IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH–I, CHENNAI

ATTENDANCE CUM ORDER SHEET OF THE HEARING
HELD ON **11.09.2025** THROUGH VIDEO CONFERENCING

PRESENT: **HON'BLE SHRI. SANJIV JAIN, MEMBER (JUDICIAL)**
HON'BLE SHRI. VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

IN THE MATTER OF **:** Baobab Broadband Ltd.
Vs
Gemini Communication Ltd.

MAIN PETITION NUMBER **:** CP/699/IB/2017

(IA/MA) APPLICATION NUMBERS

IA/1498(CHE)/2022 in IA/1215(CHE)/2021

ORDER

Present: Md. Poorthi Balakrishnan, Ld. Counsel for the Applicant/BSNL.
Shri. Ganeshraj, Ld. Counsel for R1.

Vide separate order pronounced in the Open Court, the application is disposed of with directions.

Sd/-	Sd/-
VENKATARAMAN SUBRAMANIAM	**SANJIV JAIN**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

vs

Date: 11.09.2025

IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IA/1498(CHE)/2022
IN
IA/1215(CHE)/2021
IN
CP/699/IB/2017

(filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 R/w Rule 11 of the NCLT Rules, 2016)

In the matter of ***M/s. Gemini Communication Limited***

1. **Bharat Sanchar Nigam Limited**
   Represented by its Chief General Manager,
   CNTX – South (STP previously)
   Having Office at
   No. 11, Link Road, Ganapathy Colony,
   Guindy, Chennai – 600032.

… Applicant

-Vs-

1. **M.S. Viswanathan,**
   Liquidator of Gemini Communication Limited,
   15/35, Musafer Jung Bahadur Street,
   Triplicane, Chennai – 600 005.

… 1st Respondent / Liquidator

2. **Pixtronic Global Technologies Private Limited,**
   122A, CASA, Grande Pavilion,
   Thalambur, Chennai – 603 103.
   Ashok Magnetics Ltd (Formerly AML Steel Ltd).
   Flat No. 1162, 1st Block, TVH Lumbini Square,
   127A, Bricklane Road, Purasawalkam,
   Chennai – 600 007.

… 2nd Respondent / Successful Auction Purchaser

For Applicant : R. Vidhyashankar, Advocate

For Respondents : T.K. Bhaskar
Ganesh Raj, Advocate for R1
Kalyan Jhabakh, Advocate for R2

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

Order Pronounced on 11th September 2025

O R D E R

(Heard Through Hybrid Mode)

This application has been filed seeking the following reliefs.

i. Issue a direction that further to the order of the NCLT Division Bench – I, Chennai in IA/1215/CHE/2021 in CP/699/IB/2017, the proceedings in A.F. No: 46 of 2018 before the Arbitration Tribunal of Justice (Retired) K.N. Basha can be continued to be prosecuted in respect of claim of the Applicant against Corporate Debtor and that award if any as may be passed in favour of the Applicant is liable to be enforced against the Corporate Debtor and Auction Purchaser in as much as the Sale of the Corporate Debtor as a Going Concern.

ii. Pass such further or other orders as it may deem fit and necessary and thus render justice.

Facts of the Case

2. Briefly the facts are that the Corporate Debtor, Gemini Communications Limited got a Purchase Order dated 28.06.2010 for

