IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
(Court No. I)
KOLKATA

IA (IB) No.537/KB/2022
in
CP (IB) No.891/KB/2018

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016.

In the matter of

CP (IB) No.891/KB/2018

Punjab National Bank

...Financial Creditors

Versus

Divine Vidyut Limited [CIN U40102WB2007PLC118068]

... Corporate Debtor

IA (IB) No.537/KB/2022

In the matter of

Shah Sponge and Power Limited

..Applicant/Successful Bidder

Versus

Rajesh Kumar Agarwal, liquidator of Divine Vidyut Limited

...Respondent

Date of hearing: 03 November, 2022
Order pronounced on: 02 February, 2023

Coram:

Shri Rohit Kapoor	:	Member (Judicial)
Shri Balraj Joshi	:	Member (Technical)

Appearances (via video conferencing/physical hearing):

For the Applicant	:	Ms. Swati Dalmia, Advocate
	:	Mr. Arijit Chatterjee, Advocate
	:	Mr. Shubham Raj, Advocate
For the RP	:	Mr. Rajesh Kr. Agarwal. Advocate

ORDER

Per Balraj Joshi, Member (Technical)

1. This court convened *via*hybrid mode.

2. This is an Interlocutory Application filed under section 60 (5) of the Insolvency and Bankruptcy Code, 2016 ***('the Code')*** by Mr Rishi Pratim Ghosh, Company Secretary, Shah Sponge & Power Limited***('Applicant')***, duly authorised *vide* Board Resolution dated 02 May, 2022, against the liquidator of DivineVidyut Limited ***('Corporate Debtor')***, seeking the following reliefs:-

a. To pass necessary order directing the liquidator to issue the Sale Certificate to Shah Sponge and Power Limited, the Successful bidder, for sale of Corporate Debtor as going concern; and
b. To pass necessary order granting the reliefs and waivers as prayed for in paragraph 22; and
c. To pass necessary order directing the liquidator to provide all support and assistance to the Applicant for the smooth functioning of the Corporate Debtor to complete the acquisition; and
d. Such further and/or other order or orders as this Adjudicating Authority may deem fit and proper.

3. ***The Ld. Counsel appearing on behalf of the Applicant submits as follows***:

3.1 The Corporate Debtor was admitted into Corporate Insolvency Resolution Process ***('CIRP')*** on 19 September, 2019 by this Adjudicating Authority and Mr. Rajesh Kumar Agarwal was appointed as the Interim Resolution Professional. Later on he was also confirmed as the Resolution Professional***('RP')***.Thereafter, on 26 February, 2021 the Application for the liquidation of the Corporate Debtor was allowed..

3.2 Subsequently, the Liquidator published a Sale notice in the newspaper on 21March, 2022 for sale of Corporate Debtor on a going concern basis. After providing few extensions, the e-auction was scheduled to be held on 29 April, 2022.

3.3 On 30th March, 2022, Shah Sponge and Power Limited, the Applicant, submitted an EoI along with refundable deposit of Rs.5,00,000/- (Rupees Five Lakh only). After verification of documents, the Liquidator intimated to the Applicant through his e-mail dated 04 April, 2022 that the Applicant was eligible to participate in the E-Auction Process.The Applicant also visited the plant of the Corporate Debtor for inspection and the Liquidator's office for due diligence of the documents related to the Corporate Debtor.

3.4 On 12 April, 2022, the Applicant by way of Bank Guarantee deposited the EMD of Rs 2.20 Crores and participated in the E-Auction held on 29 April, 2022, and was declared as HI/Successful Bidder by the Liquidator.

3.5 The Liquidator issued LoI to the Applicant on 02 May, 2022 which was unconditionally accepted by the Applicant. As per the LoI, the Applicant has paid further 15% of the final bid value i.e., Rs.3.345 Crores on 12 May, 2022 in the Bank Account in the name of 'Divine Vidyut Limited - In Liquidation' and the Balance consideration is to be paid within 90 days of the issue of LoI.

