



**In the National Company Law Tribunal  
Kolkata Bench, (Court-II), Kolkata**

In IA (IB) No. 1317/ (KB) /2023

CP(IB) No. 2074/( KB) /2019

***An Application under Section 60(5) of Insolvency and Bankruptcy Code, 2016 read  
with Rule 11 of the NCLT, Rules, 2016;***

**In the Matter of:**

Sanjeev Kumar Mishra, residing at Village - Narayanur, Post- Sakri, Darbhanga, Bihar,  
Pin - 847239.

**... Operational Creditor**

And

Abhijeet Hazaribagh Toll Road Limited, having its registered office at FE-83, Sector -III,  
Salt Lake City, Ground Floor, Kolkata - 700106, West Bengal.

**....Corporate Debtor**

And

In the matter of:

Sanjeev Kumar Mishra, residing at Village - Narayanur, Post- Sakri, Darbhanga, Bihar,  
Pin - 847239.

**.... For the Applicant / Operational Creditor**

Versus

Nirmal Kumar Agarwal, Liquidator of Abhijeet Hazaribagh Toll Road Limited, having  
its registered office at Shreegunj, Block-E, 83, Golaghata Road, North 24 Parganas, West  
Bengal - 700048 and also at 24, Tara Chand Dutta Road Street, Near Moonlight Cinema,  
Kolkata - 700 073.

**.... Respondent**

**Date of Hearing: 27.09.2023**

**Date of Pronouncement of order: 10.10. 2023**

**Coram:**

**Smt Bidisha Banerjee : Member (Judicial)**

**Shri Arvind Devanathan : Member (Technical)**



**Counsel appeared physically / through video Conferencing**

1. Mr. Joy Saha, Sr. Adv. ] For the Applicant in IA 1317 of 2023
2. Mr. Avishek Guha, Adv.
3. Ms. Arunika Dutta, Adv.

1. Mr. Abhrajit Mitra, Sr. Adv. ] For the Respondents
2. Mr. D.N. Sharma, Adv.
3. Mr. Debartha Charaborty, Adv.
4. Mr. K. Saraf, Adv.

**ORDER**

**Per Bidisha Banerjee, Member (Judicial):**

1. Heard the Ld. Sr. Counsels /Counsels on both sides.
2. This application has been preferred by Abhijeet Hazaribagh Toll Road Limited. The said Operational Creditor has challenged the propriety of the decision taken by Stakeholders Consultation Committee at its meeting dated 10.07.2023, whereby and whereunder the said Committee has decided to seek benefit of Vivad Se Vishwas-II (Contractual Disputes) Scheme, being **Annexure 'F'** to the Application.

**3. Contentions of the Applicant:**

- a. Ld. Sr. Counsel Mr. Joy Saha appearing for the Operational Creditor would submit that the Arbitral Tribunal has been pleased to award an amount of Rs. 234,59,51,401.46 against NHAI which is under challenge before the Hon'ble Delhi High Court, in two separate petitions preferred by the Corporate Debtor as well as NHAI.
- b. The total claim of the Financial Creditor is to the tune of Rs. 555 crores (Principal plus interests) which can be recovered from the NHAI once Hon'ble Delhi High Court passes an order, the correction of the calculations within, whereas the settlement entered into with the NHAI by the Liquidator at the instance of the Stakeholders Consultation Committee



is for an amount of Rs. 190 Crores (65%) amounts to a hair cut of 35% which is not in the interest of the business.

- c.Ld. Sr. Counsel for the Applicant further states that once the Code, through section 35(1) (f) and through Liquidation Regulations, 32, 32A , 37 and 37A has provided a mode and manner of sale of the Actionable Claims / Assets of the Corporate Debtor, no other mode or manner can be permitted. In this regard, the Ld. Sr. Counsel for the Applicant relies on the judgment of Hon'ble Apex Court in the case of Union of India vs. Mahendra Singh, wherein the Hon'ble Apex Court, reiterated the principle laid down in Nazir Ahmad Vs. King Emperor that *“where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. All other modes of performance are necessarily forbidden.”*
- d. Ld. Sr. Counsel for the Applicant further asserts that the existence of Stakeholders Consultation Committee is for the purpose of collating and verifying claims and any decision by SCC is merely advisory having no bearing on the liquidator, thus based on a decision of the SCC amnesty, thus cannot be claimed.
- e.Ld. Sr. Counsel for the Applicant further submits that the Respondent Liquidator is duty bound to follow the process as envisaged under the Code and the Liquidation Regulations and the Liquidation process is a step-by step process and the procedure cannot be negated and the Respondent / Liquidator cannot be permitted to adopt a procedure as per its own whims and fancies.
- f. Ld. Counsel has drawn our attention to the observations of the Adjudicating Authority of the NCLAT.



