

IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH, KOLKATA

C.A.(IB) No.792/KB/2019

C.A.(IB) No.684/KB/2019

IN

C.P.(IB) No.574/KB/2017

IN THE MATTER OF

Appeal Under Section 42 and application U/s 60(5) of the Insolvency and Bankruptcy Code, 2016.

And

IN THE MATTER OF

Bharat Heavy Electircals Ltd.

BHEL House, Siri Fort, New Delhi- 110049

...Appellant/Operational Creditor/Applicant

Versus

1. Mr. Anil Goel,
The Liquidator of Visa Power Limited
E-10A, Kailash Colony, Greater Kailash-I,
New Delhi-110048.

....(Respondent in C.A.(IB)No.792/
KB/2019, Respondent No.1 in
CA(IB) No.684/KB/2019)

2. Agrawal Structure Mills Pvt. Ltd. Having its Registered office at Govind Kunj, Near Krishna Talkies, Samta Colony, Raipur 492001, Chhattisgarh also at Plot No. 870 & 879, Sector-D, Urla Industrial Area, Raipur-493221, Chhattisgarh.

.... (Respondent No.2 (in (C.A.(IB)
No.684/KB/2019)

And

IN THE MATTER OF

Visa Power Ltd.
Visa House, 8/10 Alipore Road,
Kolkata- 700 027.

... Corporate Debtor

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Date of Hearing : : 25.11.2019
Order Delivered on : :..... 2019

Coram:

Madan B Gosavi : Member (J)

Virendra Kumar Gupta : Member (T)

For the Operational Creditor /BHEL	: 1.Mr.Punit Tyagi, Advocate : 2.Ms.Swastika Chakravarti, Advocate
For the Respondent/ Liquidator	: 1.Mr.Arun Gupta, Advocate : 2.Mr.Atul Sureka, Advocate
For the Respondent Nos.1 & 3 (CP(IB)No.574/KB/2017)	: 1.Mr.Abir Debnath, Advocate : 2.Mr. A.K.Singh, Advocate
For the Respondent No.2 (CA(IB)No.684/KB/2019)	: 1.Mr. Joy Saha,Sr. Advocate : 2.Mr.Kumarjit Banerjee, Advocate : 3.Mr.Pankaj Agarwal, Advocate : 4.Mr.Paramita Maity, Advocate

ORDER

Per Virendra Kumar Gupta, Member(Technical)

- 1) C.A.(IB)No.792/KB/2019 was heard at the first instance which involves issue of lien/charge of the appellant on the goods sold and services rendered to the corporate debtor.Whereas in C.A.(IB)No. 684/ KB/2019,the action of Liquidator in selling goods/equipments through auction has been challenged.It was decided that both petitions shall be disposed of together as common facts and contentions are involved.
- 2) The relevant facts, in brief, are that the appellant and the corporate debtor signed Letter of Award on 28.06.2010 for supply and erection of plant and machinery in accordance with terms and conditions of notice inviting tender and letter of award. In May, 2016 appellant initiated Arbitration proceedings against the corporate debtor for recovery of its dues under LOA. Subsequently, the corporate debtor was admitted under CIRP under section 7 on 22.12.2017. The

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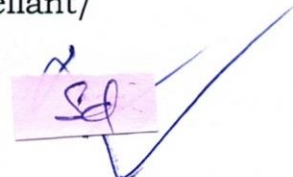
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appellant submitted its claim in Form-B before the IRP/RP. Due to failure of CIRP, liquidation proceedings were initiated and liquidator was appointed, who published public notice of liquidation process on 13.10.2018. The appellant filed its claim before the liquidator in Form-C. The appellant claimed statutory charge/lien on the plant and machinery erected by the appellant at the project site and on unused material both in form B and C. On 23.11.2018 liquidator sought additional information and clarifications in respect of claim filed by the appellant which were duly replied on 29.11.2018. The liquidator vide its order dated 31.12.2018 which was communicated to the appellant on 04.01.2019 provisionally admitted claim at Rs.290,01,85,395/- as against amount claimed at Rs. 664, 98, 37,221/-. The appellant was also treated as unsecured creditor. The reasons for reduction in amount claimed were given that arbitration proceedings were pending and for claim of interest no specific contract or order had been provided. The order of priority was categorised under section 53 (1)(f) of the IBC, 2016. On 17.01.2019, the appellant filed an appeal challenging liquidator's order. Subsequently, on 11.04.2019 liquidator issued an advertisement for auction of assets of corporate debtor including the plant and machinery supplied by the appellant. On 11.04.2019, the appeal was heard by the Adjudicating Authority, wherein claim of the appellant regarding lien/or charge was opposed by the liquidator. The Adjudicating Authority vide its order dated 10.05.2019 set aside the order of the liquidator dated 31.12.2018 and directed the liquidator to verify the claims of the appellant afresh and pass a reasoned order. On 20.05.2019, the liquidator issued a Sale Certificate in favour of M/s Agarwal Structure Mills Pvt. Ltd. On 27.05.2019, the liquidator sent a mail requiring the appellant to appear before him on 29.05.2019 and on that date appellant appeared and provided all details/explanations in support of its claim including the claim of lien and/or its charge. On 03.06.2019, the liquidator accepted its monetary claim at Rs. 5,72,19,46,434/-



but rejected the appellant's claim of lien and/or charge and categorised the appellant as unsecured creditor.

- 3) The Ld. Counsel for the appellant appeared and submitted that corporate debtor invited bids for technical, commercial and price offers for design, engineering, manufacturing, supply, transportation, storage and handling at site, erection, testing and commissioning and performance testing of 2x600 MW Boiler, Turbine and Generator Package for setting up a 2 x 600 MW Coal based Thermal Power Plant in the State of Chattisgarh in February, 2019. On award of contract in June, 2010, the appellant made supplies and provided services but on continuous defaults by the corporate debtor to clear its dues, the appellant put all the activities in the project on hold with effect from 27.04.2012. The appellant also invoked arbitration clause. However, due to moratorium u/s 14 of IBC, 2016 being imposed, arbitration proceedings became stand still.
- 4) Ld. Counsel submitted that on 12.03. 2019, the liquidator filed its reply to the petition filed by the appellant on 17.01.2019 wherein such claims of the appellant were denied. The said appeal was listed for final arguments before this Tribunal on 11.04.2019, however, just one day before i.e.10.04.2019, the liquidator initiated the process of auction of all the assets of the corporate debtor including the plant and machinery lying at the Project site. Ld. Counsel submitted that the liquidator as a custodian held the assets of the corporate debtor in trust for the benefit of all the creditors including the appellant and the liquidator was duty bound to disclose these facts to the Tribunal. It was also pleaded that the liquidator initiated the auction process in spite of knowing fully well that no auction could have been initiated or pursued till the Tribunal had taken final view in respect of it's claim.
- 5) Ld.Counsel drew our attention to the order of the liquidator dated 03.06.2019 wherein the liquidator had observed that the appellant/



BHEL neither challenged the category nor the order of priority as decided by the liquidator in its appeal and contended that this was factually incorrect for the reasons that in CA(IB) No. 149/KB/2019, a specific plea was taken that the appellant had not accepted its categorisation as an unsecured Operational Creditor. Hence, there was no need to make any other specific prayer as suggested by the respondent. It was also contended that the liquidator's order dated 31.12.2018 provisionally admitting the Appellant's monetary claim and categorising the appellant as an unsecured Operational Creditor had already been set aside by order of the Tribunal dated 10.05.2019. Hence, any reference or reliance by the liquidator on the said order dated 31.12.2018 was bad and deserved to be rejected.

- 6) The Ld. counsel, thereafter, contended that agreement between the appellant and the corporate debtor was of the nature of EPC contract, wherein the appellant was to retain custody of the material till the time those were consumed, erected and successfully commissioned. It was also emphasized that only title in the material was transferred to the corporate debtor. However, the risk always remained with the appellant. The learned counsel further submitted that insurance of all the material supplied and erected was taken and maintained by the appellant, which also proved the fact that possession/custody of the unerected material remained with the appellant. Learned counsel thereafter, factually distinguished the decision of the Hon'ble Supreme Court in the case of *Contship Container Lines Ltd. Vs. D.K.Lall & Ors.* on the ground that the said case had arisen out of consumer case filed by the Supplier against the Insurance Company, hence, not applicable to the case on hand. Thereafter, he pleaded that decision of the Hon'ble Madras High in the case of *Bharat Heavy Electricals Ltd. & ors Vs. Arunachalan Sugar Mills Ltd. & Ors* relied on by the liquidator was also not applicable because in that case buyer had taken the possession of the material supplied and/or erected, whereas in the present case, the Appellant continued to remain in possession till the end. It was

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also contended that appellant's claim of lien and/or charge was in relation to the material supplied by the appellant which could easily be identified at the project site and ascertained from the invoices made available to the respondent and, therefore, liquidator's observations that claim was vague were devoid of merits. It was also pleaded that the appellant's claim was based upon lien under Sales of Goods Act, 1930 and statutory charge under the Transfer of Property Act, 1882, hence, any reference or absence of reference in the LOA was irrelevant and had no bearing on the present claim. It was further contended that rejection of the claim of the appellant by the liquidator on the ground that there existed no agreement in regard to lien/charge between the appellant and the corporate debtor deserved to be set aside.

- 7) Ld. Counsel thereafter contended that provisions of Sale of Goods Act, 1930 and Transfer of Property Act, 1882 were not contrary to the provisions of IBC, 2016 and therefore, such provisions were to be read in harmonious manner and consequently, provisions of section 238 of IBC, 2016 were not applicable. For this proposition, he relied two decisions of the Hon'ble Supreme Court in the case of *Central Bank of India Vs State of Kerala & others (2009) 4 Supreme Court Cases 94* and on the decision in the case of *ICICI Bank Ltd. Vs SIDCO leathers Ltd. & Ors (2006) 10 Supreme Court Cases 452*. Ld. Counsel also placed reliance on the decision of the Hon'ble Madras High Court in the case of *K. Saradambal Vs Jagannathan & brothers* as reported in (1972) 42 Company Cases 359 for the proposition that appellant as holder of lien/statutory charge was a secured creditor and as an unpaid vendor had a right of re-sale to realise its dues.
- 8) The Ld. Liquidator appeared in person. He initiated his arguments by stating that possession and ownership of goods/ equipments supplied by the appellant had been transferred to the corporate debtor and it belonged to the corporate debtor. He further submitted

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as per provisions of section 36(3)(a) of the IBC, 2016 these formed part of liquidation estate. It was also pleaded that there were no documents/ agreements, on the basis of which, it could be claimed that the appellant had a lien/statutory charges on such goods/equipments. It was also contended that as per terms and conditions, the appellant was obliged only to maintain insurance in regard to such good and that fact itself was not sufficient to indicate the ownership remained with the appellant. The Ld. Liquidator further pleaded that such goods, which were consumed formed part of plant and machinery of the corporate debtor and as such these had been entered into fixed assets register of the corporate debtor. It was also claimed that banks had created their charge on these assets. Learned Liquidator, thereafter, referred to provisions of sections 36(3)(b) and 36(3)(e) of the IBC, 2016 to show that the Liquidator was having wide powers to deal with the assets of corporate debtor in the liquidation process. The learned liquidator further drew our attention to Regulation 21 of IBBI (Liquidation Process) Regulations, 2016 to contend that existence of security interest could be proved by the Secured Creditor in the manner specified therein and in the present case, no such documents/information existed, hence, claim of the appellant in regard to security interest was considered and rejected. Thereafter, learned Liquidator referred to provisions of section 3(31) and 3(33) of IBC, 2016 to state that no such agreement existed whereby security interest was created or provided, hence, for this reason also there was no merit in the claims of the applicant. It was also pleaded that no claim of such lien was made during CIRP. The learned Liquidator also took us through his order dated 03.06.2019 and placed strong reliance on the reasons given therein.

- 9) The Ld. Counsel for the appellant, in the rejoinder, submitted that both in Form-B and Form-C that claim of lien/security interest had been made. He drew our attention to pages 60, 61 of General Conditions of Contract and 96,97 containing special conditions of



the contract of NIT published to state that possession was not given. It was also vehemently argued that the claims made by the liquidator regarding plant and machinery being part of its fixed assets register and, charge of banks were not substantiated by the learned Liquidator by bringing cogent materials/evidence on record. He further pleaded that if the events were analysed in chronological order then conduct of the Liquidator could not be said to be and bonafide.

