

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH- II**

KOLKATA

IA(IBC)/334/KB/2023

IN

C.P (IB) No.1634/KB/2018

In the matter of

An application under sections 60(5) and other relevant provisions of the Insolvency and Bankruptcy Code, 2016.

And

In the matter of:

Alliance Broadband Services Pvt.Ltd.

... Financial Creditor

Versus

Manthan Broadband Services Pvt.Ltd.

... Corporate Debtor

AND

In the matter of:

Rajiv Dhamija & Others

... Applicants

Versus

Mr.Kuldeep Verma, Liquidator

... Respondent

Date of hearing :09/02/2023

Order Pronounced on :14/02/2023

Coram:

Mrs. Bidisha Banerjee, Member (Judicial)

Mr. Balraj Joshi, Member (Technical)

Counsels appeared through Physically/ Video Conference

Mr.Jishnu Choudhury, Adv.] For the Applicant
Mr.Rishav Banerjee, Adv.]
Mr.Shalya Sen, Adv.]
Ms.Pruna Shaha]
Ms.Manju Bhuteria, Adv.] For the Liquidator
Mr. Rahul Auddy,Adv.]
Mr.AdityaGooptu, Adv.]
Mr.Ratnanko Banerjee,Sr.Adv.] For Alliance Broadband Services Pvt.Ltd.
Ms.Swapna Choubey, Adv.]
Mr.Kanishk Kejriwal, Adv.]
Ms.Shreya Choudhay,Adv.]

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. Ld. Counsel for the parties were heard.
2. This is an application preferred by two Members of the suspended board of Directors, challenging an E- auction notice dated 11th January, 2023 and the process memo contending that they are guarantors to the Financial Creditors and failure of the Financial Creditor to realize their dues from the liquidation process, would severely prejudice them. Reference is made to the Hon'ble Apex Court decision in Committee of Creditors of ESSAR Steel Limited Vs. Satish Kumar Gupta reported at (2020) 8 SCC 531.
3. It is submitted that by way of E-auction notice, 77,500 shares of the corporate debtor in Alliance Broad Band Services Private Limited (hereinafter referred to as "Alliance") is being sought to be sold in liquidation, apart from an immovable property at Tajpur at West Bengal.
4. The contention of the said applicants would be as under:-

-
- i. That the Corporate Debtor (Manthan) held 48.14% shares in Alliance. The majority shareholders of Alliance have devised a stratagem to obtain the shareholding of Alliance and filed a petition under 9 of IBC having put Manthan (Corporate Debtor) into CIRP process on 18th September, 2019;
 - ii. That by two right issues dated 30th September, 2019 and 7th September, 2021, the shareholding of Corporate Debtor in Alliance have been reduced from 48.14% to 25.83% and that through their associates, they are trying to acquire the said shares at an undervalue in liquidation sale;
 - iii. That in terms of proviso to regulation 32 of the Liquidation Process Regulations, 2016, any asset of the Corporate Debtor which is subject to security interest, shall not be sold, unless such security interest has been relinquished to the liquidation estate.
 - iv. That Alliance having not relinquished the security interest in favour of the liquidation estate, such assets cannot be sold in violation of regulation 32.
 - v. That CS No.54 of 2019 to prevent the Corporate Debtor or liquidator from enforcing any right in respect of these shares is pending before the Hon'ble High Court at Calcutta.
 - vi. **Further IA 380 of 2021 and IA 386 of 2021** have been preferred by the liquidator for recovering Title Deeds and share certificate from Alliance in respect of the concerned shares/land, put up for sale and during the pendency of these applications, the liquidator has put up the assets for sale which only shows that another connected entity of Alliance is attempting to acquire these properties in sale

process.