3.6 Thereafter, on 03 June, 2022 the Applicant served a letter on the Liquidator informing him of the proposed reconstitution of the Board of Directors and proposed shareholders of the Corporate Debtor upon its sale as a going concern. The Applicant also placed before the Liquidator certain Reliefs and Waivers required for the smooth running of business of the Corporate Debtor as a going concern.

3.7 However, the Liquidator *vide* mail dated 04 June, 2022 informed to the Applicant that necessary application be filed by the Applicant before this Adjudicating Authority for appropriate relief and waiver as required by the Applicant for implementation of sale of Corporate Debtor as a going concern.

Analysis and Findings

3.8 We have heard the Ld. Counsel appearing on behalf of the Applicant and perused the reliefs, waivers and concessions as sought and as given in at Pages 09 to 25 of the Application. While some of the reliefs, waivers and concessions sought by the Successful Bidder come within the purview of the Code and the Companies Act 2013, while many others fall under the power and jurisdiction of different government authorities/departments. This Adjudicating Authority has power to grant reliefs, waivers and concessions only with respect to the reliefs, waivers and concessions that are directly in relation to the Code and the Companies Act (within the powers of the NCLT). The reliefs, waivers and concessions that pertain to other governmental authorities/departments shall be dealt with the respective competent authorities/forums/offices, Government or Semi Government of the State or Central Government with regard to the respective reliefs, waivers and concession. The competent authorities including the Appellate authorities may consider grant such reliefs, waivers and concessions keeping in view the spirit of the code (IBC 2016) .

3.9 The reliefs, waivers and concessions shall be consistent with extant law. Further since this is a 'Going concern sale' , the Successful Bidder shall make necessary applications to the concerned regulatory or statutory authorities for renewal of business permits and supply of essential services, if required, and all necessary forms along with filing fees etc. and such authority shall also consider granting the same keeping in mind the objectives of the Code which is concerned with resolving of the insolvency of the Corporate Debtor.

3.10 With respect to the waivers with regard to extinguishment of claims which arose Pre-CIRP and which have not been claimed are granted in terms of ***Ghanashyam Mishra and Sons Pvt Ltd v Edelweiss Asset Reconstruction Company Ltd***[1]wherein the Hon'ble Supreme Court has held that once a resolution plan is duly approved by the Adjudicating Authority under sub-section (1) of section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Govt, any State Govt or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the

[1]2021 SCC OnLine SC 313 decided on 13.04.2021.

resolution plan. The Hon'ble Supreme Court also held that all the dues including the statutory dues owed to the Central Govt, any State Govt or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under section 31 could be continued.

3.11 With respect to the waivers sought in relation to guarantors, the judgment of ***Lalit Kumar Jain v Union of India &ors,***[2]wherein the Hon'ble Supreme Court held in para 133 that sanction of a resolution plan and finality imparted to it by section 31 does not *per se* operate as a discharge of the guarantor's liability shall apply.

3.12 Now, the only question that craves answer is the applicability of the ratio of above two judgements to the present question where the Corporate Debtor has been sold as a going concern. In our opinion, the sale of the Corporate Debtor as a going concern is akin to a de-facto CIRP, and therefore the judgments are applicable in the present case of a going concern sale too, shall therefore be applicable in the present case as well.

3.13 In view of the above the reliefs and waivers sought and granted for the smooth running of business of the Corporate Debtor as a going concern, are as follows;

S.No.	***Reliefs and Waivers***	***Remarks***
1.	Acquisition Date -The date of issue of the Sale Certificate shall be deemed to be the date of acquisition ***('Acquisition Date')*** of Divine Vidyut Limited, the Corporate Debtor by Shah Sponge and Power Limited, the Successful Bidder on a Going Concern basis.	***Granted***
2.	Shareholding pattern – i. The shares held by the present shareholders including shares held by the promoters shall stand cancelled without any further act on behalf of the Successful Bidder or the Corporate Debtor. No approval/ consent shall be necessary for cancellation of the	***Granted***