10) Ld. Counsel for the Respondent No.2, the auction purchaser, submitted that in C.A.(IB)No.792/KB/2019, auction purchaser had not been made a party, hence, any decision in regard to C.A.(IB) No.792/KB/2019 should not impact him adversely. However, considering the fact that decision in this C.A.(IB)No.792/KB/2019 could impact him, as he was a *bonafide* purchaser and had committed itself to the auction process by paying the required sale consideration, hence, it was incumbent upon him to make his submissions in response to various contentions raised by the parties to this appeal. It was again emphasised that the auction purchaser was not a party, hence, it was not bound by any order passed on such an application, for this proposition, he relied on the following two decisions.

- i. *The Secretary of State of India in Council v. Syed Ahmed Badsha Bahadur*, 1921 ILR 44 Mad 778 @prs. 4-5,15-16;
- ii. *Satrucharla Vijaya Rama Raju v. Nimmaka Jaya Raju & Ors.* (2016) 1 SCC 212 @pr.10;

Since contentions are relevant for both matters, hence, we record these as part of submissions in C.A.(IB)No.792/KB/2019 but will deal with them at appropriate places, as the case may be.

11) The Ld. Senior Counsel initiated his arguments while considering that the corporate debtor had been admitted into CIRP on 22.12.2017 and till the publication of notice of auction on 11th and

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12th April, 2019 no issues were ever raised by the appellant, hence, such belated action was liable to be dismissed because in the instant case so many events happened thereafter resulting into irreversible/inevitable consequences. He further emphasised on the fact normally delay was condoned but it was not a matter of right and in the facts and circumstances of the case, such belated action was not liable to be considered at all. In this regard, he further emphasised that delay defeats equity, especially when such delay would either result in *fait accompli* rendering the developments irreversible and placed reliance on *J. Jayalalitha Vs. Government of Tamil Nadu & Others reported in (1999) 1 SCC 53 @ prs. 7-9* and *S.S.Balu and Another Vs. State of Kerala and others reported in (2009) 2 SCC 479 @ pr.17*.

- 12) The Ld. Senior Counsel then referred to the provisions of Section 77(3) of Companies Act, 2013 and on that basis, he pleaded that unless charge was registered as prescribed therein, the claim of the appellant regarding its lien/charge based upon the provisions of Sale of Goods Act, 1930 and Transfer of Property Act, 1882 was not tenable in law. It was also pointed out that not a single document or evidence was brought on record by the appellant on the basis of which lien and/or charge on the assets in question could have been said to be created in favour of the appellant and, in such a situation, entire claim of the appellant was liable to be rejected. It was also pleaded that Regulation 21 of IBBI (Liquidation Process), Regulations, 2016 had statutory force and existence of security interest, thus, could be acknowledged only in the manner prescribed therein and as stated earlier there being no registration of any lien/charge as contemplated under section 77(3) of the Companies Act, 2013, the claim of the appellant, BHEL was liable to be disregarded. Thereafter, he referred to the provisions of Section 238 of IBC, 2016 to contend that provision of Sale of Goods Act, 1930 were not applicable as the possession of the goods/material/equipments supplied by appellant had already

been vested in the Corporate Debtor. Similarly, provisions of section 55(4)(b) of Transfer of Property Act, 1882 were also not applicable in regard to erected plant and machinery. The learned senior counsel further pleaded that in case of *bonafide* purchaser having no notice of any claim or encumbrance or liability or any other defect title in goods, provision of Section 55(4) of the Transfer of Property Act, 1882 were not applicable at all because such *bonafide* purchaser had been excluded from the application of the provisions of this section.

13) The Ld. Senior Counsel further pleaded that arbitration proceedings were initiated by the appellant wherein only money claim had been made and no claim of lien/charge was made, hence, for this reason also such claim was not maintainable now. It was also contended that in the arbitration proceedings, the appellant had sought declaration to the effect that Project had been terminated/ abandoned due to the acts and omissions of Visa Power Ltd. hence, this fact established the position that the appellant was not in the possession of the said assets. It was also pleaded that arbitration proceedings were pending, hence, claim of the Appellant, BHEL against corporate debtor could not be said to have crystallized or be a definite claim, hence, the question of such contingent claim being secured by purported line of argument could not arise.

14) It was again emphasised that the auction purchaser on payment of entire sale consideration, got the certificate of sale which was issued by the liquidator on 20.05.2019 and in this certificate of sale no such facts were mentioned, hence, as a *bonafide* purchaser after payment of full consideration, auction purchaser acquired complete right, title and interest in such property which could not be disturbed. He further contended that even statutory charge was not enforceable against *bonafide* purchaser without prior notice thereof. For this proposition, he relied on following two decisions:-

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1. *State of Karnataka & Another Vs. Shreyas Papers (P) Ltd. & Others (2006)1 SCC 615 @prs. 18-23 dated January 5, 2006.*
2. *Dattatreya Shankar Mote & Others Vs. Anand Chintaman Datar & others (1974) 2 SCC 799 @prs. 28-30 dated October 3, 1974.*

15) It was also contended that in CA(IB)684/KB/2019, the applicant described itself as Operational Creditor, hence, it was not entitled to any preferential payment and could not claim any lien or seek cancellation of the said sale. In this regard, it was pleaded that appellant was entitled to receive money in terms of water fall mechanism provided under section 53 of IBC, 2016 which it was trying to avoid or by-pass by making claim of non-existence lien over the said goods. The learned senior counsel further contended that purchaser was not at all concerned with the issue relating to distribution of sale proceeds and, therefore, issue of lien which was relevant only for the purpose of distribution of sale proceeds under section 53 of IBC, 2016 could not in any way affect the valuable right of the purchaser. He further submitted that in case it was found that there exist a charge/ lien then also such situation would result only into over sale proceeds/ right to receive payments as opposed to any rights over the underlying property. For this proposition, he relied on the following judicial decisions:-

1. *Raj Lingam Vs. Somanna (died) & Others AIR (1967) AP 7 @prs. 5-6 dated March 26, 1965,*
2. *Dattatreya Shankar Mote & Others Vs. Anand Chintaman Datar & others (1974) 2 SCC 799 @prs. 14, 17 and 24 dated October 3, 1974.*

16) The Ld. Senior Counsel, thereafter, referred to provisions of section 35(1) (b) and 35(1)(f) of IBC, 2016 and contended that the liquidator was duty bound to take the possession of the assets of the corporate debtor i.e. company in liquidation and to sell the same and, therefore, sale executed by liquidator could not be stopped or

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cancelled on the ground that appellant had any purported lien in respect of any such goods.

17) The Ld. Senior Counsel further pleaded that the the contract was awarded for the work of design, engineering, manufacturing, testing, supply, transportation etc. and therefore it was an instance Turn-key project of establishing a Thermal Power Project. Therefore, provisions of Sales of Goods Act,1930 were not applicable. Further,the appellant did not have possession, hence, unpaid sellers lien would not be applicable.

18) The Ld.Senior Counsel thereafter drew our attention to the prayers made by the applicant in C.A.(IB)No.684/KB/2019 and submitted that the goods were purchased as scrap and had already been dismantled and, therefore, prayer for return of goods/equipments could not be implemented at all. Thus, the only possible outcome could be, if the claims of the appellant/applicant were to be accepted, that monetary compensation could be claimed.The learned senior counsel drew our attention to the methodology of valuation of plant and machinery adopted during the course of CIRP as well as liquidation process. It was submitted that sale had been done at the much higher value then the valuation done by three valuers and marginally lower then the valuation adopted by one valuer.Average of all the valuations was 16 crores and actual sale price was 23.40 crores excluding tax, hence, no fault could be attributed to the valuation done by the valuers. He further submitted that the appellant/applicant had pointed out shortcomings/ discrepancies in regard to valuation , however, in fact no such discrepancies existed. In this regard, he drew our attention to the pages 57/113 of the reply and pointed out that there was no case of under valuation or wrong valuation.

19) Lastly, the Ld. Senior Counsel contended that a new case cannot be made out in the Rejoinder for the first time and that too without giving any opportunity to the auction purchaser Respondent No.2 to

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deal with such contention. For this proposition, he relied on the following judicial decision:-

Anant Construction (P) Ltd. Vs. Ram Niwas 1994 (31) DRJ 205 @ prs. 7.3,17 dated 3 October, 1994.

20) We have considered the submissions made by the parties and also perused the material on record.

21) The issue involved in this petition is regarding the status of the appellant i.e. whether appellant is a secured creditor or unsecured Operational Creditor. As per appellant, it is secured operational creditor and the basis for such claim is that it has got lien and charge in respect of goods sold and lying in its possession and used in erection of plant and machinery as per the provisions of Sections 45 to 48 of Sale of Goods Act, 1930 and Section 55(4)(b) of the Transfer of Property Act, 1882 respectively. During the course of hearing a specific query was posed by the Bench as to whether in view of provisions of section 238 of IBC, 2016, such provisions of Sales of Goods Act, 1930 and Transfer of Property Act, 1882 would be applicable or not. As per the learned counsel, these provisions are not contrary to any provisions of the IBC, 2016, hence, such provisions were to be read in harmonious manner and, consequently, provisions of these Acts would be applicable to decide the claim of the appellant. This proposition leads us to search into the scheme and specific provisions of IBC, 2016 and Regulations made thereunder to find out whether there exist some specific provisions which can be applied to determine the status of appellant i.e., whether such creditor is a secured creditor or unsecured creditor. This exercise is required because IBC, 2016 is a complete Code in itself and provisions of this Code prevail over the provisions of any other laws/instrument, which are contrary/ inconsistent to the specific provisions of IBC, 2016 as prescribed in section 238 of IBC, 2016 or not in consonance with the overall objects and scheme of the IBC, 2016. It is also a settled judicial proposition that if any

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specific provision exists in the IBC, 2016, then, such provision has to be given effect to.

- 22) Having stated so, now we have to consider various provisions which are relevant for our purpose. Firstly, we look at the definition of the term "secured creditor" which has been given in section 3(30) of IBC, 2016 and is reproduced as under:-

"Secured Creditor" means a creditor in favour of whom security interest is created".

- 23) This definition has got two elements (i) there should be a creditor and (ii) in whose favour security interest is created. As far as status of the appellant as a creditor or rather as operational creditor is concerned, it is not disputed. Thus, the question which we have to look into is whether any security interest has been created in its favour. The emphasis is on the word "created". However, before giving our thought on this, it is considered necessary to peruse the definition of term "security interest". It is defined in Section 3(31) of IBC, 2016 and is reproduced as under:-

" Security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person".

- 24) This definition covers the situation of creation as well as provision of a right, title or interest or a claim to a property in favour of a secured creditor to secure payment or performance of an obligation at the first instance. This definition has widened the scope of the mode and manner of creation of security interest in a sense that as per section 3(30) the word "created" only has been used, whereas in this definition not only the word "created" but "provided" has also been used. In our considered view, this is so because in case of financial

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transactions generally security is provided, whereas in case of operational transactions security is created in terms of the specific arrangement between the parties. Thus, the intent is to cover both types of creditors.

- 25) It is further noted that definition of security interest is inclusive and expansive as it includes mortgage, charge, hypothecation, assignment and encumbrance as well as any other agreement or arrangement securing payment or performance of any obligation of any person". The crucial part is inclusion of creation or/provision of interest through agreement or arrangement between the parties.
- 26) The definition of term "security interest" uses different terms which have been defined in other Sections of the IBC,2016, hence, we would glance through them in brief manner. The term "property" is defined in section 3(27) of IBC, 2016 and is reproduced as under:-

"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;"

- 27) It is evident that this definition is inclusive. Notably, this includes goods and property of every description situated in India or outside as well as every description of interest, whether present or future or contingent arising out of, or incidental to property.
- 28) In the definition of security interest, creation or provision is through a transaction. The term "transaction" has been defined in section 3(33) of the IBC, 2016, which is reproduced as under:-

"Transaction" includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor".

From perusal of this definition, it is evident that there should be an agreement or arrangement in writing for the transfer of assets or funds, goods or services from or to the Corporate Debtor. It is

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further crucial to note that in this definition, the term “transfer” has been used which has been defined in Section 3(34) of IBC, 2016, which reads as under:-

“ Transfer” includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien”.

From the perusal of the terms “transaction” and “Transfer” in cumulative manner, it is evident that there should be transfer of a right, title, possession or lien from or to the corporate debtor by way of an agreement or arrangement in writing. Thus, the condition of an agreement or arrangement in writing, is precursor or lays a ground for creation of security interest.

