

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I**

**IA No. 1017/MB/2022, IA No. 1318/MB/
2021 and IA No. 2980/MB/2022**

**In
CP (IB) No. 43/MB/2017**

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of the National Company Law Tribunal Rules, 2016.

Filed by
**In the IA No. 1017 of 2022 and IA No. 1318 of 2021
Shri Chandrashekar Nagral**

Proprietor of C S Construction

K-21, "Siddha-Laxmi" Amravati Road,
Bharat Nagar, Nagpur, Maharashtra - 440033

...Applicant

Versus

**Shri Vikas Prakash Gupta,
Liquidator of Gupta Energy Private Limited,
4th Floor, Gupta Tower, Temple Road, Civil Lines,
Nagpur, Maharashtra – 440001.**

...Respondent

In the IA No. 2980 of 2021

Shri Vikas Prakash Gupta

**Liquidator of Gupta Energy Private Limited,
4th Floor, Gupta Tower, Temple Road, Civil Lines,
Nagpur, Maharashtra – 440001.**

...Applicant

Versus

Shri Chandrashekhar Nagral

Proprietor of C S Construction

K-21, "Siddha-Laxmi" Amravati Road,
Bharat Nagar, Nagpur, Maharashtra – 440033

...Respondent

In the matter of

Gupta Energy Private Limited

...Corporate Debtor

Order Pronounced on: 23.12.2022

Coram:

Hon'ble Member (Judicial) : Justice P. N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicant : Mr. Pulkit Sharma, Counsel i/b Mr.
Avinash R Khanolkar, Advocates.

For the Liquidator : Mr. Aniruth Purusothaman,
Advocate.

ORDER

Per Coram:

1. The IA No. 1017 of 2022 is filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of the National Company Law Tribunal Rules, 2016 seeking permission of this Tribunal to execute and conclude the purchase/acquisition of the Corporate Debtor as a whole on a going concern basis under liquidation by way of implementation of

the acquisition plan submitted by the Applicant. The Applicant sought following prayers:

- a) Directing the Respondent that the sale of assets of the Corporate Debtor is to be considered as a 'sale as a going concern of the Corporate Debtor';
 - b) Directing that the payment made by the applicant being Rs.20,70,35,000 /- (Rupees Twenty Crores Seventy Lakhs Thirty-Five Thousand only) till 28th Feb, 2022 and the balance of Rs.50,00,10,000/- (Rupees Fifty crores Ten Thousand Only) be treated as full and final payment of all the dues towards the sale including the sale as a going concern and nothing shall remain due and payable to the Respondent;
 - c) Directing the Respondent to maintain Status-quo about the Assets of the Corporate Debtor till adjudication of this Application;
 - d) Any other order in the interest of Equity, Justice and good conscience.
2. The Corporate Debtor i.e. **Gupta Energy Private Limited** was ordered to be Liquidated vide Order dated 26.03.2018 by Adjudicating Authority. During CIRP, no resolution plan was approved by the

Committee of Creditors of the Corporate Debtor, hence this Tribunal vide Order dated 26.03.2018, ordered liquidation of the Corporate Debtor and Shri Vikas Prakash Gupta was appointed as the Liquidator.

3. The Respondent, in accordance with the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and the Process Document issued a public notice for Expression of Interest dated 01.03.2021 and all the necessary details were captured in the Expression of Interest published by the Respondent.
4. The Applicant participated in bid on 10.03.2021 and emerged as the successful bidder. The Respondent vide an e-mail dated 20.03.2021 communicated the same to the Respondent stating that the Applicant has been declared as the winning bidder. Block IV is the composite block for the entire assets of the Corporate Debtor.
5. The Applicant further states due to the onset of Covid-19, the Applicant was not in a position to pay the entire consideration amount and hence, had to file an extension application bearing no. IA 1318 of 2020 seeking an extension of 12 weeks' time to Applicant from 18.06.2021 i.e., the expiry of 90th day to pay the balance consideration and console the auction of the sale of assets. During the pendency of that application several discussion took place between the Applicant, Respondent and the financial creditors of the Corporate Debtor and accordingly payment has

been made by the Applicant to the Respondent.