[2] 2021 SCC OnLine SC 396 decided on 21.05.2021.

	existing share capital of the said Company in terms of Section 66 and other provisions of the Companies Act, 2013 and other applicable laws. ii. Issuance of equity shares, preference shares or any other security/investment of the Corporate Debtor on or after Acquisition Date and the same shall be subscribed and allotted to the Successful Bidder or any of its nominee in lieu of the bid amount/liquidation sale amount received by the Liquidator in the Liquidation account of the Corporate Debtor. Further that, no further approval should be required under Companies Act, 2013 or SEBI regulations however, procedure compliances, if any, in terms of SEBI Regulations or listing agreement with the respective stock exchange in relation thereto shall be done by the Liquidator/Successful Bidder. iii. Any consideration payable to the shareholders of the said Company including any due, towards any unpaid dividend, share application money, etc. shall stand extinguished. iv. The approval by the Adjudicating Authority shall constitute adequate and final approval for all actions and purposes of the sale including extinguishment of all existing share capital and securities of the Corporate Debtor and issuance of fresh equity shares, preference shares or any other security/investment as per the provisions of the Companies Act, 2013.	

3.	Appointment of Directors -The Board of Directors of the Corporate Debtor would be reconstituted by removing the erstwhile Board of Directors as existing on Acquisition Date and appointment of new Board of Directors nominated by the Successful Bidder subject to affidavit and undertaking that none of such proposed directors of the Board of Directors are ineligible/disqualified under section 29A of the Code and the same stand effective from the Acquisition Date without any further act or deed.	***Granted***
4.	Compounding/condoning of non-compliance of the Corporate Debtor Companies Act, 2013 - i. All non-compliance(s) of the Corporate Debtor under the Companies Act, 1956 and/or Companies Act, 2013 and/or the notifications, circulars, rules and regulations enacted/notified thereunder, shall stand regularized and compounded without imposition of any penalty, fees, etc. ii. The status of the Corporate Debtor in the records of the Registrar of Companies should be reflected as 'Active' from the status of 'Under Liquidation'. iii. The Corporate Debtor be exempted from using the words 'and reduced' in its name as required under the provisions of the Companies Act, 2013. iv. Upon filing of the final order passed by the Adjudicating Authority, the Registrar of Companies should change the type of the Corporate Debtor from 'Limited' to 'Private Limited' without any further approval/application.	***Granted with respect to the non-compliances by the Corporate Debtor before the date of acquisition.***

	v. Compliances under the applicable law for all the statutory appointments by the Corporate Debtor including but not limited to the appointment of statutory auditors, company secretary, etc., will be complied with within a period of 12 (Twelve) months from the Acquisition Date in terms of section 31(4) of the Code.	
5.	Liabilities - i. From the Acquisition Date, all liabilities of debt of the Secured and Unsecured Financial Creditor(s), Operational Creditors), Employees, Workmen, Government and Statutory dues, whether crystallized, contingent, filed, not filed, admitted or not admitted by the Liquidator, disputed or undisputed or otherwise including those pertaining to statutory dues and penalties and other transaction 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. ii. The charges/liens/mortgages/securities created over the fixed assets as well as current assets of the Corporate Debtor would stand fully discharged on and from the acquisition date. To satisfy the charges on secured assets in the records of ROC and other statutory and regulatory authorities, if any, from the Acquisition Date, the charges registered with concerned	***Granted, strictly as per the*** decision by the Hon'ble Supreme Court in *Ghanashyam Mishra & Sons Pvt Ltd v Edelweiss Asset Reconstruction Company Ltd,*[3] shall apply.

[3] 2021 SCC OnLine SC 313 decided on 13.04.2021.

