NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Ins) No. 1355 of 2023
&
I.A. No. 4815, 4816 of 2023

IN THE MATTER OF:

Maharashtra Airport Development Company Ltd. ...**Appellant**

Versus

Vinod Kumar Kothari & Anr. ...**Respondents**

Present:

For Appellant(s)	:	Mr. Tishampati Sen, Mr. Santosh Kumar, Mr. Manoj Mishra, Mr. Rupesh Kumar, Mr. Mukul Kulhari & Mr. Anurag Anand, Advocates
For Respondent(s)	:	Mr. S.S. Bhati, Mr. Sbhuh Maheshwari & Mr. Dhruv V. Advocates in I.A. No. 4299,4300 & 4800 Mr. Sumant Batra, Ms. Sidharta Sharma & Mr. Arjun Asthana, Advocates Mr. Sarthak Bhandari & Ms. Riya Kaur Arora, Advocates Mr. Arijit Prasad, Sr. Adv. with Mr. Aman Malik, Advocates for R-2

With
Company Appeal (AT) (Ins) No. 939 of 2024

IN THE MATTER OF:

Maharashtra Airport Development Company Ltd. ...**Appellant**

Versus

Vinod Kumar Kothari & Anr. ...**Respondents**

Present:

For Appellant(s)	:	Mr. Tishampati Sen, Mr. Santosh Kumar, Mr. Manoj Mishra, Mr. Rupesh Kumar, Mr. Mukul Kulhari & Mr. Anurag Anand, Advocates
For Respondent(s)	:	Mr. Arijit Prasad, Sr. Adv. with Mr. Aman Malik, Advocates for R-2 Mr. Sumant Batra, Mr. Sidharth Sharma, Mr. Arjun Asthana, Mr. Sarthak Bhandari & Ms. Riya Kaur Arora, Advocates for R-1

<u>J U D G M E N T</u>
<u>(Hybrid Mode)</u>

<u>[Per: Justice Mohd. Faiz Alam Khan, Member (Judicial)]</u>

Both the aforesaid appeals have been preferred by the Appellant-Maharashtra Airport Development Company Ltd. (MADCL) challenging the impugned orders connected with the insolvency of the same CD and for the sake of convenience both these appeals are being disposed of by passing this common judgment.

2. CA (AT) (Ins) No. 939 of 2024 has been filed by the MADCL under Section 61 (1) of the Insolvency and Bankruptcy Code, 2016 (Code) assailing the order dated 13.03.2024, (impugned order) passed by the National Company Law Tribunal, Mumbai Bench, Court-I (Adjudicating Authority) in IA No. 3985/MB/C-I/2023 in CP (IB) No. 1315/MB/C-I/2017 whereby the sale-certificate issued in favour of the Successful Auction Purchaser has been kept on record and certain concessions and reliefs have also been granted by the Ld. Adjudicating Authority. CA (AT) (Ins) No. 1355 of 2023 has been filed by the Appellant-MADCL being aggrieved by the order dated 28.04.2023 passed in IA No. 3985 of 2023, whereby the said IA was disposed of, without considering the IA No. 147 of 2023, which was an intervening application filed by the Appellant.

3. Brief facts necessary for the disposal of aforesaid appeals are that Appellant is a Government Company constituted by the Government of Maharashtra in the year 2002 for a specific purpose of speedy development of Airport Projects across Maharashtra including one at MIHAN in Nagpur.

4. Respondent No. 1 is the liquidator of the CD- Abhijeet MADC Nagpur Energy Pvt. Ltd. who was earlier appointed as IRP vide order dated 06.10.2017 of the Ld. Adjudicating Authority and thereafter as liquidator vide order dated 31.08.2018 and Respondent No. 2 is the Successful Auction Purchaser of the Slump Sale undertaking (assets and legal entity of the CD).

5. The Appellant had approached the Government of India, Ministry of Commerce for obtaining approval for setting up Special Economic Zone (SEZ) in the MIHAN Area of Nagpur and letter of approval under Section 3 (10) of the Special Economic Zones Act, 2005 (SEZ Act) for an area of 2086 hectares, was accordingly granted.

6. With a view to have a dedicated power source of supply of uninterrupted power for the MIHAN Project an advertisement on 02.01.2007 was floated by the Appellant inviting proposals from interested parties for selection of a joint venture partner through International Competitive Bidding Process for undertaking the development design, financing, construction, operation and maintenance of a coal based thermal power plant on about 62.50 hectares of land located at MIHAN SEZ Area Nagpur Maharashtra on Build, Operate and Transfer basis (BOT basis).

7. M/s Abhijeet Infrastructure Nagpur was selected as the Successful Bidder to set up the said power plant and as per the condition of the tender document M/s Abhijeet Infrastructure Ltd. (Project Sponsor) and the Appellant (Project Owner) was required to incorporate a joint venture Special Purpose Vehicle (SPV) of MADC and Abhijeet MADC Nagpur Energy Pvt. Ltd. (AMNEPL) (Project Company/Corporate Debtor (CD)) for catering to the

power demand in the aforesaid SEZ area and thus the appellant entered into a concession agreement with the CD on 07.11.2007 whereby the Appellant granted concession by way of exclusive license to the CD to develop design, finance, construct, operate and maintain coal based electric generation plant near village Khaire Khurd, Taluka Hingana District Nagpur Maharashtra to operate and maintain the transmission and distribution network in the MIHAN Area for a period of 33 years and after this period the entire project was required to revert back to the appellant.

8. As per the aforesaid concession agreement dated 07.11.2007 the sole object and purpose of the CD was to construct the plan, supply electricity to the appellant and sell the surplus electricity in MIHAN SEZ Area and the Appellant was obliged to provide various facilities to the CD eg. Land on lease, transmission lines at the expense of appellant, free land for rail connectivity, road connectivity, water supply, free land for drainage system and low line areas for bottom ash disposal and the appellant was required to hold 26% of equity in the project company/CD.

9. In view of the above concession agreement appellant leased a land admeasuring 6.2654 hectares situated within the MIHAN SEZ boundary and 35.30 hectares outside the existing MIHAN SEZ boundary on 26.11.2008 and 16.06.2010 in consideration of payable premium @ of Rs. 65 lakhs per hectare in the form of equity shares subject to special conditions for use, enjoyment and lease hold rights in the aforesaid land.

10. The appellant had also entered into a shareholder's agreement with Abhijeet Infrastructure Ltd., Abhijeet Infra Ltd. and Abhijeet MADC Nagpur Energy Pvt. Ltd. on 02.04.2009.

11. The CD/Project Company was admitted into Corporate Insolvency Resolution Process (CIRP) vide order dated 06.10.2017 passed by the Ld. Adjudicating Authority in CP No. 1315/I& BP/2017 preferred under Section 7 of the Code and the Respondent No. 1 was appointed as the IRP of the CD and while admitting the CD into CIRP various directions were given by the Ld. Adjudicating Authority to the IRP and CoC pertaining to non-interference with the pre-existing rights of the appellant and to manage the transmission lines in accordance with the MERC order dated 04.08.2017 and concession agreement dated **07.11.2007**.

12. Vide order dated 31.08.2018, passed in MA 665/2018, IA No. 678 of 2018 the Ld. Adjudicating Authority initiated liquidation proceedings against the CD and the Respondent No. 1 was appointed as the liquidator of the CD and the liquidator was directed not to interfere with the pre-existing rights of the appellant and to carry out the liquidation of the CD subject to these rights of the appellant.

13. The liquidator entered into an agreement of sale with Respondent No. 2 (Auction Purchaser) on 24.12.2020 for sale of the assets of the CD and an asset sale report dated 24.12.2020 was issued in accordance with Regulation 36 of the IBBI Liquidation Process Regulations, 2016 (Liquidation Regulations) as a slump sale of the assets of the CD and thereafter the legal entity of the CD was also sold to the Respondent No. 2 on 11.12.2020 on standalone basis and thereafter the Respondent No. 1 filed an IA (IBC No. 2504 of 2020 on 26.12.2020) for taking on record the completion of sale process of the CD and also the liquidation process and

the appellant filed IA No. 147 of 2023 seeking intervention in IA No. 2504 of 2020 on 18.12.2022.

14. The IA No. 2504 of 2020 was disposed of by the Ld. Adjudicating Authority on 28.04.2023 and whereby the completion of sale process of the CD and liquidation process was taken on record and according to the appellant by the non-disposal of its IA No. 147 of 2023 the same has become infructuous and this IA was subsequently withdrawn on 11.09.2023.

15. The appellant filed CA (AT) (Ins) No. 1355 of 2023 requesting to setting aside the order of the Ld. Adjudicating Authority dated 28.04.2023 (connected appeal). Respondent No. 2 also filed an IA No. 3985 of 2023 with the request to place on record the sale certificate issued by the liquidator along with other various reliefs and concessions.

16. The appellant also filed IA No. 468 of 2024 seeking setting aside the sale of the undertaking of the CD on slump sale basis and also with regard to the legal entity of the CD on standalone basis. The Ld. Adjudicating Authority disposed of the IA No. 3985 of 2023 filed by the liquidator by passing the impugned order dated 13.03.2024 and aggrieved by the same CA (AT) (Ins) No. 939 of 2024 has been preferred by the appellant.

17. Ld. Counsel for the Appellant submits that it was neither arrayed as the party in IA No. 2504 of 2020 and when he filed an intervention application bearing IA No. 147 of 2023 the same was not decided, while Ld. Adjudicating Authority vide order dated 13.01.2023, had specifically directed clubbing of IA No. 2504 of 2020 and IA No. 147 of 2023 and both these applications were being listed together, however on 28.04.2023 IA No. 2504 of 2020 was allowed and the application of the appellant i.e. IA No.

147 of 2023 was adjourned to other date and the same became infructuous after passing of the impugned order.

18. It is further submitted that the impugned order dated 28.04.2023 is self-contradictory as vide order dated 12.09.2023 the liquidation process was extended till 04.02.2024 however prior to this the Ld. Adjudicating Authority has declared the completion of liquidation process and therefore patent error has been committed in clubbing the two sale transactions made under separate auctions and keeping on record the one joint certificate of sale with regard to the same and it has not been recorded as to which asset has been sold as slump sale or as standalone.

19. It is further submitted that the nature of sale is also not clear from the impugned order as in clause 2 of asset sale report dated 24.12.2020 it has been mentioned that the undertaking of the CD was sold on slump sale basis under Regulation 32 (b) of the Liquidation Regulations while the legal entity of the CD is shown to have been sold on a standalone basis under Regulation 32 (a) of the Liquidation Regulations and surprisingly in order dated 01.09.2023 passed in IA No. 3945 of 2023 by Ld. Adjudicating Authority, it was clearly mentioned that the CD's business has been sold as going concern. Thus, there is no clarity in the impugned order with regard to the sale of the assets.

20. It is further submitted that the Respondent No. 2 i.e. the Auction Purchaser is itself not certain as to whether it has stepped into the shoes of the CD, as is evident by the reply of the Respondent No. 2 in a note submitted by him before the Ld. Adjudicating Authority.

21. It is further submitted that the MADC/Project Owner has only granted exclusive licence to the CD for operation of the project on BOT Basis and the entire project after the expiry of the term was required to be transferred to the appellant therefore the Respondent No. 1 liquidator cannot sale any of the project asset/plant/facility/land or any obligation or interest of the project to the Respondent No. 2 without the consent and approval of the appellant and the sale has been made in violation of various clauses of concession agreement and shareholders agreement.

22. It is further submitted that Ld. Adjudicating Authority in its CIRP initiation order has categorically directed that Appellants rights cannot be interfered with, during CIRP of the CD, however contrary to this the sale have been made, illegally.

23. It is further submitted that having regard to Rule 11 (9) of the SEZ Rules, 2006, SEZ land cannot be sold and for taking possession the Respondent No. 2 is required to obtain approval from the appropriate authority. In this regard Rule 11 (7) of the SEZ Rules, 2006 has been highlighted.