29) Thus, the word “created” used in Section 3(30) and 3(31) of IBC, 2016 is of paramount importance. The term “create” has not been defined in the IBC, 2016, hence, we have to look for the dictionary meaning of the same. As per *Concise Oxford English Dictionary 12th Edition* this term means “Create”-v.1 *bring into existence*”. The term “create” can also be interpreted to mean to make something happen or to develop something. It may also amount to make someone to do something and to provide the condition in which something can happen or exist. It also means to confer a right or to give rise to right or title or interest. Thus, there must be an action or process of creating meaning thereby that such creation is a result of an action by the parties consciously or explicitly. To explain it further, in our view, a security interest that arise due to operation of law or due to any event other than a deliberate act of creation or provision by the parties will not be covered the under definition of “secured creditor” as well as of “security interest” as given in IBC, 2016.

30) Thus, when all these terms are read together, there remains no doubt that IBC, 2016 provides a specific mechanism in regard to what is security interest and how such security interest is created/provided for. Accordingly, we hold that provisions of Sales

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of Goods Act, 1930 or Transfer of Property Act, 1882 relied on by the appellant are inconsistent or contrary to specific provisions of IBC, 2016, hence, not applicable. The inconsistency is apparent because on same set of facts two different conclusions are resulting under different statutes. The principle of harmonious construction is applied when there is no such inconsistency and the result is in furtherance to the object to the Act or Code whereunder proceedings are being adjudicated or decided. Accordingly, we reject the contention of the appellant that the provisions of these Acts are in harmony with the object of the Code.

31) Having stated so, now, we have to look into the agreement/arrangements as entered into by and between the appellant and the corporate debtor in writing to find out whether any security interest in favour of appellant has been created or provided for realisation of its dues in the event of default by the corporate debtor in payment thereof or not. This position leads to find out whether there is a written agreement/arrangement between the parties to this effect. In this regard it is noted that no formal contract has been executed between the parties and therefore, we have to look into the terms and conditions of the NIT and letter of award.

32) Before proceeding further, it is most crucial to note that originally payment was secured by an arrangement of provision of LC by the appellant/BHEL, however, this condition had been waived. As submitted by the learned counsel for the appellant and in the absence of any material on record, no alternate arrangement have been made to secure the payment, hence, it would not be out of place to mention that if this condition would not have been waived and that too without alternative arrangements being made for securing the payment, this issue would not have arisen before us at all. Be that as it may, we have very carefully gone through various clauses of NIT as well as letter of award. However, we are unable to find any clause therein, which can be said to have created security

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interest in favour of the appellant. Even the thrust of all the arguments of the appellant is on the basis of possession of goods, title of the goods and corresponding lien/ charge based upon the provisions of Sale of Goods Act, 1930 and Transfer of Property Act, 1882 which we have held that are not applicable in view of specific provisions and scheme of the IBC,2016.

33) In this regard, we further mention that letter of award was given on 28.06.2010. The total contract price is mentioned in Clause 2 thereof and terms of payment are contained in Clause 4 of the said letter of award. As per the terms of payment initial advance, balance of advance and milestone payments have been specified. Annexure-2 to this Letter of award mentions that corporate debtor was to open irrecoverable revolving usance LC without recourse and no liability of BHEL which was to be valid till the end of the Contract period. Thus, payment of BHEL stood secured. However, as stated earlier such LC Clause has been deleted subsequently. It is also to be noted that as per letter of award contract for the subject BTG package indicating details terms and conditions had to be signed between the parties shortly as informed to us no such contract has been signed so far. Thus, this LOA becomes a binding document and in such LOA no clause regarding possessory lien or interest/right or claim both in the material supplied and erected, has been created. We have also gone through the terms and conditions of NIT wherein matters relating to insurance as well as possession/custody/supervision have been dealt with but there exists no Clause as regard to lien/charge in respect of unpaid consideration. We have gone through the general conditions of the contract as well as special condition of the contract and in such conditions also there does not exist any provision for creation of lien/charge in favour of the appellant in respect of goods supplied and used in erection of the plant and machinery. This fact also been highlighted by the liquidator in its order dated 03.06.2019 that the

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LOA between the parties does not stipulate any term which grants appellants a right as unpaid seller lien.

34) It is further noted that in the order dated 3rd June, 2019, Liquidator has referred to a decision of the Hon'ble Madras High Court in the case of *Bharat Heavy Electricals Ltd. and others Vs Arunachalam Sugar Mills Ltd.* and others dated 12.04. 2011 wherein Clause 3.11.1 of contract between the parties thereto has been referred to by the Hon'ble High Court. This Clause is reproduced by us as under for the purpose of depicting that had this clause been there in the letter of award/NIT or other correspondences/documents between the parties, then perhaps the status of the appellant in the present case could have been held as of a secured creditor.

3.11.1 "The Goods, shall immediately, in consideration of payment of the first installment of the Contract Price to the supplier by the PURCHASER, become and remain the property of the Purchaser; provided always that the SUPPLIER shall have a particular possessory lien on the Goods to the extent the value thereof exceeds the total value of the installment payments made by the PURCHASER to the SUPPLIER Transfer of title to goods shall be ex-works".

35) Thus, after due consideration of facts and applicable of legal provisions as discussed in detail herein before, we hold that appellants does not have any security interest and consequently, it cannot be considered as a Secured Creditor.

36) Although, we have held that the appellant does not have any security interest, hence, it cannot be considered as secured creditor. Still we consider it necessary to deal with the contention of the liquidator/ Auction purchaser that as per regulation 21 of IBBI (liquidation process) Regulation, 2016 security interest did not exist as it may have implications in other cases. Before expressing our view in this regard, we consider it necessary to reproduce Regulation 21 as under:-

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21. Proving security interest.

The existence of a security interest may be proved by a secured creditor on the basis of -

- (a) the records available in an information utility, if any;*
- (b) certificate of registration of charge issued by the Registrar of Companies; or*
- (c) Proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India;*

37) From the perusal of the above Regulation, it is evident that this regulation comes into play only when status of a creditor has been ascertained as a secured creditor and not before that. Secondly, in the said clause word "may" has been used and, therefore, it is not mandatory and other modes can also be used to prove security interest. Thirdly, Regulations need to be consistent with the provision of IBC, 2016 as prescribed in Section 240 of the IBC, 2016. While rejecting the claim of the appellant, we have referred to definitions of the term "transaction" Section 3(33) of the IBC, 2016 and "transfer" section 3(34) of the IBC, 2016. In addition to these terms, the term "charge" has been prescribed in section 3(4) of the IBC, 2016, which reads as under :-

"Charge" means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage".

38) This definition is identical to the definition of this term given in Section 2(16) of the Companies Act, 2013. However, as per provisions of section 77(1) of the Companies Act, 2013 a duty has been cast upon every company to register a charge with Registrar of the Companies which has been created by the company. However, no such requirement has been prescribed in IBC, 2016 either in the aforesaid definition or any other provision or any Regulations made thereunder i.e. Regulation 21 of IBBI (Liquidation Process) Regulations, 2016 or Regulation 20 of IBBI (Voluntary Liquidation Process) Regulations, 2016 as these Regulations only prescribe as

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to how the security interest could be proved. It is also evident that charge registered under Section 77 of the Companies Act, 2013 is only one of the modes as per these Regulations to prove security interest, hence, if we accept the contention of the auction purchaser/ liquidator that unless the charge created by company is registered under section 77(1) of the Companies Act, 2013, the liquidator, as per the provisions of section 77(3) of the Companies Act, 2013, would not take such charge into account, then this would result into an apparent conflict between the provisions of Companies Act, 2013 and IBC, 2016. To further explain this, if a charge has been not created and registered under section 77 (1) of the Companies Act, 2013, then an obvious inconsistency arise between the two enactments in a sense that two different legal results are produced when applied to same facts if the contention of the liquidator or auction purchaser is accepted. Any different interpretation would make Regulation 21 of the IBBI (Liquidation Process) Regulations, 2016 and Regulation 20 of the IBBI (Voluntary Liquidation Process) Regulations, 2016 a nullity as security interest can be proved through other modes under these Regulations. In our view, provisions of IBC, 2016 would have to be given precedence over the provisions of Companies Act, 2013 in spite of the fact that section 77(3) of the Companies Act, 2013 is also a *non- obstante* provision because in such a situation, if any other documents are available to prove existence of security interest then on that basis, the liquidator can adjudicate upon the aspect of security interest. We also consider it necessary to mention here that IBC, 2016 is an amending and consolidating legislation in relation to the matters of Bankruptcy and Insolvency, hence, provisions of IBC, 2016 have to be given primacy or overriding effect over the provisions of other Acts/Laws even when such provisions are also of the nature of limited *non-obstante* provisions. Thus, we reject this contention of Liquidator and Auction purchaser .

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39) In this regard, we also consider it relevant to reproduce Regulation 20 of IBBI (Voluntary Liquidation Process), Regulation 2016, as under:-

20. Proving security interest.

The existence of a security interest may be proved by a secured creditor on the basis of-

- (a) *The records available in an information utility;*
- (b) *Certificate of registration of charge issued by the Registrar of Companies;*
- (c) *Proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India; or*
- (d) *Other relevant documents which adequately establish the security interest.*

40) As compared to Regulation 21 of IBBI (Liquidation Process) Regulations, 2016, a noticeable difference exists by virtue of Clause(d) of the aforesaid Regulation 20 which provides that other relevant documents can adequately establish the security interest. As stated earlier that Regulation 21 of IBBI (Liquidation Process) Regulations, 2016 is directory and discretionary in a sense that it uses the word "may", hence, to implement the scheme of the IBC, 2016 an inference can be drawn that other relevant documents can also be used to establish existence of a created security interest under liquidation proceedings ordered on failure of CIRP.

41) Even though we have already held that provisions of Sales of Goods Act, 1930 are not applicable in view of specific provisions of IBC, 2016. There has been contentious issue of possession as to who is having the possession of the goods and materials supplied by BHEL including the material which has been consumed in erection of plant. The Liquidator in its order dated 03.06.2019 has held that possession had been transferred to the corporate debtor along with the title but as per NIT, there is a condition under the head

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“document” in clause 7 of General Conditions of the Contract which reads as under:

Page- 61 *“In the case of a divisible contract, the title of ownership of Goods to be supplied shall pass on to the Owner on despatch Ex-works/F.O.B. Port of shipment. However, untill the work is completed in all respects and the Plant is taken over by the Owner, the Goods shall remain within the custody of the Contractor”.*

42) This term refers to “work” which has been defined in Clause 2.1.38 of definitions relevant for interpretation of General Conditions of Contract. This said term reads as under:-

2.1.38- *“ Work or Works” shall mean and include all permanent and temporary works to be executed, all items and things to be supplied/done and services and activities to be performed by the Contractor pursuant to and in accordance with the Contract as described in Section-3”.*

The clause 7 also refers to term “goods” which has been defined in Clause 2.1.19, which is reproduced as under:-

2.1.19- *“Goods” shall mean plant, equipment or materials to be supplied under the Contract Document”.*

The term “plant” has been defined in Clause 2.1.27, which reads as under:-

2.1.27- *“Plant” shall mean the thermal power plant and additional components as detailed in the Specification”.*

43) Thus, if the above arrangement is read as a whole, it appears that goods supplied remain within the custody of the Contractor i.e. BHEL till the work is completed and Plant is taken over by the corporate debtor. It is also pertinent to mention that Plant has not been taken over by the corporate debtor as the contract got abandoned in between. The insurance clause also mentions that the

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liability for insurance lies with the Contractor. A letter written by the Managing Director of the corporate debtor on 23.03.2016 to the GM, BHEL copy of which is placed at pages 216 and 217 paper book Volume-II in CA(IB) No.684/KB/2019 dated 23.03.2016 also states the same position not only as regard to possession but also states that risk and reward were also lying with the contractor, which is applicant. The relevant portion of this mail is reproduced as under:-

“ Please note that all the materials are in BHEL’s custody at site and are lying there entirely at the risk of BHEL and in the absence of any preservation, the condition of the materials is deteriorating. VPL reiterates that BHEL remains solely and fully responsible for the condition and safety of equipment/ materials, as well as insurance thereof, in BHEL’s custody, including the materials that have already been erected at site, till such time the same is completely erected & commissioned”.

Thus, this claim of the liquidator is rejected but it has got no bearing on our decision that the appellant does not have any security interest in the absence of any specific Clause in NIT as well as LOA.

