

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH- IV

IA 3172/ND/2021,

IA 3113/ND/2021

IN

IB No. 248/ND/2019

IN THE MATTER OF:

ARGENTIUM INTERNATIONAL PVT. LTD.

..... OPERATIONAL CREDITOR/PETITIONER

VERSUS

UTM ENGINEERING PVT. LTD.

... CORPORATE DEBTOR/RESPONDENT

IN THE MATTER OF:

Kanti Mohan Rustagi,

(In the matter of UTM Engineering Private Limited)

... LIQUIDATOR/APPLICANT

VERSUS

Red Brick Consulting Private Limited

... RESPONDENT/SUCCESSFUL BIDDER

AND

IN THE MATTER OF:

TCM-UTM(JV)

... APPLICANT

VERSUS

Kanti Mohan Rustagi,

(In the matter of UTM Engineering Private Limited)

... RESPONDENT

**APPLICATION UNDER SECTION 60(5) OF THE
 INSOLVENCY AND BANKRUPTCY CODE, 2016 AND
 REGULATION 32A OF THE INSOLVENCY AND
 BANKRUPTCY BOARD OF INDIA (LIQUIDATION
 PROCESS) REGULATIONS, 2016**

Order delivered on: 09.05.2022

IA 3113/ND/2021 & IA 3172/ND/2021

IN IB No. 248/ND/2019

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CORAM:

SH. SHRI DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)
SMT. SUMITA PURKAYASTHA, HON'BLE MEMBER (TECHNICAL)

ORDER

PER: SHRI DHARMINDER SINGH, MEMBER (JUDICIAL)

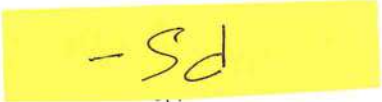
1. Instant IA 3113/ND/2021 is being filed by the Liquidator ("Applicant") of UTM Engineering Private Limited ("Corporate Debtor") under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("IBC") read with Regulation 32A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("Liquidation Process Regulation") seeking approval of the bid received by Red Brick Consulting Pvt. Ltd. ("Successful Bidder"/ "Red Brick") for acquiring the Corporate Debtor as a going concern as per the provision laid down in the code whereas, IA 3172/ND/2021 is being filed by TCM-UTM (JV) under Section 60(5) of the Code seeking quashing of the sale of Corporate Debtor to Red Brick Consulting Private Limited. Since, both the Application have common question of law and facts, we will dispose both the applications by this Common order.
2. Brief facts as stated in the IA 3113/ND/2021 are as follows:
 - 2.1 The Corporate Insolvency Resolution Process ("CIRP") was initiated vide order dated 17.10.2019. Thereafter, the liquidation process was initiated vide order dated 15.10.2020 passed by this Tribunal and the applicant Mr. Kanti Mohan Rustagi was appointed liquidator of the Corporate Debtor.

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- 2.2 Pursuant to the liquidation order, the applicant issued a Public Announcement in Form B of Schedule 2 of the Liquidation Process Regulations in newspapers viz. in Business Standard (English & Hindi) on 21.10.2020 (Delhi/NCR Edition) calling upon stakeholders to submit their proof of claims as on the Liquidation Commencement Date (i.e. as on 15.10.2020) on or before 18.11.2020.
- 2.3 The liquidator was directed vide order dated 23.11.2020, to prepare the details of the Corporate Debtor for sale as a going concern and submit the same to the other JV Partner i.e. M/s Tania Construction Limited ("JV Partner"/"TCL"). In compliance of the said order, the Liquidator shared the details of the CD with the JV Partner. Subsequently, the Liquidator filed an application submitted with details respect to the formation of stakeholder committee. The same was taken on record vide order dated 02.12.2020.
- 2.4 In the first meeting of Stakeholder's Consultation Committee ("SCC") of the Corporate Debtor held on 10.12.2020, the Liquidator brought to the notice of the stakeholders the fact that no valuation was done during the CIRP of the Corporate Debtor and there is no valuation report of the Corporate Debtor available with the liquidator. The liquidator in accordance with Regulation 35 (2) appointed Ms. Aaslesha (IBBI/RV/05/2019/12644) for the valuation of Financial Assets and Mr. Anand Kumar Prusty for the valuation Plant & Machinery. The other set of valuers

was also appointed for the purpose of valuation are Future value Advisors India Private Limited. The liquidator submitted that there are no land and building of the corporate debtor for which valuation was required.