24. It is further submitted that any alteration in the terms of the concession agreement cannot be made without the consent of the appellant and the CD could not mortgage, assign or change its right or leasehold interest and obligations in the project, in favour of any third party, in absence of any approval of the appellant. In this regard the law laid down by the Hon'ble Supreme Court in ***Jaypee Kensington Boulevard Apartments Welfare Association vs. NBCC (India) Ltd., (2022) 1 SCC 401 and BHEL vs. Anil Goyal, (2020) SCC Online NCLAT 618*** has been highlighted.

25. It is further submitted that Section 238 of the Code cannot override Appellants ownership rights. Reliance is placed on ***KV Jayaprakash vs. State Bank of India and Anr., CA (AT) (Ins) No. 362 of 2022 and Embassy Property Developments Pvt. Ltd. vs. State of Karnataka and Ors., (2020) 13 SCC 308***.

26. It is vehemently submitted that if the impugned order is not set aside the Respondent no. 2/Auction Purchaser which is an unrelated third party would become the project company without fulfilling any condition as such and also by holding 26% of shareholding which belongs to the appellant and this would leave the appellant without any shareholding or directorship or control in the project company.

27. It is further submitted that none of the liquidation Regulations provide for post facto approval of sale or approval of sale of the CD as going concern by the Ld. Adjudicating Authority.

28. While drawing the attention on Regulation 45 (3) (a) of liquidation Regulations it is submitted that the liquidator is required to submit an application to the Tribunal with final report and compliance certificate in Form –H for closure of the liquidation process which has not been done.

29. Ld. Counsel for the Respondent No. 1 however submits that when several attempts, made to auction the assets of the CD, failed the undertaking of AMNEPL was sold by way of slump sale to Respondent No. 2 pursuant to a public auction held on 21.10.2020 and subsequently after due consultation with the creditors only the legal entity of the CD was auctioned wherein also the Respondent No. 2 emerged as Successful Bidder

and in this regard sale certificate were issued on 19.12.2020 and 21.12.2020 and a sale agreement was also executed on 24.12.2020.

30. It is further submitted that appellant was always in the loop in liquidation proceedings of the CD and it has filed this appeal after almost 2.5 years of completion of sale and its confirmation by Ld. Adjudicating Authority.

31. It is further submitted that upon completion of the sale process the liquidator filed IA No. 2504 of 2020 before the Ld. Adjudicating Authority to apprise the completion of the sale process and to take on record the completion of liquidation process of the CD and it was on 17.12.2022, after two years, the appellant filed IA No. 147 of 2023 in IA No. 2504 of 2020.

32. It is further submitted that no prejudice has been caused to the appellant from sale of undertaking of the CD to the auction purchaser and it does not affect the rights of the appellant under the concession agreement or lease deeds and the sale agreement specifically takes care of the apprehension of the appellant by clearly stating that purchaser shall adhere to all such performance directions and other directions that may be imposed by the Ld. Adjudicating Authority with regard to the liquidation process and also that the pre-existing right of the appellant shall not be interfered.

33. It is further submitted that with regard to the land leased by the appellant the liquidator has only sold lease hold rights vested in with the CD which has constituted part of the liquidation estate and moreover the appellant participated in the liquidation process by filing claims amounting to Rs. 412,271,985/- as unsecured financial creditor and Rs. 8,661,384,438/- as operational creditor which was rejected by the liquidator

on the ground that amount constituted merely an investment by the appellant while the claim as an operational creditor has been treated as only a contingent claim and aggrieved by the same the appellant approached the Ld. Adjudicating Authority and the decision of the liquidator was upheld and since no appeal was preferred against that order of Ld. Adjudicating Authority, the said order has attained finality.

34. It is further submitted that the sale of the legal entity of the CD as a shell is in accordance with law, because after the undertaking of the CD was sold, only the CD as a shell was left and there is no illegality in selling the same. Reliance has been placed on ***RK Industries (Unit-II) LLP vs. HR Commercial Pvt. Ltd., Civil Appeal 772 of 2021 and Ahmed G.H. Ariff vs. Commissioner of Wealth Tax, AIR 1971, 1691 and Vikas Sales Corporation vs. Commissioner of Commercial Tax, AIR 1996, Supreme Court 2082 as well as on VV Krishna Iyer Sons vs. New Era Manufacturing Company Ltd., 1965 (35) Comp. Cas 410***.

35. It is further submitted that the appellant is having no locus either to question or challenge the sale in absence of any violation of its right.

36. It is further submitted that in case the sale is reversed there would be adverse consequences as the whole of the amount realised from such sales has already been distributed to secured creditors under Section 53 of the Code and no public interest would be served by the same.

37. Ld. Counsel for the Respondent No. 2 i.e. SRA submits that Appellant is not a creditor of the CD and has filed its claim in Form C and Form D which were rejected by the liquidator on 23.11.2018 and this rejection was upheld by the Ld. Adjudicating Authority by passing order dated 29.10.2020

in Miscellaneous Appeal No. 317 of 2019 which was never challenged by the Appellant and thus has attained finality.

38. It is further submitted that the Appellant's whole case is based on alleged 26% equity shareholding in the CD, however under Section 53 of the Code, equity shareholders rank last in the waterfall of distribution and upon the sale of the CD and distribution of proceeds the appellant cannot raise objections only on the ground of its erstwhile shareholding.

39. It is further submitted that appellant was aware of the CIR process and liquidation process of the CD from the beginning and have also participated therein as it had filed an intervention application no. 21 of 2017 seeking directions to the IRP or CoC and vide letter dated 19.03.2018 the appellant itself acknowledged to operationalise the power plant and to extend full cooperation therein however instead of participation the IA No. 468 of 2024 was filed by the Appellant on 09.01.2024, after three years of the sale of the undertaking and legal entity of the CD on 19.12.2020 and 21.12.2020.

40. It is further submitted that the concession agreement entered between the parties expressly contemplated the appointment of liquidator entitling the appellant to issue notice of termination and upon acquisition of facility to receive compensation equivalent to 90% of the total debt but the appellant consciously chosen not to terminate the agreement and now it cannot contend its entitlement to the benefits allegedly existed before the commencement of the liquidation.

41. It is further submitted that the Respondent No. 2 is not seeking any rights higher than vested in the CD and the project shall stand remitted to

appellant at the end of the concession term and this has been clarified by the impugned order also and therefore the appellant as of now, is not having any cause of action.

42. It is also submitted that Ld. Adjudicating Authority has correctly applied the Principle of clean slate while considering the reliefs sought by Respondent No. 2. Reliance in this regard has been held on ***M/s Shivshakti Interglobe Exports Pvt. Ltd. vs. M/s KTC Foods Pvt. Ltd., CA (AT) (Ins) No. 650 of 2020, Jas Amrit Designers Pvt. Ltd. vs. Gianchand Narang, CA (AT) (Ins) No. 258 of 2023 and Shri Karshini Alloys Pvt. Ltd. vs. Ramakrishnan Sadasivan liquidator, CA (AT) (CH) (Ins) Nos. 438 and 443 of 2022.***

43. It is vehemently submitted that the appellant is not the aggrieved person as the impugned order does not extinguish the rights of the appellant enshrined in BOT. Moreover, the Respondent No. 2 is a bona fide auction purchaser and is continuously prejudiced by appellant's non-cooperation.

44. Having heard Ld. Counsel for the parties, we notice that Ld. Adjudicating Authority in the impugned order dated 28.04.2023 after considering the rival submissions made by Ld. Counsel for the parties and having considered the relevant clauses of the concession agreement dated 07.11.2007 and after considering the law laid down by this Appellate Tribunal in ***Shivshakti Interglobe Exports Pvt. Ltd. and Jas Amrit Designers (supra)*** has granted certain concessions to the Respondent No. 2.

45. The factual position which emerges from the record appears to be that appellant is a Special Purpose Vehicle conceptualised by the Government of

Maharashtra and was entrusted for planning and developing the MIHAN Project. With a view to have dedicated power source for MIHAN Project, appellant appears to have floated a request for proposal for development, design, financing, construction, operation and maintenance of coal based thermal power plant on about 62.50 hectares' land located at MIHAN SEZ area Nagpur on Build, Operate and Transfer (BOT) basis and M/s Abhijeet Infrastructure Ltd. was selected as the Successful Bidder through Bidding Process and for setting up the aforesaid coal based power plant and as per the condition of tender a joint venture company was to be incorporated between M/s Abhijeet Infrastructure Ltd. (AIL) and Appellant (MADC) and the Appellant was required to held 26% of equity in that Project Company.

46. Thus, a joint venture i.e. Abhijeet MADC Nagpur Energy Pvt. Ltd. (AMNEPL)/CD was incorporated between Appellant- MADC, Abhijeet Infrastructure Ltd. (AIL). AIL along with its other group companies i.e. Abjijeet Power Ltd. held 74% equity in AMNEPL against contribution made in cash and Appellant held 26% equity in the same against contribution of lease hold land.

47. Appellant-MADC entered into a concession agreement with the AMNEPL/CD on 07.11.2007 by which the project land was released out to the CD for aforesaid purpose and for operating and maintaining the facility on BOT basis for 33 years.

48. As per the concession agreement the sole object of the CD was to construct the plant, supply electricity to the Appellant and to sell surplus electricity in MIHAN SEZ area.

49. It is further reflected that to enable the establishment of 20 MW generator set and transmissions and distribution system in the MIHAN SEZ the CD/ lessee by its letter dated 05.03.2008 requested the appellant to lease out 6.2654-hectare land in MIHAN SEZ Area in consideration of premium of Rs. 65 lakhs per hectare and an indenture of lease was executed on 26.11.2008. Subsequently lease deed with regard to the land measuring 35.03 hectare was also executed on 16.06.2010. Appellant- MADC in between entered into a shareholders agreement with Abhijeet Infrastructure Ltd. and Abhijeet Infra Ltd. as well as with Abhijeet MADC Nagpur Energy Pvt. Ltd. (AMNEPL)/CD.

50. It is also reflected that vide notification dated 03.03.2010 issued under the SEZ Act, 2005 the Appellant as developer of MIHAN SEZ was granted the status of deemed distribution licensee. Appellant appears to have approached the Maharashtra Electricity Regulatory Commission for procurement of 4 to 9 MW for further period of one year from 01.09.2017 to 31.08.2018 and the same was approved vide order dated 04.08.2017.

51. The CD/Project Company was admitted into CIRP vide order dated 06.10.2017 passed by the NCLT in CP No. 1315 of 2017 under Section 7 of the Code and Respondent No. 1 was appointed as IRP of the Company.

52. It is also evident that Appellant had filed an intervention application being IVMP No. 21 of 2017 seeking reliefs to direct IRP and Committee of Creditors (CoC) to co-operate with the Appellant as per the order of MERC dated 04.08.2017 and also in accordance with concession agreement dated 07.11.2007. In the insolvency initiation order in view of the intervening

application filed by the Appellant following order was passed by Ld. Adjudicating Authority:

> *"10. On the prayer made by this applicant company incorporated by State Government of Maharashtra, this Bench hereby holds that IRP will continue to manage switch yard and the transmission line as per the Order dated 4.8.2017 passed by Maharashtra Electricity Regulatory Commission (MERC) and in case any dispute arises on the site, Corporate Debtor represented by IRP and Committee of Creditors (CoC) shall co-operate with MADC as per the order of MERC dated 4.8.2017 and also in accordance with the Concession Agreement entered into between MADC and the Corporate Debtor on 7.11.2007.*
>
> *11. It appears that MADC has been supplying Power to all the units in the SEZ area, thereby if at all any interruption comes to power supply to SEZ area, such interruption will have ramifications on various Projects running in the SEZ area.*
>
> *12. Moreover, MADC being the land owner of the land on which Power Project has been built and this applicant company being incorporated by Maharashtra Govt. to cater the needs of SEZ area and also for development of Airport area, we are of the view that Insolvency Resolution Professional appointed in this case and CoC shall not interfere with the pre-existing rights of MADC and also the Order dated 4.8.2017 passed by MERC.*
>
> *13. Accordingly, this Bench hereby directs that Insolvency Resolution Professional shall continue to manage the transmission line as per the Order dated 4.8.2017 passed by MERC and concessional Agreement dated 7.11.2007, in case any difficulty arises on either side, the Corporate Debtor represented by IRP and CoC shall co-operate with MADC".*

53. Vide order dated 31.08.2018, passed by Ld. Adjudicating Authority in MA No. 665 of 2018 and IA No. 1315 of 2017 liquidation process was initiated against the CD and Respondent No. 1 was appointed as the liquidator.