- vii. It is further submitted that during pendency of the recovery of the share certificate which are in custody of Alliance, it is impossible for the liquidator to comply with its declared obligation under the sale notice;
 - viii. That the sale would render IA 380 of 2021 and IA 386 of 2021, infructuous.
 - ix. It is also stated that the reserve price of 77,500 shares is Rs. 9.21 crores which makes the price per share Rs. 1188/, which is obviously the book value of the shares. Where as the purported rights issue, at a book value, was at Rs. 1155/- and Rs. 1100/- which could be verified from the records of CP No. 15 of 2022, IA No. 847 of 2021 and IA No. 850 of 2021 all of which are pending.
 - x. It is alleged that by way of the sale, the Alliance through its stooges, will acquire shares worth in excess of Rs. 50 crores giving purchaser about 50% rights in Alliance. On the contrary if proceedings were concluded, rights issues were setaside, the shares would fetch a much higher price, which would benefit the process of liquidation.
 - xi. It is further alleged that valuation i.e. required to be done by two valuers in terms of Regulation 35 of the Liquidation Process Regulations, 2016, being not done the absurd reserve price of Rs.9.21 crores cannot sustain.
5. Per contra, Ld. Counsel for the liquidator would submit as under:-
- i. That the instant IA has been filed seeking stay of sale of land and shares on 14th February, 2023. In so far as the land is concerned, no EoI from any purchaser, has been received and hence the land will not be auctioned on 14th February, 2023 and therefore the liquidator would restrict

-
- the auction only to the 77500 shares owned by the CD in Alliance;
- ii. In regard to the shares, it is submitted that they were pledged by the CD to Alliance in April, 2017 and the pledge arrangement is over. The initial loan for which the pledge was created has been repaid. The pledge was not renewed for any for loan arrangement.
- iii. The pledge agreement dated 7th April, 2017 contained a provision that till the time the pledge by CD to Alliance is subsisting, Alliance will not cause any rights issue. However, two rights issue were done by Alliance in 2019 and 2021 and presumably there is no pledge on the shares at all.
- iv. That the Liquidator has always maintained a stand that there is no pledge and hence the shares which were always a part of the Liquidation Estate should be handed back to the Liquidator.
- v. **IA 386/2021-** It was filed by the RP (now liquidator) against Alliance praying:-
“ Necessary directions upon the Respondent to hand back the physical custody and possession of the 77500 shares of the Respondent Company owned/held by the Corporate Debtor which is being held or retained by the Respondent without any basis”.
- vi. That Regulation 21 of the Liquidation Regulation, provides for proving a security interest by a secured creditor. However, nothing could be proved by Alliance as per the requirements of Regulation 21 of the Liquidation Regulation.
- vii. Further, Regulation 21A of the Liquidation Regulation-

provides that if the secured creditor has not discharged its obligations within 90 days from liquidation commencement date, the shares will automatically form part of the Liquidation Estate.

- viii. That in the present case, liquidation commenced on 06/04/2022 and the 90 days period expired on 06.07.2022. Admittedly, Alliance has not performed its obligations contained in Regulation 21A (2) of the Liquidation Regulations and hence as per Regulation 21A(3), the shares have automatically become part of the Liquidation Estate by operation of law.
- ix. That the sale is being conducted on an “*as is where is whatever there is where ever there is basis*”. The same is expressly stated in the process document. Auction participants have access to the Virtual Data Room where copies of all cause papers and details of litigation are uploaded.
- x. That the possession of the shares are not with the liquidator and the same has been categorically stated in the bid process document. Since the process document pertains to an auction which includes several other assets (such as plant/machinery and land),possession whereof is with the Liquidator, there is inconsistency in the bid process document.
- xi. That the bidders are participating with full knowledge of all the risks and facts and the new auction participant will continue with the litigation against Alliance, if required.

- 6. Ld. Counsel Ms. Manju Bhuteria appearing for the liquidator, at hearing would vociferously allege that the attempt of the Directors of suspended board to come up with an application against the sale. That the

application is frivolous one intended to delay the liquidation process and frustrate the same so that the valuation of assets reduce further.

