

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 258 of 2023

[Arising out of Order dated 02.12.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, in I.A. No. 3207 of 2022 in CP(IB) No. 706/PB/2018]

IN THE MATTER OF:

Jasamrit Designers Private Limited,

Having its registered office at Plot No. 08,
Main Road, Opp. CNG Petrol Pump,
Goverdhan Vilas, Udaipur – 313001

...Appellant

Versus

1. Mr. Gian Chand Narang,

Liquidator of Apex Buildsys Limited,

409, Ansal Bhawan, 16 K.G. Marg,
Cannaught Place

2. Apex Buildsys Limited ,

B-292 Chandra Kanta Complex,
Shop No. 7, Near Metro Pillar No. 161,
New Ashok Nagar New Delhi,
110096

...Respondents

Present:

For Appellant: Ms. Pooja Mahajan, Ms. Arveena Sharma, Mr. Savar Mahajan, Advocates

For Respondents: Mr. Abhishek Anand, Mr. Karan Kohli, Mr. Vaibhav Mendiratta, Mr. Sahil Chopra, Advocates for Liquidator/Respondent

J U D G M E N T

ASHOK BHUSHAN, J.

1. This Appeal has been filed by Successful Bidder challenging the Order dated 02.12.2022 passed by National Company Law Tribunal, New

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Delhi, Principal Bench (hereinafter referred to as **“The Adjudicating Authority”**) disposing of I.A. No. 3207 of 2022 filed by the Appellant.

2. Brief facts of the case necessary to be noted for deciding this Appeal are:-

- a.** The Adjudicating Authority passed an order dated 09.01.2020 for liquidation of Apex Buildsys Limited- Corporate Debtor.
- b.** E-Auction Notice was issued by the Liquidator for sale of the Corporate Debtor as a going concern. After issuance of several E-Auction Notices by the Liquidator, e-Auction Notice was issued on 04th May, 2022 fixing 23rd May, 2022 as date for e-auction. E-auction process information document was also issued inviting bids for auction/sale of M/s. Apex Buildsys Limited as a going concern in its totality along with its employees/workers.
- c.** E-auction document contained various annexures and formats. E-Auction Notice also contained terms and conditions of the e-auction. Prospective bidders were required to make their own independent inquiries regarding the encumbrances, title of assets/properties of the company put on auction as going concern. It is useful to extract clause 2 of Terms and Conditions of the E-Auction which is to the following effect:

“The prospective bidders should make their own independent inquiries regarding the encumbrances, title

of assets/properties of the company put on auction as going concern and claims/rights/dues/affecting the assets and should conduct their own due diligence prior to submitting their bid. The e-auction advertisement does not constitute and will not be deemed to constitute any commitment or any representation of the Liquidator. The company is being sold with all the existing and future encumbrances/claims/dues/demands whether known or unknown to the liquidator. Liquidator shall not be responsible in any of way for any third party claims/rights/dues.”

- d.** Terms and Conditions of e-Auction under Heading P(II) Other Terms and Conditions of E-auction contains certain additional terms and conditions. Under clause 2, following has been stated:

“2. The Liquidator has proposed to conduct sale of the Corporate Debtor as a going concern in its totality as contemplated under Regulation 32(e) of the Liquidation Regulations through E-auction Process, as under: -

*a. **Upon payment of 25% of the bid amount**, A Term Sheet shall be executed between the Liquidator representing the Corporate Debtor and the successful bidder to give effect for sale of the Corporate Debtor as a going concern in its totality alongwith its employees/workers. The broad terms are stated herein below: -*

- The cut-off date for the purposes of determination of all assets and liabilities of the Corporate Debtor shall be the liquidation commencement date, i.e., January 9th 2020.*

- *The sale of the Corporate Debtor as a going concern shall result in the transfer of the entire available assets of the Corporate Debtor in favour of the successful bidder on the date of transfer after payment of full sale consideration amount, i.e., on the date of handover of the reins of the company.*
- *All known or unknown, claimed or unclaimed, disclosed or undisclosed liabilities/ obligations, risks as on the cut-off date including prior claims of all creditors whether secured, unsecured, workers, employees, statutory authorities on account of Income Tax, Sales Tax, GST, Service Tax, DGFT, Excise, Customs etc., shareholders on account of transactions prior to the cut-off date shall be dealt with as per Section 53 of the Insolvency and Bankruptcy Code, 2016 as full and final settlement of their dues. The Liquidator shall in no event be responsible for any liabilities /obligations/ risks pertaining to the period prior to the Cut-off date, and the same shall be dealt with as per the provisions of law and directions of Hon 'ble NCL Tor any higher authority thereof.*
- *The transfer of ownership of the Corporate Debtor shall take place by way of writing off the entire existing shareholding of Corporate Debtor and issuance of fresh equity shares to the successful bidder. The shares shall be issued only in the name of the successful bidder and will not be issued in any other name.*
- *The closing date of the transaction shall be 90 days from the payment of the full consideration amount, wherein in these 90 days, all the ancillary processes as mentioned in the Term Sheet shall be executed and implemented by the Liquidator and the bidder. The said executions include but are not restricted to distribution*