54. On the intervention application no. 678 of 2018 following order was passed in the liquidation initiation order:

"9. That on Intervention Application 678/2018 moved by MADC, for there being consensus between the RP and Counsel appearing on behalf of MADC regarding the rights of MADC, the Liquidator, while dealing with liquidation of the assets of the company, shall not interfere or deal with the pre-existing rights of MADC and shall continue to manage switch yard and the transmission line as stated in the order dated 4.8.2017 passed by MERC and the Concession Agreement dated 7.11.2007 and shall carry out liquidation of the Corporate Debtor subject to the rights of MADC".

Thus a clear direction was given to the liquidator also to carry out liquidation subject to the rights of the Appellant- MADC.

55. It is further reflected that the undertaking of AMNEPL/CD was sold by way of slump sale to Respondent no. 2 vide public auction dated 21.10.2020 and the legal entity of the CD was auctioned and sold to Respondent No. 2 and in this regard sale certificates dated 19.12.2020 and 21.12.2020 were executed and sale agreement was also executed on 24.12.2020.

56. It was on 26.12.2020, Respondent no. 1 filed IA No. 2504 of 2020 for taking on record completion of sale except pending litigation. On 18.12.2022 appellant filed IA No. 147 of 2023 in aforesaid IA No. 2504 of 2020, however by passing order dated 28.04.2023, IA No. 2504 of 2020 was disposed of by passing following order:

"IA 2504/2020

Ms. Barsha Dikshit, PCS for the Applicant and Mr. B.M. Chatterjee, Ld. Sr. Advocate for the Auction Purchaser are present. The above numbered Interlocutory Application has been filed by the Liquidator of the Corporate Debtor praying for the following reliefs:

> *1. That the Hon'ble Bench takes on record the completion of the sale processes of the Corporate Debtor, whereby all the assets forming part of the Liquidation Estate including the legal entity of the Corporate Debtor stand sold and realized;*

2. That the Hon'ble Bench takes on record completion of the liquidation process of the Corporate Debtor, inter-alia sale, realization and distribution, except for the pending litigation, which may be disposed of at the earliest convenience of the Hon'ble Bench;
3. That this Hon'ble Adjudicating Authority may grant directions and/ or clarifications in terms of 5.23 of this Application.

Since, it is for the Auction Purchaser to seek the reliefs and concessions that are required by him through filing separate Application; hence, prayer ***6.3, seeking directions and/or clarifications in terms of 5.23 of this Application****, is not considered and accordingly, the Interlocutory Application bearing IA No. 2504 of 2020, is disposed of by taking on record completion of sale process of the Corporate Debtor and the Liquidation Process, except pending litigation.*

<u>IA147/2023</u>
Mr. Manoj Kumar Mishra, Advocate for the Applicant is present. List this matter on Board on 14.06.2023, for further consideration and hearing."

57. This order has been assailed by the Appellant-MADC by filing CA (AT) (Ins) No. 1355 of 2023. The intervening application no. 147 of 2023 was not disposed of by Ld. Adjudicating Authority by the same order and later on was dismissed as withdrawn vide order dated 11.09.2023.

58. It is also pertinent to mention here that in pursuance of order dated 28.04.2023, Respondent no. 2 filed IA No. 3985 of 2023 seeking various concessions and reliefs. Appellant-MADC filed IA No. 121 of 2024 before us in CA (AT) (Ins) No. 1355 of 2023 and vide order dated 08.01.2024, the same was disposed of with the observation that any action taken in pursuance of Ld. Adjudicating Authority's order dated 28.04.2023 shall abide by the result of CA (AT) (Ins) No. 1355 of 2023. However, Ld. Adjudicating Authority disposed of IA No. 3985 of 2023 by passing order dated 13.03.2024 which has been assailed by the appellant in CA (AT) (Ins) No. 939 of 2024 and by passing this order various reliefs have been granted to Respondent No. 2

however certain observations with regard to the rights of the appellant – MADC have also been made in following terms:

> *"19. We have heard the rival submissions of both sides and perused the record. It is observed that the Applicant does not seek to acquire better rights than those vested with the Corporate Debtor. Moreover, the Applicant is aware that the project company will be remitted back to MADC after completion of the term and does not seek to evade the stipulations contained in the agreements. Further, as far as the contention of the Respondent No.2 qua dilution of shareholding of 26% in Corporate Debtor is concerned it is the admitted position that the shares were allotted by the Corporate Debtor to the Respondent No. 2 in lieu of payment for "Lease Premium", as per the Indenture of Lease dated 26.11.2008 and Lease Deed dated 16.06.2010.*
>
> *20. From a plain reading of the aforesaid clause it is discernible that the arrangement between the parties was such that consideration payable for lease premium was in the form of equity shares of the Corporate Debtor. The contention of the Respondent No.2 that shareholding of MADC ought not to be extinguished cannot be sustained as the Corporate Debtor is undergoing Liquidation and the proceeds from sale will be distributed in terms of Section 53 of the Code".*

59. It is further reflected that there after discussing clauses 5.2, 5.4 and 5.5 of the concession agreement dated 07.11.2007 following observations were made:

> *"22. The aforesaid clauses make it clear that MADC i.e. Respondent No.2 had option to terminate the agreement pursuant to project company event of default which includes appointment of Liquidator but the Respondent No.2 has chosen not to terminate the agreement and has not paid the compensation amount equivalent to 90% of the Total Debt Due. Accordingly, now MADC cannot as an after thought contend that it is entitled to benefits as they existed prior to commencement of Liquidation proceedings against the Corporate Debtor as it has not elected to terminate the agreement. Further, it is clear from the indenture of lease that the equity of the Corporate Debtor was given to the Respondent No. 2 in discharge and towards payment of consideration payable as Lease*

Premium for granting lease of the land. Moreover, since the applicant has submitted that it does not seek to acquire better rights than the Corporate Debtor and has admitted that the project will be remitted back to MADC at the end of term, the objections raised by MADC to sale in favour of the Applicant cannot be considered. However, we make it clear that the rights of MADC under the BOT agreements shall remain protected and the successful bidder shall be bound to transfer the facility in the manner as was obligated for the Corporate Debtor".

60. It is to be highlighted here that Respondent no. 1-liquidator or Respondent No. 2- auction purchaser has not challenged these observations of Ld. Adjudicating Authority by filing any appeal, therefore, these observations have become final, so far as Respondents are concerned to the extent of transfer of facility by Respondent No. 2, in the manner obligated for CD and the project would be remitted back to the appellant after the end of the term and admission of the Respondent no. 2 has also been recorded in para no. 22 that it does not seek to acquire any better right than that of CD.

61. The first contention of the appellant is that IA No. 147 of 2023, which was filed in IA No. 2504 of 2020, when were clubbed together should have been disposed of simultaneously, while by passing impugned order in CA (AT) (Ins) no. 1355 of 2023 the IA No. 2504 of 2020 was allowed and completion of sale process and liquidation process was taken on record and IA No. 147 of 2023 of the appellant was kept pending which, as said earlier, was subsequently withdrawn and it is stated by appellant that by passing order dated 13.01.2023, the same had become infructuous.

62. We notice that the IA No. 2504 of 2020 was moved by the Respondent No. 1-liquidator for taking on record the completion of the sale process whereby all the assets forming part of the liquidation estate including the

legal entity of the CD stand sold and also for taking on record completion of liquidation process of the CD except pending litigation.

63. It is in this background Ld. Adjudicating Authority disposed of this application by taking on record completion of sale process as well as liquidation process of the CD. Thus, the completion of sale and liquidation process was apparently taken on record subject to the pending litigation.

64. It is also pertinent to mention here that by moving IA No. 147 of 2023 appellant has requested for following prayers:

> *"a)Under the circumstances mentioned above the humble request of the Applicant is to hear its side before disposing of the matter.*
>
> *b) The copy of present Interlocutory Application for the sale of the Corporate Debtor as a going concern be shared with the Applicant to enable the Applicant to place its objection.*
>
> *c)The transfer of the land on lease basis admeasuring 35.03 Hectares and 6.2654 Hectares to the Purchasing Company be solely subject to the resolution that may be passed in the meeting of the Board of Directors of the Applicant Company, being the owner of the said land.*
>
> *d)An order be granted to make the Applicant a party before disposing of the matter".*

65. Thus, it is evident that the only request apart from providing copy of application was pertaining to the fact that the transfer of land on lease basis to the purchasing company must be subject to the resolution which may be passed in the meeting of the board of directors of the appellant.

66. It is also reflected that IA No. 2504 of 2020 was pending before Ld. Adjudicating Authority since 26.12.2020 while IA No. 147 of 2023 was filed by the appellant on 18.12.2022 about two years after filing of IA No. 2504 of

2020. Moreover, no prayer was made in this IA with regard to not taking of completion of sale process or liquidation process on record. Rather, a facilitating approach was adopted by praying to transfer the lease land to Respondent no. 2 subject to any resolution which may be passed in the meeting of the board of directors of the appellant.

67. It is also worthwhile to highlight that up to the passing of order in IA No. 2504 of 2020 no application was filed by the appellant to set aside the sale of either undertaking or of legal entity of the CD and an IA being IA No. 468 of 2024, according to the own admission of the appellant could only be filed on 09.01.2024. Therefore, till 28.04.2023 the appellant has not challenged any of the sale process. It is also reflected that IA No. 468 of 2024 is stated to have been adjourned sine die by the Ld. Adjudicating Authority vide order dated 10.04.2024.

68. Therefore, having regard to the reliefs claimed/sought by the Appellant in IA No. 147 of 2023 whereby no effective remedy was claimed pertaining to the cancellation of sale process or sale certificate or sale deed, no prejudice appears to have been caused to the appellant in keeping the IA No. 147 of 2023 pending and keeping on record the completion of sale and liquidation process, which in our understanding was purely a ministerial act and in absence of any challenge to the sale process, no effective relief could have been granted to the appellant. However, it would have been in the fittest of things if IA No. 147 of 2023 would have been disposed of by Ld. Adjudicating Authority along with IA No. 2504 of 2020.

69. The other grievance of the appellant-MADC appears to be that it is the owner of the project and has only granted exclusive license to CD for

operating the project according to the concession agreement, on BOT basis and after the expiry of the term the CD was obliged to transfer the entire project back to the appellant and therefore the liquidator cannot sell any of the project assets including land and also that the sale has been done in violation of various clauses of concession agreement. In this regard, clause 5.2, 6.1 (c), 23.1, 23.3, 23.5,23.11(a) of concession agreement and clause 6 (V), 7.1, 8 (c), 8 (f) (h), 12.6 and 12.7 of the lease deed dated 20.11.2008 and clause 8 (t) (u), 11.1, 12 (b) (e), (g) and 16.6, 16.7 of lease deed dated 16.06.2010 has been highlighted. Ld. Counsel for the appellant has also highlighted clause 7.17, 8.1 (b), (c), (e), (i) and (t) of shareholder's agreement dated 02.04.2009 in order to show that under BOT agreement assets could only be used by the CD and title therein could not be transferred to the third party.