6. The Applicant submits that that the Applicant is sincerely willing to revive and make operational the (2x60 MW) Thermal Power Project of the Corporate Debtor which was closed since FY 2013-14 and thereby the scarce idle resources of the economy could be converted into valuable asset. The Applicant state that on account of closure of the (2x60 MW) Project of the Corporate Debtor more than 400 Skilled / unskilled labours have lost their livelihood and that the revival of Corporate Debtor would not only put the idle asset to use but also would cater employment generation to the tune of 500 employees especially at the time when the entire globe is facing crises on account of COVID-19. It is pertinent to state that revival of the Corporate Debtor instead of just sale as a gross block will expedite the revival of the project expeditiously which will help the entire economy surrounding the plant.
7. Further that it is pertinent to mention that (2x60 MW) Power Project of the Corporate Debtor is one of the very few Power Projects in the country based on CFBC Boiled Technology which can consume low calorific coal rejects in an environmentally friendly manner.
8. Further that the sale of Corporate Debtor as a 'going concern' sale would deeply benefit in expeditious revival of (2x60 MW) Power Project since various Licenses/approvals/permits/permission/etc which have lapsed

on account of closure of the Project can be renewed / revived in an efficient and timely manner as compared to lengthy & complex Procedures involved in case of obtaining fresh licenses/permissions.

9. In order to revive the (2x60 MW) Power Project of the Corporate Debtor it is expedient that the mode of sale of the corporate debtor shall be made in accordance with Regulation 32(e) of the Insolvency and Bankruptcy (Liquidation Process) Regulation, 2016 whereby the aforementioned objective could be achieved in the greater good of all the stakeholders.
10. It is stated that after the order of liquidation dated 26.03.2018 was passed, the legislature amended Regulation 32 to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 vide Notification No. IBBI/2017-18/GN/REG 028 dated 27.03.2018 with effect from 01.04.2018 which inserted "sell the corporate debtor as a going concern". Regulation 32 to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 was further amended to introduce the sale of the business of the corporate debtor as a going concern.
11. The Regulation 32A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016 wherein the mechanism to decide on "sale as a going concern" was introduced.
12. It is stated that in M/s Gujarat NRE Coke Limited [NCLT KOLKATA

BENCH: C.P. (IB) No. 182/KB/2017], it has been held by the Hon'ble Tribunal that it should always be the priority of the Liquidator to sell the concern as a going concern. It was opined that at the first instance, the Liquidator should always make an endeavor to sell the corporate debtor as a going concern and only if, under no circumstances, can the corporate debtor be sold as a going concern, then the assets will be sold as individual assets. Further, this perspective has been observed by various National Company Law Tribunals across various jurisdictions wherein the liquidators are directed to endeavor a going concern sale prior to other modes of sales envisaged under the Liquidation Process Regulations.

13. The Applicant refer and rely on para Nos. 7 of the Round Table of Insolvency and Bankruptcy Board of India held with the stakeholders on 21/05/2018, referring to the case of Gujarat NRE, wherein a note was published by IBBI defining "going concern" as below:

"7. 'Going Concern' means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource.

In view of this, the following options are submitted for consideration:

- a. The corporate debtor may be sold as a going concern, as provided*

in the extant regulations. As the Company survives, there will be no need for dissolution of the Company in terms of section 54 of the Code. The assets along with all attendant claims, limitations, licenses, permits or business authorizations remain in the Company. The Company survives as it was; the ownership of the Company is transferred by the Liquidator to the acquirer. The Liquidator shall make an application to the AA for approval of the sale of the corporate debtor as a going concern and the AA may pass an order with respect to:

- a) Sale of the corporate debtor to the intended buyer as a going concern*
- b) Transfer of shares of the corporate debtor to the intended buyer*
- c) Transfer of the going concern of the corporate debtor to the buyers*
- d) Continuation of the authority, powers and obligations of the Liquidator to complete the liquidation process as provided under the Code and the regulations including the control, operations and continuation of the liquidation bank account of the corporate debtor,*
- e) Payment to stakeholders in accordance with section 53*

from the liquidation bank account, and

f) Protection of the intended buyer from all claims and liabilities pertaining to the period prior to the sale of the corporate debtor as a going concern.