Rs.378.0 Crores for supply, installation and commissioning of 2707 BTS across seven circles from BSNL, the Applicant herein. Even after 18 months of issuance of Purchase Order, it completed less than 2% of the project. A show cause notice dated 22.02.2012 was issued to the Corporate Debtor. On 29.03.2012, in CS/207/2012, the Corporate Debtor obtained ad-interim injunction against the Applicant restricting the termination of contract and encashment of Bank Guarantee. The stay was vacated on 21.09.2012 by the Hon'ble High Court. Thereafter, the Applicant terminated the contract on 22.09.2012 and initiated steps for the invocation of Bank Guarantee. The Corporate Debtor preferred an appeal against the order dated 21.09.2012 before the Division Bench of the Hon'ble High Court and the Hon'ble High Court vide order dated 19.12.2012 dismissed the appeal. Thereafter, the Applicant encashed the Bank Guarantee of Rs. 23.40 Crores given in favour of the Applicant. The Corporate Debtor preferred SLP (Civil) 4278 & 4279 of 2013 before the Hon'ble Supreme Court seeking an order of stay against the termination of the purchase order and encashing of the Bank Guarantee on which, the Hon'ble Supreme Court issued the notice and limited the appeal to the question "whether the parties can be referred to arbitration". In 2014 the matter was referred to arbitration. Shri. R.N. Prabhakaran (Retired) TRAI member was appointed as the Arbitrator on 24.06.2014. The Corporate Debtor filed the claims qua damages to the tune of Rs.1388.0 Crores while the Applicant filed the counter claims for Rs. 4698.0 Crores. The arbitration went for about 2 ½ years. In June 2017, the Corporate Debtor in O.P./ No. 364 of 2017, requested for the change of Arbitrator and the Hon'ble High Court vide an order dated 24.01.2018, appointed Retd. Justice Shri. K.N. Basha as the Arbitrator. During the course of proceedings, one of the creditors of the Corporate Debtor filed an application for initiation of insolvency proceedings against the Corporate Debtor which was allowed vide an order dated 20.06.2018. The Applicant being one of the Operational Creditors filed a claim of Rs.4704 Crores before the RP, however, the RP vide letter dated 15.10.2018, rejected the claim stating that dispute is pending in the arbitration. Because of the pendency of CIRP, the arbitral proceedings did not progress. Since the resolution process failed, liquidation proceedings were initiated against the Corporate Debtor. During the proceedings, the Liquidator sold the Corporate Debtor to Pixtronic

Global Technologies Private Limited (Respondent No.2) as a going-concern which was post facto approved by the Tribunal vide an order dated 15.02.2022 with reliefs & concessions. The Liquidator/Respondent No.1 filed a memo dated 05.07.2022 before the Arbitrator stating that as per the order of the Tribunal, the sale of the Corporate Debtor was as a going-concern with concessions. He however stated that the liquidation estate has retained both the assets and liabilities relating to the Corporate Debtor subject to litigation *inter alia* that if the Arbitrator passes an award allowing the counter claim and disallowing the claim of the Corporate Debtor, the Applicant can maintain claim before the Liquidator and requested the arbitral proceedings to go on. He referred Clause 6 of the Sale Notice inter alia as under.

> *"6. Subsequent to the completion of the arbitration proceedings between the Corporate Debtor and the BSNL or from any other proceedings and in case any proceeds received from the arbitration award or from any other known or unknown litigations, subsequent to the declaration of the successful bidder of the LOT1, shall be distributed / assigned to creditors of the corporate debtor as per IBC, 2016."*

3. It is stated that above Clause discloses that what is retained in liquidation estate is only the contingent receivable and not the contingent liability. There is no way out of the contingent liability in a going-concern sale. In the meantime, the mandate of Arbitrator expired on 12.08.2022. The Applicant moved to the Hon'ble High Court seeking extension of time.

4. Regulation 32 and Regulation 32A of IBBI Liquidation Regulations, 2016 are referred to state that the auction sale notice is unambiguous as the entire sale is on ‘as is where is’ ‘as is what is’ and ‘whatever is basis’ meaning thereby that the auction Purchaser has purchased the Corporate Debtor with all liabilities and litigations. The Tribunal in the order dated 15.02.2022, referring the case of ***Visisth Services Ltd. vs. S.V. Ramani, Liquidator of United Chloro – 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. It was held that the term ‘going concern’ means all such assets and liabilities which constitute an integral business of the

Corporate Debtor that must be transferred together. The Tribunal while granting reliefs and concessions, ruled vide table set in para-16 the following terms:

S. No.	RELIEF / CONCESSIONS SOUGHT FOR	ORDERS THEREON
11	All liabilities and guarantees extended by the Corporate Debtor whether monetary or non-monetary, statutory, crystallized or not crystallized, claimed or not claimed, admitted or not admitted, disputed or undisputed, confirmed or contingent or due or overdue or future date, decrees obtained for satisfaction of debt and all such obligations of the Corporate Debtor shall stand extinguished and discharged in full without any recourse to the Corporate Debtor.	Granted, subject to the provisions of IBC, 2016 and other applicable law.
15	The successful auction bidder/Corporate Debtor shall not be held responsible/liable for any past liabilities of the Corporate Debtor in enquiries, investigations, assessments, notices, criminal cases, civil cases, suits, claims, disputes, litigations, arbitrations or other judicial, regulatory, administrative proceedings or in relation to or in	Granted in terms of the judgment of the Hon'ble Supreme Court in Ghanashyam Mishra and Sons v. Edelweiss Asset Reconstruction Company Limited

	connection with the Corporate Debtor prior to effective date.	2021 SCC Online SC 313