70. The contention of Respondent no. 1 liquidator of the CD is that after various attempts to sale the assets of the CD by auction sale which failed, the undertaking of the CD was sold by slump sale to Respondent no. 2 pursuant to public auction held on 21.10.2020 and after due consultation with the creditors of the CD in the meeting of the stakeholder's committee dated 20.11.2020, the legal entity of CD was also sold in public auction and in both the auction sales Respondent no. 2 has emerged as highest bidder and in any case the ownership of the appellants leasehold land has not been transferred to the auction purchaser. It is also submitted that pre-existing rights of the appellant as directed by Ld. Adjudicating Authority has been preserved by the impugned order dated 13.03.2024 and the purchaser shall continue to manage switch yard and transmission lines as per the order

dated 04.08.2017 passed by MERC and Concession agreement dated 07.11.2007. It is also submitted that liquidator has only sold lease hold rights in the land leased by the appellant-MADC which were part of the liquidation estate and the claim filed by the MADC has been rejected by the liquidator as well as Ld. Adjudicating Authority on the ground that the money infused by the appellant was an investment and no appeal has been preferred by the appellant against the same, therefore this order has become final and binding and further the shell of the CD of the legal entity has been sold to maximise the value of the assets of the CD.

71. Respondent No. 2 on the other hand has claimed itself to be a bona fide purchaser who has paid the entire consideration of about 100 crore which is claimed to have been distributed amongst creditors in view of Section 53 of the Code. It is also highlighted by Respondent no. 2 that while disposing of IA No. 3985 of 2023 the Adjudicating Authority expressly protected the rights of the appellant under the BOT arrangement and recorded that the Successful Bidder shall remain bound to transfer the facility in the manner, in which the CD was obliged.

72. It is also submitted that the appellants case is solely premised on 26% shareholding, however under Section 53 of the Code, equity shareholders are ranked last in the waterfall distribution and also that the claim of the appellant filed as secured financial creditor has been rejected by the liquidator and the adjudicating authority which has also attained finality.

73. Respondent no. 2 has also submitted that MADC never terminated concession agreement and thus cannot claim pre-liquidation benefits and

also that the Respondent no. 2 does not seek any better rights then those vested in the CD.

74. In rebuttal Ld. Counsel for the Appellant highlighted clause 3.3, 7,7.14, 7.2 (a) and 8.1 (u) of the shareholder agreement and submits that out of 4 directors the appellant is having right to appoint one and in whose absence the Coram would not reach, however by passing the impugned order this right of the appellant has been extinguished illegally.

75. In order to deal with the submissions of Ld. Counsel for the parties, it becomes obligatory to have a look on various clauses of concession agreement, lease deeds, and shareholder's agreement as well as relevant provisions of the Code and liquidation regulations.

"Concession Agreement dated 07.11.2007 entered into between the Appellant and Corporate Debtor

2.1 Concession

*Subject to the provisions of this Agreement, MADC hereby grants an exclusive license("**License"**) to the Project Company to do the following:*

(i) develop, design, finance, construct, operate and maintain the Facility on a Build, Operate & Transfer (BOT) basis for the Term;

(ii) operate and maintain the Transmission and Distribution Network in the MIHAN Area as set up and handed over by MADC to the Project Company for the Term;

(iii) supply electricity to the Consumers in the MIHAN SEZ Area on a priority basis;

(iv) sell electricity, over and above the requirement of MIHAN SEZ Area, at any point of time during the Term;

(v) charge to the Consumers in the MIHAN Area (both SEZ as well as outside SEZ area) a Tariff for purchase of electricity as per the terms and conditions mentioned in this Agreement;

(vi) sell any excess electricity over and above the requirements of MIHAN Area (both SEZ as well as outside

SEZ area) to third parties at mutually agreeable terms. For avoidance of doubt it may be noted that the order of priority of electricity supply by Project Company to customers will be MIHAN SEZ Area followed by MIHAN non SEZ. area followed by any third party as per the Laws of India;
(vii) unless the Term is extended as per the provisions of Article 5, at the end of initial Term, transfer the Facility to MADC.
For this purpose, Project Company shall:

- *build, operate and maintain the Facility, all at its own expense and responsibility in accordance with the proposal submitted to and accepted by MADC, within the technical limits and each of the Schedules that are part of this Agreement for the Term of this Agreement;*
- *operate and maintain the Transmission and Distribution Network provided by MADC in the MIHAN Area for the Term of this Agreement,*
- *supply electricity to the Consumers in the MIHAN SEZ Area on a priority basis;*
- *sell electricity, over and above the requirement of MIHAN SEZ Area, at any point of time during the Term of this Agreement, to other consumers in the MIHAN Area;*
- *charge to the consumers in the MIHAN Area (both SEZ as well as outside SEZ area) a Tariff for purchase of electricity as per the terms and conditions mentioned in this Agreement for both power supplied from the Facility including any additional units as and when developed;*
- *sell any excess electricity over and above the requirements of MIHAN area (both SEZ as well as outside SEZ area) to third parties at mutually agreeable terms as per applicable rules and regulations. For avoidance of doubt it may be noted that the order of priority of electricity supply by Project Company to customers will be MIHAN SEZ Area followed by MIHAN non SEZ area followed by any third party;*
- *transfer the Project to MADC at the end of Term of this Agreement.*

In the event there is any inconsistency between the terms of the proposal and the stipulations of this Agreement, the clauses of the Agreement and the conditions and specifications contained in each of the Schedules hereto shall prevail for all legal and contractual purposes.

5.1 Term of Agreement

This Agreement shall become effective on the Effective Date and shall terminate at the end of the 33 Year thereafter, unless extended or earlier terminated pursuant to the provisions of this Agreement. The termination of this Agreement shall be without prejudice to all rights and obligations of the Parties accrued under this Agreement prior to such termination.

Four (4) Years prior to the end of Term, MADC will carry out a revised tariff based competitive bidding for the award of concession to generate and supply electricity to Consumers in MIHAN Area for another period of 30 (thirty) Years starting from end of Term. If the Project Company decides to participate in such bidding process, Project Company shall be offered a first right of refusal to match the tariff quoted by the most competitive bidder for award of Project on Build, Operate & Transfer basis. The contractual terms and conditions will be finalized at such appropriate time as a part of the new bidding process.

6.1 Project Company Covenants

(s) Project Sponsors of the Project Company shall hold minimum 51% of the subscribed, paid up and voting equity capital of the Project Company upto a period of two (2) years from Commercial Operation Date, and thereafter, the lead Project Sponsor, i.e. Abhijeet Infrastructure Limited, shall hold a minimum of 26% of subscribed, paid up and voting equity capital of the Project Company during the Concession Period;

(g) it shall develop, design, finance, construct, operate, and maintain the Facility in accordance with,

(i) the plans and specifications prepared in accordance with this Agreement,

(ii) the Contracted Operating Characteristics set forth in Schedule 2,

(iii) all Laws of India, and

(iv) sound engineering and construction practices and Prudent Utility Practices;

6.2 MADC covenants

MADC hereby covenants to and agrees with the Project Company to:

(a) Invest in the shareholding of the Project Company to the minimum extent of 26% of the subscribed, paid up and voting equity capital of the Project Company by way of its contribution of Land for the Project, which shall he valued at INR 65 lakhs per hectare, on or before the Financial Closure Date;

(b) assist the Project Company, if so requested, to obtain electrical energy for construction and Commissioning, in accordance with Article 7;

(c) assist the Project Company in connection with Project Company's negotiation and execution of the Financing Documents;

(d) assist the Project Company in obtaining all Consents including, but not limited to, construction, water, air, other environmental, import and transportation permits and licenses;

(f) transfer to the Project Company within fifteen (15) Days of this Agreement, free of all encumbrances, against the consideration to be provided by the Project Company, all rights and title of the Project related to:

(i) all Consents which are under application or have been obtained from the Government Authority for the Project, and

(ii) all studies, designs, specifications and drawings, including but not limited to environmental impact study, carried out for the Project.

10.1 Operating Procedures

(a) The Parties shall comply with the operating procedure established pursuant to this Article 10 and the plan for the operation and maintenance of the Facility presented by Project Company pursuant to Article 7.2(c).

(b) The Facility shall be operated and maintained in accordance with guidelines which comply with the Prudent Utility Practices and the plan presented by Project Company. The Joint Coordinating Committee will be responsible for monitoring and coordinating the compliance with these guidelines and settling disputes that may arise from the operation of the Facility.

<u>Indenture of Lease b/w. MADC and AMNEPL for land admeasuring 6.2654 Ha. as on 26.11.2008</u>

AND WHEREAS by the Letter of intent dated 28th August, 2007 M/s. Abhijeet Infrastructure Ltd. was selected through the international competitive bidding process to setup a coal based Power Plant on about 62.50 Hectares land and as per the condition of the tender document a joint venture company was incorporated between M/s. Abhijeet Infrastructure Ltd. and MADC with MADC holding upto 26% equity in the project company in accordance with the Concession Agreement executed on 7th November 2007 between the LESSOR. therein referred to as MADC and the LESSSEE, therein referred to as the Project Company

AND WHEREAS as per the terms of the tender document, out of the total land of about 62.5 Hectares to be leased for the Power Plant project about 60 Hectares land would be leased outside the existing MIHAN, SEZ boundary and the balance of about 2.5 Hectares land would be leased within the MIHAN, SEZ boundary.

AND WHEREAS by its letter dated 5th March 2008 the LESSEE requested the LESSOR to lease about 6.2654 Hectares of land in the processing area of the MIHAN, SEZ in consideration of the premium of Rs. 65,00,000/- (Rupees Sixty-Five Lakhs Only) per Hectare for setting up a 25 M.W. Diesel Generator set and transmission and distribution system.

NOW THIS INDENTURE WITNESSETH THAT in pursuance of the said Concession Agreement dated 7th November, 2007 and in consideration of the premium Rs. 4,07,25,100/- (Rupees Four Crore Seven Lacs Twenty-Five Thousand One Hundred Only) to be paid by the LESSEE to the LESSOR in the form of equity shares as aforesaid after the execution of these presents as per the SHA the LESSOR do hereby admit and acknowledge and acquit, release and discharge the LESSEE from the payment and receipt thereof and every part thereof of the total consideration of Rs. 4,07,25,100/- (Rupees Four Crore Seven Lacs Twenty Five Thousand One Hundred Only) the LESSOR do hereby demise unto and to the use of the LESSEE and the LESSEE do hereby accept, confirm and take on lease all that piece or parcel of the said Land on ground situated lying and being in the processing area of the SEZ at Project MIHAN, all that piece or parcel Land on ground situated, lying in Village 'Dahegaon' in the 'Hingna PS' jurisdiction and the Post office is 'Khapri' within the taluka, District of Nagpur (Rural) admeasuring 6.2654 Hectares equivalent to 62654 Sq. Mtrs. and more *particularly described in the First Schedule hereunder written and as shown on the Plan in Annexure 'A' hereto and delineated thereon in red colour boundary line (hereinafter referred to as 'the Demised Land');*

2. GRANT OF DEMISE

2.1 In consideration of the LESSEE agreeing to undertake the responsibilities under the Concession Agreement and the covenants and warranties on the part of the LESSEE therein and herein, the LESSOR doth hereby demise to the LESSEE, the Leased Premises for a period of thirty-three (33) Years together with all rights, liberties. privileges, easements, appurtenances, hereditaments or premises belonging to or in any way appurtenant thereto or enjoyed therewith of the leased premises, for the duration of the term and grants to the LESSEE the right to implement the project including constructing, operating and maintaining the project facilities in accordance with the terms of the Concession Agreement on the leased premises from 1 April to 31 March of each and every year or any part thereof (the "Lease Rent"), the Lease Rent to be paid in advance without any deduction whatsoever on the 1 day of April in each and every year.