- 2.5 The Liquidator then conducted the second SCC meeting on 22.12.2020, where it was informed that the details of the corporate debtor has been shared with the TCL in order to enable themselves to submit a proposal to purchase the corporate debtor as a going concern.
- 2.6 The preliminary report and the assets memorandum was filed by the Liquidator on 11.01.2021 in compliance of Regulation 14 and Regulation 34 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 ("Liquidation Regulation").
- 2.7 Further, TCL was directed vide order dated 11.01.2021 passed by this Tribunal to send communication to the liquidator with respect to their proposal for buying UTM Engineering Pvt. Ltd. as on a going concern. Further directions were also issued that appropriate communication and information be supplied to the TCL to take ahead the takeover of UTM Engineering Pvt. Ltd. which is under liquidation.
- 2.8 The liquidator conducted the 3rd stakeholders meeting on 19.01.2021, wherein it was decided that an advertisement with respect to the sale of the corporate debtor as a going concern should be published in the newspaper to invite bids. The terms and condition



regarding the process was also discussed in the meeting.

- 2.9 On 22.01.2021 the Applicant published an Invitation to Expression of Interest, inviting bids for the sale of the Corporate Debtor as going concern in Financial Express (English, Delhi/NCR) and Jansatta (Hindi, Delhi/NCR) and Nafa Nuksan (Hindi) (Rajasthan). The Applicant has also issued the 'E-Auction Process Information Document'.
- 2.10 The liquidator conducted the fourth SCC meeting on 22.02.2021, wherein the Liquidator discussed the way forward in respect of sale of the Corporate Debtor as a going concern with the stakeholders and informed the stakeholders that no proposal has been received in order to purchase the Corporate Debtor as a going concern. The liquidator further requested the JV Partner, TCL and director of the Corporate Debtor (power suspended), Mr. Gyandeep Kantipudi (who has shown interest in acquiring the Corporate Debtor as a Going Concern) to submit the proposal for acquisition of the Corporate Debtor as a going concern, at the earliest.
- 2.11 Since the time period of ninety days provided for completion of sale as a going concern of the corporate debtor under Regulation 32A of the Liquidation Regulations expired on 15.01.2021. The liquidator filed an application, bearing I.A. No. 870/2021, seeking extension of time for selling the corporate debtor as going concern for a further period of ninety (90) days, which was allowed vide order dated 16.03.2021, and

an extension of time by 90 days till 15.04.2021 for the purpose of selling the Corporate Debtor was granted.

- 2.12 Thereafter, on 15.03.2021, M/s Red Brick Consulting Pvt. Ltd. ("Bidder") submitted a proposal for acquisition of the Corporate Debtor as a going concern. The Liquidator presented and discussed the said proposal with the members of the SCC in the fifth SCC meeting held on 03.04.2021. The liquidator then requested the members to submit their views on the proposal and has received the views of operational creditor namely, Anuj Global Corporation (vide email dated 03.04.2021) and financial creditors namely Mr. Prawin Devchell (vide email dated 12.04.2021) and Central Bank of India (vide email dated 13.04.2021).
- 2.13 The liquidator received a mail dated 22.04.2021 from M/s Tania Constructions Limited where the details with respect to the submission of EMD by EDCL Infrastructure Limited ("EDCL") was mentioned along with the transaction details. Accordingly, E-auction Process documents were shared vide email dated 23.04.2021 with TCL/EDCL. The KYC documents received from M/s Tania Construction Limited for EDCL Infrastructure Limited were received on 30.04.2021 and the liquidator requested them to furnish some other documents in order to check 29A compliance of to the 29A EDCL Infrastructure Limited.
- 2.14 The Liquidator again filed an application seeking an extension of time by thirty (30) days as the process of sale of the Corporate Debtor as a going concern was under progress and the Applicant had also received

interest from EDCL Infrastructure Limited. The same was granted vide order dated 26.04.2021.

- 2.15 Subsequently, the liquidator contacted the E-auction agency to initiate the process of sale of the Corporate Debtor through E-auction. The details required for E-auction were received to the liquidator from the E-auction agency vide email dated 12.05.2021. The liquidator vide its mail dated 14.05.2021 shared the details and other documents of the Corporate Debtor to the E-auction agency (Linkstar Infosys Private Limited) to start the E-auction Process. Further, a mail was received from the E-auction agency that the auction property is live on their portal.
- 2.16 One of the prospective bidders M/s Tantia Construction Limited through its representative namely Ms. Vaishali Patodia vide its mail dated 16.05.2021 informed the liquidator that there is lockdown in Kolkata till 31.05.2021 and sought some time to perform the due diligence of the Corporate Debtor. Furthermore, they requested the liquidator to extend the date for E-auction till 07.06.2021, so that necessary documents could be arranged.
- 2.17 Furthermore, upon publication of E-auction details on the portal of the E-auction agency, the liquidator received a mail from Umang Enterprises dated 15.05.2021 regarding their interest in the bidding of the Corporate Debtor for the sale as going concern. The liquidator vide its mail dated 15.05.2021 requested them to refer the E-auction Process Document ("Process Document") (available on the auction portal)

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and submit an EMD of Rs. 5,00,000/- in terms of the said Process Document. The liquidator vide its mail dated 18.05.2021 informed them that the E-auction date has been extended up to 07.06.2021.