5. It is stated that the Tribunal clarified that such reliefs and concessions will only be subject to the provisions of IBC. It is stated that the Liquidator cannot claim that post takeover of the Corporate Debtor as a going-concern, the Auction Purchaser is absolved from any liability arising from the pending arbitral proceedings. It is stated that the decision in the case of "***Ghanashyam Mishra and sons v. Edelweiss Asset Reconstruction Company Limited 2021 SCC Online SC 313*** will not come to the rescue of the auction purchaser / Corporate Debtor post takeover as a going-concern since the claim of the Applicant against the CD is to be crystallised during the arbitral proceedings which fact was disclosed in Clause-6 of the Sale Notice. It is stated that the Liquidator is not right in suggesting that the claim of the Applicant against the Corporate Debtor will not be enforceable against the Corporate Debtor / auction purchaser post going concern sale.

6. It is stated that due to failure of the Corporate Debtor, a national project failed and large claim of Government entity went into stalemate. It is stated that in the absence of appropriate direction / clarification, the Applicant being a public sector, will be put to irreparable prejudice.

<u>Arguments and Contentions</u>

7. We have heard Ld. Counsel Shri. R. Vidhya Shankar for the Applicant, Shri. T.K. Bhaskar Ld. Counsel for Respondent No.2 and Shri. V. Manivannan, Ld. Counsel for Respondent No.1.

8. <u>Ld. Counsel for the Applicant/BSNL</u> reiterated what has been stated in the application. He contended that in terms of Regulation 32A, sale as a going-concern means sale of assets plus liabilities. IBBI discussion paper on Corporate Liquidation Process clarifies that such a sale will include both assets and liabilities. He referred the case ***Varshish Services Limited supra*** to contend that in a going concern sale of the Corporate Debtor, the liabilities form part of sale and the bidder cannot seek waiver from liability after acceptance of bid. He also referred the case of ***Nabinagar Power Generating Company Ltd. and Anr vs. Ram***

Ratan Modi and Anr 2023 SCC Online NCLAT 1168 where the case of ***Visisth Services Ltd***. *supra* was considered and it was held that in a going-concern sale, the purchaser is liable for the debt which is not crystallised. Ld. Counsel submits that the sale notice provides that the arbitral proceedings have to continue which has also been stated by the Liquidator in his memo filed vide S.R. No.804 praying for the continuation of the arbitral proceedings. The Tribunal while approving the sale, has also clarified the sale being a going-concern sale of the Corporate Debtor inclusive of liabilities and not sans liabilities. He contends that the tabulation in para-16 of the order cannot be read in a manner which overrides express findings in the preceding paras of the order which clarify that the exemption and reliefs granted are subject to the provision of IBC, 2016. Ld. Counsel submits that the sale certificate cannot carry terms contrary to IBC and the order dated 15.02.2022. Further, in the case of ***Nabinagar Power Generating Company Ltd.*** *supra,* Hon'ble NCLAT has held that the sale notice terms bind the auction purchaser and he cannot walk away from the binding obligation to discharge the liabilities thereafter.

9. Ld. Counsel submits that IBC is a special law which contains an overriding provision. In the case of "***Gujarat Urja Vikas Nigam Ltd. vs Amit Gupta & Ors. In Civil Appeal No. 9241 of 2019,*** the Hon'ble Supreme Court has held that under Section 60(5)(c), NCLT has wide discretion to adjudicate and decide all questions of law or fact arising out of or in relation to insolvency or liquidation.

10. <u>Ld. Counsel for Respondent No. 1 / Liquidator</u> per contra argued that the Applicant did not file any claim after the initiation of liquidation process against the Corporate Debtor. It was neither a member of CoC during the CIRP nor a member of SCC during liquidation as such, it does not have any *locus standi* to file the present application. He submits that no person or a legal entity claiming to be a creditor is entitled to receive any money apart from the procedure established under Section 53 of IBC. Ld. Counsel submits that this application has been filed with a sole intention to derail the arbitral proceedings making a colourable attempt to receive the alleged dues from the Respondent No.2/Auction Purchaser.