In such a case, the final report of Liquidator, as required under clause (3) of regulation 45, shall form part of the application for the closure of the liquidation process of the corporate debtor and not for the dissolution of the corporate debtor to the AA to be made under section 54.

b. The regulations may provide another option of sale, that is, sale of business of the corporate debtor as a going concern. It will be only sale of business, not the corporate debtor which will be liquidated in accordance with the regulations. In this case, the assets and liabilities relevant for the business are transferred to a new entity, and stakeholders are paid from proceeds of sale in accordance with section 53 and the corporate debtor will be dissolved."

14. In this regard, it is pertinent to mention that the Hon'ble Delhi High Court in the matter of *Nitin Jain, Liquidator of PSL Limited vs. Enforcement Directorate, 287(2022) DLT 625, held as follows:*

"Undisputedly and as has been explained in the decisions of the Supreme

Court noticed above, maximization of value would be clearly impacted if a resolution applicant were asked to submit an offer in the face of various imponderables or unspecified liabilities. The amendment to sub-Section (1) of Section 31 and the introduction of Section 32A undoubtedly seek to allay such apprehensions and extend an assurance of the resolution applicant being entitled to take over the Corporate Debtor on a fresh slate. Section 32A assures the resolution applicant that it shall not be held liable for any offense that may have been committed by the Corporate Debtor prior to the initiation of the CIRP. It similarly extends that warranty in respect of the properties of the Corporate Debtor once a resolution plan stands approved or in case of a sale of liquidation assets”.

Further, the Hon’ble Supreme Court of India in the matter of ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta***, (2020) 8 SCC 531 has held as under:

“Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the Corporate Debtor on a fresh slate as it were A successful resolution applicant cannot suddenly be faced with “undecided” claims after the resolution plan submitted by him has been accepted as this would amount

to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the Corporate Debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the Corporate Debtor. This, the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove.”

6.1 It is submitted that this Tribunal in the matter titled ***Bank of Baroda vs. Topworth Pipes & Tubes Private Limited*** CP(IB) No. 1239/MB/2018 vide Order dated 09.03.2021 granted reliefs similar to the ones prayed for by the Applicant in the present Application. This Tribunal while allowing the reliefs prayed for by the applicants therein observed as follows:

“28. *In the normal parlance “going concern” sale is transfer of assets along with the liabilities. However, as far as the ‘going concern sale in liquidation is concerned, there is a clear difference that only assets are transferred and the liabilities of the Corporate Debtor has to be settled in accordance with Section 53 of the Code and hence the purchaser of this assets takes over the assets without any encumbrance or charge and free from the action of the Creditors.*

29. *This Bench feels that following are the advantages of selling the Corporate Debtor “as a going concern”: (a) The entity i.e. the Corporate Debtor itself gets transferred; (b) The equity shareholding gets transferred or extinguished and new shares are issued. (c) The purchaser is expected to carry on the business of the Corporate Debtor after the sale of assets is confirmed; (d) The existing employees will have a chance to continue in their employment.*

30. *The decision to sell the Corporate Debtor as a going concern is taken by the Liquidator himself or in consultation with the Creditors/ Stakeholders and the proceeds from the sale of assets are going to be utilized for distribution to the Creditors in the manner specified under Section 53 of the Code. Hence all the Creditors of the Corporate Debtor get discharged and the assets are transferred free of any encumbrances. The legal entity of the Corporate Debtor however survives.”*

15. It is stated that if sale as a going concern is permitted then intangible assets in the form of old licenses etc. will help in the revival of the corporate debtor and generation of business and adding value to the economy.
16. Thus, IA 1017 of 2022 is filed by the Applicant requesting this Tribunal to allow the assets of the Corporate Debtor to be sold as a going concern

which will lead to maximization of the value of the assets of the Corporate Debtor and the Applicant will be able to revive the operations immediately.