7. She would further submit that an order of liquidation which they challenged before the Hon'ble NCLAT, met with dismissal on 20th September, 2022. Aggrieved by the order, they preferred Civil Appeal before the Hon'ble Apex Court on 3rd November, 2022 and kept the same defective for three months until January, 2023. When the matter was listed and on 3rd February, 2023, the Civil Appeal was dismissed. Hence, their present application is an attempt to thwart the proceedings before this Adjudicating Authority.
8. Further, that the first sale notice on 6th December, 2022 of the CD, as a going concern, was never objected to by the present applicants and hence this time they should be restrained from raising objection.
9. That the contention of the present applicants that CISCO, a secured financial creditor recovers more from auction sale, then the applicant's personal liability under their personal guarantee would reduce was urged before the Hon'ble Apex Court but discarded and so the objection should not be considered.
10. In regard to the locus of the suspended director to challenge the sale, Ld. Counsel would submit that under no circumstances, the suspended director of the CD should be allowed to object the sale which has been agreed to by CoC with 100% voting.
11. In regard to the book value, the value, fair value, the liquidator submitted as under:-
 - i. Fanciful baseless figures pertaining to valuation of shares were quoted by the Applicant during the hearing on 9th February, 2023. It was submitted by the Applicant that the shares can be sold for around Rs. 45-50 crores. It was alleged that that the

Liquidator is putting up the shares at 9 crores which is the book value.

- ii. The book value of the 77,500 shares are Rs. 54.85 lakhs. The average fair value as per IDBI Registered Valuers is Rs. 9.21 Cr and average liquidation value is Rs. 4.61 Cr.
- iii. The shares have been put for auction at Rs. 9.21 crores i.e. at the average fair value.

Number of shares or % of shares

- iv. Arguments were made 48% shares can be sold if the same is sold after adjudication of the 241/242 petition filed by the Applicants challenging the 2 rights issue.
- v. Without prejudice to the issue of strict time lines in IBC liquidation stage, it is 77,500 shares which are being sold and not 48% or 27% shareholding.
- vi. Thus, this line of argument is unfounded and holds no ground” .

12. Ld. Sr. Counsel Mr. Ratnanko Banerji, appearing for **Alliance Broadband Services Pvt.Ltd.** would submit that Alliance is a secured financial Creditor of Manthan Broadband Services Pvt.Ltd., (the Corporate Debtor) in view of the short-term loan of Rs.10.20 Crore provided to Manthan in 2018 securing the following assets-

- i. Pledge of 77,500 equity shares in the petitioner Company held in the name of Respondent Company, by deposit of the share certificates.
- ii. Equitable mortgage over 10.08 Acre of non-agricultural land situated at Mouza Tajpur, PS Ramnagar, Dist- Purba Medinipur, West Bengal, by deposit of title deeds.

13. It is submitted that upon failure of the Resolution Process, the CoC of Manthan at the CoC meeting held on 08/03/2021 decided to liquidate Manthan. This Adjudicating Authority directed liquidation of Manthan

by its order dated 06/04/2022.

Alliance filed its claim with the Liquidator in Form D for Rs. 14,47,32,521 also indicating that Alliance shall not relinquish the security interest held in respect of the pledged Shares and the Tajpur land.

The financial claim of Alliance for Rs. 14,47,32,521 together with the security interest is confirmed by the Record of Default/Debt issued by NeSL.

14. Ld. Sr. Counsel would forcefully assert that the present application is not maintainable at the behest of suspended board of Manthan, as the present applicants are responsible for the insolvency of Manthan resulting in its liquidation. As per records Manthan ceased to be a going concern even before commencement of the CIRP in 2019. The applicants have frustrated and delayed the CIRP process.
15. It is urged that pending till date the financial statements of Manthan have not been prepared for the financial years 2017-18, 2018-19, 2019-20, 2020-21, 2021-22 and that an application under section 19(2) of IBC being IA no. 408 of 2020 is still pending adjudication. That a Civil Suit of Alliance was preferred prior to initiation of CIRP. An order passed by the Single Judge of Hon'ble High Court was appealed against and the Hon'ble Division Bench on 31/01/2023 disposed of the appeal directing application of Alliance be heard by the Single Bench upon filing of affidavits by the parties.
16. That Alliance has opposed the liquidation sale of Manthan as some assets of Manthan are pledged/mortgage and any sale of pledged share of Tajpur shall be subject to security interest, claim and rights of Alliance against Manthan over such assets.
17. That the rights issue of shares by Alliance in 2019 and 2021 are bona fide and genuine. This Adjudicating Authority does not have the

jurisdiction to adjudicate the issue of further shares in Alliance. Thus IA 847/KB/2021 is wholly misconceived and an abuse of process of law.