- g. Ld. Sr. Counsel would further submit, that in terms of Regulations 39 of the IBBI (Liquidation Process) Regulations, 2016, the Liquidator is mandatorily required to take all necessary steps to realize all assets of the Corporate Debtor. Further, drawing our attention to Regulation 31A(10), Ld. Counsel would submit that advice of the Stakeholders Consultation Committee is not binding on the Liquidator, the award being a crystallised claim, the Liquidator could not have negotiated with NHAI at a lower value.
- h. Drawing our attention to the affidavit of reply of the Liquidator, Ld. Sr. Counsel would allege that Liquidator has proceeded as if the Liquidation value is NIL whereas the award would fetch a whopping 234 Crores. That, as the Liquidator has already applied for benefit of the scheme, an interim order in terms of the prayer 'f' of the application be granted by this Tribunal as a prima facie case has made out necessitating grant of interim protection.
- i. Ld. Sr. Counsel would further submit that the Liquidator having failed to act in terms of the Code and without having explored other possibilities of challenging the award or getting the sale conducted on "as is where is" basis could not have straight away asked for benefits under the rewards scheme. He neither has the power nor has justified use of his discretion on equitable grounds to seek benefit under the Scheme.
4. Per contra, Ld. Sr. Counsel Mr. Abhrajit Mitra would submit that the Award was passed on 02.10.2017 and a Section 34 application has been preferred, meanwhile on 30.10.2023 last date of such benefit of the Scheme will expire. The parties do not have time to wait until the appeals are decided, further the Stakeholders are of the view that an Operational Creditor whose claim is worth 4 (four) lakhs cannot



question the wisdom of Stakeholders Consultation Committee to dislodge a claim under the Scheme. The Liquidation value of the company being '0' even if 200 crores comes to the kitty, the Applicant is not worse of.

5. Ld. Sr. Counsel for the Respondent further contended that the Department of Expenditure, Ministry of Finance has launched the scheme, "Vivad se Vishwas II - (Contractual Disputes), to effectively settle the pending contractual disputes of government and government undertakings with the following object:

**"a. To settle contractual dispute of government and government undertakings, wherein arbitral award is under challenge in a court, a voluntary settlement scheme with standardized terms will be introduced. This will be done offering granted settlement terms depending on pendency level of the disputes."**

b. The Department of Expenditure, Ministry of Finance, had issued an order on 29.05.2023 indicating guidelines of the scheme. The last date for submission of claims is 31.10.2023.

Cases satisfying the following criteria will be eligible for settlement under this scheme:

Status of dispute	The award shall have been issued upto the following date
Arbitral Award passed	31.01.2023
Court Award passed	30.04.2023

The scheme will apply to all domestic contractual disputes where one of the parties is either the Government of India or an organisation working under its control.



Under the scheme, for Court Awards passed on or before 30.04.2023 the settlement amount offered to the Contractor will be up to 85% of the net amount awarded / upheld by the court.

For Arbitral Award passed on or before 31.01.2023, the settlement amount offered is up to 65% of the net amount awarded.”

6. Ld. Sr. Counsel for the Respondent further contended that the commercial wisdom of the Liquidator which is a quasi- judicial authority, has also been recognised which would appear from the NCLAT judgement dated September 16, 2022 (**V. S. Palanivel –vs- CS P. Shriram, CC, Liquidator – M/s. Sri Lakshi Hotles Pvt. Ltd. & Ors.**)-at page 15 wherein the commercial wisdom of the Liquidator has been recognised to be treated as at par with the commercial wisdom of the Committee of Creditors. The Hon’ble National Company Law Appellate Tribunal while passing the judgment had relied upon the decision of the Hon’ble Apex Court reported in **2022 SCC Online SC 1124 (RK Industries –vs- H. R. Commercial Pvt. Ltd.)** (paras 57, 60, 62 - 65 & 67) the Hon’ble Apex Court noted as under:

*“57. On the aspect of rejecting even the highest bid received by an Authority, this Court has held in Laxmikant and Others (supra) as under :*

*“4. Apart from that the High Court overlooked the conditions of auction which had been notified and on basis of which the aforesaid public auction was held. Condition No. 3 clearly said that after the auction of the plot was over, the highest bidder had to remit 1/10 of the amount of the highest bid and the balance of the premium amount was to be remitted to the trust office within thirty days “from the date of the letter informing confirmation of the auction*



*bid in the name of the person concerned". Admittedly, no such confirmation letter was issued to the respondent. Conditions Nos.*

*"5, 6 and 7 are relevant: "5. The acceptance of the highest bid shall depend on the Board of Trustees.*

*6. The Trust shall reserve to itself the right to reject the highest or any bid.*