of the purchase consideration to various stakeholders, extinguishment of shares of the Corporate Debtor, issuance of fresh equity shares to the bidder, etc.

***b. Confirmation of sale:** On payment of the 100% of the bid amount, and any applicable GST/Taxes, registration fees, transfer fee etc. the successful bidder shall be issued the letter for confirmation of sale. The confirmation of sale is subject to the necessary approvals and processes, if any, towards various statutory and non-statutory authorities which include but is not restricted to Securities and Exchange Board of India, Bombay Stock Exchange, National Stock Exchange, The Directorate General of Foreign Trade, Income Tax, GST Department, Factory Inspector, PCB, SIDCUL, MIDC.”*

- e.** The Appellant was selected as a highest bidder in the e-Auction held on 23rd May, 2022. Appellant has submitted a bid of INR 91 Crores against the reserve price of INR 73 Crores. There was certain challenge by another bidder which challenge was unsuccessful. The Appellant made the payment of sale consideration. Liquidator issued a Sale Certificate dated 22nd June, 2022 to the Appellant. Appellant thereafter filed an I.A. No. 3207/2022 in Company Petition seeking certain directions/reliefs/concessions and the provisions which according to the Appellant were necessary for fulfilling and actualizing the sale of the corporate debtor as a going concern.

- f.** The Application was listed before the Adjudicating Authority, the Adjudicating Authority by Order dated 02.12.2022 disposed of the Application. In the order, the Adjudicating Authority noticed large number of prayers which were made by Appellant in the Application and after extracting prayers made in the Application, the Adjudicating Authority disposed of the Application by following order:

“The Applicant in this case is a successful auction purchaser of the Respondent/Corporate Debtor i.e. namely M/s. Apex Buildsys Limited.

Though the application is filed with a number of reliefs. In this application, we are not constrained to go to every aspect of the relief and concessions sought, except observing that the applicant successful auction purchaser will be entitled to seek appropriate relief from the respective department concerned in accordance with the law.

IA-3207 /2022 stands disposed of in the above terms.

In so far as the direction to ROC is concerned, we are inclined to accept the plea and direct the ROC to change the status of the corporate debtor from under liquidation to action on the application made by the applicant.”

- g.** The above order indicates that except one direction directing ROC to change the status of the corporate debtor from under Liquidation to action on the application made by the applicant, for other reliefs and concessions, the Adjudicating Authority observed that applicant – successful auction

purchaser will be entitled to seek appropriate relief from the respective department concerned in accordance with law.

3. We have heard Ms. Pooja Mahajan, Learned Counsel for the Appellant and Mr. Abhishek Anand, Learned Counsel for the Liquidator.

4. Learned Counsel for the Appellant submits that Application filed by the Appellant seeking certain reliefs/concessions/directions were necessary to affect the takeover of the Corporate Debtor on clean slate basis. The Adjudicating Authority erred in not granting the said reliefs. The question of settlement of liabilities of the creditors under Section 53 of the Code in case of sale of a corporate debtor in liquidation is a question that ought to be decided by the Adjudicating Authority in the Application filed under Section 60(5)(c) of the Code. It is submitted that without judicial order, the statutory authorities are not accepting settlement of their claims in terms of Section 53 of the Code. In the present case after passing of the impugned order applicant did approach various authorities for waiver of their liabilities which stood settled in terms of Section 53 of the Code however the Tax Authority informed the Applicant that since the impugned order does not grant any relief, the Appellant should contest the pending tax cases on merits. Notices have been issued by SIDCUL for payment of past dues, despite the fact that the E-Auction Process Notice specifically provided that SIDCUL's claim will be settled under Section 53 of the Code. When the Liquidator after receipt of the sale consideration has settled all claims of the creditors, no creditors can insist for any claim which stood settled under the liquidation. It is submitted that Adjudicating Authority have passed

several orders in relation to sale as a going concern allowing various reliefs, concessions and directions whereas several reliefs and concessions have been granted. Learned Counsel for the Appellant submits that due to non-consideration of various reliefs, concessions and directions which are necessary for operationalisation of Corporate Debtor as a going concern, the objective of the Code shall not be fulfilled.