2.18 The Liquidator again with revised timelines, made the publication of an invitation for expression of interest for the sale of the Corporate Debtor as a going concern in newspapers viz. in Financial Express (English) and Jansatta (Hindi) Delhi / NCR region and Nafanuksan (Hindi) (Jaipur/Dausa, Rajasthan region) on 23.05.2021).

2.19 Due to sudden outbreak of the pandemic (COVID-19) and lockdown imposed in the various parts of the country. There was a delay in the process of sale of the Corporate Debtor as a going concern and the process was not completed by 15.05.2021. The Liquidator had received an additional proposal from the Bidder which was under active consideration, further, a request was received from TCL/EDCL to extend the time till 07.06.2021 and accordingly, it was decided that the E-auction shall be held on 09.06.2021 for the purpose of sale of the Corporate Debtor as a going concern. However, as the time available for completing the process expired on 15.05.2021, the Liquidator approached this Tribunal for seeking an extension of time by a period of ninety (90) days for the purposes of selling the Corporate Debtor as a going concern. The same was grant vide order dated 08.06.2021.

2.20 The E-auction for the sale of the Corporate Debtor was scheduled to take place on 09.06.2021, however, EDCL

moved an application, inter alia, seeking relief and directions from this Tribunal. This Tribunal vide its order dated 09.06.2021, granted five (5) days' time to EDCL to submit a bid/proposal and postponed the E-auction for the sale of the Corporate Debtor till 16.06.2021.

2.21 The Liquidator conducted the sixth SCC meeting on 15.06.2021 wherein the Liquidator informed the stakeholders that this Tribunal has postponed the E-auction for the purpose of sale of the Corporate Debtor as a going concern till 16.06.2021. The stakeholders were further informed, that EDCL and Red Brick Pvt Ltd would be participating in the said E-auction.

2.22 Thereafter, E-auction for the sale of the Corporate Debtor as a going concern was conducted on the e-auction portal on 16.06.2021 from 11.00 am to 2.00 pm. The log-in credentials were issued to both, Red Brick as well as EDCL. However, only one bid of Rs. 2.05 Cr was put in, by Red Brick against the reserve price of Rs 2.04 Cr. The detailed report in respect of the bidding was provided by the E-auction portal on conclusion of the e-auction at 2.00 pm. As no counter bid was placed, Red Brick Consulting Pvt. Ltd. was announced as the Successful Bidder for having placed a bid higher than the Reserve Price of Rs. 2.04 Crores. According, Letter of Intent (LOI) dated 19.06.2021 was issued to the Successful Bidder. The Successful Bidder signed and shared the LOI on 23.06.2021.

2.23 The Liquidator conducted the seventh SCC meeting on 07.07.2021 wherein the Liquidator informed the

stakeholders about the successful conclusion of the E-auction process conducted on 19.06.2021 for the sale of the Corporate Debtor as a going concern and issuance of the Letter of Intent to the Successful Bidder.

2.24 The Successful Bidder sought one week's time for depositing 25% of the Total Sale Consideration vide its email dated 06.07.2021. On 15.07.2021, the Successful Bidder deposited 25% of the Total Sale Consideration amounting to Rs. 51, 25,000 (inclusive of the EMD amount of Rs. 5 lacs). ‘

2.25 The Liquidator submitted that the Successful Bidder has sought the certain reliefs in order to effectively take control over the Corporate Debtor once the sale of the Corporate Debtor as a going concern is approved by this Tribunal and to continue and complete the ongoing railway project at Dausa, Rajasthan. The reliefs sought by the Successful bidder are as follows:

- i. That the Bank Accounts of the Corporate Debtor and TCL-UTM (JV) will continue at Axis Bank Ltd., Udyog Vihar, Gurugram, Branch. However, the Signatories to these Bank Accounts will be changed and appointed by the Successful Bidder;
- ii. A direction for smooth handover of the Dausa Site alongwith accounts, materials, equipment, etc.;
- iii. The Hon'ble Tribunal may direct TCL (the JV Partner), to pass a resolution stating that they have no objection towards the appointment of a new Authorized representative of their choice for the TCL-UTM JV and that UTM shall continue to run the operations of the JV;

- iv. The working of the TCL-UTM JV shall revert to the original method when the Tender was awarded, i.e., Authorized Signatory for operating the TCL-UTM (JV) Bank Accounts will be nominated only by UTM;
- v. Mr. KS Mandal (Authorized representative of the JV) be directed to peacefully hand over the entire Records of UTM which are in his possession;
- vi. The Railways be instructed that since the past few months JV work could not be carried out as UTM was under liquidation process, the status quo is to be maintained and no penalties can be charged for lack of work by JV till matters are settled by NCLT;
- vii. Appointment of Mr. YV Rao as the authorized representative.
- viii. Immediate handover of all UTM files, correspondence etc. from KS Mandal
- ix. Immediate removal of Mr. K.S. Mandal as a bank signatory on behalf of UTM in the JV account.
- x. Mr. S.S. Jha is a signatory on behalf of M/S Tantia Construction Limited and I am already a signatory with Mr. Mandal on behalf of UTM.
- xi. Instructions to North Western Railways that in order to keep the project running on 'as is where is' basis, Mr. K.S. Mandal is to vacate the site immediately as he has no locus, and that the nominee appointed by the Successful Bidder will replace Mr. Mandal for all purposes.
- xii. Instructions to North Western Railways to ensure continuity of the project without any penalties or liquidated damages.