- 44) It was also pleaded by the appellant that liquidator though observed that decision in regard to lien could be decided by a Court and in spite of that the liquidator proceeded to decide this issue on his own, hence, such action of the liquidator was not valid. In our view, this plea has got no merit as per the provisions of IBC,2016 and Regulations made thereunder. Liquidator is a *quasi judicial* authority unlike resolution professional, who has to work under supervision and decision making authority of CoC. The liquidator under Section 40 of IBC has been given an authority to decide the matters relating to claims of the parties read with Regulation 30 of IBC (Liquidation process) Regulations, 2016 whereas, IRP/RP has got the power just to collect, verify and collate the claims during CIRP. Accordingly, we reject this contention of the appellant.

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45) The other ground in this appeal is regarding reduction of its monetary claim by the liquidator. The amount of reduction has been stated at Rs. 92,78,90,786/- which is on account of reduction in the rate of interest claimed by the BHEL at 80% to SBI base rate. The Liquidator has given reason for such reduction based upon the fact that no interest clause existed in the contract, hence, we do not find any merit in this claim of the appellant. Thus, this ground stands rejected.

46) **Now, we shall proceed with the C.A.(IB) No.684/KB/2019. The basic facts remain the same and additional facts/contentions raised by the parties would be discussed as may be necessary.**

47) The learned counsel for the applicant has raised following contentions:-

I. The issuance of sale notice dated 11.04.2019 was violative of the provisions of IBC,2016 and was an act over reaching this Authority. In this regard, it was contended that when the sale notice was issued there was a pending claim of the applicant as regard to it's lien/charge on the plant and machinery supplied by the applicant and possibility of such claim becoming a reality could not be ruled out.As regard to legal aspects involved therein, the learned counsel submitted that the applicant would had a right under Section 52 of the IBC as a secured creditor read with proviso to Regulation 32 of IBBI (Liquidation process) Regulations, 2016 and, therefore, any auction could not be initiated unless the applicant had relinquished its security interest in the liquidation estate. It was vehemently argued that liquidator in the present case, accepted the claim of the applicant at Rs. 572 Crores, whereas reserved price was arrived at 23.30 crores, which was roughly 4% of the total claim of the applicant alone and it was also not clear that which of the assets of the applicant were valued and which were left out. The learned counsel further contended that issuance of sale certificate on

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20.05.2019 without complying with the directions of this Authority given in its order dated 10.05.2019 virtually amounted to contempt. Such action created strong doubts on the *bonafides* of the liquidator as hearing on 29.5.2019 was an empty formality for the reason that subsequent to issue of sale certificate no decision in favour of the applicant could have been possible at all. It was also prayed that there existed no circumstances which could justify such action of liquidator.

II. The next line of argument was based upon the fact that valuation was arbitrary, improper and full of inconsistency, hence, the entire process appeared to be an outcome of collusive working. To elaborate on this point, the learned counsel submitted a chart and made different claims. For the sake of ready reference, the chart along with observations of applicant thereon is reproduced hereunder:-

	<i>During</i>	<i>CIRP</i>	<i>During</i>	<i>Liquidation</i>
<i>Asset/ Valuer</i>	<i>Adroit Valuation</i>	<i>United Surveyors</i>	<i>Mr. Anit Goel</i>	<i>Mr. Partha P. Chottopadhyay</i>
<i>Land</i>	33,13,79,583	26,92,21,000	39,64,09,415	44,62,38,000
<i>Building</i>	8,99,56,226	6,75,30,000	8,84,18,596¹	2,06,19,000
<i>Total(L&B)</i>	42,13,35,809	33,67,51,000	48,48,28,011	46,68,57,000
<i>P&M</i>	14,06,72,000²	30,33,11,000³	11,83,56,929⁴	9,73,46,000⁵
<i>Furniture & Fixtures; Office Equipments, Computers etc</i>	<i>NIL</i>	<i>NIL</i>	24,46,814	7,84,000

1 Mr. Ankit Goel has taken the partially erected (I) Turbine Generator Structure;(ii) Boiler Tower & (iii) ESP as building and has purportedly valued them on per Sq. ft basis.

2. Adroit has taken only erected portions of (I) Boiler Tower &(ii) ESP towards P & M. No other material lying at site erected or any other

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partially erected plant has been taken into account of valued. Nor any valuation is done for office furniture & fixtures, Viz. ACs, Almirahs etc. nor any valuation is done for computers etc. Or any other moveable asset.

3. First Valuer depreciated the value by 91% in 3-4 and arrived at a "Value" and took 50% of the said value to arrive at the liquidation value. No basis for such huge depreciation was provided. Whereas other valuers provided expected life at 40 years and 60 years. Further, there is absolutely no basis provided in the report. There is no clarity what quantity has been taken into consideration for valuation. Nor any valuation is done for office furniture & fixtures, viz. ACs, Almirahs etc. nor any valuation is done for computers etc. or any other moveable asset.

4. The valuation was only for the P & M mentioned in the Fixed Assets Register. No material supplied by BHEL was valued.

5. Valuation was for the P & M mentioned in the Fixed Assets Register and also for the erected portions (assumption is based on the original cost taken for the calculation as that is close to the quantity used for erection).

48) In support of his claims, the Learned counsel drew our attention to page no.23 of additional affidavit filed by the applicant on 23.09.2019 containing part E of Valuation Report done by Adroit and submitted that the total quantity of Boiler Turbine and Generator was shown much less as against quantity actually supplied by the applicant. At this point, it was pointed out from the liquidator side that this quantity was arrived at considering the material which had been used for installation and erection of Boiler and balance was lying in the yard allocated to the applicant. The learned counsel for the applicant vehemently contended that the plant and machinery was sold at less than 1/3 of the prescribed rate for the sale of scrap metal, which was published by the joint plant committee constituted by Government of India and this fact alone was sufficient to cancel the auction. To support this contention, he referred to Annexure-A of Rejoinder to Respondent

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No.1 dated 21.08.2019 page no. 20 which contained the market price as on 15.06.2019. According to the learned counsel, the value per metric ton should have been actually realised at Rs. 33000 per metric ton as against Rs. 9000 per metric ton now received.

49) The learned counsel also submitted that the material supplied was not only lying in the enclosures the area allocated to it but it was lying on different locations and the liquidator had given a wrong affidavit that material belonging to the applicant was lying only in the allocated area to it. Hence, the valuation could not be said to be correct as it was not clear as to what material had been included and what material had been excluded. The learned counsel, thereafter, contended that furniture and fixtures and office equipments which were valued at Rs. 24.46 lakhs and Rs. 784 lakhs whereas reserve price was fixed at Rs. 12 lakhs and 6 lakhs, and no basis was provided for the same, hence, such action also suggested that due diligence and case was absent.

50) The learned counsel again reiterated that there was significant divergence in the approach of both the valuers as regard to ascertainment of depreciated value of the plant and machinery based upon useful life and also the depreciated value of assets was ascertained at lower than the scrap value, hence, scrap value should have been considered as the liquidation value. According to him, for this reason also, the auction process was in contravention of the provisions of liquidation process regulations and provisions of section 36(2) IBC, 2016 which envisaged the benefit for all the creditors. Thereafter, he contended that in the certificate of Sale dated 20.05.2019 Turbine Generator Structure, Boiler Tower and ESP Electrostatic Precipitator which shown as part of plant and machinery, whereas the same were shown as part of building in the sale notice dated 11.04.2019. These structures were sold on the basis of per sq. meter instead of per metric ton. In this regard, he referred to the relevant pages of Auction notice as well as sale



certificate and in particular drew our attention to pages 57,113 and 189 to 193 of the reply filed by the auction purchaser and additional affidavit filed by applicant containing copy of sale notice.

- 51) The 3rd line of argument was that since liquidator was holding the liquidation estate in a fiduciary capacity for the benefits of all the creditors in terms of provisions of section 36(2) of the I.B.Code, hence, it was his duty to protect the interest of all creditors in the best possible manner. This being so and when fairness of his conduct was challenged, then, the onus was upon the liquidator to show that transaction was done in perfectly fair and reasonable manner. For this proposition, he placed strong reliance on the order of the Hon'ble Supreme Court in the case of *Krishna Mohan Kul Vs. Pratima Maity (2004) 9 SCC 468*.
- 52) The learned counsel submitted that the adjudicating authority was having requisite powers as well as an obligation to ensure that the entire liquidation process was transparent, fair, reasonable and for the benefit of all the creditors. To further buttress this point, he referred to provision of Section 35(1)(n) of IBC,2016 which required liquidator to submit progress report of liquidation process to adjudicating authority from time to time read with relevant Regulations 5,13 & 15 of IBBI (Liquidation Process) Regulations, 2016. It was also submitted that such reports were not submitted merely for record keeping. The learned counsel further emphasized that the adjudicating authority had an implied obligation to examine the correctness and adequacy of valuation reports as held by the Hon'ble Supreme Court in the case of *Union Bank of India Vs Official Liquidator (2000) 5 SCC 274*.
- 53) Thereafter, the learned counsel made following points as well:-
- a. Liquidator had not filed any material nor there was any evidence on record to show that what quantity of plant and machinery were still lying nor was there any clarity on the

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quantity and identification of the material which was included or not included in the valuation.

b. It was also not clear as to what had been sold and what had not been sold.

c. The auction purchaser had even lifted the material belonging to BHEL but no F.I.R. or other corrective actions were taken by liquidator to prevent happening of such event. At this stage, the liquidator submitted that F.I.R. had been filed.

d. Liquidator had not taken any steps to recover the material that had been illegally removed, hence, this fact was sufficient to indicate that there was a complicity between the liquidator and the auction purchaser. The scrap valuation should not been less than Rs.33,000/-per metric ton, whereas the liquidator had sold the entire plant and machinery for less than Rs. 9,000/- per metric ton. Hence, there was a case of gross under valuation and faulty report.

e. The fact that applicant was one of the stake holders entitled to distribution of proceeds under section 53 of the IBC,2016, hence, the liquidator ought to have consulted/ share the reports of such consultation with the applicant being largest creditor in terms of 2nd Proviso to Section 35(2) read with Regulation 5(3) of IBBI (Liquidation Process) Regulations, 2016.

f. The Tribunal had right to set aside auction process and direct auction purchaser to restore the status quo ante. In this regard, he placed reliance on the decision of the Hon'ble Supreme Court in the case of *Kavita Trehean Vs. Balsara Hygiene Products Ltd. (1994) 5 S.C.C. 380*, wherein the Hon'ble Court had held that whenever the justice of the case demands court had inherent power to make restitution. He also placed

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reliance on the decision of the Hon'ble Supreme Court in the case of *Chinnammal & Ors Vs. P. Arumugham & Ors (1990) 1 S.C.C. 513* for the proposition that restitution could be demanded from a person who purchased the property in Court auction being aware of the pending appeal against the decree and in the present case the issue of applicant's claim regarding lien/charge was subjudice and known to the auction purchasers, hence, restitution of the property back to the applicant would meet ends of justice.

g. Assuming that there was no collusion but fact that on the date of sale notice applicant's petition no. CA (IB) No. 149/KB/2019 was pending and on the date of sale certificate Tribunal's direction given in the said petition were yet to be complied, with these facts should have been brought to the notice of the auction purchaser. Thus the liquidator failed to discharge his duty.

h. There were only two bidders and the unsuccessful bidder had no financial credential / capacity/ networth. Thus, It appeared to be a case of comfort bid to award the contract to auction purchaser only. The learned counsel drew our attention to the financial documents of the M/s Pavani Construction Work Pvt. Ltd. to show that it was incorporated only in 2016 .In this regard, he further drew our attention to financial statements/details.

54) **The learned counsel appearing on behalf of the liquidator initiated his arguments** by stating that the application had been filed with malafide intention and just to stall the proceedings. In this regard, he submitted that Rules and Regulations as per the provisions of law were followed in letter and spirit and no violations occurred. For such claim, he referred to second progress report filed by the liquidator on 16.04.2019 wherein it was mentioned that liquidator conducted first meeting of stakeholders 18.01.2019 and

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second meeting was conducted on 13.03.2019 to discuss the progress of liquidation process and future course of action to be adopted.

55) The learned counsel for the liquidator referred to Annexure-A containing the minutes of the second consultation meeting dated 13.03. 2019 wherein issue of valuation of assets was discussed in detail. He referred pages 29 to 33 and 51 to 55 of the progress report to show that valuation was done as per valuation, norms/ standards by the approved/ registered Valuers and there was no arbitrariness or under valuation of assets. It was emphasized that assets belonging to corporate debtor were only valued and assets belonging to applicant BHEL were not considered by the valuers, hence, arguments made by the applicant in this regard were absolutely based on the assumptions without any cogent material being brought on record.

