



**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT-I
KOLKATA**

IA.(IB)No. 586/ KB/2024.

&

IA.(IB)No. 995/ KB/2024

&

IA.(IB)No. 447/ KB/2024

In

C.P.(IB) No. 23 /KB/2019

Applications filed by the applicant under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 33(2) (c) of the IBBI(Liquidation Process) Regulations, 2016 and Rule 11 of the NCLT Rules, 2016

In the matter of:

Asset Reconstruction Company (India) Ltd.

...Applicant/Financial Creditor

Versus

Corporate Power Ltd.

...Respondent/Corporate Debtor

In the matter of:

S M Steels and Power Limited

...Applicant

Versus

Pankaj Dhanuka

Liquidator of Corporate Power Limited

...Respondent



Coram:

Bidisha Banerjee, Member (Judicial)

Balraj Joshi, Member (Technical)

Appearances: (via video conferencing/physically)

Mr. S.N . Mookerjee, Senior Advocate] For the C.P.L

Mr. Mainak Bose, Advocate

Ms. Manju Bhuteria, Advocate

Mr. Avisek Swaroop, Advocate

Mr. Seaipayan Basy, Advocate

Mr. Anupam Prakash, Advocate

Mr. Naman Chaudhary, Advocate

Mr. S.C. Prasad, Advocate

] For P.F. Authority in IA 1262/2024

Mr. Avijit Tewary, Advocate

Mr. Sumitra Sarkar, Advocate

] For Director General Central Industrial Security Force

Mr. S. Sengupta, Advocate

] In IA 1091/2024

Mr. Souvik Ghosh, Advocate

Mr. Abhrajit Roy Choudhary,

Advocate

Mr. Joy Saha, Senior Advocate

] For Applicant in UA 586/2024 & IA 995/2024

Ms. Urmila Chakraorty, Advocate

Mr. Siddhartha Sharma, Advocate

Mr. Rishav Dutt, Advocate

Mr.Arjun Asthana, Adv.

]

Ms. Shalini Basu,Adv.

]

Mr.Aman Kataruka,Adv.

]

Mr.Ratnanko Baneji,Sr.Adv.

] For Orissa Alboy Steel Pvt. Ltd.

Mr.Anirban Ray,Adv.

]

Mr.Shaunak Mitra, Adv.

]

Mr.Zulfiqar Ali Alquaderi,Adv.

]

Mr.Saptarshi Mandal, Adv.

]

Mr.Mainak Bose, Adv.

] For ACRE in IA 995/2024

Mr.Soorjya Ganguli, Adv.

]

Ms.Kiran Sharma, Adv.

]

Mr.Mainak Bose, Adv.

] For SCC in IA 447/2024

Ms.Simran More, Adv.

]



Date of pronouncement:20/12/2024

C o m m o n O r d e r

Per : Balraj Joshi, Member (Technical)

1. The court congregated through hybrid mode and the matter was heard out on at substantial length.
2. It is noted at the outset that two IAs namely IA 586 and IA 995 have been filed by SM Steels and Power limited assailing the purported sale of the Corporate Debtor as a going concern by virtue of a Private sale and alleging that the sale is in violation of various provisions of IBC 2016 with particular reference to Regulation 33(3) alleging a fraud. Since both of these IAs seek dismissal of IA 447 which is an application by the liquidator seeking approval of the private sale of the CD in terms of regulation 33 of the IBBI (Liquidation Process) Regulations, 2016, the submissions made by various parties overlapped and as such a common order is being passed in all the three IAs.
3. **IA.(IB)No. 447/KB/2024 in CP(IB) No.23/KB/2019-** is an application filed by the applicant under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 33(2) (c) of the IBBI(Liquidation Process) Regulations, 2016 and Rule 11 of the NCLT Rules, 2016 for the following reliefs:-
 - a. Permit the Liquidator to conduct the sale of the Corporate Debtor, Corporate Power Limited, as a going concern, by means of a private sale under Regulation 33(2) (c) of the Liquidation Regulations, to the successful bidder through the Swiss Challenge process, considering the offer submitted by Orissa Alloy Steel Private Limited as the anchor bid, as envisaged in the Public Announcement dated 22/02/2024;
4. **IA.(IB)No. 586/KB/2024-** is an application filed by the applicant under section An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016; read with Rule 11 of the NCLT Rules, 2016 for the following reliefs:-
 - a. Direct the Liquidator to accept the expression of interest of the Applicant;
 - b. Direct the Liquidator to conduct bid auction process for the private sale process for

the Corporate Power Limited as a going concern on an “ as is where is basis”.

- c. Stay the auction conducted on 5th March 2024;
 - d. Stay execution of Letter of Intent in furtherance to auction conducted on 5th March, 2024;
 - e. Cancel confirmation of any sale certificate in furtherance to auction conducted on 5th March 2024;
- Or in the alternative:
- f. Set aside the Public Announcement dated 21st February 2024 issued by the Liquidator;
 - g. Ad-interim reliefs in terms of prayers aforementioned;

5. **IA.(IB)No. 995/KB/2024-** *is an application filed by the applicant under section 60(5) read with section 235A of the Insolvency and Bankruptcy Code, 2016; along with Rule 11 of the NCLT Rules, 2016 for the following reliefs:-*

- b. Set aside the Public Announcement dated 21st February 2024 and subsequent steps taken thereto by the Liquidator;
- c. Set aside the Letter of Intent dated 6th March 2024 issued in favour of Respondent No.3;
- d. Direct removal of Mr. Pankaj Dhanuka as Liquidator of Corporate Power Limited;
- e. Replacement of Liquidator of Corporate Power Limited;
- f. Penalise the Respondents under Section 235A of the IBC and direct the Respondents to severally pay find to the tune of INR 2 Crore per each Respondent;
- g. Dismiss of IA 447/KB/2024;
- h. Stay of I.A (IBC) No. 447/KB/2024 will adjudication of the present application ;
- i. Allow statements contained in the present application and its annexures be considered for the disposal of I.A.(IBC) No. 447/KB/2024 and I.A (IBC) No.586/KB/2024;
- j. Injunction restraining the Respondent Nos. 2 & 3 and other Rashmi Group companies from participating in or acquiring any right, title or interest in the present liquidation process of Corporate Power Limited.
- k. Direct publication of fresh auction for sale of Corporate Debtor as a going concern and/or private sale while allowing Applicant to participate on fair and equitable basis;
- l. Ad-interim reliefs in terms of prayers aforementioned;



Submissions on behalf of the applicant

1. Mr. A. M. Singhvi appearing for the Applicant asserted that the liquidator in collusion with the successful auction purchaser has given go-bye to the relevant regulations of the code and whereby despite the fact that a mandated **prior approval** of the Adjudicating Authority has not been sought, the sale letter has been issued. He made elaborate submissions in order to explain as to how a fraud had perpetrated in a methodical manner. Drawing on the provisions of Regulation 33 of the IBBI (liquidation regulations), which outlines the modus of such a sale. Much stress has been given to the assertion that the liquidator being in cahoots has aided the purported fraud. He presented a list of dates along with notes of arguments which outlines the following chronological sequence.
2. The cause of action for institution of I.A. (IBC) No. 995/KB/2024 filed by SMSPL arises out of the perpetration of serious frauds and collusion between the Bidder/ Rashmi Group, i.e., Patwari Family, who has set up the major creditor of CD by round tripping of funds through recent assignment of debt in favour of ACRE on 5th February 224 (thereby holding 60.65% voting share in SCC), as well as the Liquidator, for ensuring acquisition of CD by the OASPL/ Rashmi Group, under the grab of private sale auction under the I & B Code, 2016.
3. An usual fetish has been made over the last date of submission of the expression of interest of the auction notice (V2. P1. @ pg. 43-44), deeming it to be sacrosanct, without appreciating that the timelines under the I & B Code, 2016 are directory and not mandatory, and more so in the case of liquidation, where the main object is maximisation of value of asset for better recoveries in favour of stakeholders, more so in the present case, where approximately 40 % of the debt is owed to public sector banks and public sector enterprise, namely, - (i) REC Limited (19.55%); (ii) Indian Bank (5.37%); (iii) Punjab National Bank (4.52%); (iv) Union Bank of India (7.92%); and (v) Life Insurance Corporation of India (1.99%). Thus, the maximisation of value of assets of CD are in the main interests of the recovery of public money from CD.
4. Despite having received a better value of INR 300.20 Crore, subsequently backed with creation of Fixed Deposit of INR 150 Crore (V8. Pt. 3 @ Pg. 451) by SMSPL, Liquidator has acted contrary to law and has not made any endeavour to get maximum sale price for



the benefit of the stakeholders and recovery of public money at the hands of public sector banks/ PSUs/ PSEs, while there is ample time for completion of liquidation process which shall now expire by efflux of time on 29th December 2024 (earlier on 29th June 2024).