5. Learned Counsel for the Liquidator during his submissions supported the claims for reliefs, concessions and directions as was made by the Applicant. However, in the written-submissions, the Liquidator has submitted that there are certain reliefs claimed by the Appellant in I.A. No. 3207 of 2022 which is neither permissible under the Code nor in terms of settled position of law. Liquidator further submits that sale of the Corporate Debtor as a going concern would entail transfer of both assets as well as liabilities of the Corporate Debtor in favour of the Successful Bidder. Learned Counsel for the Liquidator further raised question as to whether principle of clean slate theory will be applicable in case which is applicable in case of approval of Resolution Plan hence whether shall also be applicable with regard to sale of the corporate debtor as a going concern under Regulation 32A of the Liquidation Regulations, 2016.

6. We have considered the submissions of Learned Counsel for the parties and have perused the record.

7. From the facts brought on record, it is clear that sale of Corporate Debtor was sale as a going concern. E-Auction Process Document on the basis of sale as a going concern plays an important role and clarificatory

role. Other terms and conditions of the e-auction as extracted above states that all known or unknown, claimed or unclaimed, disclosed or undisclosed liabilities/ obligations, risks as on the cut-off date including prior claims of all creditors whether secured, unsecured, workers, employees, statutory authorities on account of Income Tax, Sales Tax, GST, Service Tax, DGFT, Excise, Customs etc. are required to be dealt with as per Section 53 of the Code as full and final settlement of their claims. When the process document clearly contemplated such consequences the said consequences shall ensue on sale as going concern and if any roadblocks come into ways of successful resolution applicant, necessary directions, clarifications can very well be issued by the Adjudicating Authority on an Application filed under Section 60(5)(c) of the Code.

8. Further the process document clearly contemplated that transfer of ownership of the corporate debtor shall take place by way of writing off entire existing shareholding of the corporate debtor and issuance of fresh equity shares to the successful bidder. The share shall be included in the name of Successful Bidder and will not be issued in any other name.

9. Learned Counsel for the Appellant has brought on record the letter dated 3rd March, 2023 issued by the State Infrastructure and Industrial Development Corporation of Uttarakhand Limited informing the liquidator that necessary application for transfer of the land should be undertaken. By an affidavit dated 01st April, 2023, the Appellant has brought on record various communications received from several authorities including notices issued by various departments. Notices issued by

Income Tax Department claims reference to various outstanding payments.

10. In view of the subsequent facts and notices brought on record by the Appellant and other terms and conditions of the process document as extracted, we are of the view that ends of justice will be served in granting liberty to file an Application before the Adjudicating Authority claiming reliefs/concessions/directions which may be necessary for operationalisation of the Corporate Debtor as per terms and conditions of the process document.

11. We may also observe that prayers which were included in I.A. No. 3207 of 2022 were too elaborate and general prayers which cannot be made by a Successful Bidder who have been declared as Successful Bidder. Successful Bidder on e-Auction of the Corporate Debtor as a going concern can make only such prayers for reliefs/concessions which are commensurate and in accordance with the terms and conditions of the process document. Prayers in general in a very wide term as contained in I.A. No. 3207 of 2022 may not require any consideration by the Adjudicating Authority.

12. We while granting such liberty to the Appellant observe that law is well settled, a successful bidder who is declared as successful bidder of sale as going concern can seek access of the Adjudicating Authority and may pray for necessary directions in accord with and in consonance with the process document in the liquidation proceedings. In result, we partly allow this Appeal and hold that applicant's prayers i.e. relief/concessions/directions needs consideration by the Adjudicating

Authority for which we grant liberty to the Applicant to make a fresh Application containing prayers which may be commensurate and in accord with terms and conditions of the process document of e-auction process document. The Appellant may submit a fresh application praying for reliefs, concessions and directions which may be considered and decided by the Adjudicating Authority in accordance with law. The Appeal is disposed of, accordingly.

**[Justice Ashok Bhushan]
Chairperson**

**[Naresh Salecha]
Member (Technical)**

**NEW DELHI
04th July, 2023**

Basant B.

Company Appeal (AT) (Insolvency) No. 258 of 2023