Submissions made by the Respondent/Liquidator are as follows:

17. It is submitted that the Respondent has taken endeavors to sale the Corporate Debtor. The Respondent issued 7 (Seven) Public Announcements Inviting Expression of Interest for sale of the Corporate Debtor. However, all the 7 (Seven) Public Announcement issued by Respondent are tabulated hereinbelow:

Date	Date of Invitation for Expression of Interest (EoI)
1.	19.19.2018
2.	10.02.2019
3.	01.09.2019
4.	03.01.2020
5.	18.02.2020
6.	21.01.2021
7.	01.03.2021

18. It is stated that only after the 7th Public Announcement, an interest was shown in the Corporate Debtor.

19. Further pursuant to its Expression of Interest the Applicant deposited the requisite Earnest Money Deposit (“**EMD**”) of Rs.70,53,000/- (Rupees Seventy Lakhs Thirty-Five Thousand Only) on 08.03.2021.

20. It is submitted that the Applicant, as the winning bidder, was supposed

to deposit the total consideration amount of Rs.70,45,00,000/- (Rupees Seventy Crores Forty-Five Lakhs Only) for the auction of assets the Corporate Debtor by 19.04.2021. However, the Applicant failed to make the payment for the said assets which were auctioned on 10.03.2021.

21. It is submitted that the Applicant filed an Application bearing Interlocutory Application No.1318 of 2021 on 09.06.2021 seeking an extension of 12 (twelve) weeks' time from 18.06.2021 i.e., the expiry of 90 days' time as per Point No.12 Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 to pay the balance consideration and conclude the auction sale.
22. It is submitted that this Tribunal vide order dated 20.07.2021 in L.A. 1318 of 2021 directed the Applicant to deposit 35% of the bid amount before the next date of hearing i.e., 03.08.2021. Hereto annexed and marked as Exhibit E is a copy of the order dated 20.07.2021 passed by this Tribunal in I.A. No. 1318 of 2021.
23. It is submitted that the Applicant has deposited a total amount of Rs.78,63,94,623/- (Rupees Seventy Eight Crores Sixty Three Lakhs Ninety Four Thousand Six Hundred and Twenty Three Only) towards the sale consideration including interest, which also includes the EMD amount of Rs.70,35,000/- (Rupees Seventy Lakhs Thirty-Five Thousand Only) deposited on 08.03.2021, and an amount of Rs.8,18,94,623/-

(Rupees Eight Crores Eighteen Lakhs Ninety Four Thousand Six Hundred and Twenty Three Only) towards interest at rate of 12% for payments made after 30 days up to 06.11.2022 [as per Point No.12 Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016)] as tabulated hereinbelow:

Sr. No.	Particulars	Amount Deposited (Rs.)	Amount (Rs.)
	Bid Amount		70,45,00,000/-
1.	EMD(08.03.21)	70,35,000/-	
2.	28.02.2022	20,00,00,000/-	
3.	25.03.2022	27,00,00,000/-	
4.	30.03.2022	13,57,00,000/-	
5.	31.03.2022	7,60,00,000/-	
6.	09.11.2022	8,18,94,623/-	
	Total Amount Received (including interest of Rs.8,18,94,623/- up to 06.11.2022)	78,63,94,623/-	

24. With respect to the prayer of applicant for treating this said sale of Corporate Debtor as going concern, it is submitted that the Sale as going concern was never discussed in the Stakeholders Consultation Committee (SCC) meeting.
25. In view of the above submissions, the Respondent states that though there are slight deviations in the Acquisition Plan submitted by the Applicant as compared to the Process Document, the same may be

considered by this Tribunal keeping in view the best interest of the Corporate Debtor and all stakeholders and for maximization of the value of the Corporate Debtor.