18. That IA No. 850/2021 filed by the RP/Liquidator under section 66 of IBC, do not seek to set aside or challenge the rights issue by Alliance. The interim order passed in IA 847/2021 and 850/2021 did not interfere with the rights issue by Alliance in September 2021. The challenge of suspended board to the rights issue on September, 2019 has been dismissed by this Adjudicating Authority and no appeal was preferred against such order of dismissal. The contention that the Pledged shares represent 48% of the shareholding in Alliance, is incorrect and frivolous.
19. We have heard Ld.Sr. Counsels/Counsels for the parties and perused record. It is noticed that IA 847/2021 is an application preferred by the present applicants seeking to restrain Alliance from taking any step towards giving effect to the rights issue till the conclusion of the CIRP of Corporate Debtor. The IA was considered and the order passed therein is as under:-

“ i. At this point of time, we are not convinced that a case has been made out for grant of any interim stay in so far as rights issue of the petitioning financial creditor (Alliance Broadband Services Private Limited) is concerned. We hereby direct the respondents to submit their replies to the application within a period of three weeks from today. Copies thereof shall be served on the Counsel on record for the applicants who shall have two weeks thereafter to file rejoinder if need be. Copies of rejoinder, if filed shall be served on Counsel on record for the applicant. List the matter along with IA/850(KB)2021 on 29.11.2021 for further consideration.

j) At this point of time, Mr. Vivek Sibbal, Ld. Senior Counsel appearing for the RP in IA/850(KB)2021 makes a prayer to say that the rights issue may be made subject to the final outcome of the orders in IA/850(KB)2021. This is a reasonable request to make and this is acceded to. Though Mr. Ratnanko

Banerjee, Ld. Senior Counsel appearing for Alliance Broadband Services Private Limited opposes this request, this Bench is convinced that this is reasonable request and it is acceded to”.

20. **IA 850/2021-** was preferred under section 66 of the Code seeking compensation against action undertaken by the suspended board of Directors of Corporate Debtor which is yet to be decided.
21. We would also note that the present applicants had taken out the Company Appeal (AT) (Insolvency) 1002/2019 before the Hon’ble NCLAT against the impugned order dated 18th September, 2019 whereby the Corporate Debtor was admitted into CIRP.

Hon’ble NCLAT restrained the present applicants (being the appellants therein) from settling the matter with only one Financial Creditor i.e. **Alliance Broadband Services Pvt.Ltd.** The judgement of the Hon’ble NCLAT would run thus;

“ In the facts and circumstances, we are not inclined to allow the Appellant to settle the matter with only one of the ‘Financial Creditor’- ‘Alliance Broadband Services Private Limited’ but give liberty to the Appellant to move before the ‘Resolution Professional’ by filing an application for settlement under Section 12A of the ‘I &B Code’.The interim Resolution Professional’ will constitute ‘Committee of Creditors’ and if the Appellant files the application under Section 12A, place the same before the ‘Committee of Creditors’ to consider accepting the same with 90% voting share and thereby enable the ‘Alliance Broadband Services Private Limited’ to withdraw the application. The ‘Committee of Creditors’ will consider the same before considering any ‘resolution plan.

It is expected that all this procedure will be completed within 30 days. If the proposal under section 12A is not with 90% voting

share, the 'Committee of Creditors' will take up the 'resolution plan' for consideration.

The appeal stands disposed of with aforesaid liberty/ observations and directions”.

22. The order dated 22/10/2019 when challenged, met with dismissal. Consequently, CoC was constituted. By an order dated 16/04/2022 liquidation of Manthan was ordered by this Adjudicating Authority. Further challenge against the liquidation order also stood dismissed by Hon'ble NCLAT and the Honble Apex Court.
23. A considerable time has lapsed since Liquidation of Manthan was ordered, and presumably it is the Directors of the suspended Board who had pushed Manthan into Liquidation. At this juncture, allowing the Directors of the suspended board to intervene or restrain the liquidator from proceeding with the auction would not be fair. Accordingly, we allow E auction as proposed on 14th February, 2023 to be conducted, which shall however, abide by the result of this application. Consequential action in regard to auction shall be conducted only with the liberty of this Tribunal and a report to that effect shall be submitted by the liquidator on the next date of hearing.
24. List IA(IBC)/334/KB/2023 on 15/03/2023.
25. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on the 14th day of February, 2023

PJ.