56) After narrating these facts, the learned counsel for the liquidator made a legal plea that valuation was an area of expert and this adjudicating authority had a very limited role therein. He stated that expert opinion was to be respected unless some gross mistakes or arbitrariness were observed. For this proposition, he referred to the decision of Hon'ble Supreme Court in the case of *J.L. Sultania & others Vs Securities and Exchange Board of India and others as reported in AIR 2007 SC 2172* and drew our attention to paras 80 and 81 of the said order. He also referred to the decision of the Kolkata Bench NCLT in the *Nicco Corporation Limited and others in Miscellaneous Application No.(IB) 585/KB/2019* vide order dated 25.06.2019 wherein action of the liquidator was found to be valid. He, thereafter, placed reliance on the decision of the Kolkata Bench in the case of *Dr.Syed Sabahat Azim Vs Sahaj-E-Village Limited and others as reported in 2017 SCC Online NCLT 2115* for the proposition that when valuation has been done as per accepted norms then the same could not be challenged where either of the



parties was not satisfied. On the aspect of correctness of the valuation reports, he referred to valuation reports obtained during the course of CIRP as well as during the liquidation process to show that physical inspection was done. On enquiry, the recording of physical inspection done by Adroit during CIRP, that specific date of inspection could not be cited. However, it was stated that such valuation being older than six months, hence, it had not been used for fixing reserve price during the liquidation process. Thereafter, he referred to reports of Mr. Goyal and Mr. Partha and contented that valuation of plant and machinery was done in the appropriate manner. He once again reiterated that all the stakeholders had been consulted. All secured creditors and numerous Operational Creditors had accepted the valuation except the applicant, hence, this fact by itself was sufficient to indicate that applicant had no bonafide intent and such application was filed just to stall the process.

57) Thereafter, he contended that the applicant had filed an arbitration wherein only the money claim had been made and issue of its lien/charge was not a subject matter and, therefore, such claim could not be raised now. The learned counsel also referred to the order of liquidator dated 31.12.2018 where applicant had been shown as unsecured creditor and on this basis, it was pleaded that how the unsecured creditor could raise such claim.

58) As regard to the contentions of the applicant that the liquidator had violated the order/directions of this authority, which were given in its order dated 10.05.2019, it was reiterated that no violation of whatsoever nature had been done. It was strenuously argued that liquidator had complied with the directions of Tribunal by passing a reasoned order.

59) As regard to the validity of bids, the learned counsel submitted that the eligibility criteria for auction was deposit of 10% of the bid amount and on that basis bidders were to be finalised. No other

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criteria was required in the circumstances of the liquidation process, hence, there was no necessity to look into the financials of prospective bidders. He emphasized that after deposit of earnest money if the prospective bidder was not in a position to execute the auction sale that the liquidator could forfeit the same as per terms and conditions of the auction, hence, no adverse impact could happen on the liquidation process. Thus, there was no substance in such pleadings of the applicant.

60) As regard to the onus aspect, it was stated that onus lies on the person who alleges and not on the person against whom such allegations are made. As regard to the case relied on by the applicant in this regard, it was submitted that the learned counsel submitted that the case was distinguishable on facts as in the present case liquidator was not having any superior authority/dominant position.

61) The Learned Counsel for the liquidator further submitted that present application was an instance of selective picking one points from here and there to build up a case which did not exist in the facts and circumstances. Hence, the petition filed by the applicant was liable to be dismissed. He further submitted that the plant had been dismantled, proceeds of sale had already distributed and the applicant being the unsecured Operational Creditor, hence, restitution was not possible, hence, for these reasons auction process could not be cancelled. It was again emphasised that having regard to the nature of assets/materials which had been sold, no restitution was possible in fact, and hence, due to such limitation, the request for restitution was liable to be dismissed. He further stated that case laws relied on the applicant were distinguishable on facts.

62) **In the Rejoinder, learned counsel for the BHEL submitted that** scope of the arbitration proceedings was in the background of entirely different settings where BHEL was seeking relief for

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termination as the contract was not under execution and, therefore, to say that claims not made therein could not be made now or the debt had not crystallised were totally incorrect. The learned counsel, for this view, submitted that BHEL submitted/made claim in Form-B and Form-C as per applicable regulations and the liquidator had accepted its claim to the tune of Rs. 574 Crore and, therefore, there was no merit in such contentions of the auction purchaser.

63) The learned counsel, thereafter, submitted that Notice Inviting Tender provided that possession had to remain with the applicant/appellant although the title had passed for limited purpose of execution of contract/project. It was further pleaded that during the course of CIRP, if the possession had been handed over because of operation of law that by itself did not mean that the appellant/applicant did not have right as unpaid seller on the basis of possession till that time or it got extinguished thereafter as such condition was not prescribed Section 46/47 of the Sale of Goods Act, 1930.

64) As regard to the delay and applicant being termed as sleepy, the learned counsel submitted that since beginning all actions were taken in time and, therefore, it was not correct to say that there was a case of belated action. In this regard, he further emphasised on the fact that the BHEL filed an appeal against the provisional admission of claim order immediately which was pending for disposal and wherein such issues had been raised and, therefore, this claim was made by the auction purchaser just to secure its interest and were devoid of merits.

65) It was also pleaded that pages 57/113 were not part of the same document as claimed by the auction purchaser in a sense that page 57 was part of sale notice whereas page 113 was part of E-auction process document and discrepancies were apparently noticeable. Therefore, this was an instance of wrong statement of fact on the part of the auction purchaser. The learned counsel again reiterated



that it was not clear that which property was valued and which property was not valued. It was also not clear that which property was sold and which property was not sold. It was also pointed out that no reply in writing or oral submissions were made by the liquidator in regard to valuation and these discrepancies. The learned counsel also referred to page 193 of the reply of the auction purchaser wherein plant and machinery included the assets which had been shown as part of land and building in sale notice/ E-auction process document and contended that this was major discrepancy/manipulation which could not happen without any extraneous considerations on the part of the liquidator. The Learned counsel, thereafter submitted photo of the plant and machinery and contended that only two erected machineries i.e. Boiler Tower and ESP (Electrostatic Preceptor) were valued whereas 3rd erected plant/ machinery (TG structure) was not valued at all though it has also been sold. He also submitted that materials were sold at much lessor price and, if the materials supplied by the other vendors/ contractors were also taken into consideration the price fetched/realised would be much more less and, therefore, it was a perfect case for cancellation of auction.

66) We have considered the submissions made by the parties and have also perused the material on record of this CA as well as CA(IB)No.792/2019. This application raises following questions:-

- (1) Whether liquidator has complied with the order of the Tribunal dated 10.05.2019 in CA/149/KB/2019?
- (2) Whether there exists a case for cancellation of auction? Whether restitution as claimed by the applicant can be made and any mechanism is prescribed for enforcement of such claim in IBC, 2016?

67) Firstly, we shall deal with the question whether liquidator has complied with the order of Tribunal dated 10.05.2019.

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68) It is noted that corporate debtor was put under liquidation vide order dated 11.10.2018 after CIRP failed to result into any positive response/ feasible resolution plan. The appellant filed their claim as Operational Creditors before the Liquidator wherein security interest was also claimed. The Liquidator vide provisional admission of claim dated 31.12.2018 finalised the order of priority and category of appellant as an Unsecured Creditor to be governed by provisions of section 53(1)(f) of IBC, 2016. The learned Liquidator refused to accept the claim of interest on unpaid amount since the matter was under arbitration. The appellant filed an Appeal under section 42 of the IBC, 2016 in January, 2019. The Tribunal passed an order on 10.05.2019 in CA(IB)No.149/KB/2019 in CP (IB) No.574/KB/2017. It has been pleaded by the learned Liquidator that this Tribunal required the Liquidator for passing reasoned order for rejecting or allowing the claim of the applicant. The Liquidator after calling for an information from the appellant passed a "Reasoned Order" on 03.06.2019 maintaining the status of appellant as an "Unsecured Operational Creditors". Since, the thrust of the argument of the learned Liquidator is that he was required only to pass a reasoned order, hence, we consider it necessary to reproduce the prayers made in the appeal and findings of the Tribunal in order dated 10.05.2019 as under for understanding the issues raised therein and directions given by the Tribunal:-

Prayers made in CA/149/KB/2019,

"A. Set aside the decision of the Liquidator dated 31.12.2018 (received on 04.01.2019) rejecting the claim filed by the Appellant and direct the Liquidator to admit the claims of the Appellant in terms of 'Form C':

B. Declare that the Appellant has an unpaid seller's lien under the Sale of Goods Act, 1930 on the material supplied that are lying/stored at Corporate Debtor's Project Site and a statutory charge under the provisions of Transfer of Property Act, 1882 on the goods supplied that have since been erected; and .."

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ORDER OF TRIBUNAL

"This appeal is under section 42 of Insolvency and Bankruptcy Code, 2016(in short, "IBC") is filed by one of the creditors of the Corporate Debtor, M/s Bharat Heavy Electricals Limited against the order of the Liquidator, dated 21.12.2018.

7. The point for determination before this Tribunal is whether the order passed by the Liquidator admitting the appellant's claim provisionally needs any interference. My answer to this point is affirmative for following reasons:

7.1. Very recently, the Hon'ble Supreme Court in the ruling of Swiss Ribbons Private Limited -vs- Union of India observed that, " It is clear from these sections that when the liquidator "determines" the value of claims admitted under section 40, such determination is a "decision", which is quasi-judicial in nature, and which can be appealed against to the Adjudicating Authority under section 42 of the Code". In view of this, it was necessary for the Liquidator to give suitable reason of his decision while accepting or rejecting the claim of the creditor under section 40 IBC.

7.2. It is necessary to see whether in this case the Liquidator has really passed any reasoned order while accepting or rejecting the claim of the appellant.

8. I perused the records, I did not come across any reasoned order passed by the Liquidator accepting or rejecting the claim. The appellant did not produce copy of such formal order. The Liquidator, though filed affidavit-in-reply in this proceeding, did not produce the copy of his order for perusal of this authority. In this case, the Liquidator is acting in dual capacity, (i) that he is in control of the assets of the corporate debtor who is under liquidation and (ii) he is sitting as a quasi judicial authority to determine the claims of the creditors. In such situation, it becomes too essential for him to give reasons for his decision about admitting or rejecting the claim. As already pointed, the Liquidator did not produce copy of the order. But in his reply para-7, he stated that, " the claim was indeed filed by the appellant before the Liquidator, however, as the amount claimed therein were subject to adjudication by Arbitral Tribunal. At this moment, it cannot be ascertained whether corporate debtor failed to make payment to the appellant".

9. It appears from the above contentions of the Liquidator that he did not at all determine the claim. He just ignored the claim only on the ground that the

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dispute about the some parts of the claim is going on before the Arbitrator. It is not expected from the quasi-judicial authority, like the Liquidator for not considering the claim of the appellant. In fact, this authority, during course of hearing, has suggested the Liquidator to consider the claim as per the rules and this authority may pass such orders but the Liquidator did not accept the suggestion saying that it is not possible for him due to complexity of facts and figures. However, such approach of the Liquidator cannot be approved.

10. Be that as it may, since the Liquidator failed to pass reasoned order, as per section 40 of IBC, this appeal succeeds. I pass the following order:-

ORDER

I. The appeal is allowed. The matter is remitted back to the Liquidator for passing appropriate reasoned order by rejecting or allowing/partly allowing the claim of the appellant, as per the rules.

II. Liquidator to decide the claim within 30 days of this order.

III. CA(IB) No. 149/KB/2019 stands disposed off. CP to come up for further consideration along with other pending CAs on 26.06.2019.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities."