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- xiii. Ensure that Corporate Debtor is sold as a going concern on 'as is where is basis', meaning that the Successful Bidder, Red Brick Consulting Pvt. Ltd. will be continuing to run the project at Dausa.
3. The Liquidator further submitted that mere purchase of the Corporate Debtor as a 'going concern' as per Liquidation Process Regulations will not suffice. In order to ensure smooth running of the business of the Corporate Debtor, it is imperative that certain additional reliefs are allowed, which would be essential and necessary to run the business of the Corporate Debtor as a 'going concern'. Unless these reliefs are provided, the purpose of the revival of the Corporate Debtor as a 'going concern' under Liquidation Process Regulations will not be achieved. In fact, these reliefs are crucial to kick start the business of the Corporate Debtor and achieve value maximization of the Corporate Debtor.
4. The brief facts of IA 3172/ND/2021 are as follows:
- a) It is submitted that as recorded in various Orders of this Hon'ble Tribunal, for instance, Order dated 11.01.2021, 16.03.2021, 26.04.2021, 08.06.2021, the process for auction/sale of the Corporate Debtor as a going concern was ongoing under the power and control of the Liquidator.
 - b) The applicant has submitted that the auction purchaser Red Brick Consulting Pvt. Ltd. is controlled and managed by Mr. Gyandeep Kantipudi, who is also the suspended/erstwhile Director, Promoter and Shareholder of the Corporate Debtor. Moreover, Mr. Gyandeep Kantipudi and one Radhika Kantipudi are the only two directors in Red Brick Consulting Pvt. Ltd.

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- c) It is further submitted that the Applicant had no means or access to the information pertaining to prospective bidders during the auction process of the Corporate Debtors, which was being monitored and conducted by the Liquidator. On the other hand, it is evident from the Minutes of 7th Meeting dated 07.07.2021 of Stakeholders Consultation Committee of the Corporate Debtor that the Liquidator was aware all throughout about Mr. Gyandeep's involvement, position, role and control of management in Red Brick Consulting Pvt. Ltd.
- d) The applicant stated that it is an obligations of the Liquidator under Regulation 33(3) of the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016 that the Liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties. Learned Counsel for the applicant has relied upon judgement passed by Hon'ble Supreme Court in ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd.*** [Civil Appeal No.9664 of 2019] decided on **15.03.2021**. Accordingly, it is prayed to quash the said approved Bid with respect to the auction purchaser Red Brick Consulting Pvt. Ltd.
5. The Liquidator has filed its reply and written submission and submitted that:

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- 5.1.** On 16.06.2021 e-auction was held, the notice for e-auction was published in the newspaper i.e. Financial Express and one local newspaper in Rajasthan. Two parties i.e. Red Brick Consulting Private Limited and Tania Constructions Private Limited expressed interested, however, only one bid from Red Brick was received for an amount of Rs. 2.05 Cr. which was accepted. The e-auction was conducted online through a third party i.e. Linkstar Infosys Private Limited, the report of e-auction is annexed with the IA 3113/ND/2021.
- 5.2.** The auction has been conducted in transparent manner and no objections have been filed challenging the auction process, the only objection i.e. IA No. 3172 of 2021 has been filed by Mr. KS Mandal claiming to be Authorized Representative of TCL-UTM (JV). It is stated that TCL-UTM (JV) is a joint venture of Corporate Debtor and Tania Constructions Limited, Corporate Debtor is undergoing liquidation and Tania Constructions Limited has been taken over by EDCL Infrastructure Limited as a Resolution Plan of EDCL has been approved by Hon'ble Adjudicating Authority vide order dated 24.02.2020. It is submitted that as JV comprises of Corporate Debtor and Tania Constructions Limited and neither any authorization of Corporate Debtor nor any authorization of EDCL has been placed on record by Mr. KS Mandal to establish his locus for filing IA No. 3172 of 2020.
- 5.3.** The liquidator raised an objection against the authorization of Mr. Shri Krupa Singh Mandal. It is

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submitted that Shri Krupa Singh Mandal has not annexed any authorization from TCL-UTM(JV) authorizing him to file the instant application.