5. The entire private sale auction contemplated under the liquidation process is named with irregularities and patent flaws in order to unduly give preference to OAPSL/ Rashmi Group, owned and controlled by the Patwari Family, i.e., the bidder, thereby completely vitiating the entire process and liable to be set aside.
6. It is a matter of record that the entire process has been completed in **12 days**, out of which there were **4 days were either Saturday or Sunday**, i.e., from the publication of notice on 22nd February 2024, till the date of auction, i.e., 5th March 2024 (**VI@ pg. 15**).
7. The inexplicable speed and alacrity in which the entire process has been conducted, including but not limited to: (i) calling of SCC meeting by liquidator within 58 minutes from receipt of private officer from OASPL (Refer V4. @ pg. 34, 37-38); (ii) overnight publication on national newspaper by Liquidator on 22nd February 2024, when OASPL itself confirmed its offer at 8:27 P.M. on 21st February 2024 (V4. @ Pg. 42-43); (iii) making public announcement on 22nd February 2024 without seeking prior permission of AA, or even waiting for receipt of the EMD of INR 150 Crore from OASPL which was received only on 26th February 2024 (V.2 Pt.2, para 4 (x) @ Pg. 198), etc. clearly goes on to show that the Respondents have colluded and defrauded all the stakeholders of CD.
8. Once we pierce the corporate veil of the companies and identify the majority Security Receipt Holder of the '**ACRE-153-TRUST**' (**V7. @ pg. 52**), i.e., the Trust which has acquired the assignment of debt of CD, the element of fraud played by the majority creditor and the bidder, starting with the collusion becomes apparent. The spirit of IBC as is enshrined in its Preamble and the Statement of Objects and Reasons are for balancing the acts of all the stakeholders in the insolvency resolution of the corporate persons. Any action which militates against such a spirit of IBC is bound to raise serious doubt about the CIRP and should be looked into deeply to examine element of **fraud or 'gaming'**. Therefore, any abuse of the provisions of IBC to fulfil the ulterior motive and business interests of certain parties to the detriment of certain other parties should not be allowed to happen.



9. Without seeking prior permission of this Hon'ble Tribunal, Liquidator also received EMD of INR 150 Crore for OASPL on 26th February 2024 (V.2 Pt. 2, para 4 (x) Pg. 198). While I.A. (IBC) No. 447/KB/2024 is sub-judice, Liquidator has issued LoI to OASPL on 6th March 2024 (v.2 @ pg. 189.192 Reply).
10. The submissions of Liquidator that the steps for private sale and issuance of LoI is subject to outcome of I.A (IBC) No. 447/KB/2024 is completely fallacious in as much as the interpretation of statute is clear on the issue that "IF words used in a statute are capable of one construction only, then it is not open to adopt any other hypothetical construction only, then it is not open to adopt any other hypothetical construction on the ground that such construction on the ground that such construction is more consistent with the alleged object and policy of the Act. Prohibited or negative words in a statute are usually mandatory, even though the statute provides no penalty for disobedience.
11. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offer is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. Hence, it is the duty of the Court to see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud.
12. The Hon'ble Supreme Court while considering Regulation 33 (2) and prior permission in case of private sale has observed that "56.To avoid the pitfalls of disposing of the assets by conducting a Private Sale for the Benefit of Creditors, Regulation 33 has prescribed some stringent conditions that the Liquidator is under an obligation to comply. The said pre-conditions are that (1) the asset is perishable; (ii) the asset is likely to deteriorate in value significantly if not sold immediately; (iii) the asset is sold at a higher price than the reserved price of the failed auction; and (iv) the Adjudicating Authority (NCLT) must grant prior permission for such a sale. The proviso appended to Regulation 33(2) of the Liquidation Regulations places yet another embargo to the effect that when the Liquidator intends to sell the assets of the Corporate Debtor by way of a Private Sale to a related party of the Corporate Debtor, his relative party or any professional appointed by him, it is mandatory to obtain prior permission of the Adjudicating Authority (NCLT)




- 13.** Accordingly, the proviso to Regulation 33 (2) places yet another embargo and in no manner curtails the validity of prior permission in case of any private sale under the I & B Code, 2016. However, Respondents have by-passed the entire process of "prior permission" under the garb of the so-called commercial wisdom of SCC
- 14.** Super-sonic speed at which private sale concluded reflecting Collusion under Regulation 33 (3) of the Liquidation Process Regulations, 2016:
- 15.** The Liquidator, in his 31-pg. note placed before this Hon'ble Tribunal on 21 June 2024, has copiously explained the 9 failed auctions and publications made thereunder. However, it is imperative to state here that the Liquidator completely ignored the fact that SMSPL has: -
- a. Made a committed offer of INR 300.20 Crore on 22nd March 2024 (P.2 Pt. 2 pg. 207-211);
 - b. Created Fixed Deposit of INR 150 Crore on 14th May 2024 (V8. Pt. 3 @ Pg. 451) towards EMD for conducting fair auction sale.
- 16.** None of the reasons attributed for rejection of offer of SMSPL in the 21" meeting of SCC dated 26th March 2024 (V2. P2. @ Pg. 231-232) are valid or maintainable in view of the facts that have transpired before 21 June 2024, ie the handing over of the 31-pg. note of Liquidator. However, the Liquidator failed to apply his commercial wisdom and seek maximisation of value of assets of CD.
- 17.** It is further stated that reliance over 9 failed auctions by Liquidator is completely irrelevant in as much as there was no bidder who came forward, save except for portion of the assets of CD which were sold during liquidation. Offers of both JKDL as well as SMSPL were also rejected on the pretext of "opportunistic buyers", however, the fact of the matter is that it was Rashmi Group, through its various group companies, who, as an opportunistic buyer, expressed interest in public auctions (3, 6, 8 and 9th) however, never participated in any of such public auctions of CD (@pg. 7 & 8 of Liquidator 31-pg Note) as Rashmi Group was admittedly waiting for the reserve price of CD to lower down to its optimum value.



18. JKDL, another prospective bidder, gave its offer for private sale for INR 290 Crore on 04.12.2023 (V.2 P.2, 5th bullet point @ Pg. 167). However, such offer was turned down by Liquidator as the offer of JKDL was less than the reserve price of the last auction (i.e., INR 361.22 Crore).
19. Mr. Mainak Bose, Advocate appearing on behalf of ACRE made express submissions that there is no control of Rashmi Group, ie, the Patwari family, over ACRE. However, the Declaration of Trust Deed dated 10.08.2023. Le, the Trust which is in control and ownership of the debts of CD, clearly shows that the Trustee/ ACRE operates and works solely for the benefit of the Security Receipt Holders (V7. Clause 2.2 @ Pg. 59) and the Trust can be terminated at the option of the special majority of Security Receipt Holders (V7, Clause 2.7.1 @ Pg. 59. 60). The majority Security Receipt Holder is CIMMCO, Le, company under control of the Rashmi Group, i.e.. owned and promoted by the Patwari family. Accordingly, by funding and effecting Assignment in favour of ACRE, Rashmi Group obtained main seat in SCC (60.65% voting right).
20. JKDL was not even consulted by Liquidator before proceeding with private auction in favour of OASPL. No email issued to JKDL. JKDL wanted to participate in public auction, when he came to know but by then time it was little late and he issued a legal notice on 29.02.2024 for not allowing him the extension, objected the excess EMD also. However, the same was rejected by SCC. The notice was issued by JKDL on 29th February 2024, i.e., the same date when the process Document was prepared by Liquidator for the auction process. ACRE held that as JKDL reached out to Liquidator only after expiry of timeline, the same goes on to show lack of commitment towards private sale process by JKDL (**V2. P1 @ pg. 169**).
21. Entire stratagem devised by Rashmi Group/Patwari family to defraud stakeholders of CD and defeat value maximisation:
22. The entire auction process has been cut down and closed by the Respondents as under (V1 @ pg. 15):-
 - a. Violation of Clause (1D) of Schedule 1 of the Liquidation Regulations which stipulates that Liquidator shall provide atleast 14 (fourteen) days from issue of public notice for submission of eligibility documents by prospective bidder. In the present case only given 6 (six) days for submission of eligibility documents,