(u) At the expiration or sooner determination of the said term quietly to deliver unto the LESSOR the Demised Land and all erection and building/s then standing thereon PROVIDED always that the LESSEE shall be at liberty if it shall have paid all the installments of premium then payable and shall have paid all Municipal and other taxes, rates and assessments, then to remove and appropriate to itself all building. erections and structures and materials from the Demised Land but so nevertheless that the LESSEE shall deliver up as aforesaid to the LESSOR leveled and put in good order and condition to the satisfaction of the LESSOR all the Demised Land from which such building, erection structures may have been removed.

(v) Not to assign, underlet or part with the possession of the Demised Land or any part thereof or any building or buildings thereof or any part thereof or any interest therein without the previous written consent of the LESSOR, which shall not be denied unreasonably and while granting such consent the LESSOR shall be entitled to impose conditions for payment of additional premium, rent or otherwise howsoever as the LESSOR may in its absolute discretion think fit and in any event not to assign, underlet or transfer the LESSEE's interest therein so as to cause any division by

metes and bonds or otherwise to alter the nature of this present Lease and use.

(f) The LESSEE mortgaging, assigning or otherwise charging its rights. and leasehold interest in the Demised Land or any portion thereof in favour of any third party otherwise than in accordance with Article 7 above

(h) The LESSEE setting up a title adverse to that of the LESSOR or in a third person or claiming a title absolute in itself.

12.6 Subject to the provisions of this Lease Deed, the LESSEE shall not. except in accordance with the terms of this Lease Deed, assign any of its rights or obligations as such LESSEE, except with the prior written consent of the LESSOR

12.7 No variation of this Lease Deed shall be binding on either party unless such variation is in writing and signed by both parties.

Lease Deed b/w. MADC and AMNEPL for land admeasuring 35.03 Ha. dated 16.06.2010.

Q. AND WHEREAS upon the joint survey of the said Land it is agreed between the LESSOR and the LESSEE, that the lease of the said Land shall be for a term of thirty (33) years from effective date and LESSEE shall pay the agreed premium rate of Rs. 65,00,000/- (Rupees Sixty-Five Lakh Only) per Hectare for the total land admeasuring 35.03 Hectares amounting to aggregate premium of Rs. 22,76,95,000 (Rupees-Twenty-Two Crore Seventy-Six Lakh Ninety-Five Thousand Only) as set out therein and that the LESSEE shall instead of so paying the LESSOR the said premium, issue to the LESSOR its ordinary shares of the face value of Rs. 10/-Rupees Ten Only) each at par.

T. In pursuance of the said Concession Agreement, the LESSOR has now agreed to execute this Land Lease Deed in favour of the LESSEE and whereas by mutual agreement, the LESSOR has consented to receive from the LESSEE a premium of Rs. 65,00,000/- (Rupees Sixty Five Lakh Only) per hector in the form of equity shares to be allotted within a period of three (3) months of Land Lease Deed by the LESSEE at their face value of Rs.10 each per share at par towards the said Land as per Shareholders Agreement dated 2nd April, 2009 (hereinafter referred to *as the "SHA") and the LESSEE shall develop the said Land strictly in accordance with Concession Agreement to establish, operate and maintain 246 MW Power Plant subject to Special Conditions for use, enjoyment and Leasehold Ownership of the said Land agreed between the LESSOR and the LESSEE as set out in Annexure 'B' hereto (hereinafter referred to as 'the said Special Conditions') as hereinafter appearing,*

NOW THIS INDENTURE WITNESSETH THAT in pursuance of the said Concession Agreement dated 7th November, 2007 and in consideration of the premium Rs. 65,00,000/- (Rupees Sixty Five Lakh Only) per hectare to be paid by the LESSEE to the LESSOR in the form of equity shares at par as aforesaid after the execution of these presents as per the Share Holders Agreement (SHA); the LESSOR do hereby admit and acknowledge and acquit, release and discharge the LESSEE from the payment and Receipt thereof Hereof and every part thereof) of the total consideration of approx. - Rs. 22,76,95,000 (Rupees Twenty Two Crore Seventy Six Lakh Ninety Five Thousand Only) the LESSOR do hereby demise unto and to the use of the LESSEE and the LESSEE do hereby accept, confirm and take on lease all that piece or parcel of the said Land Sn ground situated lying and being outside the MIHAN-SEZ and outside SEZ, all that piece or parcel Land on ground situated, lying in Village 'Khairi (Khurd) and Ukkali in the 'Hingna PS' jurisdiction and the Post office is 'Hingna' within the taluka, Hingana, District Nagpur, admeasuring about 35.03 Hectares. and more particularly described in the First Schedule hereunder written and as shown on the Plan in 12 of Annexure 'A' hereto and reiterated thereon in red colour boundary line (hereinafter referred to as 'the Demised Land)

5. LEASE PERIOD: The lease period shall be 33 years and commence from the effective date which is 7th January, 2009.

(s) ***Surrender of the Demised Land****: At the expiration or sooner determination of the said term quietly to deliver unto the LESSOR the Demised Land and all Buildings, structures, Plants and Equipments then standing thereon at no cost to the LESSOR*

(u) ***Lease or Assignment****: - Lease or assignment of the demised land under this lease is not permitted.*

16.6 Subject to the provisions of this Lease Deed, the LESSEE shall not, except in accordance with the terms of *this Lease Deed, assign any of its rights or obligations as such LESSEE,*

16.7 No variation of this Lease Deed shall be binding on either party unless such variation is in writing and signed by both parties.

<u>Shareholders Agreement between MADC, Abhijeet Infrastructure Ltd., Abhijeet Infra Ltd. and Abhijeet MADC Nagpur Energy Pvt. Ltd.</u>

2.2 On the effective date:

(iii) MADC shall enter into a Lease Deed for the Concession Period for the lease of 62.5 hectares of land for power project valued at the rate of Rs.65,00,000/- per hectare (Rupees Sixty-Five lakhs per hectare). In consideration of MADC executing the Lease Deed with the Company, MADC shall be allotted Equity Shares.

MADC shall provide bottom ash land of 10 hectares on lease to the Company. In consideration of MADC executing the lease deed of bottom ash land, the Company shall allot equity shares equivalent to following:

i. In case, MADC procures bottom ash land, the Company shall allot equity shares to MADC equivalent to, actual price of purchase by MADC plus 10% overheads on the actual purchase price.

ii.In case AIL/ AlnL procures bottom ash land on behalf of MADC, then MADC shall pay to AIL/Alnl. actual price of purchase by AIL / Alnl plus 1% overheads on the actual purchase price. The Company shall allot equity shares to MADC equivalent to, actual cost to MADC (i.e. actual price of purchase by AIL/AlnL plus 1% overheads) plus 10% overheads on the actual cost to MADC.
AIL, Alnl. and the Company hereby confirm, covenant and agree that MADC's Shares issued in consideration of the lease of the land, shall at all times be deemed to be fully paid up Shares in the capital of the Company, and that no calls or claims shall be made against MADC upon MADC Shares at any time, whether during the term of this Agreement or thereafter, for any reason whatsoever, except as per Clause 5.3 (c);
(iv) In consideration of the issuance and allotment of Shares in the Agreed Proportion, all the Shareholders, shall deposit in the Account of the Company cash in accordance with the provisions of Clause 5 hereof.

5.3 The Shareholders hereby agree that they shall directly or indirectly through their Affiliates, subscribe to and hold such numbers of the Shares of the Company as may be necessary for the Shareholders to own and hold, issued share capital of the Company in the manner set forth below, and at all times strictly in accordance with the Approved Financing Plan. ("the Agreed Proportion"):

*(a) The Shareholders shall subscribe to such number of Equity Shares of the Company necessary for the Shareholders to collectively own and hold Issued Capital, in a manner that MADC along with their associates hold at least 26% of the Issued Equity Capital (such Shares being hereinafter referred to as "**MADC Shares**") upto the completion of 45 days from the COD and AIL shall hold not less than 51% of the issued Capital ("AIL Shares") upto a period of two (2) years from Commercial Operation Date (COD) and Alnl. /other shareholders shall hold the balance portion of the Issued Capital. ("AInL Shares"). On the date of COD and within 45 days from the date of finalization of 'Total Project Cost, AIL shall hold not less than 26% of the issued and Subscribed Capital and MADC shall have right to hold upto 26% of the Issued and subscribed Capital.*

Any amount required to be brought in for completion of the Facility, beyond the paid up equity share capital as mentioned hereinabove, shall be contributed by AlL/Alnl through 18% Compulsorily Convertible Preference Shares (CCPS). No dividend shall be accrued or paid on CCPS till the COD. The CCPS shall be converted into equity shares within a period of 90 days from the date of COD.

(d) The land contribution of MADC, while considered as equity shall be first recognised in the books of the Company as "share application money". Proportionate to the equity contribution by the other shareholders AlnL and AIL, in accordance with the Financing Plan, the equity calls shall be made and the share application money towards the land contribution shall be converted into equity.

(e) AIL shall continue to hold minimum of 51% of the subscribed, paid up capital of the company upto a period of two (2) years from Commercial Operation Date (COD) us defined in the Concession Agreement and thereafter, all shall hold a minimum of 26% of Subscribed, paid up capital of the company during concession period, subject to fulfilment of the conditions mentioned at Clause 5.3 (h) below.

(f) After completion of the Two Years from the Commercial Operation Date as per the Concession Agreement, each party shall be entitled but not obliged to sell, transfer, assign or dispose all or part of the shares held, to any

third parties subject to clause 5.3(e) and fulfilment of the conditions set forth. Clause 5.3(g) below.

(h) All the shares held by MADC shall be transferred to the All for considerations of the transfer of all the assets of the company to MADC at the end of the concession period. All the agreements of the Company with any other party shall be terminated at the time of transfer of the assets of the company.

7.1 The Board shall consist of a minimum of four Directors and a maximum of 12 Directors.

7.2 The composition of the Board shall be as under:

(a) MADC shall have the right to nominate one Director on the Board of Directors of the Company throughout the Concession Period, irrespective of their shareholding in the Company, in consideration of the grant of the Concession.

(b) AIL/Alnl along with the affiliates shall have the right to appoint 3 directors on the Board of Directors of the Company.

(c) The board shall appoint one of the directors as Chairman.

(d) The appointment of any other director shall be only if any Lead lender asks to appoint their representative.

7.14 The quorum for the meetings of the Board or any adjournment thereof shall necessarily include at least one Director nominated by MADC. If within half an hour appointed for holding a meeting of the Board, a quorum is not present, the said Board meeting shall stand adjourned to the same day in the next week, to be held at the same time and place. If the adjourned date in the next week is holiday, then the said Board meeting shall be held on the next business day succeeding the holiday. If at the adjourned meeting as well, a valid quorum is not constituted; the Directors present shall constitute a valid quorum (provided however that such quorum shall not be entitled to vote on a Reserved Matter, without the presence of Director nominated by MADC or the written consent of MADC).

8.1 Each Shareholder agrees that it shall procure that the Company shall not do or omit to take any actions on any of the following matters without the affirmative vote/written approval of MADC or persons nominated by MADC,

-During the construction period and

-Beyond the construction period, till MADC's shareholding in the Company is not less than 11 percent.