*7. The person making the highest bid shall have no right to take back his bid. The decision of the Chairman of the Board of Trustees regarding acceptance or rejection of the bid shall be binding on the said person. Before taking the decision as above and informing the same to the individual concerned, if the said individual takes back his bid, the entire amount remitted as deposit towards the amount of bid shall be forfeited by the Trust."*

***From a bare reference to the aforesaid conditions, it is apparent and explicit that even if the public auction had been completed and the respondent was the highest bidder, no right had accrued to him till the confirmation letter had been issued to him. The conditions of the auction clearly conceived and contemplated that the acceptance of the highest bid by the Board of Trustees was a must and the Trust reserved the right to itself to reject the highest or any bid. This Court has examined the right of the highest bidder at public auctions in the cases of Trilochan Mishra v. State of Orissa, State of Orissa v. Harinarayan Jaiswal, Union of India v. Bhim Sen Walaiti Ram and State of Uttar Pradesh. v. Vijay Bahadur Singh. It has been repeatedly pointed out that State or the authority which can be held to be State within the meaning of Article 12 of the***



*Constitution is not bound to accept the highest tender or bid. The acceptance of the highest bid is subject to the conditions of holding the public auction and the right of the highest bidder has to be examined in context with the different conditions under which such auction has been held. In the present case no right had accrued to the respondent either on the basis of the statutory provision under Rule 4(3) or under the conditions of the sale which had been notified before the public auction was held.” (emphasis added)”*

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*“60. The Statute enjoins the Liquidator to sell the immovable and movable assets of the Corporate Debtor in a manner that would result in maximization of value, lead to a higher and quicker recovery for the stakeholders, cut short the delay and afford a guaranteed timeline for completion of the process....”*

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*“62. Therefore, we concur with the view expressed by the NCLAT that the decision of the respondent No. 2 - Liquidator was driven by the desire of the stakeholders to complete the liquidation process in the shortest possible time. Let us not forget that the aforesaid exercise of selling the assets of the Corporate Debtor has been ongoing for about three years, with several litigations spewed throughout to cause further delay. The sooner the curtains are drawn on the process, the better it would be for all concerned.*

*63. It is for the very same reason that we are inclined to set aside the subsequent directions issued by the NCLAT of restarting the entire process of Private Sale by issuing fresh notices to all the prospective buyers without limiting them to those who had participated in the process.*



*“64. 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 (Page 55 of 59 (2022) ibclaw.in 104 SC IBC Laws| www.ibclaw.in Civil Appeal No.7722 of 2021 and Civil Appeal No.7731 of 2021) 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 43, 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 44 , Committee of Creditors of Amtek Auto Limited v. Dinkar T. Venkatasubramanian and Others 45 , Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another. 46 , Ghanashyam Mishra And Sons Private Limited through the Authorized Signatory v. Edelweiss Asset Reconstruction Company Limited*



*through the Director and Others. 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.***

*“65. In fact, it has been brought to our notice by the respondent No.2 – Liquidator that close on the heels of the impugned judgment passed by the NCLAT delivered on 10th December, 2021, the Core Committee of Financial Creditors of the Corporate Debtor had conducted a meeting on 15th December, 2021 and had unanimously ratified the view of the respondent No.2 – Liquidator that the bid process commenced on 24th August, 2021, ought to be continued and not restarted having regard to the fact that it had taken almost three years to find such buyers and the sale was at the cusp of being closed. It was also recorded in the minutes of the meeting that several attempts had already been made to solicit interest from parties but none had come forward to make an offer for the composite purchase of the assets. We may note that the Core Committee constitutes 70.3% of the financial creditors and when they have weighed in to support the stand taken by the respondent No.2 – Liquidator to continue the bid process commenced on 24th August, 2021, we do not see any reason to foist the view of the NCLAT on the respondent No.2 – Liquidator that he ought to restart the process for sale of the composite assets of the Corporate Debtor from the scratch after issuing an open notice to the prospective buyers”*



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*“67. As a result, Civil Appeal No.7722 of 2021 filed by R.K. Industries fails and the same is dismissed along with I.A No. 166862/2021. Civil Appeal No.7731 of 2021 filed by Welspun is allowed on the afore-stated terms. Parties are left to bear their own costs. Pending applications, if any other than IA No. 166862/2021 shall stand disposed of.”*

7. We have considered the rival contentions and perused the records and understood the implication of the decisions cited.
8. The discernible facts are that at its 5<sup>th</sup> Meeting held on 10.07.2023, the Stakeholders Consultation Committee comprising of the Financial Creditor being SBI, PNB, India Infrastructure Finance Limited and Bank of Baroda has agreed to the proposal mooted by the Liquidator and even requested the Liquidator to immediately file the claim under this Scheme. Therefore, the decision to seek benefit of the Scheme is the Stakeholders Consultation Committee and not of the Liquidator.
9. It is almost trite, axiomatic and settled law that Adjudicating Authority 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.
10. The Scheme in question being Vivad Se Vishwas-II (Contractual Disputes) Scheme, which the Ministry of Finance, Department of Expenditure Procurement Policy Division has floated on 29.05.2023, clearly lays down the terms of applicability as under:

**“4. The scheme will apply to contractual disputes where one of the parties is either the Government of India and / or an organisation detailed below. Apart**



from Ministries / Departments, attached and subordinate bodies, notwithstanding anything contained in Rule 1 of the GFRs 2017, the scheme shall also be applicable

**a) to all Autonomous Bodies of the Government of India;**

**b) To public sector banks and public sector financial institutions;**

**c) To all Central Public Sector Enterprises;**

**d) To Union Territories without legislature and all agencies / undertakings thereof; and**

e) To all organisations, like Metro Rail Corporations, where Government of India has shareholding of 50%; however, these organisations can opt out of the scheme at their discretion, with approval of the Board of Directors.

The above mentioned organisations shall hereinafter be referred to as “**procuring entities.**” The other party in dispute with the procuring entity shall be referred to as **contractor(s)** hereinafter.

**5. Disputes where the award by court / Arbitral Tribunal (AT) is only for monetary value** will be eligible for settlement under this scheme. In case the award stipulates specific performance of contract (either fully or partially); such awards will not be eligible for settlement through this scheme.

6. Cases shall satisfy following criteria to be eligible for settlement under this scheme:

Status of dispute	The award shall have been issued upto the following date
Arbitral Award passed	31.01.2023
Court Award passed	30.04.2023

7. The scheme will be applicable only to those contractors who wish to participate in the scheme. Central Public Sector Enterprises(CPSEs) etc., who are



contractors to be procuring entities as listed above, are also eligible to submit their claims under this scheme.

8. The scheme shall apply only for cases involving **domestic arbitration** and cases under international arbitration are not eligible to be settled under this scheme.

9. The scheme shall be applicable to all kinds of procurement including procurement of goods, services and works. The scheme is also applicable to all “earning contracts” (i.e. contracts where government receives money in exchange for goods, services rights etc.) as well as contracts under Public Private Partnership (PPP) arrangements.

Amount payable under the scheme

10. The settlement amount that shall be offered to Contractors for various categories of disputes is as under:

<b>Sl. No.</b>	<b>Status of dispute</b>	<b>Settlement Amount</b>
(a)	<p>Court Award passed on or before 30.04.2023.</p> <p>Notes:</p> <p>i. Case may or may not be under further appeal.</p> <p>ii. Court award will include the cases where the parties have approached the courts directly or approached the court subsequent to arbitral award (under any provision of the Indian Arbitration and Conciliation Act, 1996). However, Interim Orders under Section 9 of the Indian Arbitration and Conciliation act, 1996, shall not be considered as an award eligible for settlement under this scheme.</p>	<p>85% of the net amount awarded / upheld by the court or 85% of the claim amount lodged by the contractor under this scheme, whichever is lower.</p>



(b)	<p><b>Arbitral Award passed on or before 31.01.2023.</b></p> <p>Notes:</p> <p><b>I. Cases may or may not be under challenge / appeal</b> before a Court.</p> <p>ii. Arbitral Award passed by the Micro and Small Enterprises Facilitation Council (MSEFC) or Arbitral Tribunal appointed on reference by MSEFC under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006, shall also be included under this scheme.</p> <p>iii. However, Interim Orders of the Arbitral Tribunal under any provision of the Indian Arbitration and Conciliation Act, 1996, shall not be considered as an award eligible for settlement under this scheme.</p>	65% of the net amount awarded / upheld by the court or 65% of the claim amount lodged by the contractor under this scheme, whichever is lower.
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11. The Applicant claims benefit against the criteria 10(b), the Arbitral Award being passed on or before 31.01.2023. It is discernible that the scheme is applicable even where the award itself is under challenge before a Court. Regulation 31A(10) envisages that the advise of Consultation Committee is not binding on Liquidator. However, in terms of the proviso therein, the Liquidator can deviate from the advice recording its reasons in writing. Since it was the Liquidator's proposal that was acted upon Stakeholders Consultation Committee, there was no occasion on the part of the Liquidator to deviate therefrom.



12. That apart the Applicant being an Operational Creditor, with claim worth 4 (four) lakhs should not be allowed to oppose the move or question the wisdom of the Stakeholders Consultation Committee Members.
13. In view of such, the application fails and accordingly IA(IB)No. 1317/(KB)/2023 is dismissed.
14. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.
15. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.

**Arvind Devanathan**  
**Member (Technical)**

**Bidisha Banerjee,**  
**Member (Judicial)**

Signed on this the 10<sup>th</sup> day of October, 2023

M. Jana, PS