11. Ld. Counsel submits that the Liquidator had published an advertisement for sale of the Corporate Debtor as a going-concern for 16.04.2021 where Respondent No.2 participated and emerged as the successful bidder for a bid amount of Rs.3,55,61,750/-. The Liquidator issued a sale certificate on 15.10.2021 to the auction purchaser subject to the conditions set out therein. An application was filed by the Liquidator for approval of the sale as a going-concern under Regulation 32(e) which application was allowed by the Tribunal vide an order dated 15.02.2022 giving reliefs and concessions as tabulated below:

S. No.	***RELIEF / CONCESSIONS SOUGHT FOR***	***ORDERS THEREON***
10	*That all claims of the Corporate Debtor against third parties and its related parties, shall remain outstanding, due and recoverable in accordance with their respective terms. Corporate Debtor / successful bidder shall have full right to recover / proceed against the party, whose account is recoverable in the books of the Corporate Debtor as on the Effective Date.*	*Granted in terms of the judgment of the Hon'ble Supreme Court in Ghanashyam Mishra and Sons V. Edelweiss Asset Reconstruction Company Limited. 2021 SCC Online SC 313*
11	*All liabilities and guarantees extended by the Corporate Debtor whether monetary or non-monetary, statutory, crystallized or not crystallized, claimed or not claimed, admitted or not admitted, disputed or undisputed, confirmed or contingent or due or overdue or future due, decrees obtained*	*Granted, subject to the provisions of IBC, 2016 and other applicable laws*

	for satisfaction of debt and all such obligations of the CD shall stand extinguished and discharged in full without any recourse to the CD.	
14	*The liabilities, if any, arising out of non-compliance of provisions of any laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permissions prior to effective date shall stand extinguished for the successful auction bidder and the same shall be settled by the Liquidator in accordance with the provisions of Section 53 of IBC, 2016.*	*Allowed, subject to the provisions of IBC, 2016*
15	*The successful auction bidder/Corporate Debtor shall not be held responsible / liable for any past liabilities of the Corporate Debtor in enquiries, investigations, assessments, notices, criminal cases, civil cases, suits, claims, disputes, litigations, arbitrations or other judicial, regulatory, administrative proceedings or in relation to or in connection with the Corporate Debtor prior to effective date.*	*Granted in terms of the judgment of the Hon'ble Supreme Court in Ghanashyam Mishra and Sons V. Edelweiss Asset Reconstruction Company Limited* *2021 SCC Online SC 313*
24	*All liabilities or debt whether crystalized, contingent, filed, not filed, admitted or not admitted by the Liquidator, disputed or undisputed or otherwise including those pertaining to statutory dues and penalties shall be deemed as having been fully discharged in accordance with the provisions of the Code and the Corporate Debtor and the successful bidder shall not be liable for the same.*	*Granted in terms of the judgment of the Hon'ble Supreme Ghanashyam Mishra and Company Sons V. Edelweiss Asset Reconstruction Limited.* *2021 SCC Online SC 313*

It is clear from the tabulation that all claims of the Corporate Debtor against the third parties shall remain outstanding, due and recoverable and the successful bidder shall have full right to recover the same.

12. Ld. Counsel submits that in the event of the Arbitrator passing an award allowing the counter claim of the Applicant and rejecting the claim of the Corporate Debtor, the Applicant can file claim under Section 38 of IBC to the Liquidator as a Creditor who after verification, under Section 39, shall admit the claim as per Section 14 of IBC. Ld. Counsel submits that right of the Applicant which may arise in future is protected under Regulation 28. Ld. Counsel submits that as per clause-15 of the Sale Certificate dated 15.10.2021, *the Successful Auction Bidder/Corporate Debtor shall not be held responsible / liable for any past liabilities of the Corporate Debtor in enquiries, investigations, assessments, notices, criminal cases, civil cases, suits, claims, disputes, litigations, arbitrations or other judicial, regulatory, administrative proceedings or in relation to or in connection with the Corporate Debtor prior to effective date.*

13. Ld. Counsel submits that at present that the sole Arbitrator has recused himself from the matter and there is no composition of the Tribunal.

An application for appointment of an Arbitrator is pending before the Hon'ble High Court. The relief sought by the Applicant is premature because the auction purchaser is not even a party to the arbitral proceedings so there cannot be any question of declaring that Applicant can enforce an award against the third party.