- b. Violation of Clause (IE) of Schedule 1 of the Liquidation Regulations which stipulates that liquidator shall provide atleast 7 (seven) days' time to the qualified bidder for inspection or due diligence of asset under auction, from the date of declaration of qualified buyer. In the present case, only given 5 (five) days' time for
- c. The auction was conducted in 12 days from the publication;
- d. Public Announcement dated 22nd February, 2024 is null and void because as per the Point-12 of the same, the vital terms of sale including eligibility criteria, due diligence and site visit, submission of eligibility documents, payment of EMD, mode of submission of bid are as per the Process Document which was prepared on 29th February, 2024. The Process Document dated 29th February, 2024 mentions 27th February, 2024 as the last date for submission of eligibility documents and 29th February, 2024 as the last date for payment of EMD. No bidder can participate without these details.
- 23.** The purpose of auction (open or close format) is to get the most remunerative price and giving opportunity to the intending bidders to participate and fetch higher realizable value of the property. If that path is cut down or closed, the possibility of fraud or to secure inadequate price or underbidding would loom large. In the given circumstances, it is the duty of the Court to exercise its discretion wisely and with circumspection and keeping in view the facts and circumstances in each case.
- 24.** Once the auction notice was decided to be published on newspapers, the concept of "private sale" ceases to have effect, and any publication made even under private sale shall mandatorily require compliance of Schedule 1 of the Liquidation Regulations. The Liquidator cannot cut down path for bidders to participate and fetch higher realizable value of the property.
- 25.** Without prejudice to the above, if it is considered that purported 'private auction' is not bound to comply with Schedule 1 Liquidation Regulation, even in such case, the hasty manner in which publication was made on 22 February 2024 and auction was decided to



be conducted on 5 March 2024, i.e., in 12 days, out of which there were 4 days were either Saturday or Sunday, is liable to be set aside and quashed.

26. The Hon'ble NCLAT in Naren Seth Liquidator of Ciemme Jewels Ltd. vs. Sunrise Industries & Ors., while considering a case when no timeline was prescribed under the I & B Code, 2016 for conducting auction observed that "**Although, no specific timelines have been given in the Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016, normally notice period of 30 days is given to get best value.**"
27. Observing that the entire E-auction were rather conducted in a hurry and the Adjudicating Authority rightly observed that there was hardly any sufficient gap for date of application in completing the E-auction exercise, NCLAT held that "entire auction was conducted in flat five days including weekend."
28. Pankaj Dhanuka has been held guilty for conducting CIRP of same Corporate Debtor with mala fide and negligence in IBBI/DC/92/2022 dated 12.04.2022 and was disqualified from taking any assignments for one year. Violation of Section 208(2) (a) and (e) of the I & B Code, 2016 along with Regulation 7(2) (a) and 7(2)(h) of the IBBI (Insolvency professionals) Regulations, 2016 (IP Regulations) and Clause 14 and 23B of the Code of conduct under First Schedule of regulation 7(2). Although the said order has been stayed by the Hon'ble High Court of Delhi in W.P.(C) No. 7285 of 2022, however, the writ petition is sub-judice.
29. ACRE objected to opportunity to be given to SMSPL by relying upon deliberations made with respect to rejection of JKDL offer. Further, ACRE suggested that as LoI has been issued, SMSPL request should be rejected as the auction process would be dragged for significant time. (V2. P2. @ pg. 231);
30. However, in the present case, the acts and conduct of the Respondents clearly go on to show that the entire auction process has been conducted to defraud the stakeholders of CD, for the financial gains of **Rashmi Group**, i.e., the Patwari Family and consequently, there shall be huge financial loss of public money accounted by public financial



institutions and PSEs, being:- (i) REC Limited (19.55%); (ii) Indian Bank (5.73%); (iii) Punjab National Bank (4.52%); (iv) Union Bank of India (7.92%); and (v) Life Insurance Corporate of India (1.99%) cumulating to approximately 40% of total debt of CD.

It has been stated that after failure of successive auctions liquidator decided to go for a private sale in collusion with the SCC despite the fact that on 05th March, 2024 the Applicant had given a much higher offer of Three Hundred Two Crores as against Two Hundred fifty odd Crores by the Current Auction Purchaser.

- 31.** He asseverated that the Asset Reconstruction company who was the original Financial Creditor had assigned its own loan to Acre for Fifty Crores and this amount was in turn funded by one Rashmi Metalicks and the SAP Orrisa Metalicks through CIMMCO Vinimay Private Limited. By virtue of this assigned Acre became majority decision maker in the SCC. It is to be noted that ACRE holds about 60% voting share in SCC , while REC with 19.55% , Indian Bank (5.73%); (iii) Punjab National Bank (4.52%); Union Bank of India (7.92%); and Life Insurance Corporate of India (1.99%)


It was brought out that private sale notice by Swiss method which was advertised on 22nd February, 2024 for sale of the Corporate Debtor as a going concern wherein the last date of bid submission was 5th March 2024 , which does not give enough time to the bidders to evaluate the assets of the CD and make a reasoned bid. Swiss challenge method for achieving maximization of the value was resorted to, with an anchor bid equal to the price quoted by the Present successful auction purchaser.

- 32.** He made elaborate submission to drive home this point stressed on the issue that the liquidator has worked at a supersonic speed to drive home the point that point that the present sale was being pushed through hurriedly due to a collusion between the liquidator, the SCC and the purported Successful Purchaser which is no way in which the value of the assets can be maximized, that being the principal objective of the code.
- 33.** He further stated that whereas the last date for submission of the eligible candidates was given as 27th February, 2024, the last date for the competitive bidding was 05th March, 2024. The fact remains that this being a fixed match, the SCC had already fixed the humongous amount of Rs. 150 Crores as EMD, which being more than 50% of the total sale proceeds is unheard of in public procurement processes like tendering and public auction. This was to ward off other prospective bidders.



34. The proposal was not even examined properly which could have resulted in the value of maximization and SCC hurriedly agreed to the existing offer, as was the plan. Accordingly, the liquidator in tearing hurry issued the LOI on 06th March, 2024 itself. This unexplained hurry clearly shows that there was something more than what meets the eye and that a fraud has been perpetrated on the part of the liquidator by filing IA No.447 seeking approval of the going concern sale of the Corporate Debtor on a private placement basis.
35. He further pointed out that these timelines were directory in nature and in any case the timelines have to be only a means and not the end in itself. This also important to note that Rashmi Metalicks, which is the principal company owning the Successful bidder as well as the company that funded M/s ACRE for becoming a part of the CoC through another entity namely M/s CIMMCO Vinimay , though applied for participating in the sale process , but waited on the side lines so as to ensure that the reserve price of the next auction was reduced by the Liquidator as per the relevant regulations and the moment he felt that the value had been brought down substantially, it asked its sister concern namely, Orrisa Metalicks Limited to bid for the CD on a private basis.
36. It was stressed that the period allowed for the liquidation by the statute was still far, ending on 10th July, 2024, thus there was not so much of a cause of concern and moreover these dates are not “cast in stone” which in any case was far away. However for obvious reasons the liquidator worked in overdrive and issued a letter of intent, without seeking the mandatory approval of the Adjudicating Authority .
37. He cited two judgments namely, (*Raj Singhania Official Liquidator of Gontermann Peipers (India) Limited Vs. Chinar Steel Segment Centre Pvt. Ltd. and Ors. 2022 SCC Online NCLAT 4074*) wherein in Paragraph-44 ,the Court held as follows:

“The principle laid down in the above Judgment are not in controversy and it is evident from Regulation 33 and as per Schedule I, the Liquidator must make very endeavour to get maximum sale price for the benefit of the Committee of Creditors but in the instant case, on account of failure of the Liquidator/Appellant in Comp. App. (AT) (Ins.) No.465/2022 failure to fix time and date for inspection, deprived the many interested bidders to participate in the bid and consequently failed to maximize the ‘Corporate Debtor’ such irregularity can be termed as material irregularity which vitiates the entire proess of Liquidation. Therefore, the



Adjudicating Authority rightly held that the Liquidator committed material irregularity in conducting e-Auction of 'Corporate Debtor' and failed to realize the maximum price on account of such irregularity."

38. He also relied on the judgment of Hon'ble NCLAT, namely, (*Aditya Kumar Tibrewal Vs. Om Prakash Pandey and Ors.*, 2022 SCC Online NCLAT 142) wherein Hon'ble NCLAT, in Paragraph-11 sub-para-(XIII) held as follows:

"The Law laid down by the Hon'ble Supreme Court in the above judgment which deals with the interpretation of provisions of the Code itself are applicable to interpretation of Regulation 35A of CIRP Regulations and following the above judgment we hold that tieline prescribed in Regulation 35A of CIRP Regulations is directory and not mandatory."