- 5.4.** On behalf of Mr. KS Mandal, it is being submitted that he is Authorized Representative of JV in terms of Agreement dated 13.01.2017, and JV partners i.e. Corporate Debtor has undergone liquidation. JV partner, Tania Constructions Limited has undergone Resolution, thus, it is by mandate of law, that representation on behalf of TCL-UTM(JV) can be only through liquidation of Corporate Debtor and through EDCL and in absence of authorization from both the JV Partners, the objection i.e. IA No. 3172 of 2021 on behalf of TCL-UTM(JV) is not maintainable.
- 5.5.** The Liquidator further submitted that the application has been filed challenging the eligibility of Red Brick for acquiring Corporate Debtor as a going concern. It is the case of Applicant that Red Brick is ineligible under Section 29A for acquiring Corporate Debtor as a going concern. It has been alleged against Red Brick that they are ineligible under Section 29A of the Code. However, Red Brick has not been arrayed as Respondent in the instant application for the reason best known to the Applicant. It is submitted that allegations / averments have been made against Red Brick and hence, Red Brick is a necessary and a proper party to the instant application. The liquidator has placed reliance of judgment passed by Hon'ble NCLAT in the matter of **Nair Service Society**

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***Karayogam V. V.C. Velayudhan Nair, Company
Appeal (AT) (Ins.) No. 410 of 2017.***

- 5.6.** It is further submitted by the liquidator that Red Brick is not ineligible under Section 29A of the Code, the affidavit has been filed by Red Brick confirming their eligibility under Section 29A of the Code.
- 5.7.** Further, the applicant has failed to bring its case within the ambit of Section 29A of the Code. It is stated that Mr. KS Mandal and Mr. Gnyandeep Kantipudi are ex-directors of Corporate Debtor and Mr. Gnypadeep Kantipudi is a director in Red Brick, it is submitted that an ex-director, if eligible under Section 29A of the Code can duly participate in the auction process and the objections have been filed by Mr. KS Mandal only to derail the process of liquidation.
- 5.8.** Mr. KS Mandal has alleged ineligibility of Red Brick under Section 29A (g), it is submitted that Red Brick is not ineligible under Section 29A (g) of Code, as there is no order passed by any court of law, wherein Red Brick or Mr. Gnyandeep Kanitpudi have been held accountable for any preferential transaction, under-valued transaction, extortionate creditor transaction or fraudulent transaction.
- 5.9.** The liquidator has stated that the Applicant by way of the present application has failed to demonstrate as to how the successful purchaser is disqualified under Section 29A of the Code. In fact, the Liquidator as mandated has prima-facie examined the eligibility under Section 29A of the Code.

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6. The applicant in IA 3172/ND/2021 has filed its rejoinder and written submission and submitted as follows:

- a) It is stated that Mr. K.S. Mandal, the Authorized Representative of the Applicant, has been involved in the project from its very inception and is appointed as Authorized Representative under Clause 5 of the registered Joint Venture Agreement, which is subsisting as on date. The applicant submitted that since the Joint Venture is a separate and distinct legal entity and operates independent of its constituent partners there is no requirement of separate authorization from corporate debtor.
- b) The applicant submitted that the Liquidator's application for approval of Bid IA 3113/ND/2021 has not yet been allowed and is pending. As such, Red Brick Consulting Pvt. Ltd. is neither a proper nor necessary party for the effective adjudication of this instant application as their position as a "Successful Bidder" is yet to be affirmed.
- c) The applicant also stated that the Resolution Applicant Red Brick Consulting Pvt. Ltd is under the control and management of Mr. Gyandeep Kantipudi, who is out of the suspended ex-director and promoter of the Corporate Debtor. The knowledge of this relation between Red Brick Consulting Pvt. Ltd. and Mr. Gyandeep, who is also the suspended Director, Promoter and Shareholder of the Corporate Debtor, is evident from the minutes of the 7th Meeting dated 07.07.2021 of the Stakeholders Consultation Committee of the Corporate Debtor. Since, Mr.

Gyandeep Kantipudi and Radhika Kantipudi (wife of Mr. Gyandeep Kantipudi) are the two Directors of Red Brick Consulting Pvt. Ltd is also specifically mentioned in the Company Master Data available with the Ministry of Corporate Affairs therefore, Red Brick is hit by disqualification under Section 29A (g) of the Code the sale and of the corporate debtor to Red Brick is in clear violation of Section 35(1)(f) of the Code.

7. From the pleadings of the parties, the following point of determination has driven.

- I. Whether Red Brick Consulting Pvt. Ltd. Company is necessary party?**
- II. Whether Mr. K.S. Mandal is entitled to challenge the auction?**
- III. Whether the Red Brick Consulting Pvt. Ltd. is ineligible hit by Section 29A of the Code to participate in the bid to acquire the property of the Corporate Debtor?**
- IV. Whether the Corporate Debtor being MSME is exempt from provision of the Section 29A of the Code?**
- V. Conclusion.**

FINDING WITH REASONS

POINT NO. I:

8. First and foremost question before this Tribunal is that whether Red Brick Consulting Private Limited is required to be necessary party in the present matter. In this regard, it

is to be mentioned that the above said company was merely is successful bidder and unless the entire bid amount is not paid and the conveyance deed is not executed in its favour, no substantive right stands accrued to this Company. In the given facts, the citation ***Nair Service Society Karayogam (Supra)*** is not applicable. Accordingly, it is held that the above said Company is not necessary party to be heard at this juncture. Hence, the contention raised by the Ld. Counsel for the Gyandeeep Kantipudi is without any force, hence, the same stands rejected.