14. Ld. Counsel submits that Section 5 of the Arbitration Act contains a non-obstante clause which is similar to the language contained in Section 238 of IBC. In the matter of arbitration, the Arbitration Act is a special law while in insolvency proceedings, IBC is a special law. He referred the case of ***Embassy Properties Private Limited v. State of Karnataka, 2020 (13) SCC 308.***

15. Ld. Counsel submits that the order of the Tribunal approving the sale has become final. The order has to be read as a whole which includes reliefs and concessions which were granted in terms of the judgment of Hon'ble Supreme Court in the case of ***Ghanashyam Mishra and Sons Vs Edelweiss Asset Reconstruction Company Limited, AIR Online 2021 SC 196***. Ld. Counesl submits that the Respondent No.2 cannot be made liable for any claims made in the arbitration which will be

against the teeth of the relief granted under Serial No. 15 by the Tribunal in the order dated 15.02.2022. Ld. Counsel submits that the principle laid down in ***Ghanashyam Mishra and Sons*** supra would equally apply to liquidation process in the realm of cleanslate story which aspect has been aptly explained in ***Essar Steel India Ltd. Vs. Satish Kumar Gupta (2019) ibclaw.in 07.*** Ld. Counsel submits that the auction purchaser has purchased the Corporate Debtor as a going-concern through auction subject to reliefs and concessions granted vide an order dated 15.02.2022. He referred the cases of ***Shiv Shakti Inter Globe Exports Pvt. Ltd. v. M/s KTC Foods Private Limited and Another, 2022 SCC OnLine NCLAT 85*** where it was held that subsequent to the sale of the Corporate Debtor as a going-concern, the claims cannot be foisted on the purchaser. The scope and objective is to extinguish all claims specifically the ones which were not even made during the CIRP or in the liquidation estate to aid the purchaser to start on a "*clean slate*". In the case of ***CoC of Essar steels Limited Vs. Satish Gupta & Ors. (2020) 8 SCC 531***, it was held that purchaser of the company even in the liquidation stage cannot be burdened with past liabilities when it is not mentioned in the sale notice. He referred the case of ***KRBL Limited Vs State of Gujarat, High Court of Gujarat at Ahmedabad, Civil Application No. 19804 of 2022*** to contend that auction purchaser was entitled to a cleanslate. Ld. Counsel submits that ***Visisth Services Ltd. vs. S.V. Ramani*** *sup*ra is a case where e-auction notice did not have any clause imposing a condition subject to approval of NCLT whereas in the present case, as per clause-3 of the sale notice, sale was subject to approval by the Tribunal which while approving the sale has granted concessions to the auction purchaser under Sr. No. 15. The Tribunal while passing the order had considered the above judgment and thereafter granted the concessions to the auction purchaser.

16. <u>Ld. Counsel for Respondent No.2</u> argued on the lines of Respondent No. 1. He contended that the sale as a going concern was made subject to terms stated in the Certificate of Sale dated 15.10.2021. The clauses in the sale certificate do not mention that auction purchaser will be liable for any of the past liabilities of the Corporate Debtor. Ld. Counsel submits that the Corporate Debtor was sold as a going-concern in liquidation where the assets were transferred while the liabilities are to be settled in accordance with Section 53 of IBC, 2016.

17. Ld. Counsel submits that during the CIRP, the Applicant had filed Claim Form on 18.09.2008 before the RP but the RP informed that the claim cannot be considered as it is a disputed claim. During liquidation, the Applicant did not file any claim before the Liquidator.

18. Ld. Counsel submits that the bid documents clearly contain that the successful bidder does not take or assume any responsibility for any liabilities / dues, statutory or otherwise of the Company including such dues, if any, which may affect transfer of the liquidation assets in the name of the successful bidder. He referred the case of ***Wave Industries Pvt. Ltd. vs State of UP and Others 2022 CC OnLine SC 1721*** where it was held that liability occurred prior to the sale but to be quantified and discharged at a future date will not fall on the shoulders of the new purchaser. He also referred the case of ***Arun Kumar Jagatramka vs Jindal Steel & Power and another 2021 (7) SCC 474*** where the Hon'ble Supreme Court held that the schemes under Section 230 of the Companies Act, 2013 which enabled the revival of the Corporate Debtor would have the benefit of doctrine of *"clean slate"* which principle in law should have been extended to going-concern sales in

liquidation which too, provides for revival of the Corporate Debtor. He also referred the case of ***Gaurav Jain vs Sanjay Gupta 2021 SCC OnLine NCLT 489*** where it was held that sale of the Corporate Debtor as a going concern will not dissolve the Corporate Debtor but the ownership is transferred along with assets so that the Corporate Debtor as a legal entity, remains intact. In such type of sale, the acquirer takes over the assets etc. excluding the liabilities. Ld. Counsel submits that liabilities which are unsettled are automatically extinguished under Section 53 of IBC. In a going concern sale in liquidation, there cannot be a question of liabilities being a part of undertaking. The objective behind the same is that the company be operated which stopped its operations long back.