Submissions by Liquidator

39. Mr. S.N. Mookherjee Ld. Sr. advocate appeared for the Liquidator and countered the allegations of the applicant systematically and asserted that no case was made against the liquidator for having worked in collusion with the Financial creditors or the Corporate Debtor as alleged.
40. 2. The Corporate Debtor was incorporated in the year 2006, as a Special Purpose Vehicle promoted by Abhijeet Group, for the purpose of a power venture in the state of Jharkhand. it had commenced construction of a 1080 (270*4) MW coal based thermal power plant in the year 2009-2010, at the coal mining area in Bana, Latehar District, Jharkhand. The power plant comprises of two (2) phases- Phase I and Phase II of 540 MW each, which are segregated by a railway line passing through.
41. On account of several financial difficulties faced by the Corporate Debtor, Asset Reconstruction Company (India) Ltd. (ARCIL) filed the captioned company petition, being, C.P.(IB) No. 23/KB/2019, under section 7 of the Insolvency and Bankruptcy Code 2016 seeking initiation of corporate insolvency resolution process of the Corporate debtor.
42. **CIRP Commencement date – 19.02.2020-** The above petition was admitted by this Hon'ble Tribunal by way of its order dated 19/02/2020, pursuant to which the Corporate Debtor was admitted into CIRP, and Mr. Pankaj Dhanuka was appointed as the Interim Resolution Professional .Therafter, the appointment of Mr. Dhanuka as the Resolution Professional was confirmed by the Committee of Creditors.



43. Liquidation Commencement date- 08/10/2021: However, on account of non –receipt of any suitable resolution plan, the Corporate Debtor was admitted into liquidation by the order dated 08/10/2021 of this Hon’ble Tribunal (“ Liquidation Commencement Date”) and Mr. Pankaj Dhanuka was appointed as the Liquidator.
44. **Stakeholder’s Consultation Committee:** After having received, collated and verified the claims of the creditors of the Corporate Debtor under the provisions of the Code, the Liquidator constituted the Stakeholders’ Consultation Committee (SCC) of the Corporate Debtor on 14/12/2021, in accordance with Regulation 31A of the IBBI (Liquidation Regulations) ,2016.The original SCC comprised of the following members :
- i. ARCIL (60.65%)
 - ii. REC Limited (19.55%)
 - iii. Indian Bank (5.37%)
 - iv. Punjab National Bank (4.52%)
 - v. Union Bank of India (7.92%) and
 - vi. Life Insurance Corporation of India (1.99%)
45. Mr. Mookerjee took us to the time lines of the case to bolster the assertion that the liquidator did everything systematically and as per law.
46. It was submitted that On 05/02/2024, ARCIL assigned its entire debt of the Corporate Debtor along with the underlying financial documents together with its rights and benefits to Assets Care & Reconstruction Enterprise Ltd. (ACRE).In view of the said assignment, the liquidator updated and modified the list of stakeholder of the Corporate Debtor as per Regulation 31 and 30A of the Liquidation Regulations and the same was taken on record by this Tribunal by its order dated 04/04/2024 passed in IA. No. 649/2024..
47. After the commencement of the liquidation process, the Liquidator has conducted a total of nine rounds of e-auctions along with intervening private sale, to sell the Corporate Debtor as a going concern and / or its assets in parcels. An elaborate table giving the dates of these auctions and the name of Newspapers in which these Advertisement have been given have been put on record.



48. It is seen that the first auction was made on 11th Feb. 2022 with the reserve price of 770 crores and following that no papers came forward, the second auction was held on 11th April 2022 with reserve price of Rs. 650 Crores.
49. In the 5th auction, even though an advertisement was made with based price of Rs.487 Crores. However, no bidders came forward for the sale as a going concern but the liquidator in his wisdom sold plant and machinery at 93.25 crores, which was said to be higher than the reserve price in the last phase auction.
50. After having sold the part of the plant and machinery thus, the liquidator again advertised for 6,7, 8 and 9 e-auction with the reserve price going down to 485.47 crores.
51. After the failure of 9th auction, the Liquidator received an offer for private sale of the Corporate Debtor as a going concern from one OASPL for an offer priced of INR 250 Crores plus applicable taxes. The offer was valid for only **three** days.
52. **On 19.02. 2024**, the Liquidator sent an email informing OASPL that meeting of the SCC of the Corporate Debtor was scheduled on 20/02/2024, wherein its offer would be deliberated upon. The above offer received from OASPL was circulated by the Liquidator to the SCC members for discussion in the 19th SCC Meeting by way of an email.
53. On 20/02/2024 itself, the 19th meeting was conducted wherein the offer received from OASPL was deliberated by the SCC and negotiated with OASPL whereby the OASPL representative informed the SCC members that it was ready to revise its offer of Rs. 265 Crores plus applicable taxes. EMD of INR 150 Crores and also agreed for undergoing Swiss Challenge auction with OASPL's bid as anchor bid.
54. A proposal was approved by all SCC members except REC, and later it was seen on 2nd March, 2024 when the voting line were still open, REC also approved above proposition and thus the agenda got approved by 99.92%
55. On 21st Feb. 2024, pursuant to the SCC meeting and negotiations, the Liquidator sent an email to OASPL capturing the final revised price bid and also fact that the sale process was subject to approval of Hon'ble Tribunal under Regulation 33(2) at 7.53 P.M.
56. This email was responded by OASPL sent by Mr. Manish Kr. Jain of **Rashmi Group** wherein offer was confirmed. The email is set out herein below :



Annexure A-9

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From: Manish Kumar Jain <manishkumarjain@rashmigroup.com>
Sent: 21 February 2024 20:27
To: IN, CPL IP
Cc: Priya Aganwat; Nilanjan Gupta; Dhanuka, Pankaj - Ext; Pankaj Dhanuka; Diniz, Alaric; IN, Project Neutron; cpl
Subject: Re: Revised Offer for Sale of Corporate Power Limited

Dear Sir

We confirm our offer subject to we as anchor bidder in swiss challenge. Also our EMD will in in form of BG. Request you to issue letter for the same and share with us format of BG

Regards
Manish Jain

57. On 22nd February 2024 very next date, an advertisement regrading Swiss Challenge process was published by the Liquidator in Economic Times (All India edition) and Regional Newspapers of Jharkhand, West Bengal, Nagpur in regional language.
58. The timeline for private sale by this process of Swiss Challenge was as follows: -
Cut of dates:


Pubic announcement:	22/02/2024
Submission of eligibility documents:	27/02/2024
Payment of EMD:	29/02/2024
Intimation to Qualified Bidder(s)	29/02/2024
Due diligence & Site visits:	04/03/2024
Competitive Bidding date:	05/03/2024
Issuance of LoI:	06/03/2024.

59. Earlier on 23rd Feb. 2024, the Liquidator approached 300 potential bidders and invited them to participate in the proposed private sale of the Corporate Debtor. It is important to note that in Note No.2 of the advertisement required an EMD of 150 crores as per the process document.
60. However, none of the parties other than OASPL participated in the Swiss Challenge and on 4th March 2024, the status of the sale was made known to the SCC who after detailed deliberations approved the proposal by 80.50% voting share, which goes to 99.92 % . on 16th March 2024 ,by virtue of the accent given by REC .




61. It is also stated that during the meeting a notice received from JKDL on 29/02/2024 was placed for discussion. However, post deliberations, the SCC including ACRE, Indian Bank, Union Bank of India, Punjab National Bank and LIC, holding the majority voting share, advised not to extend timelines of the private sale process or reduce EMD amount as requested by JKDL, thus culminating the process.
62. On 6th March 2024, the Liquidator issued the LoI to the successful bidder, i.e., OASPL, for its unconditional acceptance, which was accepted by OASPL on 7th March 2024. Following the issuance of letter on 06th March 2024, the counsel for SMSPL offered higher price on 16th March, 2024 and IA 586 was filed two days thereafter i.e on 18th March 2024.
63. Mr. Mookherjee summed up the objections of the applicant and submitted that in the letter dated 16th March 2024, the counsel for SMSPL has stated as follows:-

