from "Liquidation" in their records.
- g. The Applicants are at liberty to reconstitute the Board of Directors as per provisions of the Companies Act, 2013 and the appropriate filings may be effected before the RoC concerned.
- h. All subsisting licenses, approvals, rights, entitlements, benefits, privileges, contract, lease etc., wherein the Corporate Debtor is entitled / involved will continue, subject to payment of statutory dues with effect from this date.
- i. Prayer "h" is allowed subject to the payment of renewal fees, if any, from this date to the licensing authorities.
- j. Prayers "i" & "j" are allowed.
- k. In respect of the prayers "k" & "l" the Applicants are required to approach the Authorities concerned for exemptions, if any, and the said Authorities will decide the issue in accordance with the law.
- l. In respect of the prayers "m" & "n", since the Applicants are the successful bidders in the auction sale, they become the owners of the assets mentioned in the auction sale. The secured creditors are directed to handover the title documents of the properties covered under the

auction sale process by deleting all the encumbrances created previously.

III. No order as to costs.

Sd/-

V. Nallasenapathy  
Member (Technical)

Sd/-

Janab Mohammed Ajmal  
Member (Judicial)