69) From the perusal of the prayers made in the petition CA(IB)no.149/KB/2019, it is noted that the appellant had raised the issue of lien/charge in prayer No. B in a specific manner. Apart from this in prayer A, the appellant had prayed for a direction being given to the liquidator to admit the claim of appellant in terms of "Form-C". It is to be noted that in Form C both monetary claim and claim of security interest were made. Further, appeal filed by the appellant was allowed and in para I & II of the order, wherein it has been specifically directed that the liquidator was to pass an appropriate reasoned order "by rejecting or allowing/partly allowing the claim of the appellant as per Rules" and to decide the claim within 30 days from the date of this order. The approach of liquidator in deciding the claim was also not approved. The directions given by the Tribunal clearly state that liquidator could

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reject or allow or partly allow the claim as per rules. Had the decision of liquidator been upheld then Tribunal would have not so directed and instead the appeal would have been dismissed. Thus, there is no iota of doubt that the appellant's monetary claim and claim of lien were to be decided afresh by the liquidator. Whereas the liquidator, in our considered view, has wrongly assumed that his decision of 31.12.2018 had been approved and he was merely required to pass a reasoned order. In this regard, it is pertinent to reproduce relevant various pleas made by Ld. Liquidator in it's reply in CA No. 792/KB/2019 as under:-

Para 19, page-33-xii. That it is important to state that the hearing which took place in C.A. (IB) No. 149/KB/2019 in C.P. (IB) No. 574/KB/2917 was only with regard to claim admittance of BHEL and it is wrong to suggest that the subject matter in the said applicant was Plant & Machinery. That it is clear from the Order dated 10.05.2019 that the order was passed with a direction to the Ld. Liquidator for passing a detailed order. Hence, it is apt to state that there was no direction with regard to the Plant and Machinery and as the same was not even the subject matter of dispute in the said proceedings, the fact of E-Auction was not specifically brought to the notice of the Hon'ble Tribunal.

Para 19, page-34-xiv. That at the cost of repetition, it is apt to state that the Order dated 10.05.2019 was passed with a direction to Liquidator to pass a reasoned order. That the same direction was complied with by the Ld. Liquidator and in that regard a detailed order was passed by the Liquidator provisionally admitted the claim filed by BHEL.

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Page 36,para-17-That the contents of Para 2(r) are wrong and hence, denied. It is most humbly submitted that the operation of 11.04.2019(should be 10.05.2019) was limited to the extent that the Liquidator was directed to pass a detailed order. It is specifically stated that there was no direction passed by the Hon'ble Tribunal against auctioning of the Plant & Machinery. Therefore, the Liquidator continued with the liquidation process of the corporate debtoras per the mandate provided under the Code. It is most humbly stated that the prayer of the Appellant with regard seeking a declaration that the Appellant has an unpaid seller's lien under the Sale of Goods Act was not accepted by this Hon'ble Tribunal. Therefore, it is wrong to suggest that the Liquidator acted contrary to the provisions of the Act and failed in his duties as the Liquidator.

Page 37,para-19-That the contents of Para 2(t) are wrong and denied. It is most humbly stated that the Liquidator suppressed any material fact from this Hon'ble Tribunal. That it is most humbly reiterated that the auctioning the Plant & Machinery was continued as there was no stay granted by the Hon'ble Tribunal and the prayer made by the Appellant seeking declaration against the goods was also not accepted by the Hon'ble Tribunal. Therefore, it is wrong to imply that the conduct of the Liquidator violated provisions of law.

Page 38,para-20- That the contents of Para 2(u) are admitted to the extent that the order dated 10.05.2019 was passed by the Hon'ble Tribunal. It is stated that the operation and extent of the said order passed by the Hon'ble Tribunal was limited to the extent that

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the Liquidator was directed to pass a detailed order and there was no direction passed regarding the dis-continuance of the liquidation process.

Page 38,para-22-*That the averments made in the para 2(w) are misplaced and hence, denied. It is denied that the Liquidator did not take all steps in compliance with the order dated 10.05.2019 passed by the Hon'ble Tribunal. That it is denied that the Respondent has shown scant respect to the said order as the Respondent in compliance with the Order dated 10.05.2019 passed the detailed order reiterating the earlier stand taken by the Liquidator that the Appellant has no lien/charge on the Plant & Machinery lying at the site.*

Page 40,para-30-*That the contents of Para 2(D) are admitted to the extent that the Appeal being C.A.No.149/KB/2019 was filed by the Appellant. However, it is specifically denied that the appeal was allowed in toto and the matter was remitted back to the Liquidator. It is respectfully stated that the operation of the said order was limited to the extent that the Liquidator was directed to pass a detailed order and no order of stay against the liquidation process was passed by the Hon'ble Tribunal. Therefore, it is wrong to state that the liquidator ought to have refrained from continuing the liquidation process.*

70) In this regard, the submissions made by liquidator in Progress Reports are also reproduced.

(i) In the 3rd Progress Report dated 12.07.2019 filed on 15.07.2019 in the Index at serial no. 12,the particulars have been stated as "copy of reasoned order dated 03.06.2019 passed by the liquidator". At page 20 of the said progress report, following

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observations have been made under the head developments in any material litigation by or against the Corporate Debtor”:-

“ On the basis of above verification Liquidator passed a reasoned order dated 03.06.2019 as per the direction of Hon’ble NCLT. Further BHEL has filed an application against the order passed by the Liquidator. The matter is listed on 30.08.2019. A copy of reasoned order dated 03.06.2019 passed by the Liquidator is annexed as Annexure-J”.

(ii) In the 4th Progress Report under the same head following observations have been made by the liquidator:-

“ Developments in any material litigation, by or Against the Corporate Debtor

Litigation initiated by BHEL- As reported in the previous Progress Report, Bharat Heavy Electircals Limited (BHEL) filed a claim of Rs. 6,64,98,37,221/- including interest after the liquidation commencement date, wherein the Liquidator provisionally admitted its claim of Rs. 2,90,01,85,395/- and rejected the amount of interest of Rs. 3,74,96,51,826/-. The Liquidator issued Provisional Claim Admittance Letter, wherein it was stated that no specific contract contract or order has been provided with respect to interest claimed by BHEL. Hence, the same is disputed and rejected. Appeal under Section 42 of the Code was filed by BHEL against this order of the Liquidator. (CA(IB) No. 149/KB/2019 in CP (IB) No. 574/KB/2017).

The Hon’ble Tribunal vide its order dated 10.05.2019 remitted back the matter to the Liquidator for rejecting/allowing the claim by passing a reasoned order within 30 days.

As directed through the order dated 10.05.2019 the Liquidator invited BHEL to his office for producing necessary documents and to explain the factual matrix of the transaction by BHEL. Accordingly, the representatives of BHEL along with their Attorneys visited the Liquidator’s office and explained the flow of transactions and categorizing the large volume of supporting documents. The representatives of BHEL showed

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the invoices raised, the amounts of the same were tallied by the Liquidator's team and re-conciliations were done.

On the basis of above verification Liquidator passed a reasoned order dated 03.06.2019 as per the direction of Hon'ble NCLT. Further BHEL has filed an application against the order passed by the Liquidator. The matter is listed for hearing on 16.10.2019 and will be decided by Hon'ble NCLT with other applications filed by BHEL".

(iii) In order dated 03.06.2019, the liquidator has stated as under:-

" While verifying and issuing such Certificate, the Liquidator had however finalised the "Category" and "order of priority under Section 53(1)" of BHEL. BHEL was categorised as an "unsecured operational creditor" and its order of priority was finalised at "Section 53(1)(f)" being "any remaining debts and dues".

In exercise of its rights under Section 42 of the Code, BHEL preferred an Appeal against the Liquidator's decision of provisionally admitting the principal claim and rejecting the interest claim before the Hon'ble NCLT. It is stated that BHEL neither challenged the category nor the order of priority as decided by the Liquidator in its appeal".

(iv) In reply affidavit dated 28.08. 2019 in CA (IB) No. 792/KB/2019, it has been mentioned that in para 18 at page 8 as under:-

" Thereafter, Ld. Liquidator passed a "reasoned order" dated 03.06.2019 re-affirming therein that BHEL is an "unsecured operational creditor" of the Corporate Debtor. The Ld. Liquidator in the said detailed order observed and reiterated its earlier stand that BHEL has no lien/statutory charge over the property lying at the site and the Ld. Liquidator has every right to dispose of the said property in order to maximize the value of the assets of the Corporate Debtor. It is imperative to reproduce

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the operating part of the reasoned order passed by the Ld. Liquidator”.

71) In our considered view, the approach of the liquidator in forming such belief/opinion is contrary to the factual position as evident from the grounds of appeal and findings of the Tribunal. It is a settled position that findings and prayers are intertwined and ultimate decisions is relevant. Hence, in the facts of the case as discussed above such presumption is not justified. Further the liquidator is obliged to work subject to the directions of the Adjudicating Authority as provided in Section 35(1) of IBC,2016. As per provisions of Section 35(1)(n) of IBC,2016, the liquidator shall apply to the Adjudicating Authority for such orders or directions as may be necessary for orderly liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board. Thus, in our considered view, the better option for the liquidator was to take clarification from this Authority, however, instead of doing that, the liquidator proceeded to issue sale certificate on 20.05.2019 and interestingly after issuing such sale certificate, the liquidator required the appellant to give evidences/submissions in regard to their claim and passed so called reasoned order on 03.06.2019 which, in fact was not of any value in a sense that once a sale certificate had already been issued no different view on the subject could have been taken. Rather this act of the liquidator confirms the fact that he has passed such order on 03.06.2019 just to show that he had complied with the directions of the Tribunal which, as per his own understanding, required him to pass only a reasoned order. Assuming for a moment that the liquidator was required to pass a reasoned order only, no material has been brought on record or a convincing argument has been made as to why such order was not passed before issuance of sale certificate after giving a proper opportunity to the applicant. Further, no material has been brought on record to show that what was the urgency to issue sale certificate on 20.05.2019.



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72) This approach of the liquidator raises a query in our mind as to what could be the reasons for such approach as generally in such situations a conservative/cautious approach adopted. We make it amply clear that we are not attaching any motives rather attempting to find out structural issues, if any which could be a contributory factor apart from one's own way of functioning. This prompts us to have look at the scheme of the IBC,2016 and position of the liquidator. As per the objects of the IBC, 2016, liquidation is not envisaged in the normal course rather even in the course of liquidation, the emphasis is on sale of corporate debtor as a going concern. In spite of this objective, data show that instances of liquidations are much more than the resolutions in the three years of operations of IBC, 2016. There is a serious need to re-look at the mechanism as provided in the IBC,2016. In this factual background, we find that one of the central problems identified on the poor implementation of bankruptcy systems in India has been the liquidator as mentioned in the Vishwanathan Committee Report, 2015 and therefore, it was recommended that the efficient completion of liquidation fully rested on the shoulders of the liquidator. The liquidator has been made responsible for orderly completion of liquidation and for this purpose, he has been given full freedom and required authority. Thus, scheme of the IBC,2016 and role of the Liquidator needs a little elaboration.

73) When we look at the scheme of the IBC,2016, it is noted that two mechanism for insolvency resolution have been prescribed in the IBC, 2016. First process/mechanism is resolution of insolvency through CIRP as prescribed in Chapter II of Part II of IBC, Code, 2016. Second mechanism is liquidation which gets triggered on failure of first process. The liquidation process mechanism is prescribed in Chapter-III of Part II of IBC, 2016. Corporate Insolvency Resolution Process starts with the filing of application under sections 7,9 or 10 of IBC, 2016. If admitted by the Adjudicating Authority, appointment of IRP happens. CoC in the first meeting is required to

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approve the IRP as RP or appoint any other person as RP. The RP so appointed can be replaced under section 27 of IBC, 2016 if Committee of Creditors is of the opinion that resolution professional appointed under section 22 was required to be replaced. As against this, the Creditors or other stakeholders have no power to remove or replace the liquidator. The power of Adjudicating Authority under section 34(4) of the IBC,2016 is extremely limited and applicable only in three specified situations which practically means that liquidator once appointed cannot be removed or replaced.

74) Further, we find that role of RP is more of a administrator and his powers and duties are under complete superintendence/ subject to approval of CoC in respect of commercial decisions during CIRP. Resolution plan also requires approval of the Committee of Creditors. As per settled judicial position, commercial wisdom of CoC is supreme and intervention by Adjudicating Authority in rejection of resolution plan can happen only in very rare situations when provisions of section 30(2) of IBC,2016 are found to be violated. In contrast, there is no supervisory/approving authority over liquidator. The plan of sale of liquidation estate is solely at his discretion except a permission may be required in case of private sale. The appointment of valuers is at his discretion. As per provisions of section 35(2) of the Code, the liquidator has been vested with the power to consult any of the stakeholders entitled to distribution of proceeds under Section 53 of IBC,2016, however, such consultation is not binding on the liquidator. Further the records such consultation shall be made available to all other Stakeholders not to so consulted in a manner specified by the Board. This takes us to IBBI (Liquidation Process) Regulations, 2016. As per regulation 2(1)(k) "Stakeholders" means persons entitled to distribution of proceeds under section 53 of IBC,2016. As per Regulation 5 of IBBI (Liquidation Process), Regulations, 2016, liquidator is required to prepare reports and submit the same to the



Adjudicating Authority. For the sake of ready reference, this Regulation is reproduced as under :-

5. Reporting.

(1) *The liquidator shall prepare and submit :*

- (a) *a preliminary report;*
- (b) *an asset memorandum;*
- (c) *progress report(s);*
- (d) *sale report(s);*
- (e) *minutes of consultation with stakeholders;and*
- (f) *the final report prior to dissolution*

To the Adjudicating Authority in the manner specified under these Regulations.