19. Ld. Counsel submits that as per clause 6 of the certificate of sale, the arbitral proceeding with BSNL has been kept outside the purview of the bid. Any rights / proceeds arising out of the arbitration, would only go into the liquidation estate of the Corporate Debtor and the bidder cannot raise any claim over such amount. Ld. Counsel submits that there will be no *clean slat*e if the liabilities remain intact as it would defeat the purpose of sale as a going concern. Ld. Counsel submits

that in the case of ***Visisth Services Ltd*** *supra,* the successful bidder had accepted all the terms and conditions but in the instant case, the Respondent No.2 never agreed to take the liabilities of the Corporate Debtor. Ld. Counsel submits that the judgment in the case ***Visisth Services Ltd*** *supra* is contrary to the judgment of Hon'ble Supreme Court in the case of *"**Arun Kumar Jagatramka Vs. Jindal Steel & Power and another, 2021 (7) SCC 474*** which may also be *per incuriam* on account of failure to consider Regulation 35 which clearly requires reserve price to be value of assets sans liabilities and not the value of assets including liabilities. In the case of ***Kashvi Power & Steel Private Limited vs West Bengal State Electricity (High Court of Calcutta, W.P.A No. 6327 of 2022),*** it was held that if the sale of the assets is made with liabilities, it will be an absurd proposition.

Findings

20. We have given our thoughtful consideration to the rival contentions and perused the record.

21. This Tribunal on an application IA/1498(CHE)/2022 in IA/1215(CHE)/2021, passed an order on 01.05.2023 which is reproduced as under:

> *"The factum of an arbitral proceedings pending is also disclosed in the sale notice which is mentioned at page No. 43 and more particularly at page no. 45 in para no. 6.*
> *By virtue of the relief as above the applicant BSNL wants a direction to be issued to that the Arbitral Tribunal to pass award in favour of the Applicant and that it should be imposed against the corporate debtor and the auction purchaser in view of the sale of the corporate debtor as a going concern as indicated above.*
>
> *We find that such relief cannot be granted because no direction can be issued by this Tribunal to the Arbitral Tribunal to pass an award in favour of one party without there being a proper adjudication in the manner required by Law.*
>
> *The prayer is apparently misconceived and cannot be granted.*
> *Accordingly, IA/1498(CHE)/2022 in IA/1215(CHE)/2021 stands dismissed."*

22. Against that order, BSNL/Applicant preferred an appeal and the Hon'ble NCLAT vide an order dated 24.11.2023, set aside the order holding that there is total misunderstanding on the part of the Tribunal while considering the relief and dismissing the same on the analogy that the Applicant is seeking a direction to the Tribunal to pass the

order in its favour. As a matter of fact, the Applicant has only sought a direction for prosecuting the arbitration matter pending before the Arbitral Tribunal and has submitted in the prayer that it wants to prosecute the arbitral proceedings because if any award is passed in their favour, then they would be in a position to enforce the said award against the Corporate Debtor and the auction purchaser because the Corporate Debtor has been sold as a going-concern. The Hon'ble NCLAT remanded back the matter to the Tribunal to consider the application filed by the Applicant vis-à-vis the relief prayed for and decide the same after hearing all the parties.

23. In the present case, as seen from the documents, the sale notice was issued by the Liquidator for e-auction of the Corporate Debtor as a going concern on 30.03.2021. The reserve price was fixed as Rs. 3,54,61,750/-. It was stipulated in the e-auction documents that the e-auction will be conducted on *'as is where is', 'as is what is' and 'whatever is basis'* without any kind of warranties and indemnities. The sale of the Corporate Debtor will be subject to final approval of the Tribunal. The sale proceeds of the e-auction will be transferred to the liquidation estate and the same will be distributed to the Creditors in

accordance with their admitted claims as per Section 53 of IBC. **Subsequent to the completion of the arbitration proceedings between the Corporate Debtor and BSNL or from any other proceedings and in case any proceeds received from the arbitration award or from any other known or unknown litigations, subsequent to the declaration of the Successful Bidder of going concern in lot 1 shall be distributed / assigned to Creditors of the Corporate Debtor as per IBC.** It was stipulated that terms and conditions, deadlines, timelines, notifications, updates and other details for participating in the auction are provided in the process memorandum which is available on the website. Based on the sale notice & terms and conditions, Respondent No. 2 Pixtronic Global Technologies Private Limited participated in the bid and emerged as the Successful Bidder. The sale was approved by the Tribunal vide an order dated 15.02.2022 with reliefs and concessions as stated supra.