POINT NO. II:

9. Though, it is being contended that Mr. K. S Mandal has no locus to file the IA No. 3172/ND/2021 as there was no authorized was obtained. In this context, it is to be mentioned that Mr. K.S. Mandal has been involved in the project from its very inception and was duly authorized by way of registered joint venture agreement which stills sustains. Moreover, this Tribunal also does not lack of jurisdiction to have a view with regard to any illegality or irregularity conducted in the auction of the property of the Corporate Debtor by the Liquidator. Thus, the contention raised by the Learned Counsel for the respondent that Mr. K.S. Mandal was not authorized to challenge the auction stands discarded

POINT NO. III & IV:

10. In order to avoid repetition of the facts and evidence on the record, both these points are being discussed together. Now, it has to be seen whether the Red Brick

Consulting Private Limited through its one of the Director Mr. Gyandeep Kantipudi was hit by Section 29 A of the Code and is estopped to participate in the bid for acquiring the property of the Corporate Debtor. In this regard, it is submitted that Mr. Gyandeep Kantipudi was one of the Suspended erstwhile-Director and promoter of the Corporate Debtor and was also Shareholder. This fact is very much evident from the minutes of 7th meeting dated 07.07.2021 of the Stakeholder Consultation Committee. Red Brick Consulting Private Limited Company consists of only two directors i.e. Mr. Gyandeep Kantipudi and his wife Mr. Partika Kantipudi. Further, it is to be mentioned that the Ld. Liquidator himself moved an application, whereby he alleged that Mr. Gyandeep Kantipudi siphoned of the money of Corporate Debtor. The said application was moved qua preferential, under-value transactions and fraudulent transactions, which is still pending for consideration.

11. At this juncture , it would be appropriate to go through Section 29A of the Code and Rule 33 of the Liquidation Regulations, as well as 35(1)(f) of the Code, which are as under:

Section 29A: Persons not eligible to be resolution applicant.

A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

- a. is an undischarged insolvent;*
- b. is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;*
- c. 2[at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom*

such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 3[or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

3[Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares 4[or completion of such transactions as may be prescribed], prior to the insolvency commencement date

Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

33. Mode of sale.(Regulation 33 of Liquidation Process Regulation)

33. (1) The liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when-

- a. the asset is perishable;
- b. the asset is likely to deteriorate in value significantly if not sold immediately;
- c. the asset is sold at a price higher than the reserve price of a failed auction; or
- d. the prior permission of the Adjudicating Authority has been obtained for such sale:

Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

- e. a related party of the corporate debtor;
- f. his related party; or
- g. any professional appointed by him.

(3) The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties.

Section 35 (Powers and duties of liquidator) of IBC.

***35.** (1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—

- (f) Section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate or to sell the same in parcels in such manner as may be specified;

12. From the bare perusal of the above said related provisions, it is apparent that if the Resolution Applicant is involved in

nefarious activities being a director of the Corporate Debtor and there is also prima-facie evidence on record, he would be ineligible to participate in the auction of the property of Corporate Debtor, if he could not become a successful Resolution Applicant. If that person is not eligible as a Resolution Applicant, he would also not be entitled to purchase the property in auction even in liquidation proceedings. In this regard, the reference can also be made to the law laid down by the Hon'ble Apex Court in the matter of **Arun Kumar Jagatramka Vs. Jindal Steel and Power Ltd. & Anr. Civil Appeal No. 9664 of 2019 along with writ WP No. 269 of 2020 and Civil Appeal No. 2719 of 2020 dated 15.03.2021**,_Wherein it is being clearly held that Section 29A has been enacted in the large public interest and to facilitate effective Corporate Governance. The Hon'ble Supreme Court further observed that Parliament rectified a loophole in the Act, which allowed back-door entry to erstwhile management in the CIRP.

13. Further, it is also held that Section 29A continues to permeate Section 35(1)(f), when it applies not merely to Resolution Applicant, but liquidation also. Further in para no. 52 it is also being laid that the "purposive interpretation" has to draw with respect to Section 29A.

"Section 29A has been construed to be a crucial link in ensuring that the objects of the IBC are not defeated by allowing "ineligible persons", including but not confined to those in the management who have run the company aground, to return in the new avatar of resolution applicants. Section 35(1)(f):- Is placed in the same continuum when the Court observed that the erstwhile promoters of a Corporate Debtor in liquidation. The values which animate Section 29A continue to provide sustenance to the

rationale underlying the exclusion of the same category of persons from the process of liquidation involving the sale of assets, by virtue of the provisions of Section 35(1)(f). More recent precedents of this Court continue to adopt a purposive interpretation of the provisions of the IBC."