Findings:

26. We have perused the records and heard the Ld. Counsels for the parties.
27. It is brought to attention that the Applicant deposited a total amount of Rs.78,63,94,623/- (Rupees Seventy Eight Crores Sixty Three Lakhs Ninety Four Thousand Six Hundred and Twenty Three Only) towards the sale consideration including interest with interest @12% till date 06.11.2022.
28. It has also been observed that the aim of liquidation is not dissolution of the entity but it merely implies liquidating the entity and the main objective is to sell-off the assets of the corporate debtor at a maximum value for realization and not necessarily kill the entity. It is pertinent to state that maximization of value of assets does not mean only direct monetary benefit coming to the financial creditors but would mean that the non-monetary assets may also be put to use and if utilized in appropriate manner then it would lead to generating maximum value in future too.
29. The Applicant herein vide its prayers sought relief that sale of the Corporate Debtor may be approved as going concern sale. Considering

the matter in hand and record it emerges that the expression of interest was called for block of assets which are entire assets of the Corporate Debtor and not for sale as going concern of the Corporate Debtor. Therefore, this bench approves sale of the Corporate Debtor in terms of Public Announcement issued for Expression of Interest for sale of the Corporate Debtor. As the Applicant is going to restart the plant and the business, the concerned authorities are expected to expedite the necessary approvals and license as may be applied in that regard so that there is a maximization of value and employment is generated.

30. However, sale in liquidation is concerned, there is a clear difference that only assets are transferred and the liabilities of the corporate debtor has to be settled in accordance with Section 53 of IBC and hence the purchaser of the assets takes over the assets without any encumbrance or charge and free from the action of the creditors.
31. The said sale consideration shall be distributed by the Liquidator in terms of Section 53 of the Code. Further, the Acquirers shall have no financial obligation or liability to any Person or Stakeholder apart from payment of Final Consideration. On the date of approval by the Adjudicating Authority, all such claims which are not a part of statement of claims, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim which is not a part of the

statement of claims.

32. We have gone through the prayer in the application and heard submissions made by the party. We have also perused the process of granting similar relief, concession in other costs such as Gaurav Jain V/s Sanjay Gupta liquidator of the Topworth Pipes and Tubes Ltd. in the matter of Bank of Baroda V/s Topworth Pipes and Tubes Ltd.
33. We are of the view that the sale in terms of Public Announcement issued for Expression of Interest for of the Corporate Debtor as sale of block of **Gupta Energy Private Limited** in favour of the applicant as a successful bidder is allowed and consequently entitle the applicant to take over and run the corporate debtor on a clean slate basis.
34. Applicant vide its **IA No. 1318 of 2021** sought time for payment of balance sale consideration. In that regard Applicant and Liquidator stated that the balance sale consideration is deposited with 12% interest till 06.11.2021. Therefore, **IA 1318 of 2021** is infructuous. Hence, stands disposed as Infructuous.
35. Liquidator filed **IA 2980 of 2021** at the time when balance sale consideration was not deposited seeking fresh auction of the Corporate Debtor. Liquidator vide its Affidavit in the matter confirmed that the balance sale consideration is received with 12% interest till 06.11.2021. Therefore, **IA 2980 of 2021** is infructuous as well. Hence, stands

disposed as Infructuous.

36. With the aforesaid observation present **IA No. 1017 of 2022 In CP (IB) No. 43/MB/2017** stands disposed of as allowed in above terms.

Sd/-

SHYAM BABU GAUTAM
MEMBER (TECHNICAL)

23.12.2022

SAM

Sd/-

JUSTICE P. N. DESHMUKH
MEMBER (JUDICIAL)