	Registrar of Companies ('ROC') in respect of encumbrances over the assets of the Corporate Debtor shall stand satisfied and vacated. iii. All proceedings initiated against the Corporate Debtor for recovery of monies by the claimants including but not limited to the secured creditors and statutory authorities those who did not file their claims with the Liquidator shall be extinguished. iv. All the liabilities in relation to the employees, workmen, workers, either in full time employment or contractual, including but not limited to the dues with respect to the salary and wages, employees state insurance, provident fund, gratuity, etc., which remains unpaid as per section 53 of the Code, shall stand extinguished on the Acquisition Date. v. The rights and title and interest in whole and every part of the Corporate Debtor including but not limited to all the movable and immovable assets (comprising of all the lands, buildings, etc..) intellectual property rights, etc., continue to vest in the Corporate Debtor from the Acquisition Date with clear marketable title and free from all encumbrances and furthermore, the assets, rights, title and interest of the Corporate Debtor shall become free from charges, security interest, claim and counter claims.	
6.	Legal proceedings - i. All pending or threatened legal, regulatory or administrative proceedings in respect of the	***Granted*** in terms of Section 32A of the Code.

	affairs of the Corporate Debtor, all inquiries, investigations, notices, cause of action, whether already arisen or expected to arise (and including without limitation civil, criminal, securities laws, any anti-corruption laws, property tax, lease rent, income tax related claims, sales tax, GST, VAT, Factories Act, applicable to the Corporate Debtor) in relation to the period prior to the acquisition date shall be disposed of. However, it is clarified that the Creditors will be entitled to proceed with all the actions against the erstwhile promoters/guarantors /corporate guarantors/directors for recovery of the balance amount. Further, 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. Successful Bidders and/or the Corporate Debtor shall have full right to recover/proceed against the party, whose account is recoverable in the books of the Corporate Debtor as on the Acquisition Date. ii. No creditor can file any claim/institute any proceedings against the Successful Bidder or the Corporate Debtor in respect of any due prior to the Acquisition Date. iii. Financing documents executed earlier shall be deemed to have been terminated and the security created shall stand released in favour of the Corporate Debtor. iv. Secured Creditors shall be	

	directed to return all the original title deeds and documents to the Corporate Debtor.	
7.	Pending inquiries, investigations, etc. - i. All inquiries, investigations, assessments, notices, causes of action, suits, claims, disputes, litigations, arbitration, or other judicial, regulatory or administrative proceedings pertaining to any period prior to the Date of Acquisition or arising on account of the acquisition shall be deemed to be withdrawn or dismissed without any cost and/or causing injury financially or otherwise to the Corporate Debtors or Successful Bidder and interim order(s) if any, passed during such arbitration, or judicial, regulatory oradministrative proceedings be deemed to be immediately vacated. ii. All liabilities or obligations of the Corporate Debtor, in relation to: (a) any investigation, inquiry or show-cause, whether civil or criminal;(b) any non-compliance; (c) change of control, transfer charges, unearned increase, compensation, or any other such liability whatsoever; (d) any leasehold rights or freehold rights to movable or immovable properties in the possession of the Corporate Debtor;(e) any contracts, agreements or commitments made by the Corporate Debtor, shall be written off in full and shall stand permanently extinguished. Such written off liabilities shall not be treated as income in the books of the	***Granted in respect of only those proceedings under any law for the time being in force, that would not have an overriding effect on provisions of IBC 2016 and further provided that these are not against Public Policy of the India.***

	Corporate Debtor upon being written off. iii. Any non-compliance of provisions of any laws rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permissions including any suspension, cancellation, revocation or termination, prior to the Date of Acquisition shall be deemed to be extinguished and/or regularized automatically, as the case may be, on the Acquisition Date. iv. All inquiries, investigations, assessments, notices, causes of action, suits, claims, disputes, litigations, arbitration, or other judicial, regulatory or administrative proceedings pertaining to any period prior to the Date of Acquisition or arising on account of the acquisition shall be deemed to be withdrawn or dismissed without any cost and/or causing injury financially or otherwise to the Corporate Debtors or Successful Bidder and interim order(s) if any, passed during such arbitration, or judicial, regulatory or administrative proceedings be deemed to be immediately vacated.	
8.	Contracts - i. Existing contracts and arrangements, if any, with the existing promoters/directors and related parties of the Corporate Debtor that was entered into prior to commencement of CIRP, during the time of CIRP/ Liquidation Process shall stand	***Not granted being a 'going concern' sale, and as such the buyer is free to take all decisions after the date of acquisition.***