24. As seen from the record, because of the disputes between the Applicant BSNL and the Corporate Debtor Gemini Communication Limited, the Hon'ble Supreme Court vide an order dated 24.06.2014 referred the matter to arbitration and appointed Mr. R.N. Prabhakaran

(Retired) TRAI Member as the sole Arbitrator. The Corporate Debtor filed the claims for damages for Rs. 1388.0 Crores while the BSNL filed the counter claims for Rs. 4698.0 Crores. Till date, arbitral proceedings have not been concluded. BSNL during the CIRP filed a claim as an Operational Creditor for Rs. 4704.0 Crores before the RP, however, the RP rejected the claim observing that dispute is pending before the Arbitrator. Since the resolution process failed, liquidation order was passed against the Corporate Debtor which resulted into the sale of the Corporate Debtor as a going concern in favour of Respondent No. 2 with concessions.

25. This Tribunal while approving the sale vide an order dated 15.02.2022 in para 11 observed that in so far as sale as a going concern is concerned, the term going concern means all such assets and liabilities which constitute an integral business of the Corporate Debtor that must be transferred together and the consideration must be for the business of the Corporate Debtor. The buyer of the assets and liabilities should be able to run business without any disruption. The Tribunal distinguished the sale of the Corporate Debtor as a going

concern under Regulation 32(e) and sale of business of the Corporate Debtor as a going concern under Regulation 32(f) referring the case of ***Visisth Services Limited supra*** and held that the sale as a going concern means sale of assets as well as liabilities and not assets sans liabilities, if it is stated on 'as is where is basis'. Nevertheless the Tribunal granted reliefs and concessions to the Successful Bidder subject to the provisions of IBC, 2016 and other applicable laws, which included that all liabilities and guarantees extended by the Corporate Debtor whether monitory or non-monitory, statutory, crystalized or non-crystalized, claimed or not claimed, admitted or not admitted, disputed or undisputed, confirmed or contingent or due or overdue or future due, decrees obtained for satisfaction of debt and all such obligations of the Corporate Debtor shall stand extinguished and discharged in full without any recourse to the Corporate Debtor. This Tribunal also granted the relief and concession at S.No. 15 of the table referred in para No. 3 *supra* giving reference of the Hon'ble Supreme Court judgment in ***Ghanashyam Mishra supra***.

26. In the instant case, till date, the claims of the parties have not been crystallized. The sale notice clearly provided that subsequent to the

completion of arbitration proceedings, any proceeds received from the arbitration award shall be distributed / assigned to the Creditors of the Corporate Debtor as per IBC meaning thereby that the Creditors will be the beneficiary of the receivables of the arbitration award. Taking this analogy, in respect of any proceeds / receivables from the Corporate Debtor by the BSNL / Applicant in the arbitration award, the same shall be treated as an operational debt payable under waterfall mechanism under Section 53 of IBC. Hence the Successful Purchaser cannot be burdened for the said receivables. Regulation 28 provides that once a claim becomes due, the Stakeholder shall be entitled to distribution of liquidation asset like any other Stakeholder under Section 53 of IBC. Admittedly, this Tribunal has clarified the sale to be a going concern sale inclusive of liabilities and not sans liabilities but the Tribunal simultaneously granted the reliefs as referred supra in the table at para 3 and 10. Giving a harmonious and purposive interpretation / construction and in terms of the judgment of Hon'ble Supreme Court in *Ghanashyam Mishra supra*, the Respondent No. 2 cannot be made liable for any claims made in the arbitration. In the case of ***KRBL Limited Vs. State of Gujarat (supra),*** **Hon'ble Gujarat High Court** has held as under:

> *3.2 That IBC is a complete code which deals with solutions on a holistic perspective concerning a company and all stakeholders, irrespective of whether the provision pertains to the resolution plan or the liquidation process which is settled law that all concerns including the company, creditors, purchasers start with a 'clean slate'. He would submit that as far as the resolution process is concerned, the judgement of the Hon'ble Supreme Court in case of Ghanshayam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited, reported in (2021) 9 SCC NEUTRAL CITATION C/SCA/19804/2022 CAV JUDGMENT DATED: 22/09/2023 undefined 657, has dealt with the issue and the Hon'ble Supreme Court held that a successful resolution application cannot suddenly face with undecided claims after a resolution plan submitted by him has been approved.*
>
> *5.19 The argument of the State that since the asset was sold on a condition of "AS IS WHERE IS BASIS", the charge of the State was rightly recorded is misconceived as the deed already records that the purchaser shall not be liable for payment of any outstanding dues of the NEUTRAL CITATION C/SCA/19804/2022 CAV JUDGMENT DATED: 22/09/2023 undefined government. This too was, in the opinion of the Court a clause that would relieve the petitioner of the liability to pay tax dues. In light of the decision in the case of Ghanshayam Mishra and Sons Private Limited (supra), the petitioner was entitled to a clean slate.*