(a) Alteration of the Company's name;

(b) Alteration of the Constitutional Documents to the extent the same is inconsistent with the Concession Agreement;

(c) Change the Company's Business including whether by opening or closing any business operation, merging or

acquiring another entity, reorganising or voluntary winding up;
(d) Approval, entering into, revoking or varying any of the Project Agreements which are not approved by the lenders,
(e) Alteration or modification of the Project structure and financing plan or Budget. Sale, transfer, lease, license or disposal of all or part of the Business, undertaking or assets of the Company, whether by a single transaction or a series of transactions, related or not, provided that this shall not apply where the value of and consideration for the Business, undertaking and/or assets being sold, transferred, leased, licensed or disposed of aggregates to less than Rs. 5 Crores (Rupees Five Crores Only) in any period of six months;
(f) Creation, issue or transfer of any loan capital, debentures or Shares in the capital of the Company or any interest convertible into share capital or loan capital of the Company or encumber, redeem, purchase or grant any option over or right to subscribe for any share or loan capital of the Company or create any agreement or arrangement by which the Company might be obliged to do any of the actions referred to in this paragraph, which is not as per the Financing Plan;
(l) Sale, lease, transfer, mortgage, creation of any encumbrance, charge, pledge or otherwise disposal of any of the Company's fixed assets or real property where such assets are independently valued in excess of Rs. 5 Crores (Rupees Five Crores Only), other than any security given pursuant to the terms of any Agreement to which the Company is a party, and which is signed by or on behalf of the Company in accordance with this Agreement, save an except the interests to be created in favour of lenders and otherwise than in accordance with the Financing Plan".

76. Perusal of the above documents would reflect that a joint venture company (CD) was incorporated between Abhijeet Infrastructure Ltd. (Project Sponsor) Appellant and as per the concession agreement the appellant was required to provide land and other various facility and since the appellant was the land provider for execution of the project by the CD, he was to hold 26% of the equity in the project company. Accordingly, the appellant had leased above mentioned lands in favour of the CD in

consideration of Rs. 65 lakhs per hectare in the form of equity shares. Appellant also entered into the shareholder's agreement with AIL, Abhijeet Infra and CD. All these agreements and lease deeds, in our considered opinion, were closely integrated with each other and it is clear that after the stipulated period of 33 years, the project was to return back to the appellant and all the shares hold by the appellant (26%) were also required to be transferred to Abhijeet Infra Ltd. (Project Sponsor) for consideration of the transfer of all the assets of the CD/project company to appellant. Therefore, while receiving back the utility, all 26% of shareholding of the appellant was required to be extinguished and was to be transferred to Abhijieet Infra Ltd. The CD was having right to operate the project on BOT basis and the lease of the two lands was also made by the appellant in favour of it only for 33 years and therefore the CD was obliged to return the land and project to the appellant after the stipulated period.

77. A conjoint reading of lease deeds, shareholders agreement and concession agreement would reveal that the CD was having right to operate the project and to use the lease lands for the period stipulated in the above agreements subject to the covenants mentioned therein. Though the CD was not the owner of the land but it was having leasehold rights in its favour and in our considered opinion, these bundle of rights as contained in the aforesaid agreements was assets of the CD.

78. This Appellate Tribunal in **West Bengal Housing Infrastructure Development Corporation Ltd vs. Kshitiz Chhawchharia (Liquidator of M/s Concast Steel and Power Ltd.), CA (AT)(Ins) No. 2119 of 2024** para no. 48 to 56 are as under:

48. *The issue as to whether the leasehold rights in a land could be transferred is also now no more res integra and has been put to rest by this Appellate Tribunal and Hon'ble Supreme Court in catena of judgments.*

49. *This tribunal in* ***Company Appeal (AT) (Insolvency) No. 71 of 2024, Shristi Infrastructure Development Corporation Ltd. vs. Avishek Gupta, Resolution Professional [Sarga Hotel Pvt. Ltd.] & Anr., decided on 4th April, 2024*** *held as under:*

> "*17. The submission of the Appellant is that as per explanation (a), assets shall not include assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements. The expression 'asset' has not been defined in the IBC. However, IBC defines expression 'property' in Section 3(27) in following manner: -*
> *"3. Definition. (27) "property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property;"*
> *18. Corporate Debtor claims leasehold rights by virtue of Registered Lease Deed dated 31.03.2007. Expression 'lease' has been defined in Section 105 of the Transfer of Property Act, 1882, which is as follows: -*
> *"105. Lease defined. — A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."*
>
> *19. As per the above definition, lease of the immoveable property is a transfer of a right to enjoy such property, made for a certain express or implied, or in perpetuity, in consideration of a price paid or promised. The present is a case where on payment of monthly rent as reserved in the lease deed, Corporate Debtor has given possession and right to erect building of the land. Thus, by lease, Appellant has acquired a right to enjoy the property. Leasehold rights which has been granted to the Corporate Debtor is property within the meaning of Section 3(27) and has to be treated as an asset for the purposes of Section 18(1)(f). Much reliance has been placed by the Appellant on explanation (a) and what is*

sought to be contended is that the land under the lease is owned by the Appellant, hence, the possession of the said land ought not to have been taken by the Resolution Professional. The expression 'assets' occurring in explanation (a) has wide meaning which meaning encompasses itself the immoveable land as well as leasehold rights.

20. The leasehold rights which are owned by the Corporate Debtor consists of right to enjoy the immoveable property by virtue of Registered Lease Deed dated 31.03.2007. Explanation (a) does not come into way of the Corporate Debtor in enjoying the leasehold rights i.e. enjoyment of the property by virtue of Registered Lease Deed. We, thus, do not find any substance in the submission of the Appellant that the leasehold rights should be excluded from the assets of the corporate debtor".

50. *After considering* ***"Victory Iron Works Ltd V. Jitendra Lohia & Anr. - Civil Appeal No.1743 of 2021"*** *this tribunal in the above case further held as under;*

"22. We, thus, have no hesitation to hold that the leasehold rights which was granted to the Corporate Debtor by virtue of Registered Lease Deed dated 31.03.2007 is right to enjoy the property and erect building of the land is a right which is an 'asset' within the meaning of Section 18(1)(f) and the said asset is owned by the corporate debtor by virtue of Registered Lease Deed".

51.*In* ***New Okhla Industrial Development Authority vs Mr. Nilesh Sharma Resolution Professional of Dream Procon Pvt., COMPANY APPEAL (AT) (INSOLVENCY) No. 288 of 2021 decided on 08th March, 2022****, wherein prior approval from the lessor has not been taken before subleasing portion of the land to the 'Corporate Debtor' for development of the Housing Project by the lessee, this tribunal while upholding the sublease held as under: -*

"24. Keeping in view the decision of the Hon'ble Supreme Court in 'Rajendra K. Bhutta' (Supra), we are of the view that 'development rights' construe 'Property' of the 'Corporate Debtor' and hence we hold that the Resolution Professional has duly performed his duties as per Section 18(1)(a)(iii) and has taken control and

custody of the assets of the 'Corporate Debtor' mentioned in the Balance Sheet in compliance of the provisions of Section 18(1)(f) and resultantly we do not find any deficiency of service on behalf of the RP."

52. *This Appellate Tribunal in* ***New Okhla Industrial Development Authority vs Mr. Amit Agarwal Resolution Professional of Boulevard Projects Pvt. Ltd. decided on 21 st October, 2022****, relying on the law laid down* ***Hon'ble Supreme Court in 'New Okhla Industrial Development Authority' Vs. 'Anand Sonbhadra****' in while considering leasehold rights concluded as under: -*

"20. We are of the view that the 'Leasehold Rights' is an 'Asset' under 'Intangible Assets' falling within the ambit of Section 18(f)(iv). It is the consistent stand of the Respondent that 'the said Plot is not owned by the 'Corporate Debtor', but it has only Leasehold Rights over it'. We are of the considered view that the Leasehold Rights accrued to the 'Corporate Debtor' vide the Lease Deed, is a right vested with the 'Corporate Debtor' and is an 'Intangible Assets' and the ownership is only to the extent of these Leasehold Rights based on which the 'Corporate Debtor' can be continued as 'a Going Concern'. It is also significant to mention that the Appellant has never initiated any proceedings or chosen to exercise their rights to invoke any of the Clauses of the Lease Deed for cancellation of the subject Deed."

53. *In* ***Victory Iron Works Ltd. Vs. Jitendra Lohia and Ors., MANU/SC/0229/2023*** *Hon'ble Supreme Court while considering the nature of leasehold rights opined as under: -*

"19. Section 3(27) of the IBC defines the word "property" as follows: 3. Definitions. --In this Code, unless the context otherwise requires, -- xxx xxx xxx (27) "property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property. But the word "asset" is not defined either in Section 3 or in Section 5 or in Section 79 of the Code, though Section 79(14) defines the expression "excluded assets".

22. It may be noticed from Sections 18 and 25 that the word "asset" and not the word "property" is what is used in these provisions, though the word "property" is defined in Section 3(27). But the said word "asset used in Sections 18 and 25 is not defined in the IBC. We have seen from Section 3(37) that it makes a reference to seven different enactments, to which one can take recourse, for finding the definition of words and expressions used but not defined in the Code. Therefore, let us find out whether those seven enactments will be of any assistance to find out the meaning of the word "asset" used, but not defined in IBC.

26. As we have pointed out earlier, the word "asset is not defined, either in IBC or in any of the seven enactments referred to in Section 3(37) of the Code. But the word "asset" is defined in Section 102(2) of the Income Tax Act, 1961 to include "property or right of any kind". Though Section 102 applies as such to Chapter X-A of the Income Tax Act, the definition throws light on the fact that property or right of any kind is considered to be an asset."

54. *Thereafter Hon'ble Supreme Court after considering the factual matrix of that case came to a conclusion that by executing lease of land in favour of Corporate Debtor a bundle of rights and interests were created in favour of the Corporate Debtor, over the immovable property in question and goes on to held as under: -*

" 35. From the sequence of events narrated above and the terms and conditions contained in the Agreements entered into by the parties, it is more clear than a crystal that a bundle of rights and interests were created in favour of the Corporate Debtor, over the immovable property in question. The creation of these bundle of rights and interests was actually for a valid consideration. But for the payment of such consideration, Energy Properties would not even have become the owner of the property in dispute. Therefore, the development rights created in favour of the Corporate Debtor constitute "property" within the meaning of the expression Under Section 3(27) of IBC. At the cost of repetition, it must be recapitulated that the definition of the expression "property" Under Section 3(27) includes "every description of interest, including present or future or vested or contingent interest arising out of or incidental to property". Since the expression "asset in common parlance denotes "property of any kind", the bundle of rights that the Corporate Debtor has

over the property in question would constitute "asset" within the meaning of Section 18(f) and Section 25(2)(a) of IBC.

36. In Sushil Kumar Agarwal (supra), this Court brought out the distinction between different types of Development Agreements, with particular reference to Section 14(3)(c) of the Specific Relief Act, 1963. After summarizing the different types of Development Agreements in paragraph 17 of the decision, this Court held in paragraph 19 as follows:
19. ...An essential incident of ownership of land is the right to exploit the development potential to construct and to deal with the constructed area. In some situations, under a development agreement, an owner may part with such rights to a developer. This in essence is a parting of some of the incidents of ownership of the immovable property...

37. Therefore, it is not very difficult to conclude, that a bundle of rights and interests were created in favour of the Corporate Debtor, by a series of documents such as (i) the MoU dated 24.01.2008; (ii) the shareholders agreement dated 24.01.2008; (iii) the flow of the consideration from the Corporate Debtor to the UCO Bank and to Energy Properties; (iv) the Development Agreement dated 16.06.2008; (v) the Memorandum Recording Possession dated 02.03.2010 executed by the original shareholders of Energy Properties; (vi) the Memorandum Recording Possession dated 24.06.2010 executed by Energy Properties in favour of the Corporate Debtor; and (vii) the Leave and License Agreement primarily executed by the Corporate Debtor in favour of Victory, which was merely confirmed by Energy Properties as a confirming party. Some of these bundle of rights and interests, partake the character and shade of ownership rights. Therefore, these rights and interests in the immovable property are definitely liable to be included by the Resolution Professional in the Information Memorandum and the Resolution Professional is duty bound Under Section 25(2)(a) to take custody and control of the same."