(2) *The liquidator shall preserve a physical as well as electronic copy of the reports and minutes referred to in sub-regulation (1) for eight years after the dissolution of the corporate debtor.*

(3) *Subject to other provisions of these Regulations, the liquidator shall make the reports and minutes referred to sub-regulation (1) available to a stakeholder in either electronic or physical form, on receipt of a stakeholder in either electronic or physical form, on receipt of*

- (a) *An application in writing;*
- (b) *Costs of making such reports and minutes available to it; and*
- (c) *An undertaking from the stakeholder that it shall maintain confidentiality of such reports and minutes and shall not use these to cause an undue gain or undue loss to itself or any other person.*

As per this regulation, asset memorandum is to be prepared. As per sub regulation (3) reports/ minutes referred to in sub regulation (1) could be shared with a stakeholder subject to other provisions of these regulations. In the present case, the appellant has raised the contention that he was not provided any asset memorandum or valuation reports. This plea was negated by the liquidator on the basis of regulation 34(5) of IBBI (Liquidation Process), Regulations, 2016 which states that asset memorandum shall not be accessible to any person during the course of liquidation unless permitted by the Adjudicating Authority. In present case, the liquidator *suo motu* did not share asset memorandum with the appellant who is undoubtedly a stakeholder. No doubt such obligation in law does

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not exist and even the appellant had not applied for asset memorandum/ valuation reports earlier but provided if he would have applied, as per provisions of regulation 34(5) read with regulation 5(3), this would not have been made available to him in the normal course and only option remained available to appellant was to approach this Authority which he has been done subsequently. Now, by the Notification no. IBBI/ 2019-20/ GL/Reg.047 with effect from 25.7.2019, a new regulation 31A has been incorporated in IBBI (liquidation process) Regulations, 2016 whereby constitution of the stakeholders consultation committee has been made mandatory which would advise on the matters relating to sale under regulation 32. The Operational creditor would also have representation therein based upon percentage of their claim. However, it is noteworthy that the advice of the consultation committee would not be binding on the liquidator. This is a welcome step but requires further strengthening .

75) It is further noteworthy that liquidator is a quasi judicial authority as against RP who is merely the administrative authority. As per section 40 of the IBC, 2016 the Liquidator can adjudicate upon claims made by the creditors whereas in case of CIRP this power exists only with the CoC.

76) The duties which the liquidator has to perform have been prescribed in Section 35 and Section 36 of IBC,2016. Significant duties are to protect and preserve the assets and properties of the corporate debtor and to carry on the business of the corporate debtor for its beneficial liquidation. Apart from this, he has to sell the immovable and moveable properties by public auction or private contract in case the corporate debtor or its business cannot be disposed of as a going concern. The liquidator is obliged to verify the claims of all creditors, consolidate such claims and determine the value of such claims. The liquidator has been given specific power under section 40 of the IBC,2016 to admit or reject claims against which an

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appeal may be preferred before the Adjudicating Authority under section 42 of the IBC,2016. For formation of liquidation estate, a specific provision has been made in Section 36(3)(g) of IBC,2016 that any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest would only be included in the liquidation estate. Thus, there has been put a prohibition/limitation whereby asset of the corporate debtor wherein security interest has been created cannot be made part of liquidation estate unless such security interest has been relinquished by the secured creditor in terms of provisions of section 52 read with provisions of section 35(1)(f) and proviso to Regulation 32 of IBBI (Liquidation process) Regulations, 2016. It is important to note this proviso has been added with effect from 22.10.2018 to align regulations with the substantive provisions.

77) It is also noteworthy that as far as secured creditor is concerned, the moratorium ends immediately after completion of CIRP so that such secured creditor if wishes so, then it can realise its security interest on its own and not putting his secured as security into liquidation estate. The moratorium for other parties may continue as per the provisions of section 33 (5) of IBC, 2016. Thus, security interest becomes a central point in the liquidation proceedings.

78) From the perusal of the above discussion, it would be evident that CIRP is driven by Committee of Creditors, whereas liquidation is driven by liquidator. The liquidator has got immense powers. Although, he is subject to the direction by the Adjudicating Authority but normally no intervention/ monitoring of day to day functioning of liquidator is envisaged in the IBC,2016 or Regulations made thereunder. The liquidator is suppose to function as trustee of the creditors. He works as a fiduciary for the benefit of all the creditors. This is statutorily recognised in section 36(2) of the IBC, 2016. The said clause reads as under:-

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“36(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors”.

This brings a great obligation on the part of the Resolution Professional, who functions as a liquidator to work in a transparent and ethical manner.

79) Further Regulation 7 (2) (h) of IBBI (Insolvency Professionals) Regulations, 2016 read with Schedule-I thereto provide for code of conduct for Insolvency Professional. These are the guidelines which are to be followed by a Insolvency Professional for furtherance of the object of IBC, 2016 and also to maintain the dignity of the Insolvency Profession. Such mechanism also goes to depict that the responsibilities by the liquidator have to be discharged in a thoroughly professional manner.

80) One can understand that this mechanism is being provided based upon global practices, our earlier experiences or practices or considering the fact that if liquidation is delayed, the value of liquidation estate may erode very sharply but if subsequent events/empirical data show that this mechanism has resulted into more liquidations than resolutions or other unintended consequences then corrective measures be taken as soon as possible within the framework of existing Law and Regulations or if required, necessary modifications be carried out to attain the core objectives of IBC, 2016, in spite of fact there may exist mechanism to fix the accountability for lapses but it is advisable to have preventive measures/safeguards in place as compared to curative action so that economic value is maximised and mud slinging is avoided.

81) In the present case, the liquidator treated the applicant as unsecured creditor in his provisional order dated 31.12.2018 against which an appeal in C.A.(IB) No. 149/KB/2019 had been filed and final order was passed on 10.05.2019 whereby the provisional order of the liquidator dated 31.12.2018 had been set

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aside and the liquidator was directed to decide the claims made by applicant afresh. Thus, having regard to the sequence of events, the claim of lien/charge had to be decided prior to issue of sale certificate. On this basis, it can safely be concluded that the action of the liquidator in issuing sale certificate before deciding the claim of security interest of appellant is not correct because on that date there was a possibility that there could be a security interest of the applicant and, if that would have become a reality, unless security interest was relinquished under section 52, such asset could not have formed part of liquidation estate at the very outset. We further hold that order of Tribunal has not been understood by the liquidator in its true spirit.

82) Now, we will take up question No.2, which reads as under:

“Whether there exists a case for cancellation of auction? Whether restitution as claimed by the applicant can be made and any mechanism is prescribed for enforcement of such claim in IBC, 2016?”

83) In this regard, in our view, it is important to reproduce the facts narrated by the applicant which would be relevant for arriving at final conclusion. The same are reproduced as under:-

“4.18- C.A.(I.B.) No. 149/2019 was listed for final arguments before this Hon’ble Tribunal on 11.04.2019. Respondent No.1 was present and chose to represent himself in person. It is relevant to note here that, as detailed in the following paragraphs, Respondent No.1 completely suppressed the fact that just a day before, he had already initiated the process of auction of all the assets of the corporate debtor including all the Plant & Machinery lying at the project site whether in an erected or un- erected form.

4.19 - It is also relevant to note that most of the material at the Project Site was supplied by the Applicant, on which, the Applicant had claimed a lien/charge. The issue was directly the

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subject-matter of the Appeal being argued on 11.04.2019 before this Hon'ble Tribunal . Admittedly, no auction could have taken place without deciding Applicant's claim of lien and charge. Still, Respondent No.1 despite being an officer of the court as the Liquidator and having a professional duty to make proper disclosures, suppressed this material fact from the Hon'ble Tribunal with the ulterior motive of receiving wrongful gains in complete violation of the law and professional ethics.

4.20- *On the face of it, Respondent No.1's omission is intentional and deliberate and amounts to a gross misconduct and smears of a larger conspiracy between the Respondent No.1 and the alleged successful auctioneer. It is pertinent to note here that suppression of material facts by the Respondent no.1, apart from being unethical is contemptuous in nature. On this ground alone, the whole auction process deserves to be declared illegal and set aside with directions to the Respondents to restore the status quo ante.*

4.21- *Pursuant to the final hearing on 11.04.2019, this Hon'ble Tribunal was pleased to reserve the matter for orders. This Tribunal was pleased to allow the said Appeal vide order dated 10.05.2019 and remanded the matter to Respondent No.1 for passing an appropriate reasoned order as per law within thirty days. Needless to state that with the Appeal being allowed, the decision of the liquidator dated 31.12.2018 stood set aside and became non-est.*

4.22- *Consequently, it was expected from the Respondent No.1 to recall the action notice and put an immediate stop to all acts and directions, if any, issued pursuant to or in furtherance of the auction process. It was also expected that at least now Respondent No.1 will give an opportunity to the Applicant to substantiate its claims. As an officer of the court the Respondent No.1 was duty bound to take all steps in compliance of the order/directions of this Hon'ble Tribunal dated 10.05.2019 and was duty bound to discharge his obligations strictly in terms of the IBC, Code and the Regulations. Instead, in gross violation of the order/directions of this Hon'ble Court dated 10.05.2019, the*

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Respondent No.1 showing scant respect to the said order/directions, acting surreptitiously and in connivance with the Respondent No.2, on 20.05.2019 confirmed the auction sale of the entire plant and machinery at Project Site and issued a 'Certificate of Sale' in favour of the Respondent No.2. On the fact of it, the entire act of confirmation of sale is an act in wilful defiance of this Hon'ble Tribunal's directions and is contemptuous in nature. It is relevant to note here that Respondent no.1's decision/ act of going ahead with the auction sale and issuing 'Certificate of Sale' made Applicant's claim qua lien/ charge infructuous.

4.23- As part of a large design, after issuing a 'Certificate of Sale', merely as an eyewash on 27.05.2019, Respondent No.1 issued an e-mail dated 27.05.2019 to the Applicant stating that, in terms of the order dated 10.05.2019 passed by this Hon'ble Tribunal, a hearing has been scheduled at the office of the Liquidator on 29.05.2019 at 11:00 a.m. A copy of the e-mail dated 27.05.2019 sent by Respondent No.1 to the Applicant is annexed as Annexure-15.

4.24- However, it came to the knowledge of the Applicant on 27.05.2019, that some unknown persons claiming to be the representatives of Respondent No.2 had reached the Project Site and stated that they have come to take the 'Plant & Machinery' from the Project Site. On enquiry from the security personnel of the Applicant present at the Project Site, it was discovered that the Plant & Machinery is being taken out from the Project Site since 21.05.2019. Applicant's security personnel at Site handed over a copy of a 'Certificate of Sale dated 20.05.2019' issued by Respondent No.1 wherein it was stated that Respondent No.1 has purportedly sold the 'Plant and Machinery' at the Project Site to Respondent No.2. It is pertinent to note that Schedule-1 to the Certificate of Sale dated 20.05.2019 includes various Plant & Machinery over which the Applicant has a lien and charge. Further, the said unknown persons have since removed large quantities of Plant & Machinery from the Project Site.

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4.25- On further enquiry, the Applicant learnt that Respondent No.1 had issued an auction notice dated 10.04.2019 in a local Hindi newspaper for an auction of the 'Plant & Machinery', amongst others, on 'as is where is basis' to be conducted on 01.05.2019. Shockingly, Respondent No.1 did not deem it fit to disclose this fact to this Hon'ble Tribunal or to the Applicant at the time of final arguments before this Hon'ble Tribunal on 11.04.2019. Upon becoming aware of the actions of Respondent No.1, the Applicant issued a notice dated 28.05.2019 to the Respondents calling upon them to inter alia immediately cease and desist from removing any plant & machinery from the project site. A soft copy was served on the Respondents on 28th itself. A hard copy was served on the Respondent No.1 on 29th May, 2019. A copy of the notice dated 28.05.2019 sent by the Applicant to Respondents is annexed as Annexure-16.