	terminated, on and from the Acquisition Date. ii. Sale of the Corporate Debtor as a going concern shall be binding on all stakeholders including the utility service providers and all the utility service providers shall continue to supply the utilities as may be required for survival of the Corporate Debtor and run the Corporate Debtor as Going Concern. iii. Right to review and terminate any contract that was entered into prior to the Acquisition Date without any penalty, charges, fees, fines, liabilities, damages in relation thereto. Save and except the contracts and arrangements that may be terminated by the Corporate Debtor/ Successful Bidder, all other contracts and arrangements shall remain in existence on the same terms and conditions. iv. Any bond, surety, guarantee, power of attorney, undertaking issued by the Corporate Debtor to any person, either in India or outside India before the Acquisition Date shall stand cancelled and permanently revoked.	
9.	Licences and Approvals i. All subsisting consents, licenses, approvals, rights, entitlements, extension, waivers, benefits and privileges whether under law, contract, lease or licence, granted, which includes without limitation, permission for change of land use by the concerned governmental and/or regulatory authorities as in favour of the Corporate Debtor be deemed to	***Such a Carta Blanche cannot be granted. The Successful Bidder would need to approach the Appropriate Authorities.***

	continue for a period of twelve months from the Acquisition Date or until renewed by the relevant authorities, whichever is later. ii. In respect of the expired consents, licenses, approvals, rights, entitlements, extension, waivers, benefits and privileges whether under law, contract, lease or licence, utility services, which includes without limitation, permission for change of land use by the concerned governmental and/or regulatory authorities as in favour of the Corporate Debtor, the Successful Bidder or the Corporate Debtor be granted permission from the Hon'ble Adjudicating Authority to apply with competent authorities for renewal of all consent, licenses, clearances, permissions required to carry the operational activity of the unit. iii. The company shall be granted a period of 12 months form the Appointed Date to comply with the Statutory obligations without suffering any adverse implications including any revocation of licenses or levy of penalties or any other fees or costs. iv. At the time renewal of licenses, approvals, consents, permissions attached to the company, all the fees, costs or penalty pertaining to the period prior to the Acquisition Date shall be waived off and the Successful Bidder shall not be liable to pay any old fees/costs/penalty whether due or not.	
10.	Corporate Debtor's Account and Books-	***Granted. Further the***

	i. The Liquidator to handover all the books of accounts, documents, returns, forms, clearances, permissions, approvals, or any other documents, which is in his possession, of the Corporate Debtor for the period prior to the acquisition date to the Successful Bidder. ii. All accounts of the Corporate Debtor shall stand regularised, and its asset classification shall be classified as 'Standard'. iii. The banks/creditors shall intimate to the Reserve Bank of India and other credit rating agencies, that the Corporate Debtor is not a continuing defaulter and that the account of the Corporate Debtor stands regularised, and its asset has been classified as 'Standard'. iv. The rating agencies shall delete all negative ratings of the Corporate Debtor and not consider them defaulter from the Acquisition Date.	***Liquidator has the responsibility of handing over all the documents that were procured by him during the CIRP and Liquidation Period and also preserve the records for the prescribed periods under IBBI(Liquidation process) Regulations 2016.***
11.	Tax- i. Requirement and applicability of certificate under section 281 ofthe Income-Tax Act, 1961 and provisions of taking over its predecessor's tax liability under section 170 of the Income Tax Act, 1961 shall be deemed to be complied with on the Acquisition Date. ii. Waiver and extinguishment of any outstanding property tax, lease rent of the corporate debtor beyond the claim filed and paid under section 53 of the code. iii. Allow setting off of losses and unabsorbed depreciation for the	No general reliefs can be granted in the manner sought for. It is for the appropriate tax authorities to consider the same in accordance with the relevant law and judgment by Hon'ble Supreme Court of India in *Ghanashyam Mishra & Sons Pvt Ltd v Edelweiss Asset Reconstruction Company Ltd,*[4]