“ Our client is also of the firm view that the reserve /base price of INR 265 crore fixed for the private sale for Corporate Power Limited is undervalued and in the interest of maximisation of value of assets of Corporate Power Limited, our Client is ready and willing to submit a bid, higher than the highest bid received by your goodself on the auction process, if any.
64. While hearing of IA 586 was going on SMSPL addressed a letter to the members of SCC requesting them to consider its offer of INR 300.2 Crores with 10% of EMD with a condition that we can participate only in public auction and noted by which same process. This proposal was duly considered by the SCC in its 21st meeting on 26th March 2024, in which the SCC by voting share of 75.08% decided not to allow SMSPL to participate in the Swiss Challenge mechanism at this stage.
65. It is also important to note that REC and Union Bank was in favour of exchange the timelines. However, considering the fact that other conditions of the sale particularly the EMD not being complied by them, it was decided not to consider their proposal.
66. SMSPL had alleged EMD INR 150 Crore was unreasonable high and was in breach of the second proviso to Article 3 to Schedule 1 of the Liquidation Regulations.
67. On 5th March 2024 – SMSPL addressed another letter dated 04.04.2024 to the Liquidating Liquidator, adding more particulars to its allegation of collusion between Asset Care & Reconstruction Enterprise Limited (ACRE), a member of SCC and OASPL Reg. 33(1) inter alia stating that :CIMMCO Vinimay Pvt. Ltd. that [funded acquisition of debt of CPL by ACRE- in lieu of security receipts (SRs) of ACRE Trust therefore having



indirect control in ACRE] and OASPL are promoted by same group- Rashmi Group. Clearly, the public announcement and consequent private auction conducted to give undue and illegal preference to Rashmi Group. In order to prevent any competition, EMD was kept at unreasonably high.

68. On 08.04.2024, Upon receipt of the above two (2) letters sent by SMSPL, in discharge of its duties enshrined under the Regulation 33(3) of the Liquidation Regulations, the Liquidator sent an e-mail to OASPL on 08.04.2024 seeking details of ownership structure of OASPL, latest shareholding pattern and details of related parties of OASPL.
69. 13.04.2024, the Liquidator addressed e mails to ACRE and OASPL respectively, informing them about the allegations levelled by SMSPL by way of its letters dated 27.03.2024 and 04.04.2024, and requested them to provide a detailed response, along with all the relevant facts, material information and supporting documents in relation to the same, latest by 15/04/2024.
70. ACRE stated that they controls only 60.65% of SCC votes falls short of the required majority of 66%. In any event, offer was accepted unanimously accepted .
71. The above facts and circumstances make it clear that despite the best efforts of the Liquidator to sell the Corporate Debtor under the ordinary and usual auction process in terms of Regulation 33(1) of the Liquidation Regulations, all the said nine (9) rounds of e-auction failed. Only plant and machinery of Phase II assets could be sold by way of private sale between 5th and 6th e-acution. This was notwithstanding the efforts made in reaching out to prominent potential bidders and preliminary interest shown by many of them.
72. The offer submitted by OASPL was promising in the facts and circumstances of the case and the same has been accepted by the SCC by a voting share of 99.92% for the purpose of conducting a private sale process through a Swiss Challenge method.
73. The conduct of the private sale , as proposed, is being done with the consultation and approval of the members of the SCC, and it appears to be the best possible solution for the sale of the corporate debtor in a time bound manner at this juncture. Moreover, since the said sale process envisaged a Swiss Challenge process, as detailed above, it was in the interest of value-maximisation ultimately benefitting all concerned stakeholders.
74. Due to the failure of past e-auctions and non-consideration of sale of the Corporate Debtor, the Liquidator was constrained to take three 3 extensions under Regulation 44 of the Liquidation Regulations for completion of the liquidation process. The said




requests were allowed by this Hon'ble Tribunal by orders dated 29/12/2022, 11/07/2023, and 18/01/2024. Since, the liquidation process has been running on the extended timelines as afforded by this Hon'ble Tribunal, that is going to conclude on 28/06/2024, it is imperative that this Hon'ble Tribunal allows this Application.

75. He stated that irreparable harm would be caused to the stakeholders of the Corporate Debtor, if the Private Sale Approval Application is not allowed.
76. The liquidator has also relied on the following judgements
- **(2008) 9 SCC 299 – Valji Khimji and Company v. OL of Hinusthan Nitro Product (Gujarat) Limited & Ors --** Appeal was filed against orders of High Court where sale was confirmed after auction. The appellant contended that the sale was confirmed at a much lower price. The SC decided that there was no fraud or collusion committed as higher offers were received after one year of confirmation of sale. **(para 28- relevant)**
 - **(2020) SCC OnLine Cal 2213--** Someone who has not participated in the bidding process cannot challenge the process on any ground **(para 5- relevant)**
 - **(2023) 10 SCC 718--** After public announcement made, anyone cannot say that they were not aware of the pronouncement newspapers. **(para 22- relevant)**

Submissions by ACRE

77. Ld. Counsel Mr. Bose appearing for the major constituent of the SCC stated that the assignment of the debt was done in terms of the SARFAESI act and was thus therefore lawful. The security receipt holder viz. CIMMCO cannot be said to be influencing the ACRE as it was working through an independent trust. He further stated that the much hyped issue of EMD being 5-10% of the bid cost is applicable only for public auction which was not the case here. As such the SCC in its wisdom decided to keep it higher so as to have a genuine bidder.
78. ARCIL itself had acquired such loans from the State Bank of India and its four associate banks (i.e., State Bank of Patiala, State Bank of Bikaner and Jaipur, State Bank of Travancore, and State Bank of Hyderabad) and India Infrastructure Finance Company Limited (collectively Lender Banks) through Assignment Agreement dated March 31, 2015, ARCIL has now assigned the entire loan disbursed by the Lender Banks to the Corporate Debtor, by way of the Assignment Agreement to Respondent No. 2 with all



its rights, title and interest and any underlying security interests, pledges and/or guarantees in respect of such loans on ‘as is where is’, ‘as is what is’ and ‘without recourse basis. The loan account of the Corporate Debtor was declared as a non-performing asset (NPA) on July 31, 2013.

79. The Assigned Debt of Rs. 88,37,71,49,296/- is the claim amount admitted by Respondent No.1, i.e. the Liquidator against a claim of Rs. 93,67,43,11,855/- submitted by ARCIL in its capacity as Financial Creditor of the Corporate Debtor. The claim form was filed by ARCIL and the subsequent admission by the Liquidator took place prior to execution of the Assignment between ARCIL and Respondent No.2.

80. Therefore, Respondent No. 2 is and was not privy to the facts of the matter and/or was not involved in the liquidation process of the Corporate Debtor **prior** to the date of the Assignment Agreement. Therefore, the allegations of fraud pertaining to the private sale of the Corporate Debar to Respondent No.3, executed through the Swiss Challenge method, are without merit, as Respondent No.2 was not involved in the matter until February 2004.

The financial assets acquired by ACRE are in accordance with Master Circular dated April 3, 2023 and there is no legal infirmity in the same.

81. Respondent No.2 being a registered asset reconstitution company, is permitted under the “Master Circular- Asset Reconstruction Companies” dated April 3,2023 (‘Master Circular) issued by Reserve Bank of India to acquire the financial assets either on its own books or in the books of a trust created in accordance with the provisions of the Indian Trust Act,1882 for the purpose of securitization and asset reconstruction. Section 7(1) and 7(2) of the SARFAESI Act allows an asset reconstruction company to issue security receipts to Qualified Buyers (defined under the SARFAESI Act) for raising funds to acquire a financial asset.

82. Under clause 7 (Securitization) of the Master Circular, an asset reconstruction company shall give effect to the provisions of Section 7(1) and 7(2) of the SARFAESI Act through one or more trusts set up exclusively for the purpose. Therefore, Respondent No.2 has complied with all the applicable laws and regulations while acquiring the financial assets of the Corporate Debtor from ARCIL. **Refer to ANNEXURE I at Page Nos. 319 to 370 of Affidavit in Opposition filed by Respondent No.2**



- 83.** The Applicant has alleged without any basis that the Assignment Agreement is illegal or contrary to Clause 6(A)(2)(d) of the Master Circular. The Assignment Agreement is a valid, legal, and binding document. The Applicant is not privy to the Assignment Agreement and therefore has no locus standi to challenge the same.
- 84.** The Applicant has alleged that CIMMCO be funded through subscription to security receipts issued by Respondent No 2, the major portion of the purchase consideration required to be paid by Respondent No.2. under the Agreement through which Respondent No. 2 acquired the financial assets of the Corporate Debtor and became a majority rights holder in the SCC. It is alleged that CIMMCO is a majority security receipt holder of the ACR-155 Trust formed by Respondent No.2 and that CIMMCO is a group company of the Rashmi Group to which Respondent No. 3 belongs and there a colossal fraud has been perpetrated to give advantage is the bid submitted by Respondent No. 3. The Applicant has further alleged that the funds raised by Respondent No 2 by way of issuance of security receipts to CIMMCO are not permitted since CIMMCO is not a 'qualified buyer' within the meaning of the SARFARSI Act, 2002.
- 85.** The security receipts issued by ACRE-153- Trust were issued after completing necessary due diligence and KYC to ensure that the security receipts were issued to a 'qualified buyer' within the meaning of the SARFAESI Act. It is further highlighted that Respondent No.2 is not privy to the sources of funding insofar as CIMMCO is concerned.
- 86.** The Applicant further does not have any locus standi to challenge the assignment and/or the issuance of security receipts to by the Respondent No.2 to CIMMCO as alleged or at all. It is averred that R-2 is an independent entity capable of taking its own decisions. Also that the proposal of Respondent No.3 was approved by the SCC keeping in mind the importance of principles of value maximization.
- 87.** While submitting that this Adjudicating Authority cannot sit in an appeal over the decision of the SCC and the Liquidator it was submitted that similarly placed auction purchaser-JKDL was also considered by the SCC in light of principles of value maximization –ACRE could



not influence the decision of SCC and the proposal made by the Applicant was rejected by the SCC after careful consideration of all relevant facts.