55. *This Appellate Tribunal again in* ***Company Appeals (AT) (Insolvency) No. 1116 of 2024 and 1117 of 2024, K.H. Khan & Anr. Vs Art Constructions Pvt. Ltd. & Ors. decided on 14th November, 2024 wherein*** *the land was owned by other party and Corporate debtor was only possessing the development rights held as under: -*

"22. Whether an asset is required to be reflected in the Information Memorandum or the asset belong to the Corporate Debtor are the question which arise out of or in relation to the insolvency resolution process. The present is a case where the Corporate Debtor has claimed development rights in the land. It is no more res-integra that the development rights are property within the meaning of Section 3(27) of the IBC. We may refer to the judgment of the Hon'ble Supreme Court in "Victory Iron Works Ltd. vs. Jitendra Lohia & Anr.- (2023) 7 SCC 227" where the Hon'ble Supreme Court had held that the development rights created in favour of the corporate debtor constitute "property" within the meaning of Section 3(27) of the IBC. In paragraph 38 of the judgment, following was laid down: -

> *"38. From the sequence of events narrated above and the terms and conditions contained in the agreements entered into by the parties, it is more clear than a crystal that a bundle of rights and interests were created in favour of the corporate debtor, over the immovable property in question. The creation of these bundle of rights and interests was actually for a valid consideration. But for the payment of such consideration, Energy Properties would not even have become the owner of the property in dispute. Therefore, the development rights created in favour of the corporate debtor constitute "property" within the meaning of the expression under Section 3(27) IBC. At the cost of repetition, it must be recapitulated that the definition of the expression "property" under Section 3(27) includes "every description of interest, including present or future or vested or contingent interest arising out of or incidental to property". Since the expression "asset" in common parlance denotes "property of any kind", the bundle of rights that the corporate debtor has over the property in question would constitute "asset" within the meaning of Section 18(1)(f) and Section 25(2)(a) IBC.*

24. The Hon'ble Supreme Court while considering Issue No.2 noticed the ground of attack of the appellants to the impugned orders. In paragraph 41, following was stated: -

> *"Issue 2 41. The main ground of attack of the appellants to the impugned orders of the NCLT and NCLAT is that by virtue of the Explanation under Section 18 of the Code and also by virtue of the judicial pronouncements, the disputes between the corporate debtor and the third party lessee/licensee*

are not amenable to the jurisdiction of the authorities under the Code."

25. After considering the submissions of the parties in paragraph 53, the Hon'ble Supreme Court upheld the decision of the NCLT and NCLAT regarding exercise of jurisdiction for protection of the property of the corporate debtor. The above judgment clearly laid down that insofar as the protection of assets of the corporate debtor is concerned, the NCLT and NCLAT does not lack jurisdiction. Following was observed in paragraph 53:-

"53. Therefore, NCLT as well as NCLAT were right in holding that the possession of the corporate debtor, of the property needs to be protected. This is why a direction under Regulation 30 had been issued to the local district administration."

29. The question as to whether the assets which are included in the Information Memorandum are the assets of the corporate debtor is foundation of entire CIRP process. When the inclusion of the said asset is questioned before the NCLT by the Appellant, Adjudicating Authority does not lack jurisdiction in entering into question and deciding as to whether assets are part of the CIRP or it should be excluded. We, thus, are of the view that the above question could be determined by the Adjudicating Authority and parties need not have to be relegated to the Civil Court having jurisdiction, the view of the NCLT to the contrary cannot be approved. Judgment of the Hon'ble Supreme Court in Victory Iron, as noticed above, clearly has held that the NCLT and NCLAT can exercise jurisdiction in the above facts. We, thus, answer Question No.(I) in following manner:

The Adjudicating Authority had jurisdiction to enter into as to whether the subject land is asset of the corporate debtor and for decision of the question, the parties were not required to be relegated to the Competent Civil Court having jurisdiction."

56. *Thus it is clear from the precedents noted above that the lease hold rights created in favour of the CIL which were transferred to the CSPL by a merger scheme duly approved by the Order of the Hon'ble High Court of Calcutta as rectified by the Tribunal are the assets of the CD and the question, as to whether the assets which are included in the Information Memorandum or liquidation estate are the assets of the corporate debtor, goes to the*

core of the CIRP process and when the inclusion of the said asset is questioned before the Ld. NCLT by the Appellant, Adjudicating Authority or this Appellate Tribunal does not lack jurisdiction in entering into the question and deciding as to whether the leasehold assets are part of the Liquidation Estate of the CD or should be excluded therefrom.

Thus keeping in view the above precedents we do not find much force in the submissions of Ld. Counsel for the appellant as well as of respondent and in our considered opinion the leasehold rights in the land which were assigned in favour of the CD by a merger deed is owned by the CD while land is owned by the Appellant and these rights could be transferred and validly held to be the part of the Liquidation Estate of the CD and this issue may validly be considered and adjudicated by the Adjudicating Authority as well as by this Appellate Tribunal.

Thus keeping in view the above precedents we do not find force in the submissions of Ld. Counsel for the appellant in terms that leasehold rights occurred in favour of the CD for 33 years in the land owned by the appellant, could not be sold by auction in liquidation of the CD. In our considered opinion all those rights pertaining to the leasehold lands and project which were meant to be enjoyed by the CD are/were the assets of the CD and may legally be included in the liquidation estate of the CD and could also be sold by auction.

79. Here we also notice that Ld. Adjudicating Authority in its impugned judgment dated 13.03.2024 precisely in para no. 19 of the same, observed that the applicant of IA No. 3985 of 2023 i.e. auction purchaser, does not seek to acquire better rights than those vested with the CD and also that the auction purchaser is aware that the project company will be remitted back to the appellant-MADC after completion of the term and also that it does not seek to evade the stipulations contained in the aforesaid agreements. Thus,

the auction purchaser has admitted that it want to exercise the rights which were possessed by the CD subject to the clauses contained in the agreements and it was made clear that the project company will be remitted back to the MADC after the period stipulated in the agreements.

80. So far as dilution of 26% shareholding of the Appellant in the CD is concerned, it is evident that the consideration which was payable for lease premium was in the form of equity shares of CD and equity of the CD was given to the Appellant in discharge and towards payment of consideration payable as lease premium for granting lease of the land.

81. It also reflects that clause 5.3 (h) of the shareholders agreement clearly provides that all the shares held by the appellant shall be transferred to the AIL for consideration of the transfer of all the assets of the Company to the MADC at the end of the concession period. Thus, in view of this the transfer of the project by the CD to the appellant after the stipulated period of lease was to be made after the transfer of these 26% of shareholding by the appellant to the AIL without any further consideration.

82. It may also be recalled that the claim filed by the appellant as secured financial creditor has been rejected by the liquidator as well as by Ld. Adjudicating Authority and no appeal has been filed against the same and thus the findings recorded by the Ld. Adjudicating Authority have become final. Once, the CD has been subjected to insolvency process and consequently to liquidation, distribution of proceeds amongst creditors is to be made as per the waterfall mechanism provided under Section 53 of the Code and the claim of the equity shareholders would rank last in the waterfall distribution.

83. **In V.V. Krishna Iyer Sons vs. New Era Manufacturing Company Ltd. (1965) 35 Comp Cas 410** it was held as under:

> *"It is contended on behalf of the petitioners (in all seriousness I am assured, and that binds me to serious examination) that the paid up share capital which figures among the liabilities in the balance-sheet should be taken into account in determining the company's solvency and that, if that is done, it will be found that the company's liabilities are in excess of its assets. But, although for balance-sheet purposes, share capital is shown among the liabilities, it is no more a liability of the company than losses, which in a balance-sheet are shown among the assets, is an asset of the company. A company does not owe its members the share money paid by them, and, except when there has been a reduction of share capital (whereupon the excess ceases to be share capital) the members have no right to ask for the return of the money paid by them. Even in a winding up, what the members get, if they get anything at all, is not a return of their share money, but their rateable share of any surplus left after satisfying the creditors, and this share may be less or more than the share money paid".*

84. Thus the equity of the appellant could not be transferred to the auction purchaser and it also would have been in violation of clean slate principle.

85. In ***M/s Shivshakti Interglobe Exports Pvt. Ltd. vs. M/s KTC Foods Pvt. Ltd., CA (AT) (Ins) no. 650 of 2020*** it was highlighted as under:

> *"21.Adverting to the contention of the Learned Counsel for the Appellant that the Adjudicating Authority has erred in denying the sale of the 'Corporate Debtor' as a 'going concern' to the Appellant without including any contingent liabilities, we hold that it is a settled law that when the sale proceeds of a 'Corporate Debtor' are duly distributed in the Order of priority and in the manner prescribed under Section 53 of the Code, claims of any other Creditor cannot be entertained contrary to the provisions entailed under Section 53; subsequent to the distribution of sale proceeds under Section 53 no other entity including any Government entity can*

claim any past unpaid or outstanding dues against the Appellant who has purchased the 'Corporate Debtor Company' as a 'going concern'. It is significant to mention that the second Respondent/Liquidator has specifically submitted that even these claims by the Uttar Haryana Bijili Vitran Nigam were not submitted in the prescribed form either during the CIRP Process or at the Liquidation stage. We are of the considered view that at this stage subsequent to the sale of the 'Corporate Debtor Company' as a 'going concern', these claims cannot be foisted upon the Appellant. 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 & Sons Pvt. Ltd.' Vs. 'Edelweiss Asset Reconstruction Company Ltd. & Ors.', Civil Appeal No. 8129 of 2019 and in '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 past liabilities when it is not mentioned in the 'Sale Notice'.

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.
This Appeal is allowed to the extent indicated above".

86. In ***Jasamrit Designers Pvt. Ltd. vs. Gianchand Narang, CA (AT) (Ins) No. 258 of 2023,*** it was held by this Appellate tribunal, that para no. 12.

> *"12.We while granting such liberty to the Appellant observe that law is well settled, a successful bidder who is declared as successful bidder of sale as going concern can seek access of the Adjudicating Authority and may pray for necessary directions in accord with and in consonance with the process document in the liquidation proceedings. In result, we partly allow this Appeal and hold that applicant's prayers i.e. relief/concessions/directions needs consideration by the Adjudicating Authority for which we grant liberty to the Applicant to make a fresh Application containing prayers which may be commensurate and in accord with terms and conditions of the process document of e-auction process document. The Appellant may submit a fresh application praying for reliefs, concessions and directions which may be considered and decided by the Adjudicating Authority in accordance with law. The Appeal is disposed of, accordingly".*

87. Thus, once the assets of the CD and legal entity has been sold by the auction sale (slump sale and legal entity sale) pre-existing liabilities are extinguished, however, a fine balance has been maintained by the Ld. Adjudicating Authority in the impugned order whereby it is declared that the rights of the MADC under the BOT agreement shall remain protected and has also been observed in para no. 19 of the impugned judgment dated 13.03.2024 that auction purchaser does not seek to evade the stipulations contained in the agreements and we do not find any error in this approach of Ld. Adjudicating Authority.

88. It is to be recalled that IBC is a complete code in itself and by virtue of Section 238, it has been given precedence over other remedies which may be available to the parties. Liquidator exercises wide powers under Section

35 of the Code and liquidation process regulations, to sell assets of the CD in order to maximise value for the creditors. Judicial review is only limited to the cases of the material irregularity in conduct of sale, fraud or substantial under valuation of the assets and when these elements are not present the commercial wisdom of the liquidator is not to be interfered with.