4.26- The Appellant also raised these issues at the hearing before Respondent No.1 on 29.05.2019. Respondent No.1 confirmed that the purported auction notice dated 10.04.2019 and the purported certificate of sale dated 20.05.2019 was issued in respect of Plant & Machinery including the Plant & Machinery over which the Applicant has a lien and/or charge. However, Respondent No.1 refused to cease and desist from removing the plant and machinery over which the Applicant has a lien and/or charge from the Project Site.

4.27- It is submitted that the acts of Respondent No.1 amount to gross professional misconduct, are contemptuous in nature and are in the teeth of the order dated 10.05.2019 passed by the Hon'ble Tribunal in C.A.(I.B.)No.149/KB/2019. The decision of Respondent No.1 dated 31.12.2018 was set aside by this Hon'ble Tribunal, still, Respondent No.1, audaciously went ahead with the auction sale of all the assets including the Plant and Machinery supplied by the Applicant and proceeded with the purported sale of the Plant & Machinery without deciding the claims of the Applicant, including the lien and charge held by the Applicant. As such, the purported sale of the Plant & Machinery has caused grave prejudice to the rights of the Applicant.



4.28- Moreover, the clandestine manner in which the purported auction has been conducted and the Plant & Machinery is sought to be removed from the Project Site raises legitimate and grave concerns as to the conduct of Respondent No.1 and Respondent No.2. Respondent No.1 had every opportunity to disclose these facts to the Hon'ble NCLT as well as to the Applicant, however, Respondent No.1 deliberately concealed the purported auction process and his purported dealings with Respondent No.2 which leads to the inevitable conclusion that Respondent No.1 and Respondent No.2 have considered to enter into the purported sale of the Plant & Machinery with the ulterior motive of receiving wrongful gains in complete violation of the law and the order dated 10.05.2019 passed by the Hon'ble NCLT.

84) A bare perusal of the above shows that, in sum and substance, the applicant is aggrieved by the functioning and approach of the liquidator during the liquidation process. The applicant has not only referred to the flouting of legal provisions but has also doubted the integrity of the liquidator. During the course of pleadings also averments to this effect have been made. Thus, the question that arises from this how this grievance can be addressed within the framework of IBC.2016.

85) For the moment, we leave it here as it is and proceed to discuss other aspects as we will deal with this later on.

86) The applicant has challenged the valuation not only on account of improper method being adopted whereby the value has been arrived at on substantially lower side by allowing an exceptional depreciation as against normal depreciation although the plant has not been operated and fully erected. In this regard, it is noted that approaches of two different valuers also vary. Secondly, items valued and sold also appear to be different, hence, a case of lesser revenue. It is also noted that some of the items have been sold below the valuation amount. It has also been claimed that scrap value has

also been arrived at grossly under valued level. Thus, the valuation has been challenged on all parameters. It has been pleaded both by the liquidator and auction purchaser that the role of judicial authorities was very limited since the valuation was an exercise which was to be taken by an experts and this could not be disturbed unless there were apparent mistakes. There cannot be any dispute with this proposition but on the face of it, we find that there exist inconsistencies and contradictions in various documents produced before us, hence, a case of improper valuation is made out.

87) We also find that inconsistencies exists in the sale of plant and machinery. It is noted that assets were divided into four blocks. The auction has been done of plant and machinery and furniture and fixtures. Some of the plant and machinery as advertised in auction notice were classified under the head "land and building" in the valuation reports. However, in the sale certificate these appears to have been sold as plant and machinery, although no bids were received for land and buildings. It is also observed that the steel structure on the land foundation has been sold on per sq. meter Civil structure basis as against being sold as scrap/plant and machinery.

88) We also find that section 25(2)(h) of IBC, 2016 prescribes norms for preparation of information memorandum and evaluation matrix having regard to the complexities involved in a particular case. Though, such requirement is not applicable in the course of liquidation process, unless corporate debtor or its business is being disposed of on going concern basis. Having said so, this does not mean that disposal of assets can be done without having any intelligent criteria being applied for eligibility of bidders. In the present case, as stated by the liquidator, the only criteria which has been fixed was that deposit of 10% of amount as earnest money deposit (EMD). In our view, when sale of such a huge plant at very large site is involved, the background of the bidder is very important

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and their past experience of participation in such kind of auction and completing the auction transaction in a smooth manner is of utmost importance. However, in the present case, this criteria has not been appeared to have been followed. The financials of the second bidder do not support the credential even for depositing of 10% EMD.

89) There appears to be claims and counter claims as regard to what has been valued and what has not been valued. There also exist dispute as to what has been sold or what has not been sold. There is also a claim by the applicant that goods belonging to the applicant had been wrongly lifted by the auction purchaser. However, it has been refuted by auction purchaser as well as the liquidator.

90) The applicant has prayed for cancellation of auction and restitution. The primary request is for return of its goods while prayer for any other reliefs has also been made. Although, having regard to the above discussion, this should be a outcome but in the facts and circumstances of the case and applicable legal position, the moot question is can it really be done.

91) In this regard, we need to see the ground realities. This plant was installed way back in 2010-13. The site is spread over large area of land. The contract was abandoned in between. The plant and machinery erected has remained in open for almost 7 years. The auction of the plant and machinery, equipments/goods have been done as scrap. The plant and machinery has already been dismantled to a substantial extent and which can not be brought back to the form in which it was supplied or erected. Thus, it is physically impossible to return the plant and machinery. Accordingly, in our considered view, this prayer cannot be given effect. Even otherwise this would not serve any purpose in view of the fact that applicant is a unsecured creditor as held by us. Thus, higher sale proceeds, if any, would not go to the applicant as claims of the secured creditors would to be met first. In our view, this

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would further complicate the matter and result into prolonged litigation which is not justified in the context of economic legislation like IBC, 2016.

92) Apart from this, there exists a need to analyse the conduct of the applicant as a commercial person because in our considered view, enforcement of a right is also linked to its own conduct in a sense that what you are demanding should be justified in the background of your own approach/actions. To elaborate this, we have to go back to discussion as to how the contract has been executed i.e. the applicant has executed the contract on the basis of LOA only and no formal contract was signed. The provision of LC has been waived without securing its payment either due to financial constraints and no protection has been made for the situation of default including the wilful default. The valuation reports during CIRP have not been asked for in spite of being an invitee in the meetings of CoC. Such valuation reports were also not asked for nor any formal request was made in regard to obtaining of asset memorandum during liquidation as well.

93) The auction notice was published on 11.04.2019 and 12.04. 2019 though the matter was heard in appeal filed by the applicant in CA(IB)No.149/KB/2019 but no application was made by the applicant for stay of auction process particularly when site visits were happening thereafter which was in the applicant's knowledge. It is also a settled principle of law that relief must be sought in time, hence, merely filing application/ appeal to get relief which cannot be given due to intervening events, serves no purpose.

94) It is also noteworthy that sale certificate has been issued to the auction purchaser by the liquidator on payment of full consideration by the successful bidder. In the said sale certificate or in the auction notice or during the course of due diligence process, the Auction Purchaser has not been made aware of the fact of petition/claim made by the applicant as regard to its security

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interest, hence, as per settled judicial principles, a bonafide purchaser cannot be made to suffer. Further, the auction purchaser had no say/role in valuation of said goods/ materials, hence, the Auction Purchaser on the face of it cannot be said to have earned unlawful gains from auction.

95) Thus, for these reasons, the auction sale cannot be cancelled at this stage. That leaves us with the question of restitution.

96) The determination of this issue leads us to an interesting question i.e. whether Tribunal has got jurisdiction/ authority to grant the relief by way of restitution? To answer this, we need to look into the scheme and provisions of the IBC, 2016. The IBC, 2016 has prescribed roles of its different constituents. The roles of CoC, RP and liquidator have already been discussed herein before, hence, not repeated. The jurisdiction of Adjudicating Authority has been prescribed in various specific sections. For example under section 19(2) of the IBC, 2016, the Adjudicating Authority can direct the suspended Board of Directors to provide necessary cooperation to IRP/RP. Another example is approval of resolution plan under section 31 of the IBC, 2016 which is circumscribed by the provisions of section 30(2) of the IBC, 2016 and it has been repeatedly held that commercial wisdom of CoC is supreme and Adjudicating Authority cannot prevail over that. The Adjudicating Authority can decide the matters relating to preferential transactions, under-valued transaction, frauds etc. In addition to this under section 42, the Adjudicating Authority can decide an appeal filed by the aggrieved party by the decision of the liquidator as regard to its claim. The jurisdiction under section 60(5) of the IBC, 2016 also exists which is undisputedly a residual jurisdiction. For the sake of ready reference, this provision is reproduced as under :-

60(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-

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(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

97) The residuary jurisdiction vested in Tribunal through clause(c) above is to be applied in the present case. This clause provides for decision by Tribunal on various matters relating to Insolvency resolution or liquidation proceedings and has got overriding effect over any contrary provisions contained in any other law for the time being in force, hence, in our considered view, this jurisdiction is subject to specific provisions of the IBC, 2016. Thus, if any specific provisions/mechanism exist in IBC, 2016 and/or Regulations made thereunder for redressal of any grievance or any issue involving question of law or facts in relation to liquidation proceeding, then, such mechanism would have to be applied. To put it differently, such provisions will have to be given effect over this residual power given to Tribunal. In the IBC, 2016, roles of Adjudicating Authority, Appellate Authority and IBBI have been explicitly designed. There is no overlapping or ambiguity. IBBI is regulator who operates under the superintendence of Central Government, the Adjudicating Authority cannot give any directions to IBBI. The Adjudicating Authority cannot perform the functions which have been assigned to IBBI. For example, disciplinary proceedings against resolution professional can be taken only by IBBI. As can be seen from the various pleas made in this I.A., which have been reproduced herein before, the applicant is aggrieved by the functioning of the liquidator. For redressal of this, specific mechanism exists in section 217 & 218 IBC, 2016. Further, Regulation 11 of IBBI (Insolvency Professionals) Regulations, 2016 prescribes the procedure as to how the Disciplinary Committee would function and report to the Board in such matters. The IBBI is empowered to impose penalty on





Insolvency professional as per Section 220(3) of the IBC,2016. Section 220(4), 220(5) and 220(6) of the IBC,2016 provide for determination of unlawful gain earned by a person, to order disgorgement of an amount equivalent to such unlawful gain and to provide restitution to the person who suffered the loss from the amount so disgorged. Once these specific provisions exist, in our considered view, the proper forum to decide the question of restitution is IBBI and not this Adjudicating Authority. Thus, this contention of the applicant is rejected.

98) Now, the question arise as to what is to be done in the present facts and circumstances with regard to the lifting of goods/materials, plant and equipment etc. which have been auctioned and sale certificate has been issued and not yet lifted. As stated earlier, it has been alleged that goods belonging to the applicant has also been lifted whereas the same has been denied by the liquidator. Hence, to avoid any dispute in future the liquidator is directed to allow the lifting of goods after giving due notice of the same to the applicant who shall authorise its representative to oversee the lifting of material. The Auction purchaser is also directed to lift only that material which is cleared by applicant henceforth. The applicant is directed to accord it's approval without any delay. In any case, if approval is not done by the applicant of any such request within two days from the date of request made, the approval shall be deemed to have been granted.


99) We also consider it to mention that the applicant/ appellant filed written notes on 04.12.2019, after 10 days of conclusion of hearing though no directions were given to submit written notes. Accordingly, we have directed the Registry to return the same. Be that as it may, the applicant has cited decision of the *Chennai Bench in M.A. No. 1052/2019 in C.P. No. 646/IB/CB/2017 order dated 7.11.2019*, which is not applicable as the facts of that case are entirely different. In that case there was order of the Arbitration

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wherein BHEL was declared an unpaid Seller having lien on the equipment at site as well as goods and also charge over the fully/partially erected facilities, whereas no such arbitration award exists in the present case at first instance. Further the reasons given in our order, the contentions raised in the present CA have not been considered therein. Other decisions are regarding nature of EPC contract and claim which are based on the general principles of law, hence, not applicable at all for the proceedings under IBC,2016 in view of applicability of scheme and specific provisions of IBC,2016 as stated hereinbefore.

- 100) Before parting, we may add that we have carefully gone through all the judicial decisions relied by the applicant/appellant in both these petitions as we are of the view, that most of them are given in different set of circumstances, hence, not applicable or relevant in the context of scheme and specific provisions of IBC, 2016 read with Regulations made thereunder.
- 101) In the result, both C.A.'s stand disposed of in terms indicated above. There will be no order as to costs.
- 102) Urgent certified copies of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.


Virendra Kumar Gupta)
Member (T)


(Madan B Gosavi)
Member (J)

(Signed on^{13th} December, 2019)