- 88.** Mr. Mainak Bose emphasized that the Respondent no.2 has not and could not have influenced any of the SCC members holding only 60.64% in the SCC. It is a clear case of crying over spilt milk and the Applicant having missed the opportunity to participate in the private sale process as also in previous 9 (Nine) auctions, has come up with such a vexatious application that deserves to be dismissed as the Applicant has not adduced an iota of evidence in support of its allegations of fraud and collusion against the respondents. It was further alleged that the applicant was not a genuine or intending auction purchaser.

Submissions by OASPL

- 89.** The application being IA No. 995 of 2024 as also IA No. 586 of 2024 (a copy of which was served on the Respondent No. 3 on 22 March 2024) are not maintainable in law or on facts for the reasons given herein .
- 90.** Applicant is a mere fence sitter who failed to act on the public announcements published by the liquidator from 31 December 2021 to 15 January 2024 and the last publication on 22 February 2024 – and has no explanation for delay
- 91.** Having failed to participate in the Swiss Challenge auction process for which publication was made by the Liquidator within the timelines stipulated therein, the Applicant has no locus to seek any relief before this Hon’ble tribunal. The Applicant deserves to be treated as a stranger to the entire process.
- 92.** The Applicant is admittedly the next-door neighbour of Corporate Power Limited (“Corporate Debtor”/”CD”) inasmuch as their factory premises are located next to each other.



93. The Applicant has claimed that it had no knowledge of the fact that the CD was undergoing Corporate Insolvency Resolution Process (CIRP) (commenced on 19 February 2020) / liquidation process (commenced on 8 October 2021) under the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC). The resolution professional of the CD had made publication of Form-G on 27 June 2020. Following the admission of the CD to liquidation, 9 (nine) separate public announcements were made by the Liquidator between 31 December 2021 and 15 January 2024. A public announcement was also made by the Liquidator in connection for *sale of the CD by way of private sale under a Swiss Challenge Process* where the Respondent No. 3 was selected as the anchor bidder by the Stakeholders Consultation Committee (SCC) of the CD on 22 February 2024 where the timelines were clearly spelled out. All the aforesaid publications were made by the resolution professional and the Liquidator in leading newspapers having wide circulation. The Applicant, which is a commercial party, cannot derive any benefit by claiming that it had now knowledge that the CD was undergoing CIRP/ liquidation process/ was subject matter of a private sale process where bids were invited from interested parties. Reliance is placed on the judgment of the Hon'ble Supreme Court of India in *M/s RPS Infrastructure Limited vs Mukul Kumar & Anr.* reported in **2023INSC816** where it has been held that **the plea of not being aware of newspaper pronouncements is not one which should be available to a commercial party;**



- 94.** The Applicant has admittedly claimed that it became aware of the fact that the CD was undergoing sale process under the provisions of the IBC on 16 March 2024. The publication made by the Liquidator on 22 February 2024 in connection with the private sale of the CD by way of Swiss Challenge mechanism clearly stated that the last day for submission of bids in the private sale process was 5 March 2024. It is thus clear that the Applicant was sleeping on its rights. In the two separate applications filed by the Applicant, there is no pleading on record to explain the delay on the part of the Applicant. The
- 95.** The Applicant has to first cross the threshold entry of not participating in the earlier public auction and the Swiss Challenge auction process before he can be heard to agitate any grievance on the on the Swiss Challenge process. Applicant cannot claim that it has been prejudiced in any manner whatsoever since the Applicant did not act on the publications made by the Liquidator.
- 96.** The entire case of the Applicant is built on apparent prejudice that it has purportedly suffered because of the actions of the Liquidator, the SCC and Respondent No. 3. The Applicant is completely silent on the aspect of its own delay for which there is no explanation at all. It is only on 16 March 2024 that the Applicant discovered that the private sale process of the CD was concluded and was awaiting approval of this Hon'ble Tribunal. Having realized that it could no longer participate in the private sale process, which was fairly concluded, the Applicant has attempted to throw the private sale process of the CD into disarray without even attempting to explain its own delay far less offering any reasons for purported delay on any real time basis. The Applicant has no vested right in the liquidation process of the CD or the private sale process in which it failed to participate within the indicated timelines.



- 97. OASPL HAS ACTED IN A BONAFIDE MANNER** OASPL had in the past filed its expression of interest to the Liquidator pursuant to several public announcements which were made by the Liquidator. Having done so, OASPL accessed the details of the assets of the CD. Accordingly, it conducted legal and financial due diligence on the CD and valued the CD at INR 250 crores. However, it did not make any offer for the acquisition of the CD since there was a major gap in its valuation of the CD and its reserve price. 9. The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (“Liquidation Regulations”) did not envisage sale of a CD to a prospective purchaser at a price which is lower than the reserve price. However, this position changed when the Liquidation Regulations were amended on 12 February 2024 when Regulation 33 (2) (c) as it stood before the said date was deleted. On and from 12 February 2024, there is no embargo in the Liquidation Regulations in conducting a private sale process where the offered price is lower than the reserve price of the CD at the last failed auction.
- 98.** On 19 February 2024, OASPL made an offer of INR 250 crores to acquire the business of the CD as a going concern on a private sale basis. It also offered to make an earnest money deposit of 10% of the offered amount (i.e. INR 25 crores).
- 99.** Pursuant to the aforesaid, the representatives of OASPL were invited to attend the meeting of the SCC of the CD on 20 February 2024 by the Liquidator. Negotiations took place between the SCC and the representatives of OASPL at the said meeting of the SCC wherein OASPL agreed to (i) revise its offer to INR 265 crores, (ii) make earnest money deposit of INR 150 crores to show its seriousness in the acquisition of the CD, and (iii) agreed to participate in an auction process which would now be held by way of Swiss Challenge process where OASPL would be the ‘anchor bidder’ and have the right to match any higher bid in order to acquire the CD. The earnest money deposit was made by OASPL in two tranches on 23 February 2024 and on 26 February 2024 respectively.
- 100.12.** The private sale process by way of Swiss Challenge mechanism stood concluded as on 6 March 2024 as no prospective bidder submitted any bid pursuant to the public advertisement published by the Liquidator on 22 February 2024. **OASPL’s anchor bid of INR 265 crores was declared as the winning bid and a letter of intent (subject to the approval of this Hon’ble Tribunal) was issued to OASPL by the Liquidator.**



101. APPLICANT HAS CONTINUOUSLY CHANGED THE TERMS OF ITS OFFER

102.13. Upon discovering that the CD was undergoing liquidation process under the IBC on 16 March 2024 and even the last date for participating in the private sale process of the CD had passed them by, the Applicant caused issuance of a letter to the Liquidator through their advocates at a supersonic speed on the self-same day. In the said letter, while admitting that their client (namely, SM Steels and Power Limited) only became aware of the public notice dated 22 February 2024 (where the last date for submission of bids was 5 March 2024) on 16 March 2024, the Applicant requested to participate in the bidding process for private sale of the CD as a going concern on as is where is basis. The said letter did not contain any offer price for acquisition of the CD. Even in the application being IA No. 586 of 2024, the Applicant did not specify any offer. 14. On 22 March 2024, i.e., a month after the public advertisement dated 22 February 2024 was published by the Liquidator, the Applicant made its first offer to acquire the CD. The Applicant made a conditional offer of INR 300.20 crores to acquire the CD under a public auction (and not private sale under Swiss Challenge Auction) with a proposed earnest money deposit of 10% of the said amount. The said offer was rejected by all members of the SCC in their commercial wisdom as none of the members were willing to conduct a fresh auction process. While Assets Care and Reconstruction Enterprise Limited (“ACRE”), Union Bank of India, Punjab National Bank and LIC (together accounting for 75.08% of the SCC) did not want to let the Applicant participate in the sale process at all, REC and Indian Bank (together accounting for 24.92% of the SCC) were willing to let the Applicant participate in the private sale process only if the Applicant was willing to submit an earnest money deposit of INR 150 crores.