14. Thus, the purpose of ineligibility under Section 29A of the Code is to achieve a sustainable revival and to ensure that a person, who is the cause of the problem either by a design or a default, cannot be a part of the process of solution.
15. From the above citation, it is apparent that if a person is a cause of a problem qua the Corporate Debtor default and part of default, then he cannot be a man of a solution of that of Corporate Debtor. Meaning thereby that if applicant cannot be a Resolution Applicant, he would also not be entitled to purchase the Corporate Debtor by taking a 'new avatar'.
16. Reverting back to the fact of the present case, it is establish on the record that Mr. Gyandeep Kantipudi, who is director in Red Brick Consulting Pvt. Ltd. was also one of the ex-director of the Corporate Debtor and he was found involved in siphoning-of the money of the Corporate Debtor as alleged by Ld. Liquidator himself and a specific application was moved qua that effect. Thus, Red Brick Consulting Pvt. Ltd. Company is managed by Mr. Gyandeep Kantipudi and his wife.
17. In fact, at times, it happens that the Corporate personality of the company is generally used to commit

frauds and improper and illegal acts. Since an artificial person is not capable of doing anything illegal or fraudulent, the façade of corporate personality might have to remove to identify the person, who are really guilty and this is known as a lifting of 'corporate veil'. In fact a company or corporation can only act through human agents that compose it. In order to lift the 'corporate veil', there are two existing theories in-vogue i.e. first is '*Alter-ego*' and the other is '*instrumentality theory*'. In the present matter, the 'instrumentality theory' comes into play as the Adjudicating Authority has to examine for what purpose the use of corporation is there by its owner and in what ways that benefit the owner rather than the company. While lifting the 'corporate veil', the company as a separate legal entity is dis-regarded and the people behind the act are identified irrespective of the personality of the company. In fact, it refer to the possibility of looking behind the company framework to make the members liable, where true notion of legal entity is used to defeat public convenience, justify Rome, protect fraud or defend crime, there the law will disregard the corporate entity entry treated as an association of person. No doubt, there are ample instances, where the Courts or Tribunals have upheld the Principle of Corporate Entity and resisted the temptation to break through the veil, but where the benefit is misused, the Tribunals are not powerless to up-lift the veil of the corporate personality to see the realities behind the veil. In doing so, the Tribunal sub-serves the important public interest and to arrest misuse or abuse of the benefit conferred by law.

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18. In this regard, the reference can be made in two citation **DDA Vs. Skipper Construction Company Pvt. Ltd. 1996 SCC (4) 622**, Hon'ble Supreme Court of India while referring to the Principle Lifting 'Corporate Veil', the concept of corporate entity was evolved to encourage and to promote trade and commerce, but not to commit illegality or de-fraud people. The 'Corporate veil' indisputably can be pierced when the Corporate personality is found to be opposed to justice, convenience and interest of the revenue or the workman or against the public interest. Thus, the theory of lifting 'corporate veil' becomes a necessary, when un-scrupulous person started using the 'Corporate Veil' as an instrument to conceal fraud in the company affairs and it becomes compulsory for the Court/Tribunal to evolve and to lift the 'corporate veil' and find out the person behind the company, who are the actual beneficiary of the corporate body. Accordingly, this Tribunal is also not denuded of authority to pierce the 'corporate veil' to ascertain the real successful bidder. Therefore, the 'Corporate Veil' has to be lifted to prevent unjust and fraudulent act of the respondent herein and in order to look-into realities behind the legal façade and to hold him liable to the acts of the Corporate Debtor. No doubt, the separate personality of the company is statutory privileges, but it must be used for the legitimate purpose only. Whenever & wherever, if fraudulent or dishonest use is made of the legal entity, the individual will not be allowed to hide behind the curtain of the corporate personality. A duty is casted upon the Tribunal or the Court to break this shell of the company and to see who is actually benefitted by this curtain.

19. On lifting the 'corporate veil' of Red Brick Consulting Pvt. Ltd., it is apparent that the only two persons are involved, who are managing that Company i.e. Mr. Gyandeep Kantipudi and his wife. Mr. Gyandeep Kantipudi, was part of the ex-management of the Corporate Debtor. In the present matter in hand, actually the respondent Gyandeep Kantipudi has been benefited, accordingly, he could not be allowed to do so through M/s Red Brick Consulting Pvt. Ltd. Thus, M/s Red Brick Consulting Pvt. Ltd. is not entitled to participate in a bid of the property of the Corporate Debtor. Regulation 33 of the Liquidation Regulation also clearly lays down that the liquidator shall not proceed with the sale of assets, if he has reason to believe that there is a collusion between Corporate Debtor, Corporate Debtor's related parties and buyers accordingly it was required to seek appropriate orders from this Tribunal against the colluding parties. The law laid down of *Arun Kumar Jagatramka (supra)* is squarely applicable to the present facts. Indeed, it is the duty of this Tribunal to lift the 'Corporate veil'. In the present matter, after looking through the entire facts and circumstances emerged herein, it is apparent that Mr. Gyandeep Kantipudi had used the 'Corporate Veils' as a vehicle of fraud and his actual intention was to secure the property of the Corporate Debtor through the present company, where both being husband and wife are the only Directors in the company. Accordingly, it is held that the Red Brick Consulting Private Limited was ineligible to participate in the bid of the property of Corporate Debtor. Hence, the contention raised by the Ld. Counsel for the liquidator that the Corporate

Debtor is exempt from rigorous of the Section 29A is out of place, accordingly, the same stands discarded.