[4] 2021 SCC OnLine SC 313 decided on 13.04.2021.

	purpose of computation of book profit as permitted under section115JB of Income Tax Act, 1961. iv. Exemption from any tax liability in terms of section 115JB of the Income Tax Act, 1961. v. Allow filing return of income and/or revised return of income, for the Assessment Years prior to the Acquisition Date, pending if any and such return shall be deemed to have been filed in time as per the section 139 of the Income Tax Act, 1961. vi. Exemption available to a Successful Bidder under section 79 of Income Tax Act, in the case of a Resolution Plan under the Code, be extended to Successful Bidder and the Corporate Debtor.Changes in shareholding shall not: (a) result in in lapse of any carry forward accumulated Tax losses of the Corporate Debtor; and (b) be considered as void under Section 81 of the Central Goods and Service Tax Act, 2017 and (c) concerned authority shall not impose any successor liability on the Successful Bidder and the Corporate Debtor.	
12.	Government authorities to waive non-compliances - i. All government authorities shall waive the non-compliances of the Corporate Debtor prior to the Acquisition Date including without limitation with regard to the following: (A) any non-compliances pertaining to environment laws; (B) any non-compliances pertaining to fuel	***Granted, in view ofthe judgment of the Hon'ble Supreme Court in*** *Ghanashyam Mishra & Sons Pvt Ltd v Edelweiss Asset Reconstruction Company Ltd.* [5]

[5]2021 SCC OnLine SC 313 decided on 13.04.2021.

	supply agreement; (C) any non-compliances pertaining to electricity departments and (D) all penalties/costs/fines/interest payable by the Corporate Debtor on account of any of the noncompliances specified in (A), (B) and (C) above.	
	ii. No action by the government authorities for non-compliance;Neither shall the Successful Bidder, nor the Corporate Debtor, nor their respective directors, officers and employee appointed on and as of the Acquisition Date be liable for any violations, liabilities, penalties or fines with respect to or pursuant to the Corporate Debtor not having in place requisite licenses and approvals required to undertake its business as per applicable law, or any non-compliances of applicable law by the Corporate Debtor;Reasonable period should be allowed for rectifying the non-compliances; any non- compliance shall be deemed to be extinguished and/or regularised automatically and/or shall stand compounded without imposition of any additional obligation on the Corporate Debtor. However, this shall restrict the authority to take action against promoters/ directors/ KMPs of the Corporate Debtor if they are in default.	***Not Granted. This is for the appropriate authorities to consider***
13.	The Successful Bidder shall not be liable for any action/ responsibility of the Corporate Debtor or its erstwhile management as per the provision of section32A of the Code.	***Granted***

14.	Directions be issued to the banks to change the operating signatories of the bank account of the Corporate Debtor on or after the acquisition date for smooth transition of the Corporate Debtor to the Successful Bidder.	***Granted***
15.	The Successful Bidder shall enter in their books of account to give effect to the transaction entered into and executed for the purpose of sale of the Corporate Debtor as a going concern.	***Granted***
16.	Liquidator to provide all support and assistance to the Successful Bidder for smooth implementation of sale of the Corporate Debtor as a going concern.	***Granted***
17.	The liquidator shall execute any further document in order to complete the sale of the Corporate Debtor as a going concern in all respects and requirements.	***Granted***

3.14 Accordingly, the ***IA (IB) No.537/KB/2022*** *in* ***CP (IB) No.891/KB/2018*** is disposed of.

3.15 A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

The order is pronounced on 02nd day of February, 2023

SA [LRA]