103.15. On 8 May 2024, the Applicant issued a correspondence to the Liquidator stating that it was now willing to furnish earnest money deposit of INR 150 crores by way of bank guarantees and that it was also now willing to participate in a private sale process in order to acquire the CD.

SCC HAS REJECTED THE APPLICANT'S OFFERS IN THEIR COMMERCIAL WISDOM

104. From the minutes of the several meetings of the SCC which are on record, it is as clear as daylight that the SCC, in their commercial wisdom, has rejected the several offers which have been made by the Applicant. Furthermore, the mode of sale of the CD by way of private sale in a Swiss Challenge auction process with OASPL as the anchor bidder was also decided by the SCC in its commercial wisdom.

105. By filing IA No. 586 of 2024 as also IA No. 995 of 2024, the Applicant has relegated this Hon'ble Tribunal to the SCC of the CD. Since the SCC in its commercial wisdom has decided on a mode of sale and further chose to not entertain the aforesaid offers made by the Applicant, it is not open for the Applicant or indeed anyone else to question the commercial wisdom of the SCC. This is a settled principle of law.

106. During the course of arguments, it was submitted that the SCC's commercial wisdom or decisions arrived at by the SCC in exercise of such commercial wisdom cannot be equated with the commercial wisdom exercised by the committee of creditors ("COC") in CIRP. This argument is preposterous since the members of the COC and the members of SCC are one and the same. Furthermore, all commercial terms and commercial decisions in a liquidation process are taken by the SCC. Although the liquidator is not bound to follow each and every opinion of the SCC, in case there is any difference in opinion, the liquidator is required to file an application to record his reasons for differing with the advice/ opinion of the SCC. Each such application is decided by this Hon'ble Tribunal on its own merits. The commercial wisdom of the SCC in any liquidation process holds equal weight as the commercial wisdom of any COC in a CIRP.

107. Reliance is also placed on the judgment of the Hon'ble Supreme Court of India in ***R.K. Industries (Unit-II) LLP vs H.R. Commercials Private Limited & Ors.*** reported in (2024)4 SCC 166 (Paragraphs 75– 78) where private sale by way of Swiss Challenge process in liquidation sale under the provisions of IBC is recognized. At paragraph 78 of the said judgment, it is further held that **commercial transactions purely in the nature of business decisions are not amenable to judicial review.**



FALSE ALLEGATIONS OF COLLUSION BETWEEN ACRE AND OASPL

108. The Applicant has falsely alleged that there has been collusion between ACRE and OASPL as a related party of OASPL has purchased security receipts offered by ACRE to qualified bidders under the auspices of Master Directions issued by the Reserve Bank of India as also the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002.

109. ACRE is only one of the secured creditors who is apart of the SCC which is constituted of 5 (five) other secured creditors (consisting of 99.2% of the SCC) and unsecured creditors (consisting of 0.8% of the SCC). The details of the members of the secured creditors of the SCC as ascertained from a copy of the minutes of the 22nd meeting of the SCC of the CD have been given in the chart.

Security receipts issued by ACRE does not make out a case of collusion.

110. Regulation 33(3) of the Liquidation Regulations states as follows:

111. *“The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor’s related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties.”*

112.23. In *State of Goa and Another vs Colfax Laboratories Ltd & Anr* reported in (2004) 9 SCC 83, the Hon’ble Supreme Court of India has held that ***collusion means a secret agreement for a fraudulent purpose or a secret or dishonest arrangement in fraud of the rights of another. It is a deceitful agreement between two or more persons for some evil purpose, such as to defraud a third person of his rights.*** As such, collusion if any, has to be for a specific purpose. In the present liquidation process, there has been no collusion since the main object of value maximization of the assets of the CD was always given due importance. In fact, OASPL had to reluctantly agree to the Swiss Challenge process once the same was proposed by the members of the SCC. Under a Swiss Challenge auction process, there could not have been any threat to value maximization. Since all members of the SCC have approved the offer made by OASPL pursuant to



which the Swiss Challenge auction process was held, there can be no question of defrauding anyone's rights. 24. Furthermore, the Liquidator has argued that the Liquidator approached about 300 entities requesting them to participate in the auction. However, no incremental bid was received by the Liquidator.

113. The aforesaid regulation requires the liquidator to submit a report in the event that he has reason to believe that there is any collusion. No such report has been filed. Furthermore, the regulation **requires that any collusion has to be between all the creditors and the buyer and not just one creditor and the buyer.** All the members of the SCC have agreed to holding the private sale of the CD pursuant to the Swiss Challenge auction process where OASPL was declared as the anchor bidder by 100% of secured creditors (effectively 99.92%) in the SCC. After the Applicant expressed its interest belatedly, such secured creditors forming 99.92% of the SCC have expressly declined to conduct any further sale process other than the Swiss Challenge process which had already been agreed upon.

114. During the course of arguments, a further incorrect statement was made by the Applicant when it was alleged that OASPL and ACRE have the same promoter / management. The two entities have distinct and separate promoters and the affairs of both the entities are run by separate boards of directors. There is no commonality in the shareholders, board of directors or key managerial personnel in OASPL and ACRE. This will be borne from records.

Analysis and Findings


115. Issues that fall our consideration are as follows:

The locus of the Applicant in filing these applications

Whether the liquidator violated the regulations.


116. On Locus :

It is well recognised that the Resolution and liquidation are time dependant processes and the assets of the CD are surely going to lose value with the lapse of time. Thus, at this stage of the liquidation when the sale has been made, though not confirmed and the only reason why the liquidator has filed this application is to comply with the law, can we entertain a lazy bidder, who is trying to compensate his laziness with an enhanced enthusiasm for value maximization of the assets of CD. In order to decide the issue in its right earnest, we shall have a look at the relevant provisions under which this



application has been filed principally under Sub-Regulation 33(3) of the IBBI (Liquidation Process) regulations which stipulates as under:-

- 117.**“The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor’s related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties.”
- 118.**The Regulation itself is quite clear that liquidator will not proceed to sell the assets of the CD in liquidation, if there is a reason to believe that there was an indication of a collusion between the buyers or the Corporate Debtor’s related parties and buyers or the Creditors and the buyers. The essence of the regulation is that in case such a collusion exists it would lead to an under recovery of the assets of the Corporate Debtor which is against the primary purpose of the Insolvency Bankruptcy Code, 2016. It is with this premise that the Applicant has come forward to file this application alleging that due to a perceived collusion between the principal Member of the CoC and the buyer of the assets of the Corporate Debtor under a private sale is resulting into an under-recovery of the assets and has indicted the liquidator also with malafide intentions.
- 119.**The point that is being raised is that there is an under recovery of the value of the CD because of an unholy collusion, between the Principal member of the CoC/later SCC and the prospective bidder. It is averred that even though it may look strange as to why a principal Financial Creditor should take a decision to harm itself due to a lessor recovery for other Creditors. Here it is to be noted that one of the Members of CoC/SCC with the significant voting purchase is a Central Government utility, namely, REC having 19% voting share while remaining 21% is composed of Govt. banks and LIC. So the script is that if the prospective buyer is an alter ego of the Principal Creditor in the CoC/later SCC, and is aided by the decision taken for a private sale by laying certain favourable bidding conditions, the member who would lose out would be REC and the Govt banks and is certainly not a step towards **maximizing the value, that being the principal object of the code**. This is construed as a sufficient and substantial reason for us to take up and hear this matter out in order to examine veracity of the allegations for if that so not done, we will be working at the cross-purposes to the main objective of the Code which inter alia, calls for **maximization value of assets**.
- 120.** It has been stated that Consequent upon failure of the 9th auction, and after getting the proposal from OASPL, the liquidator reached out to more than 300 potential bidders.



Including corporate houses Jindal Steel, Aditya Birla, Tata Power, Torrent Power, Adani Power, Arcelor Mittal, JSW, Vedanta, Mahindra Group, Larsen & Toubro, etc. to seek their interest to participate in the sale process of the Corporate Debtor.