89. Hon'ble Supreme Court in **R K Industries (Unit-II) LLP vs. HR Commercial Pvt. Ltd. (2022) ibclaw.in 104 SC** held as under:

> *"39. On a conjoint reading of the aforesaid provisions of the IBC and the Liquidation Regulations, it is evident that the Liquidator is authorized to sell the immovable and movable property of the Corporate Debtor in liquidation through a public auction or a private contract, either collectively, or in a piecemeal manner. The underlying object of the Statute is to protect and preserve the assets of the Corporate Debtor in liquidation and proceed to sell them at the best possible price. Towards this object, the provisions of the IBC have empowered the Liquidator to go in for a public auction or a private contract as a mode of sale. Besides reporting the progress made, the Liquidator can also apply to the Adjudicating Authority (NCLT) for appropriate orders and directions considered necessary for liquidation of the Corporate Debtor. The Liquidator is permitted to consult the stakeholders who are entitled to distribution of the sale proceeds. However, the proviso to Section 35 (2) of the IBC makes it clear that the opinion of the stakeholders would not be binding on the Liquidator. Regulation 8 of the Liquidation Regulations refers to the consultative process with the stakeholders, as specified in Section 35 (2) of the IBC and states that they shall extend all necessary assistance and cooperation to the Liquidator for completing the liquidation process. Regulation 31A has introduced a Stakeholders' Consultation Committee that may advise the Liquidator regarding sale of the assets of the Corporate Debtor and must be furnished all relevant information to provide such advice. Though the advice offered is not binding on the Liquidator, he must give reason in writing for acting against such advice.*
>
> *60. The powers vested in and the duties cast upon the Liquidator have been made subject to the directions of the Adjudication Authority (NCLT) under Section 35 of the IBC. Once the Liquidator applies to the Adjudicating Authority (NCLT) for appropriate orders/directions, including the decision to sell the movable and*

immovable assets of the Corporate Debtor in liquidation by adopting a particular mode of sale and the Adjudicating Authority (NCLT) grants approval to such a decision, there is no provision in the IBC that empowers the Appellate Authority (NCLAT) to suo motu conduct a judicial review of the said decision. The jurisdiction bestowed upon the Adjudicating Authority [NCLT] and the Appellate Authority [NCLAT] are circumscribed by the provisions of the IBC and borrowing a leaf from ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others,*** *they cannot act as a Court of equity or exercise plenary powers to unilaterally reverse the decision of the Liquidator based on commercial wisdom and supported by the stakeholders. The Court has also observed in the captioned case that "from the legislative history, there is contra-indication that the commercial or business decisions of the financial creditors are not open to any judicial review by the adjudicating authority or the appellate authority." A similar reasoning has prevailed with Respondent in* ***K. Sashidhar v. Indian Overseas Bank and Others, Committee of Creditors of Amtek Auto Limited v. Dinkar T. Venkatasubramanian and Others, Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another. ,Ghanashyam Mishra And Sons Private Limited through the Authorized Signatory v . Edelweiss Asset Reconstruction Company Limited through the Director and Others***[7] *and* ***Jaypee Kensington Boulevard Apartments Welfare Association and Others*** *(Supra). The aforesaid view will apply with equal force to any commercial or business decision taken by the Liquidator for conducting the sale of the movable/immovable assets of the Corporate Debtor in liquidation. The Appellate Authority cannot don the mantle of a supervisory authority for overseeing the validity of the approach of the respondent No.2 – Liquidator in opting for a particular mode of sale of the assets of the Corporate Debtor".*

90. Therefore, in our considered opinion, if liquidator after consultation with the creditors has also sold shell legal entity of the CD by public auction the same could not be questioned, as otherwise the fate of the CD was not more than worth dissolution after sale of all its assets.

91. It is also evident that appellant by writing a letter dated 19.03.2021, to the IRP Vinod Kumar Kothari, as he was at that point of time, has also assured cooperation in the Resolution of the CD.

92. We also notice that liquidator has moved an application bearing MA 1343 of 2018 seeking clarification regarding sale of CD as a going concern and Ld. Adjudicating Authority vide order dated 29.11.2018 has disposed of the same by observing that when sale is being made as going concern the acquirer after the transfer of the undertaking acquires all rights, title and interest in the whole and every part of the undertaking and in that condition sale proceeds shall be distributed in accordance with the provisions contained under Section 53 of the Code.

93. The Reliance of the Appellant on ***Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd.,*** **(2022) 1 SCC 401** specifically in para no. 141 to 147 may not be of any help to it, having regard to the factual difference. The basic difference appears to be that in the case relied on by the appellant the land was not be returned back to the YEIDA, while in this case in view of the concession agreement, lease deeds and shareholders agreement the land would be returned back to the appellant by auction purchaser.

94. Likewise, appellant may also not get any help from **Bharat Heavy Electricals Ltd. (BHEL) vs. Anil Goyal, (2020) SCC Online NCLAT 618** as it was a case wherein the core issue was whether appellant as an unpaid seller could claim statutory lien/charge and could be treated as secured creditor and whether the auction process was validly conducted by liquidator and in these facts it was held that appellant therein could not be

treated as secured creditor and the auction process was vitiated by fundamental defects like improper valuation, shifting of assets, lack of pre bid qualifications and failure to decide the appellants claim before sale, however none of these conditions are present in the case at hand. The claim of the appellant has been rejected by liquidator as well as by Ld. Adjudicating Authority and in absence of any appeal the same has become final.

95. The appellant may also not take any benefit from **Municipal Corporation of Greater Mumbai (MCGM) vs. Abhilash lal and Ors. (2020) 13 SCC 234** for the reason that in that case, the lease deed was to be executed after completion of the project and that lease deed was never executed. While in the case at hand the lease deeds have been executed in favour of the CD, in pursuance of concession agreement and lease hold rights were transferred to the CD and also that MCGM in the relied case had terminated the contract while in the case at hand no such exercise has been undertaken by the appellant and the contract of lease or any other agreement was not terminated before initiation of insolvency.

96. Reliance is also placed on **Embassy Property Development Pvt. Ltd. vs. State of Karnataka and Ors., (2020) 13 SCC 358**, however in our considered opinion the leasehold rights were/are the assets of the CD and we have already held that these rights have been correctly included in the liquidation estate and sold in auction.

97. **Section 238 of the Code** is also relevant here, which provides as under:

238. Provisions of this Code to override other laws. -

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

98. **In BSE Ltd. vs. Avil Menezes, IPR of Future Corporate Pvt. Ltd., CA (AT) (Ins) No. 1786 of 2025 and 1862 of 2024 decided on 24.03.2026** we held in para no. 71 to 74 as under:

*"71. Perusal of Section 60(5) of the Code will reveal that it provides power to the Adjudicating Authority which can be invoked to entertain or dispose of any claim made by or against the corporate debtor or corporate person and also any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code. Section 238 of the Code creates an overriding effect which provides that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. We are of the firm view that **Embassy Property Developments (P) Ltd. and Gujrat Urja Vikas Nigam (Supra)** are the sheet anchor so far as the determination of the jurisdiction of NCLT is concerned. It has been held in **Gujrat Urja Vikas Nigam (Supra)** that the non-obstante clause in Section 60(5) is designed for a different purpose to ensure that the NCLT alone has the jurisdiction when it comes to the applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings. It is held that the NCLT has the jurisdiction to adjudicate such disputes, which arise solely from or which relate to the insolvency of the corporate debtor but it has also been cautioned that while doing so, the Tribunal may not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the corporate debtor and nexus with the insolvency of the corporate debtor must exist.*

*72. Since much emphasis has been given by Ld. Counsels for the Appellant and Respondent No.3 on the two cases (**Embassy Property Developments (P) Ltd. and Gujrat Urja Vikas Nigam (Supra)**. It is pertinent to mention that in the facts of the case of **Gujrat Urja Vikas Nigam (Supra)** PPA was terminated solely on the ground of insolvency since the event of default contemplated was the commencement of insolvency proceedings against the corporate debtor. In absence of the insolvency of the corporate debtor, there would be no ground to terminate the PPA. The termination was not independent of the insolvency, therefore, the dispute in that case was solely arising out of and relates to the insolvency of the corporate debtor and it was thus held that the RP can approach the NCLT for adjudication of the dispute which was related to the insolvency resolution.*

*73. In the case of **Embassy Property Developments Pvt. Ltd. (Supra)**, the corporate debtor was holding a mining lease granted by the Government of Karnataka which was to expire on 25.05.2018. A notice for premature termination of the lease was issued on 09.08.2017, on the allegation of violation of the terms and conditions of the lease deed, no order of termination had been passed till the date of initiation of the CIRP. The IRP wrote many letters to various authorities informing them of the commencement of CIRP. and also for seeking the benefit of deemed extension of the lease in terms of Section 8-A (6) of the mines and minerals (development and regulation) Act, 1957. RP also filed a writ petition seeking a declaration that the mining lease should be deemed to be valid up to 31.03.2020 but during the pendency of the writ petition, Government of Karnataka rejected the proposal for deemed extension. The RP thereafter moved an application before the NCLT for setting aside the order of the Government of Karnataka and seeking a declaration that the lease should be deemed to be valid up to 31.03.2020 which was allowed by the NCLT and ultimately the Adjudicating Authority directed the Government of Karnataka to execute the supplement lease deed. In the background of these facts, the Hon'ble Supreme Court held that in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot* *through the RP, take a bypass and approach NCLT for the enforcement of such a right. Similarly, in the case of **Tata Consultancy Service Limited (Supra)** the Hon'ble Supreme Court has reiterated that the RP can approach the NCLT for adjudication of disputes which relate to the insolvency resolution process, but when the dispute arises dehors the insolvency of the corporate debtor, the RP must approach the relevant competent authority, even at an interim stage.*

74. Having considered the aforesaid legal position with regard to the jurisdiction of the NCLT as provided under Section 60 (5) of the Code and keeping in view Section 238 of the Code wherein a specific provision has been made that in case of any conflict with the IBC with any other law, the provisions of the IBC would be having overriding effect and notwithstanding anything contained in any other law for the time being enforce the NCLT shall have jurisdiction to entertain or dispose of any question of fact or law arising out of or in relation to the Insolvency Resolution or Liquidation Proceedings of the Corporate Debtor or Corporate Person under this Code, in our, considered opinion, the issue of de-freezing of the Demat account of the CD, wherein the shares, which are admittedly the property of the CD, were lying, was/is a question of fact arising out of and in relation to the insolvency resolution and liquidation proceedings of the corporate debtors, as provided under Section 60 (5) (c) of the Code".

99. Respondent no. 2 has relied on the judgment of the co-ordinate Bench of this Appellate Tribunal passed in **Jasamrit Designers Pvt. Ltd. (supra)** wherein this Tribunal observed that a successful bidder of sale as a going concern can seek excess of adjudicating authority and may pray for necessary directions in accordance with the process document in the liquidation proceedings.

100. We also notice that appellant was in knowledge of the Resolution Process and liquidation Process as it has moved intervening application at the initiation stage of CIRP and liquidation and on both the occasions the

applications were disposed of by preserving the right of the appellant. While disposing IA No. 678 of 2018 which was disposed along with the liquidation invitation order and it was observed therein on consensus that liquidator while dealing with liquidation of assets of the CD shall not interfere or deal with the pre-existing rights of MADC and shall continue to manage the stitch yard and transmission line as stated in the order dated 04.08.2017 passed by the MERC and in concession agreement dated 07.11.2007 and to carry out the liquidation subject to the rights of the MADC. The appellant, apparently consented to this observation and the same has become binding on it.

101. Having regard to all the facts and circumstances of the case and in view of the reasons given by us herein before, we do not find any good ground to interfere in the impugned judgments passed by the Ld. Adjudicating Authority and resultantly both the CA (AT) (Ins) Nos. 1355 of 2023 and 939 of 2024 are hereby **dismissed**.

102. It is however clarified, as also highlighted by the Ld. Adjudicating Authority that the rights of the MADC-Appellant under the BOT agreements shall remain protected and the Auction Purchaser/ successful bidder shall be bound to transfer the facility in the manner as was obligated for the CD.

103. There is no order as to costs.

104. Pending IA's if any are also closed.

[Justice Mohd. Faiz Alam Khan]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

New Delhi.
14.07.2026.
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