27. In the instant case, this Tribunal has excluded the liability of the auction purchaser vide its order dated 15.02.2022 under S. No. 15 with respect to arbitration. The word 'as is where is' only means the state of the assets at the time of purchase and does not mean that the auction purchaser who has purchased it on a clean slate is liable for the counter

claim of the Applicant. In the present case, the sale of the Corporate Debtor as a going concern was subject to the final approval of the Tribunal and this Tribunal has granted the concession to the auction purchaser under S.No. 15 of the table supra referring the case of *Vishist Services Limited supra*. In *Vishist Services Limited*, the Successful Bidder had accepted all the terms and conditions, however, in the present case, nowhere in the sale certificate Respondent No. 2 agreed to take on the liabilities of the Corporate Debtor. In *Kashvi Power and Steel Private Limited supra*, the question raised before Hon'ble Calcutta High Court was 'whether the auction purchaser is liable for the past outstanding dues'. It was held that if the sale of assets is made with liabilities, a claim of equity holders and other creditors will be carried on, is an absurd proposition, due to which ***Vishist Services supra*** did not consider the amended Regulation 32A(3). As such, subsequent orders against the proposition of the earlier order dated 11.01.2021 in ***Vishist Services supra*** are misconceived in as much as interpretation of law is concerned. It was held that Regulation 32A of the Liquidation Process Regulations, 2016 clearly specifies that the liabilities for the purpose of going concern sale in liquidation are only those liabilities which have been identified and earmarked for a going concern sale by the CoC if not by the Liquidator.

28. Hon'ble Supreme Court in the case of ***Wave Industries Private Limited Vs. State of UP and others 2022 Online SCC 1721*** has held that liability occurred prior to the sale but to be quantified and discharged at a future date will not fall on the shoulders of new purchaser. In *Arun Kumar Jagatramka Vs. Jindal Steel & Power and another 2021 (7) SCC 474* while dealing with the purport and ambit of the doctrine of clean slate, Hon'ble Supreme Court recognised three modes of revival of the Corporate Debtor as against its death and going back to the status quo ante and held that the benefit of doctrine of clean slate should have been extended to going concern sales in liquidation that too provides for revival of the Corporate Debtor.

29. Hon'ble NCLAT in the case of ***Shiv Shakti Inter Globe Exports Pvt. Ltd. Vs. KTC Foods Private Limited supra,*** held as under:

> *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.

It was held that 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. The Hon'ble Supreme Court in Ghanshyam Mishra supra and CoC of Essar Steel India Ltd Vs. Satish Gupta & Ors, (2020) 8 SCC 531 has laid down the proposition that the purchaser of the Company even in the Liquidation stage cannot be burdened with post liabilities when it is not mention in the 'Sale Notice'.

30. In the case of ***Essar Steel India Ltd. Vs. Satish Kumar Gupta (2019) ibclaw.in 07***, Hon'ble Supreme Court has held that "hydra head popping up" should be prevented and emphasized that the prospective resolution applicant who successfully takes over the business of the Corporate Debtor should be protected from any past claim from resurging and thereby throwing the resolution applicant into uncertainty.

31. In the present case, the sale certificate has already been issued to the Auction Purchaser / Respondent No. 2. The Corporate Debtor has

been sold to the Respondent No. 2 as a going concern. Except the claim relating to arbitral proceedings, all the claims have been crystallized and accounted for. The distribution is to be made under Section 53 of IBC on the basis of the category of creditors and their admitted claims. The sale notice clearly provides that the beneficiary of receivables of the arbitral proceedings would be the Creditors. Applying the same analogy, if any claim is decided in favour of the Applicant during the arbitral proceedings, the claim will be treated as an operational debt and would be payable under waterfall mechanism under Section 53 of IBC from the liquidation assets of the Corporate Debtor.

32. Since in the present case except the distribution of the liquidation estate, the whole process of liquidation has been completed and the Corporate Debtor has been sold as a going concern, **the proceedings before the Arbitral Tribunal can be continued to be prosecuted in respect of the claim and the counter claim of the Applicant and the Corporate Debtor and the award as may be passed in favour of the parties is liable to be enforced in terms of the sale auction notice and under Section 53 of IBC.**

33. In terms of the above, the application is **disposed of**.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)