121. Two probable bidders namely J. Kumar Infrastructure Ltd. and Shri Mahavir Ferro Alloys Ltd., who had in the 7th round of e auction also shown interest and deposited the EMD at that time had shown interest this time also and had asked for reduction in the **EMD of 150 Crores**, which is too restrictive for anybody to come in, and also for extension of the time lines.
122. Dr. Abhishek Manu Singhvi Ld. Sr. Advocate appearing for the Intervenor i.e. M/s SM Steel succinctly explained the chronology of the process thus far , to bolster his point that the liquidator has gone out of the way to work at the “Supersonic Speed” to conclude the sale of the Corporate Debtor as a going concern on a private sale basis, which corroborate his assertion of collusion between the principal member of SCC with the buyer while the liquidator has contended that in order to comply with the Regulation 44 , it was necessary to adopt that kind of speed.
123. On this aspect of time lines, let us examine the provisions of the code particularly Regulation No.44 of Liquidation process vide which the allowable period of liquidation has been reduced from two years to one year thereby prompting the SCC to ask the liquidator to conclude the sale on instantaneous basis.

44.Completion of liquidation.

*(1) 72[The liquidator shall liquidate the corporate debtor within a period of one year from the liquidation commencement date, notwithstanding pendency of any application for avoidance of transactions made under 73[***] Part II of the Code, before the Adjudicating Authority or any action thereof:*

(2) If the liquidator fails to liquidate the corporate debtor within 75[one year], he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation.

*74[***]*



76[Explanation.- In relation to the liquidation processes commenced prior to the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019, the requirements of this regulation as existing before such commencement, shall apply.]

124. Thus it is seen that even if the liquidation period has been reduced to one year, Regulation 44(2) makes a provision for the extension of time on application by the Liquidator. This is therefore not a sound reasoning for not extending the time lines as deliberated in the SCC as well for other potential bidders like JKDL. Using this argument for justifying the “supersonic speed”, with which the liquidator functioned is nothing but ambitious.

125. Another alleged Violation of Regulations 33 Schedule I is 1C and 1D. These are set out here:

(1D) The liquidator shall provide at least fourteen days from issue of public notice for submission of eligibility documents by prospective bidder.

(1E) The liquidator shall provide to qualified bidder at least seven days, for inspection or due diligence of assets under auction, from the date of declaration of qualified bidder.

As can be made out from the above that even though the Schedule I is sometime held to be directory in nature, however usage of word “Shall” make it more definitive and rightly for the reasons of transparency and to above any arbitrariness in the public procurement processes. The relevant part of the notice for Swiss Challenge giving salient dates is given below:



	700091 Communication Email Address: incplip@deloitte.com
8. Asset on Sale*	Corporate Debtor as a going concern on an 'as is where is', 'as is what is', 'as is how is' and 'without any recourse' basis without any representation, warranty or indemnity by the Corporate Debtor or the Liquidator. *Subject to such description, inclusion, and exclusion of assets under the relevant options, as may be provided in the Process Document.
9. Anchor Bid Price/ Base Price	Rs. 265 Crores (Indian Rupees Two Hundred and Sixty Five Crores)
10. Minimum Incremental Amount	Rs. 1 crore (Indian Rupees One crore only)
11. Mode of Sale	The mode of sale is a Swiss challenge process (as per the Process document) under Private Sale as per meaning under the Code and Liquidation Process Regulations.
12. Terms of Sale	As per the Process Document.
13. Manner of Obtaining the Process Document	The detailed terms and conditions of the sale process are set out in the Process Document, which can be obtained by the bidders by sending an email request at incplip@deloitte.com
14. Last Date for Submission of Eligibility Documents	27 February 2024
15. Last Date submission of EMD	29 February 2024
16. Last Date for Bid	05 March 2024
17. Manner of Submitting Bid	Interested parties must send in their bid and the EMD strictly as per format and documents as set out specifically under the Process Document and Earnest Money Deposit ("EMD") of Rs.150 Crores (Indian Rupees One Fifty Lakh Crores only).

- 126.** From the chronology given above it is seen that the public notice was issued on 22.02.2024 whereas the last date for submission of the eligibility documents was kept as 27.02.2024, which is only 6 days as against the stipulated 14 days. Similarly, the date for deposition of the EMD was kept as 29.02.2024 which as per (1F) could have been upto 03.03.2024. The violation of the postulate 1E is also evident from the fact that the notice does not take into account this aspect at all. The argument that these stipulations are valid only for a Public Auction and not for the private sale, suffice it to say that once it has been decided by SCC to go for Swiss challenge process, the character of the sale changes to public auction and as such these stipulations get attracted.
- 127.** The allegation of the Applicant i.e., second time assignment of the debt is not permissible under law has to be examined with reference to the provisions of SARFAESI Act particularly Section-7 (3) (a) and there is nexus between the ACRE, CIMMCO Vanijya as alleged in IA 995 particularly due to the fact that CIMMCO who that has lent the money to ACRE against security receipts as well as to the SAP (Successful Auction Purchaser) is who further happens to be a subsidiary of Rashmi Metalicks Group and it is no co-incidence that the CIMMCO happens to be another group company of the



Rashmi Metalicks. Even though from the Chronology of events some inferences could be drawn but that would be a half-baked exercise in a summary proceeding like this. However, it is to be noted that OASPL has made elaborate submissions in its reply affidavits and written notes subsequently on the issues that do not pertain to the domain of OASPL.

- 128.** That being the case, one would not like to put hurdles in the path of probable bidders by resorting to such stringent conditions in regard to the EMD. This decision by the SCC to enhance the EMD to stupendous figure of 150 crores, being more than 50% of the total sale value is against the established norms of 5 to 10 percent of the expected value of assets being made for does raise a finger on the alleged nexus. The logic advanced by the liquidator-cum-SCC is paradoxical in that on one hand even after 9 auctions nobody was coming forward forcing the SCC to go on reducing the reserve price, on the other hand the stringent conditions for the EMD were put which would put off other likely contenders. It is also relevant to mention here that earlier also there had been a private sale after 5 failed auctions for which probably no prior permission from this Adjudicating Authority was sought.
- c. We have already alluded to the locus of the applicant filing this application who is purportedly a 9 to 5 operator who did not participate in any of the auctions but as and when he came to know that the Corporate Debtor is being sold on a private sale basis to the OASPL, he blew the whistle and filed this application. In this regard we have also considered various judgements cited by the liquidator and SAP, and hold that these are distinguishable on facts. The issue here is that of arbitrariness in fixing the EMD amount and the violation of the regulations, which was not the case in the cited judgements. The offer letter dated 16-03-2024 and offering to bid higher than that present successful auction purchaser was also considered by the SCC and the same was not considered as the applicant has not agreed to the terms and conditions laid down in Swiss challenge notice, principal objection being the restrictive EMD amount.
- 129.** It also may not be out of place to be mentioned here during the hearing of the matter, the liquidator had filed IAs requesting to this authority to direct CISF Authority to private securities in the establishment of the Corporate Debtor thus creating an environment primarily to drive home the point that the Corporate Debtor is situated in a dangerous



area and as such no auction purchaser is coming forward to buy the assets at the reserved price.

- 130.** Be that as it may, the EMD of 150 Crores for a sale worth of Rs 275 Crores is too restrictive and arbitrary and is in the teeth of Stipulation 3 of Schedule I under regulation 33 of the liquidation regulations. By completing the process of the sale thus and seeking the approval of this authority would be akin to our approving of the terms and conditions of sale which inter-alia includes the EMD of Rs 150 Crores. The mode and manner of carrying out the entire process is presenting a fait – accompli situation for this Adjudicating Authority and goes against the very premise of seeking a PRIOR approval of the Adjudicating Authority as per Regulation 33 of the Liquidation process regulations. Since our approval now of the Private sale would also translate into approving the terms and conditions of the sale as prepared by the liquidator which shall necessarily include the approval to the envisaged time lines and the restrictive EMD, to which we do not subscribe and therefore the public notice dated 22.02.2024 is set aside..
- 131.** In view of the above , IA 447 is **disallowed** and the liquidator is hereby directed to issue a fresh Swiss challenge notice in Two National Dailies and One in vernacular, with the bid of Orissa Metallics being the anchor bid. The EMD for the sale notice shall be kept as per the standard norms to meet the requirement of reasonableness. The liquidator shall initiate the process from the stage of issuances of the notice for Swiss Challenge process strictly in accordance with law.
- 132.** In view of the above noted facts and position of law as referred above, IA 586 and IA 995 are disposed of accordingly
- 133.** A certified copy of the order may be issued by the Registry upon fulfilment of the procedural requirements.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

Order signed on this, the 20th day of December, 2024.