20. Now, it has also to be seen whether the Corporate Debtor was MSME and accordingly the rigor of Section 29A are applicable to it or not? In this context, it is to be mentioned that on behalf of the liquidator, no such document qua the registration has been placed on record to show that the Corporate Debtor was duly registered under Micro, Small and Medium Enterprises Development Act 2006 (MSMED). Though, it is being contended that this Tribunal can go into the issue and to decide whether the present Company was MSME or not. However, in this regard the reference can be made to law laid down with Hon'ble NCLAT in the Company Appeal No. 895 of 2019 titled Ashish Mohan Gupta Vs. Liquidator of M/s Hind Motors Ltd. (in liquidation), wherein, it is held that as a matter of caution, this Tribunal should refrain from deciding, whether a particular Company was micro, small or medium Industry. The reliance was placed to the judgment passed in the matter of Amit Gupta Vs. Yogesh Gupta Company Appeal No. 903 of 2019 dated 20.12.2019, wherein it is laid down :-

“Section 7 itself shows that the Central Government has to “classify” any class or classes or enterprises either as micro or small or medium on the basis of parameters fixed in Section 7. The Appellant has not brought on record that the Corporate Debtor has been classified by Central Government and if yes, under which parameter. In the summary procedure under IBC, the Resolution

Professional and Adjudicating Authority are not expected an application falls under Section 7 examining Notifications under Explanation 2 or Sub-Section 9 of Section 7 of MSME Act.”

21. Simultaneously, the reference can also be made to **M/s Silpi Industries etc. Vs. Kerala State Road Transport Corporation & Anr. Etc. Civil Appeal Nos. 1570-1578 of 2021 and Civil Appeal No. 1620-1622 of 2021 i.e. M/s. Khyaati Engineering Vs. Prodigy Hydro Power Pvt. Ltd.**, wherein while relying upon the judgment in the matter of *Shanti Conductors Pvt. Ltd. (Supra)* passed by the Hon'ble Supreme Court of India held that the appellant cannot become micro or small enterprises of supplier to claim the benefit within the meaning of MSMED Act, 2006, by submitting a memorandum qua obtaining registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained afterwards, the same shall be prospective and applies for supply of goods & services subsequent to registration, accordingly, cannot operate retrospectively. Here in this matter, even no such Memorandum of Registration has ever been placed on record to prove the fact that the present Company i.e. a Corporate Debtor was in fact MSME. Moreover, the proceedings before this Tribunal are summary in nature, hence, it could not go into the issue in depth to decide whether Corporate Debtor is MSME or not, that too, when the record sans substantive documents to that effect.

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POINT NO. V (Conclusion):

22. In sequel of above said discussion, this Tribunal comes to the following conclusions:

1. M/s Red Brick Consulting Pvt. Ltd. participated in the auction proceedings of the Corporate Debtor in order to extend benefit to Gyandeep Kantipudi its Managing Director and erstwhile Director of the Corporate Debtor, accordingly, the auction is hit by Section 29(a) of the Code.
2. The auction proceedings are also hit by Section 33(3) of the Code because of the reason that Learned Liquidator auctioned the property knowingly well that Red Brick Consulting Pvt. Ltd. company was run by Gyandeep Kantipudi, who was also erstwhile Director of the Corporate Debtor, therefore, Gyandeep Kantipudi was closely related to the Corporate Debtor.
3. M/s Red Brick Consulting Pvt. Ltd. was also not necessary party as the auction has not fructified into sale as no conveyance deed has been executed in its favour, accordingly, no substantive right, title and interest has accrued.

23. Consequently, the auction dated 16.06.2021 stands set-aside, and Ld. Liquidator is directed to re-auction the property after obtaining fresh valuation of the property from at least two valuers, as during these two years, the value of the property has increased to a great extent.

24. This process must be completed within 30 days and valuation must be obtained by Learned Liquidator within

seven days from the date of pronouncement of the order and the copy of the same shall be placed on the record immediately.

25. Resultantly, IA No. 3172/ND/2021 filed By UTM/JV stands allowed, whereas, IA No. 3113/ND/2021 filed on behalf of M/s Red Brick Consulting Pvt. Ltd. stands dismissed with no order to costs.

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[SUMITA PURKAYASTHA]
MEMBER (T)

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[DHARMINDER SINGH]
MEMBER (J)